DIALOGUE ACROSS THE ATLANTIC: SELECTED CASE-LAW OF THE EUROPEAN AND INTER-AMERICAN HUMAN RIGHTS COURTS

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

WOLF LEGAL PUBLISHERS

Dialogue Across the Atlantic: Selected Case-Law of the European and Inter-American Human Rights Courts

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FOREWORD

In recent years the European and Inter-American Human Rights Courts have intensified their cooperation in the form of visits by judges, staff exchanges and videoconferences. Judicial dialogue between our two courts is now on a solid footing.

The importance of this cooperation cannot be overstated, given the similarity of the rights and freedoms protected by the respective treaties governing the work of the two courts, and the existence of equivalent criteria of admissibility and principles of interpretation. Moreover, the increasing similarity of issues brought before the two courts has conferred a new relevance on their respective bodies of case-law.

This book is a first, modest effort to present, in a single volume, a selection of the leading decisions delivered by each court in 2014. In addition to their importance in their own right, some of these decisions also serve to illustrate how the courts are increasingly having regard to each other's approach to human rights protection. We hope this selection, published in English and Spanish, will assist in showing similarities in the manner in which each human-rights convention is interpreted and also where the judicial approach differs.

Finally, we wish to express our gratitude to the Governments of Luxembourg and Norway for their generous financial contributions towards the staff-exchange programme enabling lawyers from each registry to spend time familiarising themselves with the working methods and case-law of the sister court.

Erik Fribergh
Registrar of the European
Court of Human Rights

Pablo Saavedra Alessandri
Registrar of the Inter-American
Court of Human Rights

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EUROPEAN COURT OF HUMAN RIGHTS

CASE OF O'KEEFFE v. IRELAND
(Application no. 35810/09)

GRAND CHAMBER

JUDGMENT OF 28 JANUARY 2014

[Extracts][1]

1. This is an excerpt from the judgment delivered by the Grand Chamber in the case of *O'Keeffe v. Ireland*. It contains a summary which does not bind the Court. The full English text of the judgment is available in the HUDOC database at: http://hudoc.echr.coe.int/eng?i=001-140235. In addition to the authentic English and French versions of this judgment, HUDOC also contains Spanish translations of select case-law at: http://hudoc.echr.coe.int.

SUMMARY[1]

Sexual abuse of child by teacher in Church-managed school

Having regard to the fundamental nature of the rights guaranteed by Article 3 and the particularly vulnerable nature of children, it is an inherent obligation of government to ensure their protection from ill-treatment, especially in a primary-education context, through the adoption, as necessary, of special measures and safeguards. The existence of useful detection and reporting mechanisms were fundamental to the effective implementation of the criminal law designed to deter child sexual abuse. A State could not absolve itself from its obligations to minors in primary schools by delegating those duties to private bodies or individuals (see paragraphs 146, 148 and 150 of the judgment).

Article 3

Positive obligations – Sexual abuse of child by teacher in Church-managed school – Inherent obligation of government to ensure protection of children from ill-treatment – Inability of State to absolve itself from obligations by delegating duties to private bodies or individuals – Awareness of risk – Effectiveness of mechanisms for detecting and reporting ill-treatment – Effective investigation

Article 13 in conjunction with Article 3

Effective remedy – Absence of domestic remedy to establish liability of State in respect of child abuse by teacher in Church-managed school

*

* *

Facts

The applicant alleged that she had been subjected to sexual abuse by a teacher (L.H.) in 1973 when she was a pupil in a State-funded national school owned and managed by the Catholic Church. National schools were established in Ireland in the early nineteenth century as a form of primary school directly financed by the State, but administered jointly by the State, a patron, and local representatives. Under this system the State provided most of the funding and laid down regulations on such matters as the curriculum and teachers' training and qualifications, but most of the schools were owned by clerics (the patron) who appointed a school manager (invariably a cleric). The patron and manager selected, employed and dismissed the teachers.

1. This summary by the Registry does not bind the Court.

L.H. resigned from his post in September 1973 following complaints by other pupils of abuse. However, at that stage the Department of Education and Science was not informed about the complaints and no complaint was made to the police. L.H. moved to another national school, where he continued to teach until his retirement in 1995. The applicant suppressed the abuse to which she had been subjected and it was not until the late 1990s, after receiving counselling following a police investigation into a complaint by another former pupil, that she realised the connection between psychological problems she was experiencing and the abuse she had suffered. She made a statement to the police in 1997. L.H. was ultimately charged with 386 criminal offences of sexual abuse involving some twenty-one former pupils of the national school the applicant had attended. In 1998 he pleaded guilty to twenty-one sample charges and was sentenced to a term of imprisonment. The applicant was subsequently awarded compensation by the Criminal Injuries Compensation Tribunal and damages in an action against L.H. She also brought a civil action for damages alleging negligence, vicarious liability and constitutional responsibility on the part of various State authorities (but, for technical reasons, she did not sue the Church). However, the High Court rejected those claims in a judgment that was upheld by the Supreme Court on 19 December 2008, essentially on the grounds that the Irish Constitution specifically envisaged a ceding of the actual running of national schools to interests represented by the patron and the manager, that the manager was the more appropriate defendant to the claim in negligence and that the manager had acted as an agent of the Church, not of the State.

In her complaint to the Court, the applicant complained, *inter alia*, that the State had failed to structure the primary-education system so as to protect her from abuse (Article 3) and that she had not been able to obtain recognition of, or compensation for, the State's failure to protect her (Article 13).

Law

1. Article 3:

a. *Substantive aspect* – It was an inherent obligation of government to ensure the protection of children from ill-treatment, especially in a primary-education context, through the adoption, as necessary, of special measures and safeguards. In this connection, the nature of child sexual abuse was such, particularly when the abuser was in a position of authority over the child, that the existence of useful detection and reporting mechanisms were fundamental to the effective implementation of the criminal law designed to deter such abuse. A State could not absolve itself of its obligations to minors in primary schools by delegating those duties to private bodies or individuals. Nor, if the child had selected one of the State-approved education options (whether a national school, a fee-paying school or home schooling), could it be released from its positive obligation to protect simply because of the child's choice of school.

The Court therefore had to decide whether the State's framework of laws, and notably its mechanisms of detection and reporting, had provided effective protection for

children attending a national school against any risk of sexual abuse of which the authorities had, or ought to have had, knowledge at the material time. Since the relevant facts had taken place in 1973, any State responsibility in the applicant's case had to be assessed from the point of view of facts and standards existing at that time, disregarding the awareness society had since acquired of the risk of sexual abuse of minors in an educational context.

It was not disputed that the applicant had been sexually abused by L.H. or that her ill-treatment fell within the scope of Article 3. There was also little disagreement between the parties as to the structure of the Irish primary-school system, which as a product of Ireland's historical experience was unique in Europe with the State providing for education (setting the curriculum, licencing teachers and funding schools) while the national schools provided the day-to-day management. Where the parties disagreed was on the resulting liability of the State under domestic law and the Convention.

In determining the State's responsibility, the Court had to examine whether the State should have been aware of a risk of sexual abuse of minors such as the applicant in national schools at the relevant time and whether it had adequately protected children, through its legal system, from such ill-treatment.

The Court found that the State had to have been aware of the level of sexual crime against minors through its prosecution of such crimes at a significant rate prior to the 1970s. A number of reports dating from the 1930s to the 1970s gave detailed statistical evidence on the prosecution rates in Ireland for sexual offences against children. The Ryan Report of May 2009 also evidenced complaints made to the authorities prior to and during the 1970s about the sexual abuse of children by adults. Although that report focused on reformatory and industrial schools, complaints about abuse in national schools were also recorded.

Accordingly, when relinquishing control of the education of the vast majority of young children to non-State actors, the State should have adopted commensurate measures and safeguards to protect those children from the potential risks to their safety through, at minimum, effective mechanisms for the detection and reporting of any ill-treatment by and to a State-controlled body.

However, the mechanisms that had been put in place and on which the Government relied were not effective. The 1965 Rules for national schools and the 1970 Guidance Note outlining the practice to be followed for complaints against teachers did not refer to any obligation on a State authority to monitor a teacher's treatment of children or provide a procedure for prompting children or parents to complain about ill-treatment directly to a State authority. Indeed, the Guidance Note expressly channelled complaints about teachers directly to non-State managers, generally the local priest, as in the applicant's case. Thus, although complaints about L.H. were in fact made in 1971 and 1973 to the manager of the applicant's school, he did not bring them to the notice of any State authority. Likewise, the system of school inspectors, on which the Government also relied, did not specifically refer

to any obligation on the inspectors to inquire into or monitor a teacher's treatment of children, their task principally being to supervise and report on the quality of teaching and academic performance. While the inspector assigned to the applicant's school had made six visits from 1969 to 1973, no complaint had ever been made to him about L.H. Indeed, no complaint about L.H.'s activities was made to a State authority until 1995, after his retirement. The Court considered that any system of detection and reporting which allowed just under 400 incidents of abuse by a teacher to occur over such a long period had to be considered ineffective.
Adequate action taken on the 1971 complaint could reasonably have been expected to avoid the applicant being abused two years later by the same teacher in the same school. Instead, the lack of any mechanism of effective State control against the known risks of sexual abuse occurring had resulted in the failure by the non-State manager to act on prior complaints of sexual abuse, the applicant's later abuse by L.H. and, more broadly, the prolonged and serious sexual misconduct by L.H. against numerous other students in the same national school. The State had thus failed to fulfil its positive obligation to protect the applicant from sexual abuse.

Conclusion: violation (eleven votes to six).

b. *Procedural aspect* – As soon as a complaint of sexual abuse by L.H. of a child from the national school was made to the police in 1995, an investigation was opened during which the applicant was given the opportunity to make a statement. The investigation resulted in L.H. being charged on numerous counts of sexual abuse, convicted and imprisoned. The applicant had not taken issue with the fact that L.H. was allowed to plead guilty to representative charges or with his sentence.
Conclusion: no violation (unanimously).

2. Article 13 in conjunction with Article 3: The applicant had been entitled to a remedy establishing any liability of the State. Accordingly, the proposed civil remedies against other individuals and non-State actors on which the Government had relied must be regarded as ineffective in the present case, regardless of their chances of success. Equally, while central to the procedural guarantees of Article 3, L.H.'s conviction was not an effective remedy for the applicant within the meaning of Article 13.
As to the alleged remedies against the State, it had not been shown that any of the national remedies (the State's vicarious liability, a claim against the State in direct negligence or a constitutional tort claim) was effective as regards the applicant's complaint concerning the State's failure to protect her from abuse.

Conclusion: violation (eleven votes to six).

JUDGMENT

In the case of *O'Keeffe v. Ireland*,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Dean Spielmann, *President*,
Josep Casadevall,
Guido Raimondi,
Ineta Ziemele,
Mark Villiger,
Isabelle Berro-Lefèvre,
Boštjan M. Zupančič,
Alvina Gyulumyan,
Nona Tsotsoria,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. de Gaetano,
Angelika Nußberger,
André Potocki,
Krzysztof Wojtyczek
Valeriu Griţco, *judges*,
Peter Charleton, ad hoc *judge*,
and Michael O'Boyle, *Deputy Registrar*,

…

Delivers the following judgment…:

PROCEDURE

1. The case originated in an application (no. 35810/09) against Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Irish national, Ms Louise O'Keeffe ("the applicant"), on 16 June 2009.

2. The applicant was represented by Mr E. Cantillon, a lawyer practising in Cork. The Irish Government ("the Government") were represented by their Agent, Mr P. White, of the Department of Foreign Affairs.

…

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicant was born in 1964 and lives in Cork, Ireland.

A. Background

13. The following facts were not contested by the parties.

14. The applicant attended Dunderrow National School from 1968. The school was owned, through trustees, by the Catholic Bishop of the Diocese of Cork and Ross who was recognised by the Department of Education and Science ("the Department") as the school's patron. The manager, acting on behalf of the bishop, was the local parish priest (S.). The latter being elderly and infirm, a local priest (Ó.) was the *de facto* manager who acted on behalf of, and in the interests of, S. The term "manager" used below refers both to Ó. and to the management function he performed. Dunderrow National School had two teachers, one of whom (L.H.) was the school's principal, a married man. Dunderrow was one of four national schools in the applicant's parish.

15. In 1971 a parent of a child complained to the manager that L.H. had sexually abused her child. That complaint was not reported to the police, to the Department or to any other State authority and was not acted upon by the manager.

16. During the first six months of 1973 the applicant was subjected to approximately twenty sexual assaults by L.H. during music lessons in his classroom. During the time she attended those lessons, the applicant and her parents were unaware of the allegation made in 1971 about L.H.

17. In September 1973 other parents brought to the applicant's parents' attention similar allegations concerning L.H. Following a meeting of parents chaired by the manager about this, L.H. went on sick leave. In September 1973 he resigned from his post. Those allegations were not reported at that time to the police, to the Department or to any other State authority. In a brief conversation, the applicant's mother asked her whether L.H. had touched her. The applicant responded to the effect that something of a sexual nature had happened but she did not recall the conversation going any further. In January 1974 the manager notified the Department that L.H. had resigned and named his replacement. Soon thereafter L.H. took up a position in another national school where he taught until his retirement in 1995.

18. Between 1969 and 1973, the inspector assigned to the region visited Dunderrow National School on six occasions which was, as he later stated

in evidence, an above average number of visits. He met with L.H. and S. He attended parent meetings on the question of Dunderrow's amalgamation with other schools. No complaint about L.H. was made to him. He observed the teaching work of L.H. and considered it satisfactory.

19. The applicant suppressed the sexual abuse. While she had significant psychological difficulties, she did not associate those with the abuse. In 1996 she was contacted by the police who were investigating a complaint made in 1995 by a former pupil of Dunderrow National School against L.H. The applicant made a statement to the police in January 1997 and was referred for counselling. During the investigation a number of other pupils made statements. L.H. was charged with 386 criminal offences of sexual abuse involving some twenty-one former pupils of the school during a period of about ten years. In 1998 he pleaded guilty to twenty-one sample charges and was sentenced to imprisonment. His licence to teach was withdrawn by the Minister for Education ("the Minister") under Rule 108 of the National School Rules 1965 ("the 1965 Rules").

20. In or around June 1998, and as a consequence of the evidence of other victims during the criminal trial and subsequent medical treatment, the applicant realised the connection between her psychological problems and the abuse by L.H. and understood the extent of those problems.

B. Criminal Injuries Compensation Tribunal ("the CICT")

21. In October 1998 the applicant applied to the CICT for compensation. An initial award (44,814.14 euros (EUR)) was made by a single judge. The applicant appealed to a CICT panel. She claimed that the CICT gave her the option of continuing her appeal (at the risk of finding that her CICT application would be rejected as out of time) or of accepting the initial offer of the CICT with some additional expenses (EUR 53,962.24, the non-pecuniary aspect being EUR 27,000). The applicant accepted the offer by letter of 5 November 2002 and gave the standard undertaking to repay the CICT award from any other award she may receive, from whatever source, in relation to the same injury. The award was made on an *ex gratia* basis. Since the State is never a party to CICT proceedings, it became aware of this award later before the High Court (see directly below).

C. Civil action for damages (No. 1998/10555P)

1. High Court

22. On 29 September 1998 the applicant instituted a civil action against L.H. and the Minister as well as against Ireland and the Attorney General,

claiming damages for personal injuries suffered as a result of assault and battery including sexual abuse by L.H. Her claim against the latter three defendants ("the State Defendants") was threefold: (a) negligence by the State arising out of the failure of the State Defendants in relation to the recognition, examination and supervision of the school and in failing to put in place appropriate measures and procedures to protect against, and put a stop to, the systematic abuse by L.H. since 1962; (b) vicarious liability of the State Defendants for the acts of L.H. since, *inter alia*, the true relationship between him and the State was one of employment; and (c) liability given the applicant's constitutional right to bodily integrity, the responsibility of the State Defendants to provide primary education under Article 42 of the Constitution and the measures put in place to discharge that responsibility.

23. Since L.H. did not file a defence, on 8 November 1999 the applicant obtained judgment in default against him. On 24 October 2006 the High Court assessed and awarded damages payable by L.H. in the sum of EUR 305,104, comprising EUR 200,000 in general damages, EUR 50,000 in aggravated damages, EUR 50,000 in exemplary damages, and EUR 5,104 in special damages. The applicant took enforcement proceedings. L.H. claimed he had insufficient means and she obtained an instalment order of EUR 400 per month. The first payment was received in November 2007 so that she has been paid in the region of EUR 31,000 to date. She registered a judgment mortgage against that part of the family home owned by L.H.

24. As regards her case against the State Defendants, she requested a Professor Ferguson to advise her on the question of the adequacy of child-protection mechanisms in Ireland in the 1970s. He responded by letter of 14 April 2003. Professor Ferguson agreed that, if the child-protection protocols existing in 2003 had been in place in 1973, it was very likely that the applicant's abuse would have been acted upon in a manner which would have ensured the promotion of her welfare. He feared that pleading the case on the basis of what the State should have known at the time would be unsuccessful because it would not be possible to project onto the past the knowledge and systems of accountability that existed in the present day.

25. The High Court hearing against the State Defendants began on 2 March 2004. On 5 March 2004, while the applicant was presenting her evidence, the High Court judge, in response to the applicant's complaint regarding the absence of a State system for adverting to and addressing sexual abuse in national schools, asked Counsel for the applicant as follows:

> "What evidence do I have, or what should I have deduce[d] from the evidence that has been given that either the system in operation was a bad system, and I will come

back to that, or that there was an alternative system that should have been applied, and what that alternative system might have been."

26. When the applicant's case concluded, the State Defendants applied for a direction to strike out the case on the basis that no prima facie case had been made out by the applicant as regards all three grounds, submitting, *inter alia*, that there was no evidence of negligence. On 9 March 2004 the High Court accepted the State Defendants' application, the court being "satisfied that the plaintiff had not established a case in negligence against the [State Defendants]" (the "non-suit" order). The court did not and was not called upon to distinguish between the two bases of the negligence claim. However, a prima facie case had been made out on the questions of vicarious and constitutional liability and evidence would be called from the defendants on those matters. The trial finished on 12 March 2004.

27. On 20 January 2006 the High Court delivered judgment. It found that the action was not statute barred. It also concluded that the State was not vicariously liable for the sexual assaults perpetrated by L.H. given the relationship between the State and the denominational management of national schools. Although counsel for the applicant had orally suggested that the State should be vicariously liable for the inaction of the manager, the High Court judgment did not address this point. Finally, the High Court found that no action lay for a breach of a constitutional right where existing laws (in this case, tort) protected that right. The costs of the proceedings against the State Defendants were awarded against the applicant.

*2. Supreme Court (*O'Keeffe v. Hickey, *[2008] IESC 72)*

28. In May 2006 the applicant appealed to the Supreme Court. Her Notice of Appeal challenged the finding on vicarious liability and referred to two matters: the absence of reasons for the interim ruling of 9 March 2004 and the High Court judgment's failure to rule on the vicarious liability for the inaction of the manager. Mr Justice Hardiman described the appeal as limited to the State's vicarious liability for the acts of L.H. and the manager, although he commented in his judgment on the other two initial claims of the applicant (direct negligence and the constitutional claim). Mr Justice Fennelly also considered that the appeal concerned only vicarious liability for the acts of L.H., although he refused to accept that the State was vicariously liable for the manager.

29. The appeal was heard from 11 to 13 June 2006. By a majority judgment of 19 December 2008 (Hardiman J and Fennelly J, with whom Chief Justice Murray and Mr Justice Denham concurred and Mr Justice Geoghegan dissented), the Supreme Court dismissed the appeal.

30. Hardiman J described in detail the legal status of national schools. While the arrangements for national-school education might "seem rather odd today", they had to be understood in the context of Irish history in the early nineteenth century. Following denominational conflict and the later concession of Catholic emancipation in 1829, the dissenting churches and the Catholic Church wished to ensure that children of their denominations be educated in schools controlled by the denomination and not by the State or the established (Anglican) Church. Those churches were "remarkably successful" in achieving this aim: from the very beginning of the Irish system of national education (encapsulated in the "Stanley letter" of 1831), State authorities paid for the system of national education "but did not manage it or administer it at the point of delivery". The latter function was left to the local denominational manager. While State funding was accorded on a proportionate basis to all denominational schools, the population was at the time overwhelmingly Catholic so that the majority of national schools had Catholic patrons and managers.

31. Hardiman J went on to describe as "remarkable" the fact that, whilst in nineteenth-century Europe firmer distinctions were being drawn between Church and State and Church influence in the provision of public services (including education) was ebbing, in Ireland the position of the Church became stronger and more entrenched. He adopted the evidence of one expert witness (in the history of education in Ireland) who described the position after the inception of the Irish Free State in 1922 and noted that the Catholic managers in this "managerial" system

> "were very clearly articulate and very absolutely ... precise in how they interpreted what the situation was for national schools in the new Ireland ... It had to be Catholic schools under Catholic management, Catholic teachers, Catholic children".

32. That expert witness went on to describe the answer of the Catholic Church in the 1950s to a request by a teachers' trade union to have local committees deal with maintaining and repairing school buildings. The Catholic Church had responded that there could be no interference whatever with the "inherited tradition of managerial rights of schooling". The limited proposal of the union was considered to be the thin edge of the wedge because, in due course, the request might be to interfere with "other aspects of the manager's authority *vis-à-vis* the appointment and dismissal of teachers which was of course the key concern that had been fought for and won over the years". Hardiman J referred to the "urgent desire" of the denominations to maintain their role in primary education.

33. As Hardiman J explained, the Constitution reflected this managerial structure: the obligation in Article 42 § 4 on the State to "provide for" free primary education reflected a largely State-funded, but entirely clerically

administered, system of education. As a result there were approximately 3,000 national schools in Ireland: most were under the control of Catholic patrons and managers, a few were under the control of other denominations and even fewer were controlled by non-denominational groups.

34. Hardiman J noted that, in recent times and after more than a century and a half, the provision of education was belatedly and at least partially placed on a statutory basis by the Education Act 1998; prior to that Act the system had been administered by the 1965 Rules as well as by other ministerial letters, circulars and notes.

35. As to what could be gleaned from the 1965 Rules, Hardiman J noted:

> "The Minister laid down rules for national schools but they were general in nature and did not allow him to govern the detailed activities of any individual teacher. He inspected the schools for their academic performance, other than religious instruction, but it did not go further than that. He was ... deprived of the direct control of the schools, and of the enormous power which that brings, because 'there was interposed between the State and the child the manager or the committee or board of management'. Equally, the Minister did not appoint the manager or the teacher or directly supervise him. This, indeed, was the essence of the 'managerial system'. I cannot see, on the evidence, that he had any scope whatever to make a personal judgment about either of these two individuals. Moreover, it seems to have been instinctively recognised by the parents who complained about the first defendant that the person with direct authority to receive the complaint and do something about it was the clerical and clerically appointed manager. No complaint, on the evidence, was directed to the Minister or to any State body. The matter was handled, so to speak, 'in house' at the election of the complainants. The end result of the process was a voluntary resignation followed by the employment of [L.H.] in another school in the vicinity.
>
> All these factors tending to distance the Minister and the State authorities from the management of the school and the control of the first defendant are direct consequences of the long established system of education, described above and mandated in the Constitution whereby the Minister pays and, to a certain extent, regulates, but the schools and the teachers are controlled by their clerical managers and patrons. It is not the concern of the Court either to endorse or to criticise that system but merely to register its existence and the obvious fact that it deprives the Minister and the State of direct control of schools, teachers, and pupils."

36. Hardiman J observed that the sexual abuse of a pupil was the negation of what L.H. was employed to do but he also found that in 1973 it "was an unusual act, little discussed, and certainly not regarded as an ordinary foreseeable risk of attending at a school". He considered it "notable" that she did not sue the patron, the diocese of which he was bishop, his successors or his estate, the trustees of the property of the Diocese of Cork and Ross (owners of the school), the manager or his estate or successors.

37. Hardiman J concluded that, having regard to the relevant test for vicarious liability and to the above-described arrangements for the control and management of national schools, the State Defendants were not liable to the applicant for the wrongs committed against her. In particular, even applying the wider form of vicarious liability invoked, the Minister's absence of direct control over L.H., long since ceded to the manager and the patron, prevented a finding against the Minister. The relationship of L.H. and the State – a "triangular one with the Church" – was entirely *sui generis* and a product of Ireland's unique historical experience. The manager was

> "the nominee of the patron, that is of a power other than the Minister and he did not inform the Minister of any difficulties with, or complaints about, [L.H.] or of his resignation and appointment to teach elsewhere until they were *faits accomplis*. He was the agent not of the Minister, but of the Catholic Church, the power in whose interest the Minister was displaced from the management of the school".

38. Hardiman J commented on two of the applicant's original claims which had "not been proceeded with".

39. As to the claim of negligence by the State, he remarked:

> "... this is a claim which could more appropriately be made against the manager. It was he who had the power to put in place appropriate measures and procedures governing the running of the school. The Minister can hardly be responsible for a failure to 'cease' a course of action of whose existence he was quite unaware."

40. As to the claim about the responsibility of the State in the provision of primary education under Article 42 of the Constitution and the measures put in place to discharge that responsibility, Hardiman J stated:

> "I have already analysed the terms of Article 42 from which it will be seen that the Minister, in the case of this national school, was simply providing assistance and subvention to private and corporate (i.e. Roman Catholic) endeavour, leaving the running of the school to the private or corporate entities. The Minister is thereby, as Kenny J pointed out in *Crowley v. Ireland* [1980] I.R. 102, deprived of the control of education by the interposing of the patron and the manager between him and the children. These persons, and particularly the latter, are in much closer and more frequent contact with the school than the Minister or the Department.
>
> I do not read the provisions of Article 42.4 as requiring more than that the Minister shall 'endeavour to supplement and give reasonable aid to private and corporate educational initiative', to 'provide for free primary education'. ... In my view the Constitution specifically envisages, not indeed a delegation but a ceding of the actual running of schools to the interests represented by the patron and the manager."

41. Hardiman J concluded by pointing out that nothing in the judgment could be interpreted as suggesting liability on the part of the Church and, in any event, it was quite impossible to do so because those authorities had not been heard by the Supreme Court since the applicant had not sued them.

42. Fennelly J, who delivered the other majority judgment, began by noting that the "calamity of the exploitation of authority over children so as to abuse them sexually" had shaken society to its foundations. Cases of sexual abuse had preoccupied the criminal courts and the Supreme Court for many years and it was surprising that that court was confronted for the first time with questions relating to the liability of institutions including the State for sexual abuse of schoolchildren in a national school by a teacher.

43. Fennelly J also described in some detail the history and consequent legal status of national schools, which system had survived independence in 1922 and the enactment of the Constitution in 1937. He accepted the expert's evidence that it was not a State system but rather a "State-supported system". He noted the clear division of power between the State (funding and fixing the curriculum) and the manager (day-to-day running of the school including hiring and firing teachers), noting that the different religions were determined to preserve and guard their own distinct religious education so that national schools developed on a denominational basis.

44. He considered inspectors to be a crucially important part of the system of State oversight and maintenance of standards which enabled the Minister to be satisfied about the quality of the system. However, he noted that the inspection regime did not alter the division of responsibilities between the State and the manager, the inspectors having no power to direct teachers in the carrying out of their duties. The 1965 Rules reflected this allocation of responsibilities between the Church and State authorities. Even if, in modern times, the State played a more intrusive role, responsibility for day-to-day management remained with the manager. He concluded that the State was not vicariously liable for the acts of L.H. or, for the same reasons, for the failure of the manager to report the 1971 complaint to the State. L.H. was not employed by the State but, in law, by the manager. While L.H. had to have the qualifications laid down by the Minister and had to observe the 1965 Rules and while the State had disciplinary powers in those respects, L.H. was not engaged by the State and the State could not dismiss him.

45. Referring back to the reference in the Notice of Appeal to the State's liability for the failure of the manager to report the 1971 complaint, Fennelly J concluded that "[f]or the same reason, insofar as it is necessary to say so, there can be no liability for the failure of [the manager] to report the 1971 complaint. [The manager] was not the employee of the second defendant."

46. Geoghegan J dissented. He accepted that neither the Department nor its inspectors had any knowledge of the assaults. He noted that, for all practical purposes, most primary education in Ireland took the form of

a joint enterprise between Church and State and he considered that that relationship was such that there was a sufficient connection between the State and the creation of the risk as to render the State liable. Geoghegan J relied, notably, on the role of school inspectors. He examined in some detail the evidence given by, and concerning the role of, school inspectors noting, *inter alia*, that if an allegation of sexual assault by a teacher on a national-school pupil was considered well-founded by an inquiry set up by the Department, it could lead to the withdrawal of recognition or to a police investigation and, if the police found the complaint justified, to the withdrawal of the teacher's licence to teach.

47. By a judgment of 9 May 2009 the Supreme Court vacated the High Court order for costs against the applicant since it was not disputed that hers was an important and complex test case. It determined that each party had to bear its own costs related to the action against the State Defendants.

48. The applicant was legally represented throughout the civil proceedings, although she did not have legal aid.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Primary education in Ireland

1. Background

49. The Court refers to the description of the history and structure of the national-schools system of primary education provided by the Supreme Court in *O'Keeffe v. Hickey*, ([2008] IESC 72) and, notably, by Hardiman J and Fennelly J (see paragraphs 30-35 and 42-44 above).

50. Section 4 of the School Attendance Act 1926 required parents to ensure their children attended a national school or another suitable school, unless there was a reasonable excuse for not so doing, for example if the child was receiving suitable primary education elsewhere, if there was no national school accessible to which the parent did not object on religious grounds, or if the child was prevented from attending by some other sufficient cause. Attendance in full-time education was therefore compulsory for all children between 6 and 14 years of age until 1969 when the official school-leaving age was increased to 16. Primary education has been universally free in Ireland since the nineteenth century.

51. The vast majority of children attending primary school attended "national schools" which are State-financed and denominational primary-education establishments. Department reports for 1972/73 and 1973/74 recorded the existence of 3,776 and 3,688 national schools respectively. The Department's statistical report for February 1973 indicated that 94% of

primary schools were national schools. According to the 1965 *Investment in Education Report*, 91% of national schools were Catholic-run and catered for 97.6% of national-school pupils while 9% were Protestant-run, catering for 2.4% of such pupils. A 2011 report by the Department notes that approximately 96% of primary schools remained under denominational patronage and management (including 89.65% under Catholic patronage and management).

52. In 1963/64 there were 192 fee-paying non-State-aided primary schools for approximately 21,000 children which represented about 4 to 4.5% of all primary-school pupils. The vast majority of these schools were in urban areas, the great majority of which were in Dublin.

53. The "Commission on School Accommodation's Report on the Revised Criteria for the Establishment of New Primary Schools" in February 2011 confirmed that, until the 1970s, the only choice effectively available to parents was the local national school. It considered that by the end of the 1970s there was evidence of change with the establishment in 1978 of the first multi-denominational school and a growth in Irish language inter-denominational and multi-denominational schools.

2. The 1937 Constitution

54. Article 42 is entitled "Education" and reads as follows:

"1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.

3. (1) The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.

(2) The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.

4. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.

5. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate

means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."

55. In *McEneaney v. the Minister for Education* ([1941] IR 430), the Supreme Court observed that for "more than a century it has been recognised that the provision of primary education is a national obligation". Article 42 § 4 conferred on children a right to receive free primary education and the words "provide for" meant that the State did not itself have to educate children but rather had to ensure that appropriate education was provided to them (*Crowley v. Ireland* [1980] IR 102).

3. Relevant legislation

56. The Children Act 1908 governed child protection and contemplated State intervention in the form of taking a child into care in cases of inter-familial abuse. The Education Act 1998 ("the 1988 Act") was the first comprehensive legislation on education since the foundation of the State. It put on a statutory basis the State-funded and privately managed nature of primary education, making no fundamental structural changes thereto.

4. Rules for national schools ("the 1965 Rules") and relevant ministerial circulars

57. Rules in place before independence in 1922 were applied to national schools until the 1965 Rules were adopted by the Department. While the 1965 Rules were neither primary nor secondary legislation, they have legal force and form part of the relevant statutory regime (*Brown v. Board of management of Rathfarnham Parish national school and Others* ([2006] IEHC 178). Otherwise, the Department regulated matters within its remit by notes, circulars and other official Department instruments. The Minister could withdraw recognition from a school or withdraw an individual teacher's licence if the 1965 Rules were not complied with (Rules 30 and 108 of the 1965 Rules, respectively).

5. Managers and boards of management

58. Rule 15 of the 1965 Rules provided that the manager was charged with the direct government of the school, the appointment of the teachers and, subject to the Minister's approval, their removal. A manager was to visit a school and ensure the 1965 Rules were complied with (Rule 16). Subject to the authority of the manager, the principal was responsible for discipline, the control of the other members of the teaching staff and all other matters connected with school arrangements (Rule 123(4)).

59. Rule 121 set out rules for teachers' conduct: they had to, *inter alia*, act in a spirit of obedience to the law; pay the strictest attention to the morals and general conduct of their pupils; take all reasonable precautions to ensure the safety of their pupils; and carry out all lawful instructions issued by the manager. Rule 130 required teachers to have a lively regard for the improvement and general welfare of their pupils, to treat them with kindness, combined with firmness, and to govern them through their affections and reason and not by harshness and severity.

60. Most primary schools now have boards of management. A ministerial circular (16/76) set out arrangements until the 1998 Act put the boards on a statutory basis. Section 14 of that Act provides that it is the duty of the patron to appoint, where practicable and in accordance with the "principle of partnership", a board the composition of which is agreed between the Minister and the education partners. As bodies corporate with perpetual succession, the boards could sue and be sued.

6. Inspectors

61. The 1965 Rules envisaged that the Minister and persons authorised by him (inspectors) could visit and examine the schools whenever they thought fit (Rule 11). Rule 161 defined inspectors as being agents of the Minister required to supply the Minister with such local information as he or she might require for the effective administration of the system. They were required to call the attention of managers and teachers to any rules which appeared to them to be being infringed. They were entitled to communicate with the manager with reference to the general condition of the school "or to matters requiring the manager's attention, making such suggestions as they may deem necessary". An inspector was required to pay frequent incidental visits to the schools in his district and to make obligatory annual visits to assess the work of teachers. Circular 16/59 provided guidance to inspectors as to their role *vis-à-vis* managers and teachers, as to the manner in which incidental and general inspections were to be carried out and as regards their assessment of the work of teachers.

7. Complaints

62. A Guidance Note of 6 May 1970 outlined the practice to be followed as regards complaints against teachers. The complainant was to be informed that the matter was one for the manager, in the first instance, and asked to clarify whether the complaint had been notified to the manager. The manager had to obtain observations from the relevant teacher and to forward those observations, together with the manager's own views, to the Department.

The Deputy Chief Inspector within the Department would then identify whether an investigation was required. If so, the inspector was to interview the manager, the teacher and parents. If an inquiry led to relevant findings against the teacher, Rule 108 authorised the Minister to take action against a teacher if the latter had conducted him or herself improperly or failed or refused to comply with the 1965 Rules. The Minister could pursue the teacher's prosecution, withdraw recognition and/or withdraw or reduce the teacher's salary. As noted above, the manager could dismiss a teacher, subject to the Minister's approval.

B. Criminal law and related matters

63. The sexual abuse of a minor was prohibited by sections 50 and 51 of the Offences Against the Person Act 1861 (as amended). The Criminal Law Amendment Act 1935 ("the 1935 Act") was designed to make further provision for the protection of young girls and to amend the law concerning sexual offences. Sections 1 and 2 of the 1935 Act created the offences of defilement of girls under 15 years of age and of girls between 15 and 17 years of age. Section 14 of the 1935 Act also provides:

> "It shall not be a defence to a charge of indecent assault upon a person under the age of fifteen years to prove that such person consented to the act alleged to constitute such indecent assault."

Consequently, any girl under 15 years of age cannot consent to any form of sexual contact and any such contact was (and still is) a crime. In addition to these statutory offences, these acts amounted to ordinary assault.

64. There was no limitation period applicable to indictable offences in Ireland so that an offender could be prosecuted until the end of his or her life.

65. A victim can apply for compensation for injury suffered as a result of violent crime under the Scheme of Compensation for Personal Injuries Criminally Inflicted. The Scheme is administered by the the CICT. The prescription period is three months, but it can be extended. The initial decision is taken without a hearing and a hearing is held in private before a division of the CICT. The appeal decision is final. Compensation is paid on an *ex gratia* basis. It covers expenses and losses (out-of-pocket expenses and bills less social welfare payments, salary or wages received while on sick leave) and, until 1986, non-pecuniary loss.

C. Civil law and related matters

66. A tort is a civil wrong which causes someone to suffer loss resulting in legal liability for the person who commits the tortious act, the tortfeasor.

The tort of negligence requires proof that there was a duty of care between the plaintiff and the defendant (which involves establishing the existence of a relationship of proximity between the parties such as would call for the exercise of care by one party towards the other), that that duty was breached and that that breach was causative of damage (for example, *Beatty v. The Rent Tribunal* [2005] IESC 66).

67. Vicarious liability is the attribution of liability to a person or entity who did not cause injury and who may not be at fault but who has a particular legal relationship to the person who did cause the injury, and who himself was at fault, including through negligence. Legal relationships that can lead to vicarious liability include the relationship of employer and employee.

68. It is also possible to rely on the Constitution to seek redress against an individual for a breach of one's constitutional rights. In *Meskell v. CIE* [1973] IR 121), the court stated:

> "... if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right that person is entitled to seek redress against the person or persons who have infringed that right."

Such a resort to constitutionally created torts only occurs if there is a gap in existing tort law which needs to be supplemented.

D. Relevant public investigations and child-protection developments

1. The Carrigan Report 1931

69. The Carrigan Committee was appointed in 1930 to consider whether certain criminal statutes needed amendments and to make proposals to deal with "the problem of juvenile prostitution". It held seventeen sittings, heard twenty-nine witnesses and considered other written submissions.

70. On 20 August 1931 the Committee submitted its final report to the Minister for Justice. The report recommended a combination of social and legislative reforms as regards, *inter alia*, sexual crimes against minors.

71. The Police Commissioner was an important witness before the Committee. Prior to appearing, he submitted statistical information he had gleaned from responses to a circular issued by him to over 800 police stations about the prosecution of sexual offences from 1924 to 1930 including for the offences of "defilement, carnal knowledge or rape" of girls under 10 years of age, between 10 and 13, between 13 and 16, between 16 and 18 and over 18 years of age. He submitted a detailed analysis of those statistics noting, *inter alia*, that there was an "alarming amount of sexual crime increasing yearly,

a feature of which was the large number of cases of criminal interference with girls and children from 16 years downwards, including many cases of children under 10 years of age". He was of the opinion that less than 15% of sexual crime was prosecuted for various reasons including the reluctance of parents to pursue matters for various reasons.

72. On the advice of the Department of Justice (in a memorandum accompanying the report), neither the evidence before, nor the report of, the Carrigan Committee was published. In so advising, the Department of Justice criticised the report in several respects and noted that the obvious conclusion to be drawn from it was that the ordinary feelings of decency and the influence of religion had failed in Ireland and that the only remedy was by way of police action. The debate on the report took place in a parliamentary committee. Several recommendations were implemented including the adoption of the Criminal Law Amendment Act 1935 (see paragraph 63 above). The Department of Justice's files on this report were published in 1991. Further archival material was released in 1999.

2. Reformatory and industrial schools

73. Reformatory schools were established in the 1850s and industrial schools in the 1860s. These schools were mainly denominational and State-funded. The former received young offenders but there were never more than a few of such schools. However, there were fifty or so industrial schools which were schools for the training of children: children were lodged, clothed and fed as well as taught (section 44 of the Children Act 1908). From 1936 to 1970, a total of 170,000 children and young persons (involving about 1.2% of the relevant age group) entered industrial schools. The average stay was approximately seven years. The great majority of children were committed to industrial schools because they were "needy" and the next most frequent grounds of entry were involvement in a criminal offence or non-attendance at school. Each of these grounds involved committal by the District Court. Section 7 of the Rules and Regulations for Industrial Schools 1933 provided that children's literary instruction would be in accordance with the national schools programme and set down recommended hours for both literary instruction and industrial training.

3. The Cussen and Kennedy Reports on reformatory and industrial schools

74. The Cussen Report, published in 1936, was commissioned by the State into the running of reformatory and industrial schools. The report endorsed the system contingent on its implementing fifty-one conclusions and recommendations. The system continued largely unchanged until a

later committee, set up by the State and chaired by Justice Eileen Kennedy, surveyed these schools. The Kennedy Report was published in 1970, when the reformatory and industrial school system was already in decline. The closure of certain schools was recommended and other proposals for change were made. It found, notably, that the system of inspection had been totally ineffective and it recommended, together with other reporting mechanisms, the establishment of an independent statutory body to ensure the highest standards of child care and to act, *inter alia*, as a watchdog.

4. The Ryan Report on reformatory and industrial schools

75. Following public disclosures and controversies in the late 1980s and early 1990s about, notably, clerical child abuse in Ireland, the Prime Minister issued the following written statement on 11 May 1999:

> "On behalf of the State and of all citizens of the State, the Government wishes to make a sincere and long overdue apology to the victims of childhood abuse for our collective failure to intervene, to detect their pain, to come to their rescue."

76. The Commission to Inquire into Child Abuse Act 2000 was adopted (amended in 2005). A Commission (later known as the Ryan Commission) investigated and reported on child abuse (including sexual abuse) primarily in reformatory and industrial schools. Since there were relatively few reformatory schools, the Commission's work principally concerned industrial schools.

77. The Commission's mandate mainly covered the 1930s to 1970s, the period between the Cussen and Kennedy Reports. Evidence was collected over a period of nine years and included voluminous documentation, expert evidence and the testimony of around 1,500 complainants. The "Investigation Committee" heard evidence from witnesses who wished to have their allegations investigated whereas the "Confidential Committee" provided a private forum for witnesses to recount abuse suffered by them. The evidence to the latter committee was therefore unchallenged.

78. The Commission reported in May 2009 ("the Ryan Report"). It found that there had been widespread, chronic and severe physical, including sexual, abuse of children mainly by clergy in the reformatory and industrial schools. While the religious authorities managed cases of abuse so as to protect the congregations and minimise the risk of public disclosure, the report confirmed that they had reported complaints of sexual abuse of pupils by lay persons to the police. The Secretary General of the Department, in evidence to the Investigation Committee, regretted the significant failings in its responsibility to children in the reformatory and industrial schools: while those institutions were privately owned and operated, the State had a

clear responsibility to ensure that the care children received was appropriate and the Department had not ensured a satisfactory level of care. Complaints of clerical child abuse were seldom reported to the Department itself and it had dealt inadequately with the complaints which were received.

79. Chapter 14 of Volume 1 ("the Brander Chapter") examined the career of "a serial sexual and physical abuser" who was a lay teacher in around ten schools (including six national schools) for forty years ending in 1980. After retirement, he was convicted on numerous charges of sexual abuse of pupils. The report noted that, when parents had tried to challenge his behaviour in the 1960s and 1970s, he was protected by diocesan and school authorities and moved from school to school. Evidence was given of complaints to the police in the 1960s. Complaints to the Department in the early 1980s were ignored, an attitude which, as the Department accepted before the Commission, was impossible to defend even by the standards of the time. Not only was the investigation shocking in itself, but it illustrated "the ease with which sexual predators could operate within the educational system of the State without fear of disclosure or sanction".

80. Volume III comprised the Report of the Confidential Committee which heard evidence of abuse from 1930 to 1990 from 1,090 persons about 216 institutions which comprised mainly reformatory and industrial schools but also included national schools. The Committee heard eighty-two reports of abuse from seventy witnesses in relation to seventy-three primary and second level schools: most concerned children leaving prior to or during the 1970s and sexual abuse was reported by over half of the witnesses. Contemporary complaints were made, *inter alia*, to the police and the Department. Certain witnesses emphasised the public, and therefore evident, nature of the sexual abuse.

81. Volume IV, Chapter 1, concerned the Department which had legal responsibility under the Children Act 1908 for children committed to the reformatory and industrial schools. The Department had insufficient information because its inspections were inadequate. Department officials were aware that abuse occurred and should have exercised more of the Department's ample legal powers over the relevant schools in the interests of the children, such as the power to remove a manager. However, the Department made no attempt to impose changes that would have improved the lot of the children in those schools. Indeed:

> "The failures by the Department ... [could] also be seen as tacit acknowledgment by the State of the ascendancy of the Congregations and their ownership of the system. The Department['s] Secretary General ... [stated] that the Department had shown a 'very significant deference' towards the religious Congregations. This deference impeded change, and it took an independent intervention in the form of the Kennedy Report in 1970 to dismantle a long out-dated system."

82. Volume V contained copies of, *inter alia*, expert reports. Certain complainants had briefed a senior lecturer in Irish history, Professor Ferriter, to address the proposition that the State had only become aware, at a policy level, of the physical abuse of minors in the 1970s and of the sexual abuse of minors in the 1980s. The Commission took over as sponsor of his report and annexed it to its own report. Professor Ferriter's report put the events before the Ryan Commission in their historical context. He described the Carrigan Report (1931) as a "milestone" as regards the provision of compiled information about the rate of prosecution of sexual crime in Ireland. He also provided and analysed later prosecution statistics (from the 1930s to the 1960s) drawn from criminal-court archives. The police had been quite vigorous in their prosecution of paedophiles but the fact that most sexual crimes were not actually reported suggested that such crime was a serious problem throughout the twentieth century in Ireland. Professor Ferriter went on to point out that the criminal-court archives demonstrated a "consistently high level of sexual crime directed against young boys and girls". While most of those cases were not recorded in the media, he considered that the police had extensive contemporaneous knowledge of the existence of such crimes.

83. Volume V annexed a research report completed by Mr Rollison, requested by the Ryan Commission itself and entitled "Residential Child Care in England, 1948-1975: A History And Report". He set out the history of residential school care in England during the period 1948 to 1975. Under the heading "Abuse", Mr Rollison indicated that, prior to the mid-1980s, there was "little professional or adult sensitisation either to the word or to the possibility of abuse" and that it was "essential to avoid the trap and potential excesses" of judging this period by today's standards.

84. The Ryan Report contained several recommendations. It was considered important, as a first step, for the State to admit that abuse of children occurred because of failures of systems and policy, of management and administration, as well as of senior personnel who were concerned with the reformatory and industrial schools. A series of other recommendations were made about the development and review of child-orientated State policies and services, about accountability, about the necessity for adequate and independent inspections of all services to children and for the fullest implementation of "Children First: National Guidelines for the Protection and Welfare of Children" (see paragraph 89 below).

5. Later reports on sexual abuse

85. Later public inquiries and reports criticised the response by the Catholic Church to allegations of child sexual abuse by the clergy.

86. The Ferns Report 2005 identified over 100 complaints of child abuse made between 1962 and 2002 against twenty-one priests of the Diocese of Ferns. The report criticised the response of the Church but referenced few complaints to the State authorities prior to or during the 1970s.

87. The Murphy Report 2009 concerned the handling by the Church and State of complaints of child abuse made between 1975 and 2004 against clergy of the Archdiocese of Dublin. The report accepted that child sexual abuse by clerics was widespread during the relevant period. While the need for child-protection legislation had been clearly recognised in the early 1970s, the legislative delay until the early 1990s was described as extraordinary.

88. In 1996 the Irish Catholic Bishops adopted a framework document entitled "Child Sexual Abuse: Framework for a Church Response". The Cloyne Report 2011 examined the response of the Catholic Church authorities to complaints made to them about clerical sexual abuse after the framework document was adopted, a point at which those authorities could reasonably be considered to have been aware of the extent of the problem and of the manner of dealing with it. The report was highly critical of the response of the Church, even during this later period.

6. Additional child-protection developments

89. In November 1991 the Department issued guidelines on procedures for dealing with allegations or suspicions of child abuse (Circular 16/91). They were updated in 2001 ("Child Protection – Guidelines and Procedures") and in 2006 ("Child Protection Guidelines and Procedures for Primary Schools"). In 1999 the first comprehensive framework for child protection was adopted by the State ("Children First: National Guidelines for the Protection and Welfare of Children"). These guidelines were to assist in the identification and reporting of child abuse and to improve professional practices in organisations providing services to children and families. The code has been updated since then, most recently in 2011. The Government have published the Children First Bill 2012 with a view to ensuring effective implementation of these guidelines.

90. The Ombudsman for Children was established in 2002 to promote public awareness of children's rights. New and focused criminal offences were adopted including the offence of reckless endangerment of a child (section 176 of the Criminal Justice Act 2006). Various compensation schemes have been set up providing redress mainly to abuse victims from reformatory and industrial schools. The "children's rights" referendum of 2012 led to the approval of the thirty-first amendment to the Constitution

which proposes to insert provisions, orientated towards child rights and protection, into Article 42 of the Constitution. The amendment has not come into force pending litigation.

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

A. The Council of Europe

91. The Parliamentary Assembly of the Council of Europe ("PACE") first made recommendations concerning child protection in 1969 with its Recommendation 561 entitled "Protection of Minors against ill-treatment". Although primarily concerned with the beating of children in the home, it recommended that States be invited to "take all necessary measures to ensure that the competent ministries and departments are aware of the gravity and extent of the problem of children subject to physical or mental cruelty" and, further, to "request the official services responsible for the care of maltreated children to coordinate their action as far as possible with the work undertaken by private organisations". Recommendation No. R (79) 17 of the Committee of Ministers on the protection of children against ill-treatment builds on this PACE Recommendation: governments were to take all necessary measures to ensure the safety of abused children "where the abuse is caused by acts or omissions on the part of persons responsible for the child's care or others having temporary or permanent control over him".

92. The European Social Charter 1961 provides in Article 7 that children and young persons have the right to special protection against physical and moral hazards to which they are exposed.

B. The United Nations

93. The Geneva Declaration of the Rights of the Child was adopted by the League of Nations in 1924 and emphasised, as a preamble to its five protective principles, that mankind owed to the child "the best that it had to give". By unanimous vote in 1959, the General Assembly of the United Nations adopted its Declaration of the Rights of the Child extending the 1924 Declaration. This 1959 Declaration is prefaced by the general principle that a child, by reason of his physical and mental immaturity, needed special safeguards and care. Principle 2 provides that a child shall enjoy special protection and shall be given opportunities and facilities to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity, the best interests of the child being always paramount. Principle 8 provides that the

child shall in all circumstances be among the first to receive protection and relief and Principle 9 states that the child shall be protected against all forms of neglect, cruelty and exploitation.

94. The Universal Declaration of Human Rights 1948 (UDHR) contains two Articles which expressly refer to children – Article 25 on special care and assistance and Article 26 on the right to free elementary education – as well as the catalogue of human rights which apply to all human beings including the right not to be subjected to cruel, inhuman or degrading treatment.

95. Article 24 of the International Covenant on Civil and Political Rights (ICCPR) stipulates that "every child shall have, without any discrimination ... the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State". Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESC) requires States to take steps, including legislating, to progressively realise the rights guaranteed by the Covenant. Article 10 of the ICESC consistently stipulates that special measures of protection and assistance should be taken on behalf of the young. Article 12 addresses the right of all to "the enjoyment of the highest attainable standard of physical and mental health", and incorporates a specific provision under which States Parties are obliged to take steps for the provision for the healthy development of children. Both Covenants were opened for signature in 1966 and they were signed and ratified by Ireland in 1973 and 1989 respectively.

96. The Preamble to the 1989 United Nations International Convention on the Rights of the Child recalls, *inter alia*, the various child-protection provisions of the 1924 and 1959 Declarations, the UDHR, the ICCPR and the ICESC. Article 19 provides that the State shall protect the child from maltreatment by parents or others responsible for the care of the child and establish appropriate social programmes for the prevention of abuse and the treatment of victims.

THE LAW

97. The applicant complained that the State failed to protect her from sexual abuse by a teacher in her national school and that she did not have an effective remedy against the State in that regard. She relied on Article 3 (alone and in conjunction with Article 13), Article 8, Article 2 of Protocol No. 1 as well as these latter Articles taken in conjunction with Article 14 of the Convention.

...

II. ALLEGED VIOLATION OF THE SUBSTANTIVE ASPECT OF ARTICLE 3 OF THE CONVENTION

122. Article 3 reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The parties' submissions

1. The applicant

123. The applicant's core complaint was that the State had failed, in violation of its positive obligation under Article 3, to put in place an adequate legal framework of protection of children from sexual abuse, the risk of which the State knew or ought to have known and which framework would have countered the non-State management of national schools. There were no clear or adequate legal obligations or guidance for the relevant actors to ensure they acted effectively to monitor the treatment of children and to deal with any complaints about ill-treatment including abuse. Articles 3 and 8, as well as Article 2 of Protocol No. 1, read together put a duty on the State to organise its educational system so as to ensure it met its obligation to protect children, an obligation facilitated, but not required, by Article 42 of the Constitution.

124. Education was a national obligation (*McEneaney* and *Crowley*, cited above), as it was in any advanced democracy. Article 42 of the Constitution was permissive so that the State could and should have chosen to provide education itself. Even if the State outsourced that obligation to non-State entities, the national-school model could and should have accommodated greater child-protection regulations. One way or the other, a State could not avoid its Convention protective obligations by delegating primary education to a private entity (see *Costello-Roberts v. the United Kingdom*[, 25 March 1993, Series A no. 247-C]). Finally, the State could not absolve itself by saying that the applicant had had other educational options which, in any event, she had not.

125. The applicant relied on certain material, notably the Carrigan and Ryan Reports, to substantiate her claim that the State either had, or ought to have had, knowledge of the risk of abuse of children in national schools. She pointed out that the Ryan Report had been published after nine years of investigation and after the Supreme Court judgment in her civil action. She also maintained that the State had or ought to have had knowledge of the fact that appropriate protective measures, including adequate monitoring and reporting mechanisms, were not in place to prevent such abuse. In

short, she maintained that the abuse of national-school pupils was facilitated by the national-school model of primary education combined with a failure to put in place effective measures of protection to prevent and detect sexual abuse.

126. The measures, on which the Government relied, were inadequate and, indeed, the applicant considered they confirmed an absence of State control. The 1965 Rules and Circulars were neither primary nor secondary legislation; their legal basis was unclear; they were so numerous and overlapping that the extent to which they remained in force was also unclear; and they were not readily available to the public. In any event, those Rules and Circulars were not effective: there was no reference to sexual abuse, no procedure for complaining about abuse and no binding requirement to monitor, investigate or report abuse to a State authority. The point of contact for the parents remained the manager. Whether or not action would have been taken on foot of a complaint to the State, the absence of an effective detection and complaints procedure meant that complaints were not passed on to the State.

127. The applicant also considered that the system of inspection could have protected children from abuse, but did not. It was designed to ensure the quality of teaching and not to control the conduct of teachers or to receive complaints of abuse. Accordingly, parents considered themselves obliged to complain to the manager and, indeed, the Guidance Note of 6 May 1970 directed them to do so. There was no relationship between the inspector and the parents, either in principle or practice and none of the guidelines or circulars referred to any contact between parents and inspectors. The inadequacy of the State system of inspection was, in the applicant's opinion, established by, *inter alia*, the Ryan Report, by a comparison with the extensive child-protection guidelines which have been adopted since then and by the facts of the present case. In this latter respect, there had been just under 400 instances of abuse since the mid-1960s in Dunderrow National School by L.H. and not one related complaint to an inspector.

128. More generally, the applicant pointed out the stark contrast between the State's detailed pleadings in her domestic action – where it claimed to have no control, knowledge or role in school management or as regards teachers' conduct or propensities and where it laid full responsibility squarely on the patrons and managers – and the State's position before this Court – where it is argued that there was a clear legal framework of State protection in place.

129. Finally, the causation test was set out in *E. and Others v. the United Kingdom*, [no. 33218/96], §§ 98-100[, 26 November 2002]). The applicant submitted that, had there been an effective reporting mechanism, the 1971

complaint would have been reported and there was therefore more than a "real prospect" that the 1973 abuse would not have happened.

2. The Government

130. The Government endorsed the Supreme Court's description of the development and structure of the Irish primary-education system adding that it existed when the Irish State was created in 1922 and was maintained with the enactment by the people of Article 42 of the Irish Constitution in 1937. Dunderrow National School was therefore owned, operated and managed by the Catholic Church and its representatives. L.H. was not a State employee but was employed by the manager who, in turn, managed the school on behalf of the patron. This was not a technical bureaucratic distinction but a real "ceding" of the ownership and management of schools to denominations. This situation suited the majority and minority denominations, it reflected the will of the Irish people and it was not the function of this Court to recast the relationships which formed the basis of a significant portion of the Irish primary-school system. The suggestion that primary education was a national enterprise to be entirely State run in an advanced democratic State stemmed from a particular ideological outlook that was not necessarily shared by all Contracting States and not by Ireland. They pointed to the fact that no legislation obliged a child to attend a national school as the law allowed other schooling options.

131. As regards the substantive complaint about a failure to protect under Article 3, the Government argued that the liability of the State was not engaged. The case of *Van der Mussele v. Belgium* (23 November 1983, Series A no. 70) was distinguishable because there was no question of "delegation" of obligations since Article 2 of Protocol No. 1 only required States to ensure that no one was denied an education. The above-cited *Costello-Roberts* case was different because corporal punishment was part of a disciplinary system and therefore within the ambit of education whereas L.H.'s behaviour was "the very negation" of a teacher's role. State responsibility for criminal offences unrelated to securing a Convention right was therefore limited to an operational obligation to protect (see *Osman v. the United Kingdom*, 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII) and there was no evidence that the State knew or ought reasonably to have known in 1973 of a real risk of a teacher abusing a pupil or of L.H. abusing the applicant.

132. As to what the State actually knew, the Government noted that neither the documents disclosed in discovery, nor the evidence of the inspector of Dunderrow National School, to the High Court indicated that the State authorities had received any complaint about L.H.'s behaviour.

133. Nor could it be said that the State ought to have been aware of a risk of sexual abuse of children by teachers in national schools in the 1970s. It was fundamental to assess the question of the State's constructive knowledge without the benefit of hindsight: in 1973 awareness of the risk of child abuse was almost non-existent and standards could not be retrospectively imposed on the early 1970s on the basis of today's increased knowledge and standards. The core question was what ought to have been the perceived risk of sexual abuse of children by teachers in primary schools in Ireland in the early 1970s and the answer was none. The Government pointed out the reference by Hardiman J to the different ethos which existed in the 1970s which explained why no parent had made a direct complaint to the State authorities at the relevant time. The Government relied also on the research paper entitled "Residential Child Care in England, 1948-1975: A History And Report" annexed to the Ryan Report. The applicant herself had presented no evidence to the domestic courts as to the level of awareness of risk in the 1970s and, indeed, her own expert (Professor Ferguson) considered that there was no evidence to support the need for preventative strategies in the early 1970s. The Carrigan Report did not assist her: while it contained some information about an increase in sexual crime and indicated that the police were active in prosecuting such crimes against young girls, there was no suggestion that a girl was at risk in school from a teacher. While the Government accepted that the Department had mishandled a complaint about Mr Brander, one could not extrapolate from this a constructive knowledge on the part of the State in the 1970s of a general risk to children from sexual abuse in schools. Once the State had a relevant awareness and understanding of the issues, relevant guidelines were introduced.

134. In any event, domestic law contained effective protective mechanisms commensurate with any risks which could have been perceived at the time. The actions of L.H. were offences in the criminal law and, indeed, as soon as complaints were made to the police in the mid-1990s, a full criminal investigation was carried out and L.H. was convicted and imprisoned. The civil law of tort provided grounds for a civil action against L.H. and the religious authorities.

135. The 1965 Rules also provided protection. These were legal rules which clearly bound a teacher and a manager and which clearly set out how to make and pursue a complaint. The Government relied, in particular, on Rules 121 and 130, which set down standards for teachers conduct, as well as Rule 108 and the Guidance Note of 6 May 1970 as regards mechanisms to deal with teachers who did not conduct themselves properly. Moreover, the inspector's role was, *inter alia*, to report to the Minister on the quality of the

system and, notably, on whether the 1965 Rules were being complied with and to ensure an "appropriate standard of education" in all primary schools. In addition, each manager, teacher and parent had a role in protecting children and each could have made, but did not make in the applicant's case, a complaint directly to an inspector, the Minister, the Department or to the police. Any such complaint would have led to relevant inquiries and investigations, and, as appropriate, a sanction such as the withdrawal by the Minister of a teacher's licence to teach. The real problem was that no use was made of the procedures which existed: the earlier complaint about L.H. was made to the manager and not to a State authority.

136. In sum, the Government argued that there were safeguards in place commensurate with any risk of which the State ought to have been aware at the time, that constructive knowledge ought to be assessed from the point of view of the 1970s and without the benefit of hindsight and, notably, without imposing today's knowledge and standards on a forty-year-old context.

B. The third parties' submissions

1. The Irish Human Rights Commission ("the IHRC")

137. The IHRC was established by statute in 2000 to promote and protect the human rights of everyone in Ireland and it has its origins in the Good Friday Agreement of 1998. It has already intervened as a third party in cases before the Court.

138. The IHRC noted, *inter alia*, the positive obligations to prevent treatment contrary to Article 3 including a more general duty to structure the primary-education system in such a way as to protect children, which obligations could not be avoided by delegating a public-service function to a private body. In this context, the IHRC considered that a serious question arose as to whether the State maintained a sufficient level of control over publicly funded national schools to ensure that Convention rights were upheld. The legal status of the 1965 Rules was unclear. The Rules were unclear about an inspector's role as regards a teacher's conduct and, while the Rules addressed "improper conduct" by teachers, they did not define this or indicate any process whatsoever for dealing with it. Since private fee-paying schools and home schooling were not options accessible to the vast majority of Irish parents, rendering primary education obligatory effectively required parents to send their children to national schools, failing which they risked criminal proceedings, fines and the possibility of children being taken

into care. In sum, in a typical national school, which most Irish children inevitably attended, school management had little guidance as to how to deal with allegations or suspicions of abuse, schools were under no duty to report such allegations to the Department or to the police, social services had limited powers to deal with any such allegations or suspicions and, finally, children and parents faced difficulties making any such complaints.

2. The European Centre for Law and Justice (ECLJ)

139. The ECLJ describes itself as a non-governmental organisation dedicated mainly to the defence of religious liberty. It has previously intervened as a third party in cases before this Court. The ECLJ focused on the question of whether the State could be considered responsible for the abuse by L.H. of the applicant.

140. The ECLJ noted that, since the creation of the education system, the role of the State therein was limited to financing it and controlling the quality of the syllabus and teaching. This system did not create hierarchical relationships between the State and the school and its teachers or, indeed, any legal basis for an obligation by the latter to keep the former informed. Neither did Article 2 of Protocol No. 1 require a State to directly administer schools to the point of managing all disciplinary matters.

141. As to whether, nevertheless, the State had fulfilled its positive obligation to prevent treatment in breach of Article 3, the ECLJ did not consider that the State was required to adopt other measures in addition to making criminal and civil proceedings available in the early 1970s.

142. Since the State was required neither by domestic law nor the Convention to take on the day-to-day management of primary education, the State was not responsible for the acts of a primary-school teacher. To suggest that it was responsible for not preventing the acts of a teacher would amount to imposing strict liability. The private and denominational character of school management was never an obstacle to the prevention or deterrence of abuse and never excluded the application of the law.

C. The Court's assessment

143. The relevant facts of the present case took place in 1973. The Court must, as the Government stressed, assess any related State responsibility from the point of view of facts and standards of 1973 and, notably, disregard the awareness in society today of the risk of sexual abuse of minors in an educational context, which knowledge is the result of recent public controversies on the subject, including in Ireland (see paragraphs 73-88 above).

1. The applicable positive obligation on the State

144. The Court reiterates that Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. This positive obligation to protect is to be interpreted in such a way as not to impose an excessive burden on the authorities, bearing in mind, in particular, the unpredictability of human conduct and operational choices which must be made in terms of priorities and resources. Accordingly, not every risk of ill-treatment could entail for the authorities a Convention requirement to take measures to prevent that risk from materialising. However, the required measures should, at least, provide effective protection in particular of children and other vulnerable persons and should include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge (see *X and Y v. the Netherlands*, 26 March 1985, §§ 21-27, Series A no. 91; *A. v. the United Kingdom*, 23 September 1998, § 22, *Reports* 1998-VI; *Z and Others v. the United Kingdom*, [no. 29392/95], §§ 74-75[, ECHR 2001-V]; *D.P. and J.C. v. the United Kingdom*, no. 38719/97, § 109, 10 October 2002; and *M.C. v. Bulgaria*, no. 39272/98, § 149, ECHR 2003-XII).

145. Moreover, the primary-education context of the present case defines to a large extent the nature and importance of this obligation. The Court's case-law makes it clear that the positive obligation of protection assumes particular importance in the context of the provision of an important public service such as primary education, school authorities being obliged to protect the health and well-being of pupils and, in particular, of young children who are especially vulnerable and are under the exclusive control of those authorities (see *Grzelak v. Poland*, no. 7710/02, § 87, 15 June 2010, and *Ilbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, no. 19986/06, § 35, 10 April 2012).

146. In sum, having regard to the fundamental nature of the rights guaranteed by Article 3 and the particularly vulnerable nature of children, it is an inherent obligation of government to ensure their protection from ill-treatment, especially in a primary-education context, through the adoption, as necessary, of special measures and safeguards.

147. Furthermore, this is an obligation which applied at the time of the events relevant to this case, namely in 1973.

The series of international instruments adopted prior to this period, summarised at paragraphs 91 to 95 above, emphasised the necessity for States to take special measures for the protection of children. The Court notes, in particular, the ICCPR and the ICESC which were both opened for signature in 1966 and signed by Ireland in 1973, although both were ratified in 1989 (see paragraph 95 above).

In addition, this Court's case-law confirmed, as early as in its fifth judgment, that the Convention could impose positive obligations on States, and it did so in the context of Article 2 of Protocol No. 1 concerning the right to education (see *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* (merits), 23 July 1968, pp. 30-31, § 3, Series A no. 6). The formulation used in *Marckx v. Belgium* (13 June 1979, § 31, Series A no. 31) to describe the positive obligations under Article 8 to ensure a child's integration into a family, has been often cited (notably, in *Airey v. Ireland*, 9 October 1979, § 25, Series A no. 32). Most pertinently, the seminal case of *X and Y v. the Netherlands*, cited above, found that the absence of legislation criminalising sexual advances to a mentally handicapped adolescent meant that the State had failed to fulfil a positive obligation to protect the Article 8 rights of the victim. In so concluding, the Court rejected the Government's argument to the effect that the facts were "exceptional" and that the legislative gap was unforeseeable. The respondent State should have been aware of a risk of sexual abuse of mentally handicapped adolescents in a privately run care home for children and should have legislated for that eventuality. Those cases concerned facts prior to or contemporaneous with those of the present application.

It is, of course, true that the Court has further elucidated the breadth and nature of the positive obligations on States since those early cases. However, this is considered to be mere clarification of case-law which remains applicable to earlier facts without any question of retroactivity arising (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 140, ECHR 2009).

148. As to the content of the positive obligation to protect, the Court observes that effective measures of deterrence against grave acts, such as those in issue in the present case, can only be achieved by the existence of effective criminal-law provisions backed up by law-enforcement machinery (see *X and Y v. the Netherlands*, cited above, § 27; as well as, for example, *Beganović v. Croatia*, no. 46423/06, § 71, 25 June 2009; *Mahmut Kaya v. Turkey*, no. 22535/93, § 115, ECHR 2000-III; and *M.C. v. Bulgaria,*

cited above, § 150). Importantly, the nature of child sexual abuse is such, particularly when the abuser is in a position of authority over the child, that the existence of useful detection and reporting mechanisms are fundamental to the effective implementation of the relevant criminal laws (see *Juppala v. Finland*, no. 18620/03, § 42, 2 December 2008). The Court would clarify that it considers, as did the Government, that there was no evidence before the Court of an operational failure to protect the applicant (see *Osman,* cited above, §§ 115-16). Until complaints about L.H. were brought to the attention of the State authorities in 1995, the State neither knew nor ought to have known that this particular teacher, L.H., posed a risk to this particular pupil, the applicant.

149. The Court also notes that it is not necessary to show that "but for" the State omission the ill-treatment would not have happened. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State (see *E. and Others v. the United Kingdom*, cited above, § 99).

150. It is indeed the case, as emphasised by the applicant, that a State cannot absolve itself from its obligations to minors in primary schools by delegating those duties to private bodies or individuals (see *Costello-Roberts*, cited above, § 27; see also, *mutatis mutandis*, *Storck v. Germany*, no. 61603/00, § 103, ECHR 2005-V). However, that does not mean that the present case challenges, as the Government suggested, the maintenance of the non-State management model of primary education and the ideological choices underlying it. Rather, the question raised by the present case is whether the system so preserved contained sufficient mechanisms of child protection.

151. Finally, the Government appeared to suggest that the State was released from its Convention obligations since the applicant chose to go to Dunderrow National School. However, the Court considers that the applicant had no "realistic and acceptable alternative" other than attendance, along with the vast majority of children of primary-school-going age, at her local national school (see *Campbell and Cosans v. the United Kingdom*, 25 February 1982, § 8, Series A no. 48). Primary education was obligatory (sections 4 and 17 of the School Attendance Act 1926) and few parents had the resources to use the two other schooling options (home schooling or travelling to attend the rare fee-paying primary schools), whereas national schools were free and the national-school network was extensive. There were four national schools in the applicant's parish and no information was submitted as to the distance to the nearest fee-paying school. In any event, the State cannot be released from its positive obligation to protect

simply because a child selects one of the State-approved education options, whether a national school, a fee-paying school or, indeed, home schooling (see *Costello-Roberts*, cited above, § 27).

152. In sum, the question for current purposes is therefore whether the State's framework of laws, and notably its mechanisms of detection and reporting, provided effective protection for children attending a national school against the risk of sexual abuse, of which risk it could be said that the authorities had, or ought to have had, knowledge in 1973.

2. Was the positive obligation fulfilled?

153. It was not disputed that the applicant was sexually abused by L.H. in 1973. L.H. pleaded guilty to several sample charges of sexual abuse of pupils from the same national school. He did not defend the applicant's civil action and the Supreme Court accepted that L.H. had abused her. The Court also considers, and it was not contested, that that ill-treatment fell within the scope of Article 3 of the Convention. In particular, when the applicant was nine years of age and for around six months, she was subjected to approximately twenty sexual assaults by L.H. who, as her teacher and school principal, was in a position of authority and control over her (see, for example, *E. and Others v. the United Kingdom*, cited above, § 89).

154. There was also little disagreement between the parties as to the structure of the Irish primary-school system, although they disputed the resulting liability of the State under domestic law and the Convention.

155. The respective roles of religious communities and the State in Irish primary education have been consistent from the early nineteenth century to date. The State provided *for* education (set the curriculum, licenced teachers and funded schools) but most primary education was provided *by* national schools. Religious bodies owned national schools (as patrons) and managed them (as managers). As pointed out by Hardiman J, the management of national schools by religious bodies was not just an authorisation by the State to take part in the provision of primary education but rather it was a "ceding" of the running of national schools to the denominational actors and to their interests, which bodies were interposed between the State and the child. The Minister for Education did not, therefore, have any direct or day-to-day management or control of national schools (see paragraphs 35 and 40 above). As observed by Hardiman J and Fennelly J in the Supreme Court, the denominations expressed their firm wish to retain that national-school model of primary education and their control of that system. Since the purpose of the denominations was to ensure that their ethos was reflected in the schools, national schools developed into a predominantly

denominational system: accordingly, a Catholic-managed national school generally referred to a Catholic manager (usually the local parish priest) with Catholic teachers and pupils (see Hardiman J and Fennelly J, at paragraphs 31-32 and 43 above).

156. This national-school model was carried over through independence in 1922 and was foreseen and facilitated by the text of Article 42 § 4 of the Constitution adopted in 1937. By the early 1970s, national schools represented 94% of all primary schools. Approximately 91% of those national schools were owned and managed by the Catholic Church, although the percentage of primary-school children catered for in Catholic-managed national schools was likely to be higher.

157. Accordingly, in the early 1970s, the vast majority of Irish children under the age of 12 or 13 attended, like the applicant, their local national school. As Hardiman J and Fennelly J of the Supreme Court noted, national schools were educational institutions owned and managed by, and in the interests of, a non-State actor, to the exclusion of State control. It was, moreover, a non-State actor of considerable influence on, in particular, pupils and parents and one resolved to retain its position.

158. This model of primary education appears to have been unique in Europe. The Supreme Court recognised this, describing the system as one which was entirely *sui generis*, a product of Ireland's unique historical experience.

159. Parallel to the maintenance by the State of this unique model of education, the State was also aware of the level of sexual crime against minors through the enforcement of its criminal laws on the subject.

160. The Irish State maintained laws, or adopted new laws, after independence in 1922 specifically criminalising the sexual abuse of minors including sections 50 and 51 of the Offences Against the Person Act 1861 (as amended) and the Criminal Law Amendment Act 1935 ("the 1935 Act"). Such acts also constituted common-law offences of indecent and ordinary assault.

161. Moreover, the evidence before the Court indicates a steady level of prosecutions of sexual offences against children prior to the 1970s. It has noted, in particular, the detailed statistical evidence provided by the Police Commissioner to the Carrigan Committee as early as 1931 (see paragraph 71 above). Based on information he had gathered from 800 police stations in Ireland, he concluded that there was an alarming amount of sexual crime in Ireland, a feature of which was the large number of cases concerning minors including children under 10 years of age. Indeed, this witness considered prosecutions to represent a fraction of the offences actually taking place. Drawing a causal connection between the frequency of assaults on children

and the impunity expected by abusers, the Committee's report recommended legislative changes and more severe punishments leading to the adoption of the 1935 Act which, *inter alia*, created certain sexual offences as regards young girls. Professor Ferriter's report, sponsored by the Ryan Commission and annexed to its report (see paragraph 82 above), analysed the statistical evidence of prosecutions gathered from criminal-court archives covering the period after the Carrigan Report and until the 1960s. In his report, he concluded, *inter alia*, that those archives demonstrated a high level of sexual crime directed against young boys and girls. Lastly, the Ryan Report also evidenced complaints made to State authorities prior to and during the 1970s about the sexual abuse of children by adults (see paragraphs 78-81 above). While that report primarily concerned industrial schools where the programme was different from national schools and where the resident children were isolated from families and the community (see the description of industrial schools at paragraph 73 above), these earlier complaints still amounted to notice to the State of sexual abuse by adults of minors in an educational context. In any event, the complaints to the State prior to and during the 1970s recorded in Volume III of the Ryan Report concerned, *inter alia*, national schools (see paragraph 80 above).

162. The State was therefore aware of the level of sexual crime by adults against minors. Accordingly, when relinquishing control of the education of the vast majority of young children to non-State actors, the State should also have been aware, given its inherent obligation to protect children in this context, of potential risks to their safety if there was no appropriate framework of protection. This risk should have been addressed through the adoption of commensurate measures and safeguards. Those should, at a minimum, have included effective mechanisms for the detection and reporting of any ill-treatment by and to a State-controlled body, such procedures being fundamental to the enforcement of the criminal laws, to the prevention of such ill-treatment and, more generally therefore, to the fulfilment of the positive protective obligation of the State (see paragraph 148 above).

163. The first mechanism on which the Government relied was a reporting process outlined in the 1965 Rules and the Guidance Note of 6 May 1970 (see paragraph 62 above). However, none of the material submitted referred to any obligation on a State authority to monitor a teacher's treatment of children and none provided for a procedure prompting a child or parent to complain about ill-treatment directly to a State authority. On the contrary, those with complaints about teachers were expressly channeled to the non-State denominational manager by the text of the Guidance Note of 6 May 1970 on which the Government relied. If a parent had been hesitant to bypass a manager (generally a local priest as in

the present case) to complain to a State authority, the relevant rules would have discouraged them from doing so.

164. The second mechanism invoked was the system of school inspectors governed also by the 1965 Rules as well as by Circular 16/59 (see paragraph 61 above). However, the Court notes that the principle task of inspectors was to supervise and report upon the quality of teaching and academic performance. There was no specific reference, in the instruments on which the Government relied, to an obligation on inspectors to inquire into or to monitor a teacher's treatment of children, to any opportunity for children or parents to complain directly to an inspector, to a requirement to give notice to parents in advance of an inspector's visit or, indeed, to any direct interaction between an inspector and pupils and/or their parents. The rate of visits by inspectors (see paragraph 61 above) did not attest to any local presence of relevance. Consistently with this fact, the Government did not submit any information about complaints made to an inspector about a teacher's ill-treatment of a child. As pointed out by Hardiman J in the Supreme Court, the Minister (via his inspectors) inspected the schools for their academic performance but it did not go further than that: the Minister was deprived of the direct control of the schools because the non-State manager was interposed between the State and the child (see paragraph 35 above).

165. The Court is therefore of the view that the mechanisms on which the Government relied did not provide any effective protective connection between the State authorities and primary-school children and/or their parents and, indeed, this was consistent with the particular allocation of responsibilities in the national-school model.

166. The facts of the present case illustrate, in the Court's opinion, the consequences of this lack of protection and demonstrate that an effective regulatory framework of protection in place before 1973 might, "judged reasonably, have been expected to avoid, or at least, minimise the risk or the damage suffered" by the present applicant (see *E. and Others v. the United Kingdom*, cited above, § 100). There were just under 400 incidents of abuse concerning L.H. since the mid-1960s in Dunderrow National School. Complaints were made in 1971 and 1973 about L.H. to the denominational manager but, as the Supreme Court accepted, the manager did not bring those complaints to the notice of any State authority. The inspector assigned to that school made six visits from 1969 to 1973 and no complaint was ever made to him about L.H. Indeed, no complaint about L.H.'s activities was made to a State authority until 1995, after L.H. had retired. Any system of detection and reporting which allowed such extensive and serious ill-conduct to continue for so long must be considered to be

ineffective (see *C.A.S. and C.S. v. Romania*, no. 26692/05, § 83, 20 March 2012). Adequate action taken on the 1971 complaint could reasonably have been expected to avoid the present applicant being abused two years later by the same teacher in the same school.

167. Finally, Professor Ferguson's letter, on which the Government relied, was not an expert investigation report but rather pre-litigation advice and thus inevitably also concerned with issues such as chances of success and costs exposure. The comments of Professor Rollison, on which the Government also relied, were directed to the state of awareness of the risk of sexual abuse in the United Kingdom whilst the issue before the Court requires a country-specific assessment.

168. To conclude, this is not a case which directly concerns the responsibility of L.H., of a clerical manager or patron, of a parent or, indeed, of any other individual for the sexual abuse of the applicant in 1973. Rather, the application concerns the responsibility of a State. More precisely, it examines whether the respondent State ought to have been aware of the risk of sexual abuse of minors such as the applicant in national schools at the relevant time and whether it adequately protected children, through its legal system, from such treatment.

The Court has found that it was an inherent positive obligation of government in the 1970s to protect children from ill-treatment. It was, moreover, an obligation of acute importance in a primary-education context. That obligation was not fulfilled when the Irish State, which must be considered to have been aware of the sexual abuse of children by adults through, *inter alia*, its prosecution of such crimes at a significant rate, nevertheless continued to entrust the management of the primary education of the vast majority of young Irish children to non-State actors (national schools), without putting in place any mechanism of effective State control against the risks of such abuse occurring. On the contrary, potential complainants were directed away from the State authorities and towards the non-State denominational managers (see paragraph 163 above). The consequences in the present case were the failure by the non-State manager to act on prior complaints of sexual abuse by L.H., the applicant's later abuse by L.H. and, more broadly, the prolonged and serious sexual misconduct by L.H. against numerous other students in that same national school.

169. In such circumstances, the State must be considered to have failed to fulfil its positive obligation to protect the present applicant from the sexual abuse to which she was subjected in 1973 whilst a pupil in Dunderrow National School. There has therefore been a violation of her rights under Article 3 of the Convention. Consequently, the Court dismisses

the Government's preliminary objection to the effect that this complaint was manifestly ill-founded.

III. ALLEGED VIOLATION OF THE PROCEDURAL ASPECT OF ARTICLE 3 OF THE CONVENTION

170. The applicant argued that the State had also failed to investigate properly or provide an appropriate judicial response to an arguable case of ill-treatment. She maintained that the lack of effective detection and reporting mechanisms meant that the 1971 complaint about L.H. was not reported and led to a long delay before a criminal investigation and L.H.'s conviction.

171. The Government argued that sufficient procedures existed in 1973 but that no complaint had been made to a State actor until 1995. At that point, the State fulfilled its procedural obligations: police investigations took place, L.H. was convicted, an award was made by the Criminal Injuries Compensation Tribunal, the applicant's civil action against L.H. was successful and her civil action in negligence against the State failed on evidential grounds only.

172. The Court reiterates the principles outlined in *C.A.S. and C.S. v. Romania* (cited above, §§ 68-70) to the effect that Article 3 requires the authorities to conduct an effective official investigation into alleged ill-treatment inflicted by private individuals, which investigation should, in principle, be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. That investigation should be conducted independently, promptly and with reasonable expedition. The victim should be able to participate effectively.

173. The existence of adequate detection and reporting mechanisms has been examined above in the context of the positive obligations of the State under the substantive aspect of Article 3 of the Convention. Thereafter, the procedural obligations arise once a matter has been brought to the attention of the authorities (see *C.A.S. and C.S. v. Romania*, § 70, with further references therein). In the present case, once a complaint about the sexual abuse by L.H. of a child from Dunderrow National School was made to the police in 1995, the investigation opened. The applicant was contacted for a statement which she made in early 1997 and she was referred for counselling (see for example, *C.A.S. and C.S. v. Romania*, § 82). L.H. was charged on 386 counts of sexual abuse involving twenty-one pupils from Dunderrow National School. L.H. pleaded guilty to twenty-one sample charges. He was convicted and imprisoned. It is not clear from the submissions whether the applicant's case was included in the sample charges: however, she did

not take any issue with the fact that L.H. was allowed to plead guilty to representative charges or with his sentence. Any question concerning her inability to obtain recognition of, and compensation for, the State's failure to protect falls to be examined below under Article 13 of the Convention taken in conjunction with Article 3.

174. For these reasons, the Court finds that there has been no violation of the procedural obligations of the State under Article 3 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION IN CONJUNCTION WITH THE SUBSTANTIVE ASPECT OF ARTICLE 3

175. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

176. The applicant complained that she was entitled to, but did not have, an effective domestic remedy against the State as regards the failure of the State to protect her from sexual abuse. The Government argued that effective remedies existed against the State and non-State actors.

177. The Court observes, as it did at paragraph 115 above, that in a case such as the present, Article 13 requires a mechanism to be available for establishing any liability of State officials or bodies for acts or omissions in breach of the Convention and that compensation for the non-pecuniary damage flowing therefrom should also be part of the range of available remedies (see *Z and Others v. the United Kingdom*, cited above, § 109). The Court also observes the relevant case-law and principles set out at paragraphs 107 and 108 of the judgment in *McFarlane v. Ireland* ([GC], no. 31333/06, 10 September 2010). In particular, the Court's role is to determine whether, in the light of the parties' submissions, the proposed procedures constituted effective remedies which were available to the applicant in theory and in practice, that is to say, were accessible, capable of providing redress and offered reasonable prospects of success. The importance of allowing remedies to develop in a common-law system with a written Constitution is also stressed (see, in particular, *D. v. Ireland* (dec.), no. 26499/02, § 85, 27 June 2006).

A. Civil remedies against non-State actors

178. The Government argued that the applicant should have sued the past and/or current patron of the school, the diocese of which he was bishop, the manager and/or the *de facto* manager or their successors or estates,

pointing out that Hardiman J of the Supreme Court found the failure to do this to be "notable". Without prejudice to her primary submission that a remedy against the State was required, the applicant noted that the patron and manager had passed away at the time of her civil action, that the present bishop denied liability in response to her pre-action letter and that the law was in his favour given that a bishop could not be sued as he was not a corporation sole with perpetual succession.

179. Since the Court considers that the applicant was entitled to a remedy establishing any liability of the State, the proposed civil remedies against other individuals and non-State actors must be regarded as ineffective in the present case, regardless of their chances of success (the patron and manager) and regardless of the recoverability of the damages awarded (civil action against L.H.). Equally the conviction of L.H. also relied upon by the Government, while central to the procedural guarantees of Article 3, was not an effective remedy for the applicant within the meaning of Article 13 of the Convention.

B. Civil remedies against the State

1. The parties' submissions

180. The Government argued that the applicant should have pleaded the State's vicarious liability for the patron and/or manager. However, the Government mainly relied on two other remedies. In the first place, they referred to an action claiming that the primary-education system, foreseen by Article 42 of the Constitution, breached her unenumerated constitutional right to bodily integrity (the constitutional tort action). Secondly, they argued that she could have continued her claim in negligence in her appeal to the Supreme Court arguing that the State had failed to structure the primary-education system so as to protect her from abuse. This was her complaint under Article 3 of the Convention. The High Court had summarily dismissed ("non-suited") her claims because she had failed to adduce any evidence: indeed, her own expert (Professor Ferguson, see paragraph 24 above) had advised her against litigating on the basis of a lack of relevant awareness of risk on the part of the State. It was therefore disingenuous to argue that she should now be excused from appealing because she had been non-suited on evidential grounds. In any event, the Government maintained that certain domestic case-law indicated that a non-suit on evidential grounds was appealable and, further, that she could have appealed the non-suit because the High Court gave no clear reasons for that decision and because it failed to address her negligence claim separately.

181. The applicant maintained that she had pleaded, in her domestic action, the State's vicarious liability for the patron and/or manager. She also disputed the effectiveness of the other two remedies against the State on which the Government relied. The High Court's dismissal of the constitutional tort claim was unappealable. The State's protection for the unenumerated constitutional right to bodily integrity was implemented through the law of tort and there was no discrete action for damages for breach of the constitutional right to bodily integrity. Neither would the negligence action have been effective. She was non-suited at first instance and, although no reasons were given, it was clearly because her evidence did not demonstrate a prima facie case of negligence. However, she did not have the resources to carry out the necessary investigation, the extent of which was demonstrated by the enormous State resources later required by the Ryan Commission's investigation and report (see paragraph 77 above). An appeal against an evidential finding of the High Court was unlikely to succeed whether or not one applied the case-law on which the Government relied.

2. The IHRC's submissions

182. The IHRC did not consider the constitutional tort remedy to be effective. In particular, it pointed out that, while the courts had, in theory, endorsed the idea of fashioning remedies for alleged breaches of constitutional rights (*Byrne v. Ireland* [1972] IR 241, p. 281; and *Meskell v. CIE* [1973] IR 121), the same courts tended to avoid replacing existing statutory and common-law remedies with a separate constitutional remedial regime so that the constitutional courts relied on existing remedies such as tort (*W v. Ireland (no. 2)* ([1999] 2 IR 141). The IHRC submitted that this was precisely what had occurred in this case: to dispose of the constitutional claim against the State it was sufficient to direct the applicant to a remedy in tort for breach of her rights to bodily integrity and privacy. However, the nature of the tortious relationship (negligence/vicarious liability) defined the State's obligations and liabilities rather than the possibly broader duty of the State to vindicate the rights of a child in the public-education system. This, in turn, raised the question of whether the private law remedy in tort was adequate to protect the substance of the applicant's constitutional rights not least because the private-law remedy focused on the State's conduct rather than on the applicant's rights.

3. The Court's assessment

183. The Court is not persuaded that any of the remedies against the State has been shown by the Government to be effective in the present case.

184. In the first place, the Supreme Court rejected the State's vicarious liability for the acts of L.H., who was a lay teacher with a salary funded by the State. The State's vicarious liability for the patron and/or manager, who were clerics not paid by the State, must be considered to have been even less likely. Consistently, Fennelly J noted that there could be no State liability for the manager since he was not employed by the State (see paragraph 45 above).

185. Secondly, a claim against the State in direct negligence would require the recognition, *inter alia*, of a relationship between the State and the applicant of such proximity as to give rise to a duty of care on the part of the State to the applicant (see paragraph 66 above). However, the interposition of the denominational managers to the exclusion of State control in national schools would appear to be incompatible with the existence of any such duty of care (see also Hardiman J at paragraphs 35 and 39 above).

186. Thirdly, the Government argued that the applicant should have maintained her constitutional tort claim before the Supreme Court (see paragraph 180 above). However, even if the Supreme Court would not have directed her to existing tort remedies as the High Court did, the Government have not demonstrated, with relevant case-law, how the State could be held responsible for a breach of her constitutional right to bodily integrity because of a system which was specifically envisaged by Article 42 of the Constitution. Whether or not this ground was properly pleaded before the Supreme Court, it remains relevant to note that Hardiman J of the Supreme Court rejected it (see paragraph 40 above).

C. The Court's conclusion

187. For these reasons, the Court considers that it has not been demonstrated that the applicant had an effective domestic remedy available to her as regards her complaints under the substantive limb of Article 3 of the Convention. There has, therefore, been a violation of Article 13. The Court therefore dismisses the Government's preliminary objection that this complaint was manifestly ill-founded.

...

FOR THESE REASONS, THE COURT

...

3. *Holds*, by eleven votes to six, that there has been a violation of the substantive aspect of Article 3 of the Convention as regards the State's failure to fulfill its obligation to protect the applicant and, consequently,

dismisses the Government's objection that that complaint was manifestly ill-founded;

4. *Holds*, by eleven votes to six, that there has been a violation of Article 13 of the Convention taken in conjunction with the substantive aspect of Article 3 on account of the lack of an effective remedy as regards the State's failure to fulfill its obligation to protect the applicant and, consequently, *dismisses* the Government's objection that that complaint was manifestly ill-founded;
5. *Holds*, unanimously, that there has been no violation of the procedural aspect of Article 3 of the Convention;

...

EUROPEAN COURT OF HUMAN RIGHTS

CASE OF MARGUŠ v. CROATIA
(Application no. 4455/10)

GRAND CHAMBER

JUDGMENT OF 27 MAY 2014

[Extracts][1]

1. This is an excerpt from the judgment delivered by the Grand Chamber in the case of *Marguš v. Croatia*. It contains a summary which does not bind the Court. The full English text of the judgment is available in the HUDOC database at: http://hudoc.echr.coe.int/eng?i=001-144276. In addition to the authentic English and French versions of this judgment, HUDOC also contains Spanish translations of select case-law at: http://hudoc.echr.coe.int.

SUMMARY[1]

Conviction for war crimes of a soldier who had previously been granted an amnesty

There is a growing tendency in international law to see amnesties for acts which amount to grave breaches of fundamental human rights, such as the intentional killing of civilians, as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish such acts. Accordingly, Article 4 of Protocol No. 7 to the Convention, which provides the right not to be tried or punished twice, is not applicable where a defendant who has been granted an amnesty in respect of offences under the ordinary criminal law is subsequently convicted of war crimes arising out of the same set of facts (see paragraphs 129-38 of the judgment).

Article 4 of Protocol No. 7

Right not to be tried or punished twice – Conviction for war crimes of a soldier who had previously been granted an amnesty – Growing tendency in international law not to accept the granting of amnesties in respect of grave breaches of human rights

*

* *

Facts

The applicant, a member of the Croatian army, was indicted for murder and other serious offences committed in 1991 during the war in Croatia. Some of the charges were subsequently dropped. In 1997 the trial court terminated the proceedings in respect of the remaining charges pursuant to the General Amnesty Act, which granted amnesty for all criminal offences committed in connection with the war in Croatia between 1990 and 1996, except for acts amounting to the gravest breaches of humanitarian law or war crimes. In 2007 the Supreme Court, on a request for the protection of legality lodged by the State Attorney, found the decision to terminate the proceedings against the applicant to be in violation of the General Amnesty Act. It noted in particular that the applicant had committed the alleged offences as a member of the reserve forces after his tour of duty had terminated, so that there was no significant link between the alleged offences and the war, as required by the Act. In parallel, in a second set of criminal proceedings the trial court convicted the applicant of war crimes and sentenced him to fourteen years' imprisonment. On appeal, the Supreme Court upheld the conviction finding, *inter alia*, that the matter had not been *res judicata* because the factual background to the offences

1. This summary by the Registry does not bind the Court.

in the second set of proceedings was significantly wider in scope than that in the first set, as the applicant had been charged with a violation of international law, in particular the 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. The applicant filed a constitutional complaint, which was ultimately dismissed.

Law

Article 4 of Protocol No. 7: The applicant complained of a violation of his right not to be tried twice. The Court acknowledged that in both sets of proceedings the applicant had been prosecuted for the same offences. There were, however, two distinct situations as regards the charges brought in the first set of proceedings: the prosecutor had withdrawn the charges concerning two alleged killings, whereas the proceedings in respect of two further alleged killings and a charge of serious wounding had been terminated by a county-court ruling adopted on the basis of the General Amnesty Act.

a. *Dropped charges* – In respect of the charges that had been withdrawn by the public prosecutor in the first set of proceedings, the Court reiterated that the discontinuance of criminal proceedings by a public prosecutor did not amount to either a conviction or an acquittal, such that Article 4 of Protocol No. 7 was not applicable.

Conclusion: inadmissible (unanimously).

b. *Termination of proceedings under the General Amnesty Act* – As regards the termination of the first set of proceedings on the basis of the General Amnesty Act, the Court observed that the applicant had been improperly granted an amnesty for acts that amounted to grave breaches of fundamental human rights protected under Articles 2 and 3 of the Convention. The States were under an obligation to prosecute acts such as torture and intentional killings. Moreover, there was a growing tendency in international law to see the granting of amnesties in respect of grave breaches of human rights as unacceptable. In support of this observation, the Court relied on several international bodies, courts and conventions, including the United Nations Human Rights Committee, the International Criminal Tribunal for the former Yugoslavia and the Inter-American Court of Human Rights. Further, even if it were to be accepted that amnesties were possible where there were some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there was nothing to indicate that there were any such circumstances. The fresh indictment against the applicant for war crimes in the second set of proceedings was thus in compliance with the requirements of Articles 2 and 3 of the Convention, such that Article 4 of Protocol No. 7 was not applicable.

Conclusion: Article 4 of Protocol No. 7 not applicable (sixteen votes to one).

JUDGMENT

In the case of *Marguš v. Croatia*,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Dean Spielmann, *President*,
Josep Casadevall,
Guido Raimondi,
Ineta Ziemele, ad hoc *judge*,
Mark Villiger,
Isabelle Berro-Lefèvre,
Corneliu Bîrsan,
Ján Šikuta,
Ann Power-Forde,
Işıl Karakaş,
Nebojša Vučinić,
Kristina Pardalos,
Angelika Nußberger,
Helena Jäderblom,
Krzysztof Wojtyczek,
Faris Vehabović,
Dmitry Dedov, *judges*,
and Lawrence Early, *Jurisconsult*,

…

Delivers the following judgment…:

PROCEDURE

1. The case originated in an application (no. 4455/10) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Mr Fred Marguš ("the applicant"), on 31 December 2009.

2. The applicant, who had been granted legal aid, was represented by Mr P. Sabolić, a lawyer practising in Osijek. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

…

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicant was born in 1961 and is currently serving a prison sentence in Lepoglava State Prison.

A. The first set of criminal proceedings against the applicant (no. K4/97)

13. On 19 December 1991 the Osijek Police Department lodged a criminal complaint against the applicant and five other persons with the Osijek County Court, alleging that the applicant, a member of the Croatian army, had killed several civilians.

14. On 20 April 1993 the Osijek Military Prosecutor indicted the applicant before the Osijek County Court on charges of murder, inflicting grievous bodily harm, causing a risk to life and assets, and theft. The relevant part of the indictment reads:

> "The first accused, Fred Marguš
>
> 1. On 20 November 1991 at about 7 a.m. in Čepin … fired four times at S.B. with an automatic gun … as a result of which S.B. died;
>
> …
>
> 2. At the same time and place as under (1) … fired several times at V.B. with an automatic gun … as a result of which V.B. died;
>
> …
>
> 3. On 10 December 1991 took N.V. to the 'Vrbik' forest between Čepin and Ivanovac … and fired at him twice with an automatic gun … as a result of which N.V. died;
>
> …
>
> 4. At the same place and time as under (3) fired at Ne.V. with an automatic gun … as a result of which she died;
>
> …
>
> 6. On 28 August 1991 at about 3 a.m. threw an explosive device into business premises in Čepinski Martinovec … causing material damage;
>
> …
>
> 7. On 18 November 1991 at 00.35 a.m. in Čepin placed an explosive device in a house … causing material damage …;
>
> …

8. On 1 August 1991 at 3.30 p.m. in Čepin … fired at R.C., causing him slight bodily injury and then … kicked V.Ž … causing him grievous bodily injury … and also kicked R.C. … causing him further slight bodily injuries …;

…

9. Between 26 September and 5 October 1991 in Čepin … stole several guns and bullets …;

…"

He was further charged with appropriating several tractors and other machines belonging to other persons.

15. On 25 January 1996 the Osijek Deputy Military Prosecutor dropped the charges under counts 3, 4, 6, 7 and 9 of the indictment as well as the charges of appropriating goods belonging to others. A new count was added, by which the applicant was charged with having fired, on 20 November 1991 at about 7 a.m. in Čepin, at a child, Sl.B., causing him grievous bodily injury. The former count 8 of the indictment thus became count 4.

16. On 24 September 1996 the General Amnesty Act was enacted. It stipulated that a general amnesty was to be applied in respect of all criminal offences committed in connection with the war in Croatia between 17 August 1990 and 23 August 1996, save in respect of those acts which amounted to the gravest breaches of humanitarian law or to war crimes, including the crime of genocide (see paragraph 29 below).

17. On 24 June 1997 the Osijek County Court, sitting as a panel presided over by Judge M.K., terminated the proceedings pursuant to the General Amnesty Act. The relevant part of this ruling reads:

"The Osijek County Court … on 24 June 1997 has decided as follows: the criminal proceedings against the accused Fred Marguš on two charges of murder … inflicting grievous bodily harm … and causing a risk to life and assets … instituted on the indictment lodged by the Osijek County State Attorney's Office … on 10 February 1997 are to be concluded under section 1(1) and (3) and section 2(2) of the General Amnesty Act.

…

Reasoning

The indictment of the Osijek Military State Attorney's Office no. Kt-1/93 of 20 April 1993 charged Fred Marguš with three offences of aggravated murder under Article 35 § 1 of the Criminal Code; one offence of aggravated murder under Article 35 § 2 (2) of the Criminal Code; two criminal offences of causing a risk to life and assets … under Article 153 § 1 of the Criminal Code; one criminal offence of inflicting grievous bodily harm under Article 41 § 1 of the Criminal Code; one criminal offence of theft of weapons or other fighting equipment under Article 223 §§ 1 and 2 of the Criminal

Code; and one criminal offence of aggravated theft under Article 131 § 2 of the Criminal Code …

The above indictment was significantly altered at a hearing held on 25 January 1996 before the Osijek Military Court, when the Deputy Military Prosecutor withdrew some of the charges and altered the factual and legal description and the legal classification of some of the offences.

Thus, the accused Fred Marguš was indicted for two offences of murder under Article 34 § 1 of the Criminal Code, one criminal offence of inflicting grievous bodily harm under Article 41 § 1 of the Criminal Code and one criminal offence of causing a risk to life and assets … under Article 146 § 1 of the Criminal Code …

After the military courts had been abolished, the case file was forwarded to the Osijek County State Attorney's Office, which took over the prosecution on the same charges and asked that the proceedings be continued before the Osijek County Court. The latter forwarded the case file to a three-judge panel in the context of application of the General Amnesty Act.

After considering the case file, this panel has concluded that the conditions under section 1(1) and (3) and section 2(2) of the General Amnesty Act have been met and that the accused is not excluded from amnesty.

The above-mentioned Act provides for a general amnesty in respect of criminal offences committed during the aggression, armed rebellion or armed conflicts …. in the Republic of Croatia. The general amnesty concerns criminal offences committed between 17 August 1990 and 23 August 1996.

The general amnesty excludes only the perpetrators of the gravest breaches of humanitarian law which amount to war crimes, and certain criminal offences listed in section 3 of the General Amnesty Act. It also excludes the perpetrators of other criminal offences under the Criminal Code … which were not committed during the aggression, armed rebellion or armed conflicts and which are not connected with the aggression, armed rebellion or armed conflicts in Croatia.

The accused, Fred Marguš, is indicted for three criminal offences committed in Čepin on 20 November 1991 and one criminal offence committed in Čepin on 1 August 1991.

The first three of these offences concern the most difficult period and the time of the most serious attacks on Osijek and Eastern Croatia immediately after the fall of Vukovar, and the time of the most severe battles for Laslovo. In those battles, the accused distinguished himself as a combatant, showing exceptional courage and being recommended for promotion to the rank of lieutenant by the commander of the Third Battalion of the 106th Brigade of the Croatian army, who was his superior officer at that time.

In the critical period concerning the first three criminal offences, the accused was acting in his capacity as a member of the Croatian army; in that most difficult period, acting as commander of a unit, he tried to prevent the fall of a settlement into enemy hands, when there was an immediate danger of this happening. The fourth criminal

offence was committed on 1 August 1991, when the accused was acting in his capacity as an on-duty member of the Reserve Forces in Čepin and was dressed in military camouflage uniform and using military weapons.

…

The actions of the accused, in view of the time and place of the events in issue, were closely connected with the aggression, armed rebellion and armed conflicts in Croatia, and were carried out during the period referred to in the General Amnesty Act.

…

Against this background, this court finds that all the statutory conditions for application of the General Amnesty Act have been met …"

18. On an unspecified date the State Attorney lodged a request for the protection of legality (*zahtjev za zaštitu zakonitosti*) with the Supreme Court, asking it to establish that section 3(2) of the General Amnesty Act had been violated.

19. On 19 September 2007 the Supreme Court, when deciding upon the above request, established that the above ruling of the Osijek County Court of 24 June 1997 violated section 3(2) of the General Amnesty Act. The relevant parts of the Supreme Court's ruling read:

"…

Section 1(1) of the General Amnesty Act provides for a general amnesty from criminal prosecution and trial for the perpetrators of criminal offences committed in connection with the aggression, armed rebellion or armed conflicts … in Croatia. Under paragraph 3 of the same section the amnesty concerns criminal offences committed between 17 August 1990 and 23 August 1996. …

For the correct interpretation of these provisions – apart from the general condition that the criminal offence in question had to have been committed in the period between 17 August 1990 and 23 August 1996 (which has been met in the present case) – there must exist a direct and significant connection between the criminal offence and the aggression, armed rebellion or armed conflicts. This interpretation is in accordance with the general principle that anyone who commits a criminal offence has to answer for it. Therefore, the above provisions have to be interpreted in a sensible manner, with the necessary caution, so that the amnesty does not become a contradiction of itself and call into question the purpose for which the Act in question was enacted. Hence, the expression 'in connection with the aggression, armed rebellion or armed conflicts' used in the General Amnesty Act, which does not specifically define the nature of that connection, has to be interpreted to mean that the connection must be direct and significant.

…

Part of the factual description of the criminal offences with which the accused Fred Marguš is charged … which suggests some connection with the aggression against the Republic of Croatia or armed rebellion and armed conflicts in Croatia, relates

to the arrival of the victims of these offences – S.B., V.B. and the minor Sl.B. – in Čepin, together with their neighbours, after they had all fled the village of Ivanovac on account of the attack by the so-called 'Y[ugoslav] P[eoples'] A[rmy]'. It should be stressed that it is not in dispute that the accused Fred Marguš was a member of the Croatian army. However, these circumstances are not such as to amount to a direct link with the aggression, armed rebellion or armed conflicts in Croatia which is required for the General Amnesty Act to apply.

The factual description of the criminal offences under count 4 of the indictment states that the accused committed these acts as a member of the Reserve Forces in Čepin, after his tour of duty had terminated. This characteristic in itself does not represent a significant link between the criminal offences and the war because, were this to be the case, the amnesty would encompass all criminal offences committed between 27 August 1990 and 23 August 1996 by members of the Croatian army or the enemy units (save for those specifically listed in section 3(1) of the General Amnesty Act); this was certainly not the intention of the legislature.

Finally, the accused's war career, described in detail in the impugned ruling, cannot be a criterion for application of the General Amnesty Act …

The factual description of the criminal offences in the indictment … does not show that the acts in question were committed during the aggression, armed rebellion or armed conflicts in Croatia, or that they were committed in connection with them.

…"

B. The second set of criminal proceedings against the applicant (no. K-33/06)

20. On 26 April 2006 the Osijek County State Attorney's Office indicted the applicant on charges of war crimes against the civilian population. The proceedings were conducted by a three-judge panel of the Osijek County Court, including Judge M.K. During the entire proceedings the applicant was represented by a lawyer.

21. A concluding hearing was held on 19 March 2007 in the presence of, *inter alia*, the applicant and his defence lawyer. The applicant was removed from the courtroom during the closing arguments of the parties. The applicant's lawyer remained in the courtroom and presented his closing arguments. The relevant part of the written record of that hearing reads as follows:

"The President of the panel notes that the accused Marguš interrupted the Osijek County Deputy State Attorney ('the Deputy State Attorney') in his closing arguments and was warned by the panel to calm down; the second time he interrupted the Deputy State Attorney he was warned orally.

After the President of the panel warned the accused Marguš orally, the latter continued to comment on the closing arguments of the Deputy State Attorney. The

panel therefore decides, and the president of the panel orders, that the accused Marguš be removed from the courtroom until the pronouncement of the judgment.

…"

22. The applicant was subsequently removed from the courtroom and the Deputy State Attorney, the lawyers for the victims, the defence lawyers and one of the accused gave their closing arguments.

23. The pronouncement of the judgment was scheduled for 21 March 2007 and the hearing was concluded. The applicant was present at the pronouncement of the judgment. He was found guilty as charged and sentenced to fourteen years' imprisonment. The relevant part of the judgment reads as follows:

"…

The accused Fred Marguš …

and

the accused T.D. …

are guilty [in that]

in the period between 20 and 25 November 1991 in Čepin and its surroundings, contrary to Article 3 § 1 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and Article 4 §§ 1 and 2 (a) and Article 13 of the Protocol Additional to the Geneva Conventions of 12 August 1949 relative to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, while defending that territory from armed attacks by the local rebel Serb population and the so-called Yugoslav People's Army in their joint attack on the constitutional legal order and territorial integrity of the Republic of Croatia, Fred Marguš, in his capacity as the commander of Unit 2 in the 3rd Corps of the 130th brigade of the Croatian army, and the accused T.D., as a member of the same Unit under the command of Fred Marguš, [acted as follows] with the intention of killing Serb civilians;

the accused Fred Marguš

(a) on 20 November 1991 at about 8 a.m. in Čepin, recognised V.B. and S.B. who were standing … in front of the Fire Brigade Headquarters in Ivanovac and were fleeing their village because of the attacks by the Yugoslav People's Army, … fired at them with an automatic gun … which caused S.B. to sustain a gunshot wound to the head … and neck as a result of which S.B. immediately died, while V.B. was wounded and fell to the ground. The accused then drove away and soon afterwards came back, and, seeing that V.B. was still alive and accompanied by his nine-year-old son Sl.B. and … his wife M.B., again fired the automatic gun at them, and thus shot V.B. twice in the head … twice in the arm … as a result of which V.B. soon died while Sl.B. was shot in the leg … which amounted to grievous bodily harm;

(b) in the period between 22 and 24 November 1991 in Čepin, arrested N.V. and Ne.V., threatening them with firearms, appropriated their Golf vehicle … took them to the basement of a house … where he tied them by ropes to chairs and kept them locked in without food or water and, together with the members of his Unit … beat and insulted them, asked them about their alleged hostile activity and possession of a radio set, and during that time prevented other members of the Unit from helping them … after which he took them out of Čepin to a forest … where they were shot with several bullets from firearms … as a result of which N.V. … and Ne.V. died;

(c) on 23 November 1991 at about 1.30 p.m. at the coach terminal in Čepin, arrested S.G. and D.G. and their relative Lj.G. and drove them to a house … tied their hands behind their backs and, together with the late T.B., interrogated them about their alleged hostile activity and in the evening, while they were still tied up, drove them out of Čepin … where he shot them … as a result of which they died;

the accused Fred Marguš and T.D. [acting] together

(d) on 25 November 1991 at about 1 p.m. in Čepin, on seeing S.P. driving his Golf vehicle … stopped him at the request of Fred Marguš … … and drove him to a field … where … Fred Marguš ordered T.D. to shoot S.P., [an order] which T.D. obeyed, shooting S.P. once … after which Fred Marguš shot him several times with an automatic gun … as a result of which S.P. … died and Fred Marguš appropriated his vehicle.

…"

24. The applicant's conviction was upheld by the Supreme Court on 19 September 2007 and his sentence was increased to fifteen years' imprisonment. The relevant part of the judgment by the Supreme Court reads as follows:

"Under Article 36 § 1 (5) of the Code of Criminal Procedure (CCP), a judge is exempted from performing judicial functions if he or she participated in the same case in the adoption of a ruling of a lower court or if he participated in adopting the impugned ruling.

It is true that Judge M.K. participated in the proceedings in which the impugned judgment was adopted. He was the President of a panel of the Osijek County Court which adopted the ruling … of 24 June 1997 by which the proceedings against the accused Fred Marguš were terminated under section 1(1) and (3) and section 2(2) of the General Amnesty Act …

Even though both sets of proceedings were instituted against the same accused, it was not the same case. The judge in question participated in two different cases before the Osijek County Court against the same accused. In the case in which the present appeal has been lodged, Judge M.K. did not participate in adopting any decision of a lower court or in a decision which is the subject of an appeal or an extraordinary remedy.

…

The accused incorrectly argued that the first-instance court had acted contrary to Article 346 § 4 and Article 347 §§ 1 and 4 of the CCP when it held the concluding hearing in his absence and in the absence of his defence lawyer because it had removed him from the courtroom when the parties were presenting their closing arguments. Thus, he claimed, he had been prevented from giving his closing arguments. Furthermore, he had not been informed about the conduct of the hearing in his absence, and the decision to remove him from the courtroom had not been adopted by the trial panel.

Contrary to the allegations of the accused, the written record of the hearing held on 19 March 2007 shows that the accused Fred Marguš interrupted the [Osijek] County Deputy State Attorney in his closing arguments and was twice warned by the President of the trial panel. Since he continued with the same behaviour, the trial panel decided to remove him from the courtroom …

Such action by the trial court is in conformity with Article 300 § 2 of the CCP. The accused Fred Marguš started to disturb order in the courtroom during the closing arguments of the [Osijek County Deputy] State Attorney and persisted in doing so, after which he was removed from the courtroom by a decision of the trial panel. He was again present in the courtroom when judgment was pronounced on 21 March 2007.

Since the trial court complied fully with Article 300 § 2 of the CCP, the accused's appeal is unfounded. In the case in issue there has been no violation of the defence rights, and the removal of the accused from the courtroom during the closing arguments of the parties had no effect on the judgment.

…

The accused Fred Marguš further argues … that the impugned judgment violated the *ne bis in idem* principle … because the proceedings had already been discontinued in respect of some of the charges giving rise to the impugned judgment …

…

It is true that criminal proceedings were conducted before the Osijek County Court under the number K-4/97 against the accused Fred Marguš in respect of, *inter alia*, four criminal offences … of murder … committed against S.B., V.B., N.V. and Ne.V, as well as the criminal offence … of creating a risk to life and assets … These proceedings were terminated by final ruling of the Osijek County Court no. Kv-99/97 (K-4/97) of 24 June 1997 on the basis of the General Amnesty Act …

Despite the fact that the consequences of the criminal offences which were the subject of the proceedings conducted before the Osijek County Court under the number K-4/97, namely the deaths of S.B., V.B., N.V. and Ne.V. and the grievous bodily injury of Sl.B., are also part of the factual background [to the criminal offences assessed] in the proceedings in which the impugned judgment has been adopted, the offences [tried in the two sets of criminal proceedings in issue] are not the same.

Comparison between the factual background [to the criminal offences assessed] in both sets of proceedings shows that they are not identical. The factual background

[to the offences referred to] in the impugned judgment contains a further criminal element, significantly wider in scope than the one forming the basis for the proceedings conducted before the Osijek County Court under the number K-4/97. [In the present case] the accused Fred Marguš is charged with violation of the rules of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and of the Protocol Additional to the Geneva Conventions of 12 August 1949 relative to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, in that, in the period between 20 and 25 November 1991, while defending that territory from armed attacks by the local rebel Serb population and the so-called Yugoslav People's Army in their joint attack on the constitutional legal order and territorial integrity of the Republic of Croatia, and in violation of the rules of international law, he killed and tortured civilians, treated them in an inhuman manner, unlawfully arrested them, ordered the killing of a civilian and robbed the assets of the civilian population. The above acts constitute a criminal offence against the values protected by international law, namely a war crime against the civilian population under Article 120 § 1 of the Criminal Code.

Since the factual background to the criminal offence in issue, and its legal classification, differ from those which were the subject of the earlier proceedings, such that the scope of the charges against the accused Fred Marguš is significantly wider and different from the previous case (case-file no. K-4/97), the matter is not *res judicata* …"

25. A subsequent constitutional complaint by the applicant was dismissed by the Constitutional Court on 30 September 2009. The Constitutional Court endorsed the views of the Supreme Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant law

26. The relevant part of the Croatian Constitution (*Ustav Republike Hrvatske*, Official Gazette nos. 41/2001 and 55/2001) reads as follows:

Article 31

"…

2. No one shall be liable to be tried or punished again in criminal proceedings for an offence of which he has already been finally acquitted or convicted in accordance with the law.

Only the law may, in accordance with the Constitution or an international agreement, prescribe the situations in which proceedings may be reopened under paragraph 2 of this Article and the grounds for reopening.

…"

27. The relevant provisions of the Code of Criminal Procedure (*Zakon o kaznenom postupku* – Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002, 62/2003, 178/2004 and 115/2006) provide as follows:

Article 300

"1. Where the accused … disturbs order at a hearing or does not comply with the orders of the presiding judge, the latter shall warn the accused … The panel may order that the accused be removed from the courtroom …

2. The panel may order that the accused be removed from the courtroom for a limited time. Where the accused again disturbs order [he or she may be removed from the courtroom] until the end of the presentation of evidence. Before the closure of the presentation of evidence the presiding judge shall summon the accused and inform him about the conduct of the trial. If the accused continues to disturb order and insults the dignity of the court, the panel may again order that he be removed from the courtroom. In that case the trial shall be concluded in the accused's absence and the presiding judge or another member of the panel shall inform him or her about the judgment adopted, in the presence of a typist.

…"

Article 350 (former Article 336)

"1. A judgment may refer only to the accused and the offence which are the subject of the indictment as initially submitted or as altered at the hearing.

2. The court is not bound by the prosecutor's legal classification of the offence."[1]

Types of judgments
Article 352

"1. A judgment shall dismiss the charges, acquit the accused or find him or her guilty.

…"

Article 354

"A judgment acquitting the accused shall be adopted when:

(1) the offence with which the accused is charged is not a criminal offence under the law;

(2) there are circumstances that exclude the accused's guilt;

(3) it has not been proved that the accused committed the criminal offence with which he or she is charged."

Article 355

"1. A judgment finding the accused guilty shall contain the following details:

(1) the offence of which the accused is found guilty, stating the facts and circumstances constituting the specific ingredients of a given criminal offence as well as those on which the application of a specific provision of the Criminal Code depends;

1. See the Supreme Court's practice in respect of this provision in paragraphs 32 to 34 below.

(2) the statutory name and description of the criminal offence and the provisions of the Criminal Code which have been applied;

(3) the sentence to be applied or whether, under the provisions of the Criminal Code, a sentence is not to be applied or imprisonment is to be substituted by community service;

(4) any decision on suspended sentence;

(5) any decision on security measures and confiscation of material gains;

…

(7) the decision on costs and on any civil claim and whether a final judgment is to be published in the media.

…"

Article 367

"1. A grave breach of criminal procedure shall be found to exist where

…

(3) a hearing has been held without a person whose presence is obligatory under the law …

…"

Reopening of proceedings

Article 401

"Criminal proceedings concluded by a final ruling or a final judgment may be reopened at the request of an authorised person, only in the circumstances and under the conditions set out in this Code."

Article 406

"1. Criminal proceedings concluded by a final judgment dismissing the charges may exceptionally be reopened to the detriment of the accused:

…

(5) where it has been established that amnesty, pardon, statutory limitation or other circumstances excluding criminal prosecution are not applicable to the criminal offence referred to in the judgment dismissing the charges.

…"

Article 408

"1. The court competent to decide upon a request for the reopening of the proceedings is the one which adjudicated the case at first instance …

2. The request for reopening shall contain the statutory basis for reopening and evidence supporting the request …

…"

Request for the protection of legality

Article 418

"1. The State Attorney may lodge a request for the protection of legality against final judicial decisions and court proceedings preceding such decisions in which a law has been violated.

2. The State Attorney shall lodge a request for the protection of legality against a judicial decision adopted in proceedings in which fundamental human rights and freedoms guaranteed by the Constitution, statute or international law have been violated.

…"

Article 419

"1. The Supreme Court of the Republic of Croatia shall determine requests for the protection of legality.

…"

Article 420

"1. When determining a request for the protection of legality the [Supreme] Court shall assess only those violations of the law relied on by the State Attorney.

…"

Article 422

"…

2. Where a request for the protection of legality has been lodged to the detriment of the accused and the [Supreme] Court establishes that it is well founded, it shall merely establish that there has been a violation of the law, without altering a final decision."

28. Under the Criminal Code (*Kazeni zakon*, Offcial Gazette nos. 53/1991, 39/1992 and 91/1992) the circumstances excluding an individual's guilt are lack of accountability (*neubrojivost*), error in law or error in fact.

29. The relevant part of the General Amnesty Act of 24 September 1996 (Official Gazette no. 80/1996, *Zakon o općem oprostu*) reads as follows:

Section 1

"This Act grants general amnesty from criminal prosecution and trial to the perpetrators of criminal offences committed during the aggression, armed rebellion or armed conflicts and in connection with the aggression, armed rebellion or armed conflicts in the Republic of Croatia.

No amnesty shall apply to the execution of final judgments in respect of perpetrators of the criminal offences under paragraph 1 of this section.

Amnesty from criminal prosecution and trial shall apply to offences committed between 17 August 1990 and 23 August 1996."

Section 2

"No criminal prosecution or trial proceedings shall be instituted against the perpetrators of the criminal offences under section 1 of this Act.

Where a criminal prosecution has already commenced it shall be discontinued and where trial proceedings have been instituted a court shall issue a ruling terminating the proceedings of its own motion.

Where a person granted amnesty under paragraph 1 of this section has been detained, he or she shall be released."

Section 3

"No amnesty under section 1 of this Act shall be granted to perpetrators of the gravest breaches of humanitarian law which have the character of war crimes, namely the criminal offence of genocide under Article 119 of the Basic Criminal Code of the Republic of Croatia (Official Gazette no. 31/1993, consolidated text, nos. 35/1993, 108/1995, 16/1996 and 28/1996); war crimes against the civilian population under Article 120; war crimes against the wounded and sick under Article 121; war crimes against prisoners of war under Article 122; organising groups [with the purpose of committing] or aiding and abetting genocide and war crimes under Article 123; unlawful killing and wounding of the enemy under Article 124; unlawful taking of possessions from the dead or wounded on the battleground under Article 125; use of unlawful means of combat under Article 126; offences against negotiators under Article 127; cruel treatment of the wounded, sick and prisoners of war under Article 128; unjustified delay in repatriation of prisoners of war under Article 129; destruction of the cultural and historical heritage under Article 130; inciting war of aggression under Article 131; abuse of international symbols under Article 132; racial and other discrimination under Article 133; establishing slavery and transferring slaves under Article 134; international terrorism under Article 135; putting at risk persons under international protection under Article 136; taking hostages under Article 137; and the criminal offence of terrorism under the provisions of international law.

No amnesty shall be granted to perpetrators of other criminal offences under the Basic Criminal Code of the Republic of Croatia (Official Gazette no. 31/1993, consolidated text, nos. 35/1993, 108/1995, 16/1996 and 28/1996) and the Criminal Code of the Republic of Croatia (Official Gazette no. 32/1993, consolidated text, nos. 38/1993, 28/1996 and 30/1996) which were not committed during the aggression, armed rebellion or armed conflicts and are not connected with the aggression, armed rebellion or armed conflicts in the Republic of Croatia.

…"

Section 4

"A State Attorney may not lodge an appeal against a court decision under section 2 of this Act where the court granted amnesty in favour of the perpetrator of a criminal

offence covered by this Act on the basis of the legal classification given to the offence by a State Attorney."

B. Relevant practice

1. Practice of the Constitutional Court

30. In its decision no. U-III/543/1999 of 26 November 2008 the Constitutional Court held, in so far as relevant, as follows:

"6. The question before the Constitutional Court is whether there was a second trial concerning an event constituting the offence for which the General Amnesty Act was applied, and thus whether the proceedings concerned a 'same offence' in respect of which, under Article 31 § 2 of the Constitution, it is not possible to institute a new, separate and unrelated set of proceedings. Such proceedings would infringe [the principle of] legal certainty and permit multiple sanctions to be imposed for one and the same conduct which may be the subject of only one criminal sanction. In answering this question, the Constitutional Court should examine two issues: (a) the similarity between the descriptions of the events constituting the offences with which the appellant was charged in the first and second set of proceedings, in order to verify whether the decision on the application of amnesty and the final conviction in the subsequent proceedings concern the same subject, that is, the same 'criminal quantity', irrespective of whether they concern the same historical events; and after that … (b) whether the case in issue concerns a situation in which it was not possible to bring fresh charges in relation to the facts already adjudicated in the first decisions of the courts (applying the amnesty), but in which, under Article 31 § 3 of the Constitution, it was possible to seek the reopening of the proceedings as provided for by the relevant law. Article 406 § 1 (5) of the Code of Criminal Procedure allows for the reopening of proceedings which were terminated by a final judgment dismissing the charges, where 'it has been established that amnesty, pardon, statutory limitation or other circumstances excluding criminal prosecution are not applicable to the criminal offence referred to in the judgment dismissing the charges'.

6.1. The Constitutional Court can examine the similarity between the descriptions of the events constituting the offences only by reference to the normative standards. In so doing it is bound, just like the lower courts, by the constituent elements of the offences, irrespective of their legal classification. The descriptions of the events forming the basis for the charges in the judgment of the Bjelovar Military Court (no. K-85/95-24) and the Supreme Court (no. I-Kž-257/96), and the impugned judgments of the Sisak County Court (no. K-108/97) and the Supreme Court (no. I Kž-211/1998-3), undoubtedly suggest that they concern the same events, which were merely given different legal classifications. All the relevant facts had been established by the Bjelovar Military Court (which finally terminated the proceedings) and no other new facts were established in the subsequent proceedings before the Sisak County Court. The only difference in the description of the charges was in the time of the commission of the offences, which does not suggest that the events were different but rather that the courts were unable to establish the exact time of the offences. As

regards the identical nature of the events, it is also relevant to note that the Supreme Court emphasised in the impugned judgment that the events were the same, so there is no doubt about this aspect.

6.2. In the impugned judgment the Supreme Court held that the conduct in issue constituted not only the offence of armed rebellion under Article 235 § 1 of the Criminal Code of the Republic of Croatia, in respect of which the judgment dismissing the charges was adopted, but also the offence of war crimes against the civilian population under Article 120 §§ 1 and 2 of the Basic Criminal Code of the Republic of Croatia, the offence of which [the appellant] was later convicted. It follows from this reasoning of the Supreme Court that the same conduct constituted the elements of two offences and that the situation was one of a single act constituting various offences.

6.3. The Constitutional Court finds that in the impugned judgment the Supreme Court erred in finding that the same perpetrator, after a final judgment had been adopted in respect of a single act constituting one offence, could be tried again in the new set of proceedings for the same act constituting another offence. Under Article 336 § 2 of the Code of Criminal Procedure the court is not bound by the prosecutor's classification of the offence. The Bjelovar Military Court, if it considered that the facts underlying the charges constituted the offence of war crimes against the civilian population under Article 120 § 1 of the Basic Criminal Code of the Republic of Croatia, should therefore have found that it had no competence to determine the case (because it had no competence to try war crimes), and should have forwarded the case to the competent court, which could have convicted [the appellant] of the offence of war crimes against the civilian population, in respect of which no amnesty could be applied. Since the Bjelovar Military Court did not act in such a manner, it follows that, owing to the final nature of its judgment, the decision dismissing the charges became *res judicata*. The subsequent conviction in this case is a violation of the *ne bis in idem* rule, irrespective of the fact that the operative part of the first judgment did not concern 'the merits', sometimes understood simply as a resolution of the question whether the accused committed the offence or not. The formal distinction between an acquittal and a judgment dismissing the charges cannot be the only criterion for the resolution of the question whether a new and unrelated set of criminal proceedings may be instituted in respect of the same 'criminal quantity': although it is contained in the judgment dismissing the charges, the decision on the application of amnesty, in the legal sense, creates the same legal consequences as an acquittal, and in both judgments a factual issue remains unproven.

6.4. Therefore the Constitutional Court cannot accept the reasoning of the Supreme Court's judgment no. I Kž-211/1998-3 of 1 April 1999, according to which the judgment or ruling on the discontinuance of the proceedings for the offence of armed rebellion concerning the same event does not exclude the possibility of a subsequent prosecution and conviction for the offence of war crimes against the civilian population on the ground that the latter offence endangers not only the values of the Republic of Croatia but also humanity in general and international law. In any event, the Supreme Court later departed from that position in case no. I Kž-8/00-3 of 18 September 2002, finding that the judgment dismissing the charges 'without any

doubt concerns the same event, in terms of the time, place and manner of commission; the event was simply given a different classification in the impugned judgment than in the ruling of the Zagreb Military Court'. It also stated the following: 'When, as in the case in issue, the criminal proceedings have been discontinued in respect of the offence under Article 244 § 2 of the Criminal Code of the Republic of Croatia, and where the actions … are identical to those of which [the accused] was found guilty in the impugned judgment … under the ne bis in idem principle provided for in Article 32 § 2 of the Constitution, new criminal proceedings cannot be instituted because the matter has been adjudicated.'

…"

31. Constitutional Court decision no. U-III-791/1997 of 14 March 2001 referred to a situation where the criminal proceedings against the accused had been terminated under the General Amnesty Act. Its relevant parts read as follows:

"16. The provision of the Constitution which excludes the possibility of an accused being tried again for an offence of which he or she has already been 'finally acquitted or convicted in accordance with the law' refers exclusively to a situation where a judgment has been adopted in criminal proceedings which acquits the accused or finds him or her guilty of the charges brought against him or her in the indictment.

…

19. … a ruling which does not finally acquit the accused but terminates the criminal proceedings cannot form the basis for application of the constitutional provisions concerning the prohibition on being tried or punished again …"

2. Practice of the Supreme Court

32. The relevant part of ruling no. I Kž-533/00-3 of 11 December 2001 reads as follows:

"Under Article 336 § 2 of the Code of Criminal Procedure the court is not bound by the prosecutor's legal classification of the offence, and it was therefore empowered to decide upon a different criminal offence since that offence is more favourable [to the accused] …"

33. The relevant part of ruling no. I Kž 257/02-5 of 12 October 2005 reads as follows:

"Since under Article 336 § 2 of the Code of Criminal Procedure the court is not bound by the prosecutor's legal classification of the offence, and given that the possible sentence for the criminal offence of incitement to abuse of authority in financial affairs under Article 292 § 2 is more lenient than the possible sentence for the criminal offence under Article 337 § 4 of the Criminal Code, the first-instance court was empowered to classify the acts in question as the criminal offence under Article 292 § 2 of the Criminal Code …"

34. The relevant part of ruling no. I Kž 657/10-3 of 27 October 2010 reads as follows:

> "Even though the first-instance court correctly stated that a court is not bound by the prosecutor's legal classification of the offence, the terms of the indictment were nevertheless exceeded because the first-instance court put the accused in a less favourable position by convicting him of two criminal offences instead of one …"

III. RELEVANT INTERNATIONAL LAW MATERIALS

A. The Vienna Convention of 1969 on the Law of Treaties

35. The relevant part of the Vienna Convention on the Law of Treaties of 23 May 1969 ("the Vienna Convention") provides:

Section 3. Interpretation of treaties

Article 31
General rule of interpretation

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

Article 32
Supplementary means of interpretation

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

Article 33
Interpretation of treaties authenticated in two or more languages

"1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

B. The Geneva Conventions of 1949 for the Protection of Victims of Armed Conflicts and their Additional Protocols

36. The relevant part of common Article 3 of the Geneva Conventions of 1949 reads:

Article 3

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

…"

37. The relevant parts of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949 – hereinafter "the First Geneva Convention") read:

Chapter IX. Repression of Abuses and Infractions

Article 49

"The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a 'prima facie' case.

…"

Article 50

"Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

38. Articles 50 and 51 of the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949 – hereinafter "the Second Geneva Convention") contain the same text as Articles 49 and 50 of the First Geneva Convention.

39. Articles 129 and 130 of the Convention (III) relative to the Treatment of Prisoners of War (Geneva, 12 August 1949 – hereinafter "the

Third Geneva Convention") contain the same text as Articles 49 and 50 of the First Geneva Convention.

40. Articles 146 and 147 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949 – hereinafter "the Fourth Geneva Convention") contain the same text as Articles 49 and 50 of the First Geneva Convention.

41. The relevant part of the Additional Protocol (II) to the Geneva Conventions, relating to the Protection of Victims of Non-International Armed Conflicts (Geneva, 8 June 1977) reads:

Article 4

"1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

…"

Article 6

"…

5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

Article 13

"1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities."

C. Convention on the Prevention and Punishment of the Crime of Genocide[2]

42. The relevant parts of this Convention read as follows:

Article 1

"The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

Article 4

"Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

Article 5

"The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3."

D. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[3]

43. The relevant part of this Convention reads as follows:

Article I

"No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

(a) War crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the 'grave breaches' enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;

(b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and

2. Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948.
3. Adopted on 26 November 1968; entry into force on 11 November 1970. It was ratified by Croatia on 12 October 1992.

Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed."

Article II

"If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission."

Article III

"The States Parties to the present Convention undertake to adopt all necessary domestic measures, legislative or otherwise, with a view to making possible the extradition, in accordance with international law, of the persons referred to in article II of this Convention."

Article IV

"The States Parties to the present Convention undertake to adopt, in accordance with their respective constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes referred to in articles I and II of this Convention and that, where they exist, such limitations shall be abolished."

E. Rome Statute of the International Criminal Court

44. Article 20 of the Statute reads:

Ne bis in idem

"1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

F. Customary Rules of International Humanitarian Law

45. Mandated by the States convened at the 26th International Conference of the Red Cross and Red Crescent, the International Committee of the Red Cross (ICRC) presented in 2005 a Study on Customary International Humanitarian Law[4]. This Study contains a list of customary rules of international humanitarian law. Rule 159, which refers to noninternational armed conflicts, reads:

> "At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes."

G. United Nations Security Council

Resolution on the situation in Croatia, 1120 (1997), 14 July 1997

46. The relevant part of the Resolution reads:

> "The Security Council,
>
> …
>
> 7. Urges the Government of the Republic of Croatia to eliminate ambiguities in implementation of the Amnesty Law, and to implement it fairly and objectively in accordance with international standards, in particular by concluding all investigations of crimes covered by the amnesty and undertaking an immediate and comprehensive review with United Nations and local Serb participation of all charges outstanding against individuals for serious violations of international humanitarian law which are not covered by the amnesty in order to end proceedings against all individuals against whom there is insufficient evidence;
>
> …"

H. The International Covenant on Civil and Political Rights

47. Article 7 of the International Covenant on Civil and Political Rights (ICCR) 1966 provides:

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

4. J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, vols. I and II, Cambridge University Press and ICRC, 2005

I. The United Nations Human Rights Committee

1. General Comment No. 20, Article 7 (Forty-fourth session, 1992)

48. The United Nations Human Rights Committee noted in 1992 in its General Comment No. 20 on Article 7 of the International Covenant that some States had granted amnesty in respect of acts of torture. It went on to state that "[a]mnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible".

2. Concluding observations, Lebanon, 1 April 1997

49. Paragraph 12 reads as follows:

"12. The Committee notes with concern the amnesty granted to civilian and military personnel for human rights violations they may have committed against civilians during the civil war. Such a sweeping amnesty may prevent the appropriate investigation and punishment of the perpetrators of past human rights violations, undermine efforts to establish respect for human rights, and constitute an impediment to efforts undertaken to consolidate democracy."

3. Concluding observations, Croatia, 30 April 2001

50. Paragraph 11 reads as follows:

"The Committee is concerned with the implications of the Amnesty Law. While that law specifically states that the amnesty does not apply to war crimes, the term 'war crimes' is not defined and there is a danger that the law will be applied so as to grant impunity to persons accused of serious human rights violations. The Committee regrets that it was not provided with information on the cases in which the Amnesty Law has been interpreted and applied by the courts.

The State party should ensure that in practice the Amnesty Law is not applied or utilized for granting impunity to persons accused of serious human rights violations."

4. General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004

"18. Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and

degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity (see Rome Statute of the International Criminal Court, article 7).

Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (see General Comment 20 (44)) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility. …"

J. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[5]

51. The relevant parts of this Convention provide:

Article 4

"1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

Article 7

"1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

…"

Article 12

"Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."

Article 13

"Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps

5. Adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984; entry into force 26 June 1987.

shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given."

Article 14

"1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."

K. The United Nations Commission on Human Rights

52. The relevant parts of the resolutions on impunity read:

1. Resolution 2002/79, 25 April 2002, and Resolution 2003/72, 25 April 2003

"The Commission on Human Rights,

…

2. Also emphasizes the importance of taking all necessary and possible steps to hold accountable perpetrators, including their accomplices, of violations of international human rights and humanitarian law, recognizes that amnesties should not be granted to those who commit violations of international humanitarian and human rights law that constitute serious crimes and urges States to take action in accordance with their obligations under international law;

…"

2. Resolution 2004/72, 21 April 2004

"The Commission on Human Rights,

…

3. Also recognizes that amnesties should not be granted to those who commit violations of human rights and international humanitarian law that constitute crimes, urges States to take action in accordance with their obligations under international law and welcomes the lifting, waiving, or nullification of amnesties and other immunities;

…"

3. Resolution 2005/81, 21 April 2005

"The Commission on Human Rights,

…

3. Also recognizes that amnesties should not be granted to those who commit violations of human rights and international humanitarian law that constitute crimes, urges States to take action in accordance with their obligations under international law and welcomes the lifting, waiving, or nullification of amnesties and other immunities, and recognizes as well the Secretary-General's conclusion that United Nationsendorsed peace agreements can never promise amnesties for genocide, crimes against humanity, war crimes, or gross violations of human rights;

…"

L. The European Parliament

Resolution A3-0056/93, 12 March 1993

53. The relevant text of the Resolution on human rights in the world and Community human rights policy for the years 1991 to 1992 reads:

"The European Parliament,

…

7. Believes that the problem of impunity … can take the form of amnesty, immunity, extraordinary jurisdiction and constrains democracy by effectively condoning human rights infringements and distressing victims;

8. Affirms that there should be no question of impunity for those responsible for war crimes in the former Yugoslavia …"

M. The United Nations Special Rapporteur on Torture

Fifth report, UN Doc. E/CN.4/1998/38, 24 December 1997

54. In 1998, in the conclusions and recommendations of his fifth report on the question of the human rights of all persons subjected to any form of detention or imprisonment, in particular, torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur of the United Nations Commission on Human Rights stated with respect to the Draft Statute for an International Criminal Court:

"228. In this connection, the Special Rapporteur is aware of suggestions according to which nationally granted amnesties could be introduced as a bar to the proposed court['s] jurisdiction. He considers any such move subversive not just of the project at hand, but of international legality in general. It would gravely undermine the purpose of the proposed court, by permitting States to legislate their nationals out of the jurisdiction of the court. It would undermine international legality, because it is axiomatic that States may not invoke their own law to avoid their obligations under international law. Since international law requires States to penalize the types of crime contemplated in the draft statute of the court in general, and torture in particular, and

to bring perpetrators to justice, the amnesties in question are, ipso facto, violations of the concerned States' obligations to bring violators to justice. …"

N. International Criminal Tribunal for the former Yugoslavia

55. The relevant part of the *Furundžija case* (judgment of 10 December 1998) reads:

"155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: 'individuals have international duties which transcend the national obligations of obedience imposed by the individual State.'"

O. American Convention on Human Rights[6]

56. The relevant part of this Convention reads as follows:

Article 1. Obligation to Respect Rights

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

2. For the purposes of this Convention, 'person' means every human being."

6. Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

P. Inter-American Commission on Human Rights

1. Case 10.287 (El Salvador), Report No. 26/92 of 24 September 1992

57. In 1992, in a report on a case with respect to the Las Hojas massacres in El Salvador in 1983 during which about seventy-four persons were allegedly killed by members of the Salvadoran armed forces with the participation of members of the Civil Defence, and which had led to a petition before the Inter-American Commission on Human Rights, the latter held that:

> "…
>
> The application of [El Salvador's 1987 Law on Amnesty to Achieve National Reconciliation] constitutes a clear violation of the obligation of the Salvadoran Government to investigate and punish the violations of the rights of the Las Hojas victims, and to provide compensation for damages resulting from the violations.
>
> …
>
> … The present amnesty law, as applied in these cases, by foreclosing the possibility of judicial relief in cases of murder, inhumane treatment and absence of judicial guarantees, denies the fundamental nature of the most basic human rights. It eliminates perhaps the single most effective means of enforcing such rights, the trial and punishment of offenders."

2. Report on the situation of human rights in El Salvador, Doc. OEA/Ser.L/V/II.85 Doc. 28 rev. (11 February 1994)

58. In 1994, in a report on the situation of human rights in El Salvador, the Inter-American Commission on Human Rights stated, with regard to El Salvador's General Amnesty Law for Consolidation of Peace, as follows:

> "… regardless of any necessity that the peace negotiations might pose and irrespective of purely political considerations, the very sweeping General Amnesty Law [for Consolidation of Peace] passed by El Salvador's Legislative Assembly constitutes a violation of the international obligations it undertook when it ratified the American Convention on Human Rights, because it makes possible a 'reciprocal amnesty' without first acknowledging responsibility …; because it applies to crimes against humanity, and because it eliminates any possibility of obtaining adequate pecuniary compensation, primarily for victims."

3. Case 10.480 (El Salvador), Report No. 1/99 of 27 January 1999

59. In 1999, in a report on a case concerning El Salvador's 1993 General Amnesty Law for Consolidation of Peace, the Inter-American Commission on Human Rights stated:

"113. The Commission should emphasize that [this law] was applied to serious human rights violations in El Salvador between January 1, 1980, and January 1, 1992, including those examined and established by the Truth Commission. In particular, its effect was extended, among other things, to crimes such as summary executions, torture, and the forced disappearance of persons. Some of these crimes are considered of such gravity as to have justified the adoption of special conventions on the subject and the inclusion of specific measures for preventing impunity in their regard, including universal jurisdiction and inapplicability of the statute of limitations. …

…

115. The Commission also notes that Article 2 of [this law] was apparently applied to all violations of common Article 3 [of the 1949 Geneva Conventions] and of [the 1977 Additional] Protocol II, committed by agents of the State during the armed conflict which took place in El Salvador. …

…

123. … in approving and enforcing the General Amnesty Law, the Salvadoran State violated the right to judicial guarantees enshrined in Article 8(1) of the [1969 American Convention on Human Rights], to the detriment of the surviving victims of torture and of the relatives of …, who were prevented from obtaining redress in the civil courts; all of this in relation to Article 1(1) of the Convention.

…

129. … in promulgating and enforcing the Amnesty Law, El Salvador has violated the right to judicial protection enshrined in Article 25 of the [1969 American Convention on Human Rights], to the detriment of the surviving victims …"

In its conclusions, the Inter-American Commission on Human Rights stated that El Salvador "ha[d] also violated, with respect to the same persons, common Article 3 of the Four Geneva Conventions of 1949 and Article 4 of [the 1977 Additional] Protocol II". Moreover, in order to safeguard the rights of the victims, it recommended that El Salvador should "if need be, … annul that law *ex-tunc*".

Q. Inter-American Court of Human Rights

60. In its judgment in *Barrios Altos v. Peru* ((merits), judgment of 14 March 2001, Series C No. 75) involving the question of the legality of Peruvian amnesty laws, the Inter-American Court of Human Rights stated:

"41. This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.

42. The Court, in accordance with the arguments put forward by the Commission and not contested by the State, considers that the amnesty laws adopted by Peru prevented the victims' next of kin and the surviving victims in this case from being heard by a judge …; they violated the right to judicial protection …; they prevented the investigation, capture, prosecution and conviction of those responsible for the events that occurred in Barrios Altos, thus failing to comply with Article 1(1) of the [1969 American Convention on Human Rights], and they obstructed clarification of the facts of this case. Finally, the adoption of self-amnesty laws that are incompatible with the [1969 American Convention on Human Rights] meant that Peru failed to comply with the obligation to adapt internal legislation that is embodied in Article 2 of the [1969 American Convention on Human Rights].

43. The Court considers that it should be emphasized that, in the light of the general obligations established in Articles 1(1) and 2 of the [1969 American Convention on Human Rights], the States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse, in the terms of Articles 8 and 25 of the [1969 American Convention on Human Rights]. Consequently, States Parties to the [1969 American Convention on Human Rights] which adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2 of the [1969 American Convention on Human Rights]. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of th[at] Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation.

44. Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the [1969 American Convention on Human Rights] have been violated."

In his concurring opinion, Judge Antônio A. Cançado Trindade added:

"13. The international responsibility of the State for violations of internationally recognized human rights, – including violations which have taken place by means of the adoption and application of laws of self-amnesty, – and the individual penal responsibility of agents perpetrators of grave violations of human rights and of International Humanitarian Law, are two faces of the same coin, in the fight against atrocities, impunity, and injustice. It was necessary to wait many years to come to this conclusion, which, if it is possible today, is also due, – may I insist on a point which is very dear to me, – to the *awakening of the universal juridical conscience*, as the *material source par excellence* of International Law itself."

61. In *Almonacid Arellano et al. v. Chile* ((preliminary objections, merits, reparations and costs), judgment of 26 September 2006, Series C No. 154), the Inter-American Court of Human Rights noted:

"154. With regard to the *ne bis in idem* principle, although it is acknowledged as a human right in Article 8(4) of the American Convention, it is not an absolute right, and therefore, is not applicable where: i) the intervention of the court that heard the case and decided to dismiss it or to acquit a person responsible for violating human rights or international law, was intended to shield the accused party from criminal responsibility; ii) the proceedings were not conducted independently or impartially in accordance with due procedural guarantees, or iii) there was no real intent to bring those responsible to justice. A judgment rendered in the foregoing circumstances produces an 'apparent' or 'fraudulent' *res judicata* case. On the other hand, the Court believes that if there appear new facts or evidence that make it possible to ascertain the identity of those responsible for human rights violations or for crimes against humanity, investigations can be reopened, even if the case ended in an acquittal with the authority of a final judgment, since the dictates of justice, the rights of the victims, and the spirit and the wording of the American Convention supersedes the protection of the *ne bis in idem* principle.

155. In the instant case, two of the foregoing conditions are met. Firstly, the case was heard by courts which did not uphold the guarantees of jurisdiction, independence and impartiality. Secondly, the application of Decree Law No. 2.191 did actually prevent those allegedly responsible from being brought before the courts and favored impunity for the crime committed against Mr. Almonacid-Arellano. The State cannot, therefore, rely on the *ne bis in idem* principle to avoid complying with the order of the Court …"

62. The same approach was followed in *La Cantuta v. Peru* ((merits, reparations and costs), judgment of 29 November 2006, Series C No. 162), the relevant part of which reads as follows:

"151. In this connection, the Commission and the representatives have asserted that the State has relied on the concept of double jeopardy to avoid punishing some of the alleged instigators of these crimes; however, double jeopardy does not apply inasmuch as they were prosecuted by a court who had no jurisdiction, was not independent or impartial and failed to meet the requirements for competent jurisdiction. In addition, the State asserted that 'involving other people who might be criminally liable is subject to any new conclusions reached by the *Ministerio Público* [General Attorney's Office] and the Judiciary in investigating the events and meting out punishments', and that 'the military court's decision to dismiss the case has no legal value for the General Attorney's Office's preliminary investigation. That is, the double jeopardy defense does not apply.'

152. This Court had stated earlier in the *Case of Barrios Altos* that

"This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extra-legal, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."

153. Specifically, in relation with the concept of double jeopardy, the Court has recently held that the *non bis in idem* principle is not applicable when the proceeding in which the case has been dismissed or the author of a violation of human rights has been acquitted, in violation of international law, has the effect of discharging the accused from criminal liability, or when the proceeding has not been conducted independently or impartially pursuant to the due process of law. A judgment issued in the circumstances described above only provides 'fictitious' or 'fraudulent' grounds for double jeopardy.

154. Therefore, in its complaint against the alleged instigators of the crimes …, who were discharged by the military courts, the *Procuraduría Ad Hoc* (Ad Hoc Prosecutor's Office) deemed it inadmissible to consider the order for dismissal of the case issued by the military judges in the course of a proceeding aimed at granting impunity as a legal obstacle for conducting prosecutions or as a final judgment, since the judges had no jurisdiction and were not impartial, and thus the order may not provide grounds for double jeopardy."

63. In *Anzualdo Castro v. Peru* ((preliminary objection, merits, reparations and costs), judgment of 22 September 2009, Series C No. 202), the Inter-American Court of Human Rights reiterated that:

"182. … [T]he State must remove all obstacles, both factual and legal, that hinder the effective investigation into the facts and the development of the corresponding legal proceedings, and use all available means to expedite such investigations and proceedings, in order to ensure the non-repetition of facts such as these. Specially, this is a case of forced disappearance that occurred within a context of a systematic practice or pattern of disappearances perpetrated by state agents; therefore, the State shall not be able to argue or apply a law or domestic legal provision, present or future, to fail to comply with the decision of the Court to investigate and, if applicable, criminally punish th[ose] responsible for the facts. For this reason and as ordered by this Tribunal since the delivery of the Judgment in the case of *Barrios Altos v. Peru*, the State can no longer apply amnesty laws, which lack legal effects, present or future …, or rely on concepts such as the statute of limitations on criminal actions, *res judicata* principle and the double jeopardy safeguard or resort to any other measure designated to eliminate responsibility in order to escape from its duty to investigate and punish th[ose] responsible."

64. In *Gelman v. Uruguay* ((merits and reparations), judgment of 24 February 2011, Series C No. 221), the Inter-American Court analysed at length the position under international law with regard to amnesties granted for grave breaches of fundamental human rights. In so far as relevant, the judgment reads as follows:

"184. The obligation to investigate human rights violations falls within the positive measures that States must adopt in order to ensure the rights recognized in the Convention and is an obligation of means rather than of results, which must be assumed by the State as [a] legal obligation and not as a mere formality preordained to be ineffective that depends upon the procedural initiative of the victims or their next of kin, or upon the production of evidence by private parties.

…

189. The mentioned international obligation to prosecute, and if criminal responsibility is determined, punish the perpetrators of the human rights violations, is encompassed in the obligation to respect rights enshrined in Article 1(1) of the American Convention and implies the right of the States Parties to organize all of the governmental apparatus, and in general, all of the structures through which the exercise of public power is expressed, in a way such that they are capable of legally guaranteeing the free and full exercise of human rights.

190. As part of this obligation, the States must prevent, investigate, and punish all violations of the rights recognized in the Convention, and seek, in addition, the reestablishment, if possible, of the violated right and, where necessary, repair the damage caused by the violation of human rights.

191. If the State's apparatus functions in a way that assures the matter remains with impunity, and it does not restore, in as much as is possible, the victim's rights, it can be ascertained that the State has not complied with the obligation to guarantee the free and full exercise of those persons within its jurisdiction.

…

195. Amnesties or similar forms have been one of the obstacles alleged by some States in the investigation, and where applicable, punishment of those responsible for serious human rights violations. This Court, the Inter-American Commission on Human Rights, the organs of the United Nations, and other universal and regional organs for the protection of human rights have ruled on the non-compatibility of amnesty laws related to serious human rights violations with international law and the international obligations of States.

196. As it has been decided prior, this Court has ruled on the non-compatibility of amnesties with the American Convention in cases of serious human rights violations related to Peru (*Barrios Altos* and *La Cantuta*), Chile (*Almonacid Arellano et al.*), and Brazil (*Gomes Lund et al.*).

197. In the Inter-American System of Human Rights, of which Uruguay forms part by a sovereign decision, the rulings on the non-compatibility of amnesty laws with conventional obligations of States when dealing with serious human rights violations are many. In addition to the decisions noted by this Court, the Inter-American Commission has concluded, in the present case and in others related to Argentina, Chile, El Salvador, Haití, Perú and Uruguay its contradiction with international law. The Inter-American Commission recalled that it:

> has ruled on numerous occasions in key cases wherein it has had the opportunity to express its point of view and crystallize its doctrine in regard to the application of amnesty laws, establishing that said laws violate various provisions of both the American Declaration as well as the Convention and that '[t]hese decisions which coincide with the standards of other international bodies on human rights regarding amnesties, have declared in a uniform manner that both the amnesty laws as well as other comparable legislative measures that impede or finalize the

investigation and judgment of agents of [a] State that could be responsible for serious violations of the American Declaration or Convention, violate multiple provisions of said instruments.'

198. In the Universal forum, in its report to the Security Council, entitled *The rule of law and transitional justice in societies that suffer or have suffered conflicts*, the Secretary General of the United Nations noted that:

'[…] the peace agreements approved by the United Nations cannot promise amnesty for crimes of genocide, war, or crimes against humanity, or serious infractions of human rights […].'

199. In the same sense, the United Nations High Commissioner for Human Rights concluded that amnesties and other analogous measures contribute to impunity and constitute an obstacle to the right to the truth in that they block an investigation of the facts on the merits and that they are, therefore, incompatible with the obligations incumbent on States given various sources of international law. More so, in regards to the false dilemma between peace and reconciliation, on the one hand, and justice on the other, it stated that:

'[t]he amnesties that exempt from criminal sanction those responsible for atrocious crimes in the hope of securing peace have often failed to achieve their aim and have instead emboldened their beneficiaries to commit further crimes. Conversely, peace agreements have been reached without amnesty provisions in some situations where amnesty had been said to be a necessary condition of peace and where many had feared that indictments would prolong the conflict.'

200. In line with the aforementioned, the Special Rapporteur of the United Nations on the issue of impunity, stated that:

'[t]he perpetrators of the violations cannot benefit from the amnesty while the victims are unable to obtain justice by means of an effective remedy. This would lack legal effect in regard to the actions of the victims relating to the right to reparation.'

201. The General Assembly of the United Nations established in Article 18 of the Declaration on the Protection of all Persons from Enforced Disappearance that 'persons who have or are alleged to have committed [enforced disappearance] shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.'

202. The World Conference on Human Rights which took place in Vienna in 1993, in its Declaration and Program of Action, emphasized that States 'should derogate legislation that favors the impunity of those responsible for serious human rights violations, […] punish the violations,' highlighting that in those cases States are obligated first to prevent them, and once they have occurred, to prosecute the perpetrators of the facts.

203. The Working Group on Enforced or Involuntary Disappearances of the United Nations has handled, on various occasions, the matter of amnesties in cases of enforced disappearances. In its General Comments regarding Article 18 of the

Declaration on the Protection of All Persons Against Enforced Disappearance, it noted that it considers amnesty laws to be contrary to the provisions of the Declaration, even when it has been approved in referendum or by another similar type of consultation process, if directly or indirectly, due to its application or implementation, it terminates the State's obligation to investigate, prosecute, and punish those responsible for the disappearances, if it hides the names of those who perpetrated said acts, or if it exonerates them.

204. In addition, the same Working Group stated its concern that in situations of post-conflict, amnesty laws are promulgated or other measures adopted that have impunity as a consequence, and it reminded States that:

> in combating disappearances, effective preventive measures are crucial. Among them, it highlights […] bringing to justice all persons accused of having committed acts of enforced disappearance, ensuring that they are tried only by competent civilian courts, and that they do not benefit from any special amnesty law or other similar measures likely to provide exemption from criminal proceedings or sanctions, and providing redress and adequate compensation to victims and their families.

205. Also in the universal forum, the bodies of human rights protection established by treaties have maintained the same standards concerning the prohibition of amnesties that prevent the investigation and punishment of those who commit serious human rights crimes. The Human Rights Committee, in its General Comment 31, stated that States should assure that those guilty of infractions recognized as crimes in international law or in national legislation, among others—torture and other acts of cruel, inhumane, or degrading treatment, summary deprivations of life, and arbitrary detention, and enforced disappearances—appear before the justice system and not attempt to exempt the perpetrators of their legal responsibility, as has occurred with certain amnesty laws.

206. The Human Rights Committee ruled on the matter in the proceedings of individual petitions and in its country reports, noting in the case of *Hugo Rodríguez v. Uruguay*, that it cannot accept the posture of a State of not being obligated to investigate human rights violations committed during a prior regime given an amnesty law, and it reaffirmed that amnesty laws in regard to serious human rights violations are incompatible with the aforementioned International Covenant of Civil and Political Rights, reiterating that they contribute to the creation of an atmosphere of impunity that can undermine upon the democratic order and bring about other serious human rights violations.

…

209. Also in the universal forum, in another branch of international law – that is international criminal law, amnesties or similar norms have been considered inadmissible. The International Criminal Tribunal for the former Yugoslavia, in a case related to torture, considered that it would not make sense to sustain on the one hand the statute of limitations on the serious human rights violations, and on the other hand to authorize State measures that authorize or condone, or amnesty laws

that absolve its perpetrators. Similarly, the Special Court for Sierra Leone considered that the amnesty laws of said country were not applicable to serious international crimes. This universal tendency has been consolidated through the incorporation of the mentioned standard in the development of the statutes of the special tribunals recently created within the United Nations. In this sense, both the United Nations Agreement with the Republic of Lebanon and the Kingdom of Cambodia, as well as the Statutes that create the Special Tribunal for Lebanon, the Special Court for Sierra Leone, and the Extraordinary Chambers of the Courts of Cambodia, have included in their texts, clauses that indicate that the amnesties that are conceded shall not constitute an impediment to the processing of those responsible for crimes that are within the scope of the jurisdiction of said tribunals.

210. Likewise, in an interpretation of Article 6-5 of the Protocol II Additional to the Geneva Convention on International Humanitarian Law, the ICRC stated that amnesties cannot protect perpetrators of war crimes:

> [w]hen it adopted paragraph 5 of Article 6 of Additional Protocol II, the USSR declared, in the reasoning of its opinion, that it could not be interpreted in such a way that it allow war criminals or other persons guilty of crimes against humanity to escape severe punishment. The ICRC agrees with this interpretation. An amnesty would also be inconsistent with the rule requiring States to investigate and prosecute those suspected of committing war crimes in non-international armed conflicts …

211. This norm of International Humanitarian Law and interpretation of Article 6-5 of the Protocol has been adopted by the Inter-American Commission on Human Rights and the Human Rights Committee of the United Nations.

212. The illegality of the amnesties related to serious violations of human rights vis-à-vis international law have been affirmed by the courts and organs of all the regional systems for the protection of human rights.

213. In the European System, the European Court of Human Rights considered that it is of the highest importance, in what pertains to an effective remedy, that the criminal procedures which refer to crimes, such as torture, that imply serious violations of human rights, not be obstructed by statute of limitations or allow amnesties or pardons in this regard. In other cases, it highlighted that when an agent of the State is accused of crimes violating the rights of Article [2] in the European Convention (Right to life), the criminal proceedings and judgment should not be obstructed, and the granting of amnesty is not permitted.

214. The African Commission on Human and Peoples' Rights considered that amnesty laws cannot protect the State that adopts them from complying with their international obligations, and noted, in addition, that in prohibiting the prosecution of perpetrators of serious human rights violations via the granting of amnesty, the States not only promote impunity, but also close off the possibility that said abuses be investigated and that the victims of said crimes have an effective remedy in order to obtain reparation.

…

F. Amnesty laws and the Jurisprudence of this Court

225. This Court has established that 'amnesty provisions, the statute of limitation provisions, and the establishment of exclusions of responsibility that are intended to prevent the investigation and punish those responsible for serious violations to human rights such as torture, summary, extrajudicial, or arbitrary executions, and enforced disappearance are not admissible, all of which are prohibited for contravening irrevocable rights recognized by International Law of Human Rights.'

226. In this sense, amnesty laws are, in cases of serious violations of human rights, expressly incompatible with the letter and spirit of the Pact of San José, given that they violate the provisions of Articles 1(1) and 2, that is, in that they impede the investigation and punishment of those responsible for serious human rights violations and, consequently, impede access to victims and their families to the truth of what happened and to the corresponding reparation, thereby hindering the full, timely, and effective rule of justice in the relevant cases. This, in turn, favors impunity and arbitrariness and also seriously affects the rule of law, reason for which, in light of International Law, they have been declared to have no legal effect.

227. In particular, amnesty laws affect the international obligation of the State in regard to the investigation and punishment of serious human rights violations because they prevent the next of kin from being heard before a judge, pursuant to that indicated in Article 8(1) of the American Convention, thereby violating the right to judicial protection enshrined in Article 25 of the Convention precisely for the failure to investigate, persecute, capture, prosecute, and punish those responsible for the facts, thereby failing to comply with Article 1(1) of the Convention.

228. Under the general obligations enshrined in Article 1(1) and 2 of the American Convention, the States Parties have the obligation to take measures of all kinds to assure that no one is taken from the judicial protection and the exercise of their right to a simple and effective remedy, in the terms of Articles 8 and 25 of the Convention, and once the American Convention has been ratified, it corresponds to the State to adopt all the measures to revoke the legal provisions that may contradict said treaty as established in Article 2 thereof, such as those that prevent the investigation of serious human rights violations given that it leads to the defenselessness of victims and the perpetuation of impunity and prevents the next of kin from knowing the truth regarding the facts.

229. The incompatibility with the Convention includes amnesties of serious human rights violations and is not limited to those which are denominated, 'self-amnesties,' and the Court, more than the adoption process and the authority which issued the Amnesty Law, heads to its *ratio legis*: to leave unpunished serious violations committed in international law. The incompatibility of the amnesty laws with the American Convention in cases of serious violations of human rights does not stem from a formal question, such as its origin, but rather from the material aspect in what regards the rights enshrined in Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention.

G. The investigation of the facts and the Uruguayan Expiry Law

…

240. … in applying the provisions of the Expiry Law (which, [to] all inten[ts and] purposes constitutes an amnesty law) and thereby impeding the investigation of the facts and the identification, prosecution, and possible punishment of the possible perpetrators of continued and permanent injuries such as those caused by enforced disappearance, the State fails to comply with its obligation to adapt its domestic law enshrined in Article 2 of the Convention."

65. In *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil* ((preliminary objections, merits, reparations and costs), judgment of 24 November 2010, Series C No. 219) the Inter-American Court again strongly opposed the granting of amnesties for grave breaches of fundamental human rights. After relying on the same international law standard as in the above-cited *Gelman* case, it held, in so far as relevant, as follows:

"170. As is evident from the content of the preceding paragraphs, all of the international organs for the protection of human rights and several high courts of the region that have had the opportunity to rule on the scope of amnesty laws regarding serious human rights violations and their compatibility with international obligations of States that issue them, have noted that these amnesty laws impact the international obligation of the State to investigate and punish said violations.

171. This Court has previously ruled on the matter and has not found legal basis to part from its constant jurisprudence that, moreover, coincides with that which is unanimously established in international law and the precedent of the organs of the universal and regional systems of protection of human rights. In this sense, regarding the present case, the Court reiterates that 'amnesty provisions, the statute of limitation provisions, and the establishment of exclusions of responsibility that are intended to prevent the investigation and punishment of those responsible for serious violations to human rights such as torture, summary, extrajudicial, or arbitrary executions, and enforced disappearance are not admissible, all of which are prohibited for contravening irrevocable rights recognized by International Law of Human Rights.'

…

175. In regard to the parties[' arguments] regarding whether the case deals with an amnesty, self-amnesty, or 'political agreement,' the Court notes, as is evident from the criteria stated in the present case (*supra* para. 171), that the non-compatibility with the Convention includes amnesties of serious human rights violations and is not limited to those which are denominated, 'self-amnesties.' Likewise, as has been stated prior, the Court, more than the adoption process and the authority which issued the Amnesty Law, heads to its *ratio legis*: to leave unpunished serious violations in international law committed by the military regime. The non-compatibility of the amnesty laws with the American Convention in cases of serious violations of human rights does not stem from a formal question, such as its origin, but rather from the material aspect as they breach the rights enshrined in Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention.

176. This Court has established in its jurisprudence that it is conscious that the domestic authorities are subject to the rule of law, and as such, are obligated to apply the provisions in force of the legal code. However, when a State is a Party to an international treaty such as the American Convention, all of its organs, including its judges, are also subject to it, wherein they are obligated to ensure that the effects of the provisions of the Convention are not reduced by the application of norms that are contrary to the purpose and end goal and that from the onset lack legal effect. The Judicial Power, in this sense, is internationally obligated to exercise 'control of conventionality' *ex officio* between the domestic norms and the American Convention, evidently in the framework of its respective jurisdiction and the appropriate procedural regulations. In this task, the Judicial Power must take into account not only the treaty, but also the interpretation that the Inter-American Court, as the final interpreter of the American Convention, has given it."

66. More recently, in the case of *The Massacres of El Mozote and Nearby Places v. El Salvador* ((merits, reparations and costs), judgment of 25 October 2012, Series C No. 252) the Inter-American Court, in so far as relevant for the present case, held as follows (footnotes omitted):

"283. In the cases of *Gomes Lund v. Brazil* and *Gelman v. Uruguay*, decided by this Court within the sphere of its jurisdictional competence, the Court has already described and developed at length how this Court, the Inter-American Commission on Human Rights, the organs of the United Nations, other regional organizations for the protection of human rights, and other courts of international criminal law have ruled on the incompatibility of amnesty laws in relation to grave human rights violations with international law and the international obligations of States. This is because amnesties or similar mechanisms have been one of the obstacles cited by States in order not to comply with their obligation to investigate, prosecute and punish, as appropriate, those responsible for grave human rights violations. Also, several States Parties of the Organization of American States, through their highest courts of justice, have incorporated the said standards, observing their international obligations in good faith. Consequently, for purposes of this case, the Court reiterates the inadmissibility of 'amnesty provisions, provisions on prescription, and the establishment of exclusions of responsibility that seek to prevent the investigation and punishment of those responsible for grave human rights violations such as torture, summary, extrajudicial or arbitrary execution, and forced disappearance, all of which are prohibited because they violate non-derogable rights recognized by international human rights law.'

284. However, contrary to the cases examined previously by this Court, the instant case deals with a general amnesty law that relates to acts committed in the context of an internal armed conflict. Therefore, the Court finds it pertinent, when analyzing the compatibility of the Law of General Amnesty for the Consolidation of Peace with the international obligations arising from the American Convention and its application to the case of the Massacres of El Mozote and Nearby Places, to do so also in light of the provisions of Protocol II Additional to the 1949 Geneva Conventions, as well as of the specific terms in which it was agreed to end hostilities, which put an end to the conflict in El Salvador and, in particular, of Chapter I ('Armed Forces'), section 5 ('End to impunity'), of the Peace Accord of January 16, 1992.

285. According to the international humanitarian law applicable to these situations, the enactment of amnesty laws on the conclusion of hostilities in non-international armed conflicts are sometimes justified to pave the way to a return to peace. In fact, article 6(5) of Protocol II Additional to the 1949 Geneva Conventions establishes that:

> At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

286. However, this norm is not absolute, because, under international humanitarian law, States also have an obligation to investigate and prosecute war crimes. Consequently, 'persons suspected or accused of having committed war crimes, or who have been convicted of this' cannot be covered by an amnesty. Consequently, it may be understood that article 6(5) of Additional Protocol II refers to extensive amnesties in relation to those who have taken part in the non-international armed conflict or who are deprived of liberty for reasons related to the armed conflict, provided that this does not involve facts, such as those of the instant case, that can be categorized as war crimes, and even crimes against humanity."

R. Extraordinary Chambers in the Courts of Cambodia

67. The Extraordinary Chambers in the Courts of Cambodia, in the Decision on Ieng Sary's Appeal against the Closing Order (case no. 002/19 09-2007-ECCC/OCIJ (PTC75) of 11 April 2011), discussing the effects of the amnesty on prosecution, stated:

> "199. The crimes charged in the Closing Order, namely genocide, crimes against humanity, grave breaches of the Geneva Conventions, and homicide, torture and religious persecution as national crimes, are not criminalised under the 1994 Law and would therefore continue to be prosecuted under existing law, be it domestic or international criminal law, even if perpetrated by alleged members of the Democratic Kampuchea group.
>
> …
>
> 201. The interpretation of the Decree proposed by the Co-Lawyers for Ieng Sary, which would grant Ieng Sary an amnesty for all crimes committed during the Khmer Rouge era, including all crimes charged in the Closing Order, not only departs from the text of the Decree, read in conjunction with the 1994 Law, but is also inconsistent with the international obligations of Cambodia. Insofar as genocide, torture and grave breaches of the Geneva Conventions are concerned, the grant of an amnesty, without any prosecution and punishment, would infringe upon Cambodia's treaty obligations to prosecute and punish the authors of such crimes, as set out in the Genocide Convention, the Convention Against Torture and the Geneva Conventions. Cambodia, which has ratified the ICCPR, also had and continues to have an obligation to ensure that victims of crimes against humanity which, by definition, cause serious violations of human rights, were and are afforded an effective remedy. This obligation would generally require the State to prosecute and punish the authors of violations.

The grant of an amnesty, which implies abolition and forgetfulness of the offence for crimes against humanity, would not have conformed with Cambodia's obligation under the ICCPR to prosecute and punish authors of serious violations of human rights or otherwise provide an effective remedy to the victims. As there is no indication that the King (and others involved) intended not to respect the international obligations of Cambodia when adopting the Decree, the interpretation of this document proposed by the Co-Lawyers is found to be without merit."

S. Special Court for Sierra Leone

68. On 13 March 2004 the Appeals Chamber of the Special Court for Sierra Leone, in Cases Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), adopted its Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, in which it observed the following:

"82. The submission by the Prosecution that there is a 'crystallising international norm that a government cannot grant amnesty for serious violations of crimes under international law' is amply supported by materials placed before this Court. The opinion of both *amici curiae* that it has crystallised may not be entirely correct, but that is no reason why this court in forming its own opinion should ignore the strength of their argument and the weight of materials they place before the Court. It is accepted that such a norm is developing under international law. Counsel for Kallon submitted that there is, as yet, no universal acceptance that amnesties are unlawful under international law, but, as amply pointed out by Professor Orentlicher, there are several treaties requiring prosecution for such crimes. These include the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the four Geneva conventions. There are also quite a number of resolutions of the UN General Assembly and the Security Council reaffirming a state obligation to prosecute or bring to justice. Redress has appended to its written submissions materials which include relevant conclusions of the Committee against torture, findings of the Human Rights Commission, and relevant judgments of the Inter-American Court.

…

84. Even if the opinion is held that Sierra Leone may not have breached customary law in granting an amnesty, this court is entitled in the exercise of its discretionary power, to attribute little or no weight to the grant of such amnesty which is contrary to the direction in which customary international law is developing and which is contrary to the obligations in certain treaties and conventions the purpose of which is to protect humanity."

THE LAW

…

II. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 7 TO THE CONVENTION

92. The applicant complained that the criminal offences which had been the subject of the proceedings terminated in 1997 and those of which he had been found guilty in 2007 were the same. He relied on Article 4 of Protocol No. 7 to the Convention, which reads as follows:

> "1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
>
> 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
>
> 3. No derogation from this Article shall be made under Article 15 of the Convention."

A. Compatibility *ratione temporis*

1. The Chamber's conclusions

93. In its judgment of 13 November 2012 the Chamber found that the complaint under Article 4 of Protocol No. 7 to the Convention was compatible *ratione temporis* with the Convention. It held as follows:

> "58. The Court notes that the first set of criminal proceedings against the applicant did indeed end prior to the entry into force of the Convention in respect of Croatia. However, the second set of criminal proceedings in which the applicant was found guilty of war crimes against the civilian population was conducted and concluded after 5 November 1997, when Croatia ratified the Convention. The right not to be tried or punished twice cannot be excluded in respect of proceedings conducted before ratification where the person concerned was convicted of the same offence after ratification of the Convention. The mere fact that the first set of proceedings was concluded prior to that date cannot therefore preclude the Court from having temporal jurisdiction in the present case."

2. The parties' submissions to the Grand Chamber

94. The Government submitted that the ruling granting the applicant amnesty had been adopted on 24 June 1997 and had been served on him on 2 July 1997, whereas the Convention had come into force in respect of Croatia on 5 November 1997. Therefore, the ruling in question lay outside the Court's temporal jurisdiction.

95. The applicant made no submissions in that regard.

3. The Grand Chamber's assessment

96. The ruling granting the applicant amnesty was adopted on 24 June 1997, whereas the Convention came into force in respect of Croatia on 5 November 1997 and Protocol No. 7 on 1 February 1998. Therefore, the issue of the Court's competence *ratione temporis* has to be addressed.

97. The Grand Chamber endorses the findings of the Chamber as to the compatibility *ratione temporis* with the Convention of the applicant's complaint under Article 4 of Protocol No. 7. It further points to the Commission's reasoning in the case of *Gradinger v. Austria* (19 May 1994, opinion of the Commission, §§ 67-69, Series A no. 328-C):

> "67. The Commission recalls that, in accordance with the generally recognised rules of international law, the Convention and its Protocols are binding on the Contracting Parties only in respect of facts occurring after the entry into force of the Convention or the Protocol in respect of that party.
>
> 68. It is the nature of the right enunciated in Article 4 of Protocol No. 7 that two sets of proceedings must have taken place: a first set, in which the person concerned was 'finally acquitted or convicted', and thereafter a further set, in which a person was 'liable to be tried or convicted again' within the same jurisdiction.
>
> 69. The Commission further recalls that, in determining the fairness of proceedings, it is entitled to look at events prior to the entry into force of the Convention in respect of a State where the findings of those earlier events are incorporated in a judgment which is given after such entry into force (see *X v. Portugal*, no. 9453/81, Commission decision of 13 December 1982, DR 31, p. 204. at p. 209). The essential element in Article 4 of Protocol No. 7 is the liability to be tried or punished 'again'. The first set of proceedings merely provides the background against which the second set is to be determined. In the present case, the Commission finds that, provided the final decision in the second set of proceedings falls after the entry into force of Protocol No. 7, it may deal with the complaint *ratione temporis*. As Protocol No. 7 entered into force on 1 November 1988 and on 30 June 1989 Austria made a declaration under Article 7 § 2 of that Protocol which did not exclude retroactive effect (see *X v. France*, no. 9587/81, Commission decision of 13 December 1982, DR 29, p. 228, at p. 238), and the final decision of the Administrative Court is dated 29 March 1989, the Commission finds that it is not prevented *ratione temporis* from examining this aspect of the case."

98. Accordingly, the Grand Chamber sees no reason to depart from the Chamber's conclusion that the Government's plea of inadmissibility on the ground of lack of jurisdiction *ratione temporis* must be dismissed.

B. Applicability of Article 4 of Protocol No. 7

1. The Chamber's conclusions

99. The Chamber concluded, firstly, that the offences for which the applicant had been tried in the first and second set of proceedings had been

the same. It left open the question whether the ruling granting the applicant amnesty could be seen as a final conviction or acquittal for the purposes of Article 4 of Protocol No. 7 and proceeded to examine the complaint on the merits under the exceptions contained in paragraph 2 of Article 4 of Protocol No. 7. The Chamber agreed with the conclusions of the Supreme Court to the effect that the General Amnesty Act had been erroneously applied in the applicant's case and found that the granting of amnesty in respect of acts that amounted to war crimes committed by the applicant represented a "fundamental defect" in those proceedings, which made it permissible for the applicant to be retried.

2. The parties' submissions to the Grand Chamber

a. The applicant

100. The applicant argued that the offences in the two sets of criminal proceedings against him had been factually the same and that the classification of the offences as war crimes in the second set of proceedings could not alter the fact that the charges were substantively identical.

101. He further contended that a ruling granting amnesty to the accused was a final decision which precluded a retrial.

b. The Government

102. In their written observations the Government argued that in the first set of proceedings the Osijek County Court had applied the General Amnesty Act without establishing the facts of the case and without deciding on the applicant's guilt. The ruling thus adopted had never given an answer to the question whether the applicant had committed the crimes he had been charged with, nor had it examined the charges in the indictment. Therefore, that ruling did not have the quality of *res judicata* (see paragraph 33 of the Government's observations). However, they went on to state that it did fulfil all the requirements of *res judicata* and could be considered as a final acquittal or conviction within the meaning of Article 4 of Protocol No. 7. (see the Government's observations, paragraph 37).

103. The Government further contended, relying extensively on the Chamber's findings, that no amnesty could be granted in respect of war crimes and that the granting of an amnesty had amounted to a fundamental defect in the proceedings.

104. After the first set of proceedings had been discontinued new facts had emerged, namely that the victims had been arrested and tortured before being killed. These new elements had been sufficient for the acts in issue

to be classified as war crimes against the civilian population and not as "ordinary" murders.

105. The General Amnesty Act had been enacted with the purpose of meeting Croatia's international commitments arising from the Agreement on the Normalization of Relations between the Federal Republic of Yugoslavia and the Republic of Croatia (23 August 1996), and its primary aim had been to promote reconciliation in Croatian society at a time of ongoing war. It explicitly excluded its application to war crimes.

106. In the applicant's case the General Amnesty Act had been applied contrary to its purpose as well as contrary to Croatia's international obligations, including those under Articles 2 and 3 of the Convention.

107. As to the procedures followed by the national authorities, the Government maintained that the proceedings against the applicant had been fair, without advancing any arguments as to whether the procedures were in accordance with the provisions of the Code of Criminal Procedure.

c. The third-party interveners

108. The group of academic experts maintained that no multilateral treaty expressly prohibited the granting of amnesties for international crimes. The interpretation of the International Committee of the Red Cross (ICRC) of Article 6 § 5 of the second Additional Protocol to the Geneva Conventions suggested that States might not grant amnesty to persons suspected of, accused of or sentenced for war crimes. However, an analysis of the *travaux préparatoires* of that Article showed that the only States which had referred to the question of perpetrators of international crimes, the former USSR and some of its satellite States, had linked that issue to that of foreign mercenaries. It was curious that the ICRC had interpreted Article 6 § 5 as excluding only war criminals and not perpetrators of other international crimes from its ambit, since the statements of the former USSR on which the ICRC relied had specifically provided for the prosecution of perpetrators of crimes against humanity and crimes against peace. It was difficult to see what arguments would justify the exclusion of war criminals but not of perpetrators of genocide and crimes against humanity from the potential scope of application of an amnesty. Furthermore, the ICRC referred to instances of non-international conflicts such as those in South Africa, Afghanistan, Sudan and Tajikistan. However, the amnesties associated with those conflicts had all included at least one international crime.

109. The interveners pointed to the difficulties in negotiating treaty clauses dealing with amnesty (they referred to the 1998 Rome conference on the establishment of the International Criminal Court (ICC); the

negotiations of the International Convention for the Protection of All Persons from Enforced Disappearance; and the 2012 Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels). The difficulties confirmed the lack of any consensus among States on that issue.

110. The interveners relied on a line of legal doctrine on amnesties[7] which argued that since the Second World War States had increasingly relied on amnesty laws. Although the number of new amnesty laws excluding international crimes had increased, so too had the number of amnesties including such crimes. Amnesties were the most frequently used form of transitional justice. The use of amnesties within peace accords between 1980 and 2006 had remained relatively stable.

111. Even though several international and regional courts had adopted the view that amnesties granted for international crimes were prohibited by international law, their authority was weakened by inconsistencies in those judicial pronouncements as to the extent of the prohibition and the crimes it covered. For example, while the Inter-American Court of Human Rights had adopted the position in the above-cited *Barrios Altos* case that all amnesty provisions were inadmissible because they were intended to prevent the investigation and punishment of those responsible for human rights violations, the President of that court and four other judges, in *The Massacres of El Mozote and Nearby Places* (cited above), had nuanced that position by accepting that even where gross violations of human rights were in issue, the requirement to prosecute was not absolute and had to be balanced against the requirements of peace and reconciliation in post-war situations.

112. Furthermore, a number of national Supreme Courts had upheld their countries' amnesty laws because such laws contributed to the achievement of peace, democracy and reconciliation. The interveners cited the following examples: the finding of the Spanish Supreme Court in the trial of Judge Garzón in February 2012; the ruling of the Ugandan Constitutional Court upholding the constitutionality of the 2000 Amnesty Act; the Brazilian Supreme Court's ruling of April 2010 refusing to revoke

7. The interveners relied on the following sources: Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart Publishing, 2008); Louise Mallinder, "Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment", in Francesca Lessa and Leigh A. Payne, *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge University Press, 2012); Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, *Transitional Justice in Balance, Comparing Processes, Weighing Efficacy* (United States Institute of Peace Press, 2010); Leslie Vinjamuri and Aaron P. Boesenecker, *Accountability and Peace Agreements, Mapping trends from 1980 to 2006* (Geneva: Center for Humanitarian Dialogue, 2007).

the 1979 Amnesty Law; and the ruling of the South African Constitutional Court in the AZAPO case upholding the constitutionality of the Promotion of National Unity and Reconciliation Act of 1995 which provided for a broad application of amnesty.

113. The interveners accepted that the granting of amnesties might in certain instances lead to impunity for those responsible for the violation of fundamental human rights and thus undermine attempts to safeguard such rights. However, strong policy reasons supported acknowledging the possibility of the granting of amnesties where they represented the only way out of violent dictatorships and interminable conflicts. The interveners pleaded against a total ban on amnesties and for a more nuanced approach in addressing the issue of granting amnesties.

3. The Grand Chamber's assessment

a. Whether the offences for which the applicant was prosecuted were the same

114. In *Sergey Zolotukhin v. Russia*, the Court took the view that Article 4 of Protocol No. 7 had to be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arose from identical facts or facts which were substantially the same ([GC], no. 14939/03, § 82, ECHR 2009).

115. In the present case the applicant was accused in both sets of proceedings of the following:

(a) killing S.B. and V.B. and seriously wounding Sl.B. on 20 November 1991;

(b) killing N.V. and Ne.V. on 10 December 1991.

116. Therefore, in so far as both sets of proceedings concerned the above charges, the applicant was prosecuted twice for the same offences.

b. The nature of the decisions adopted in the first set of proceedings

117. There are two distinct situations as regards the charges brought against the applicant in the first set of proceedings which were also preferred against him in the second set of proceedings.

118. Firstly, on 25 January 1996 the prosecutor withdrew the charges concerning the alleged killing of N.V. and Ne.V. on 10 December 1991 (see paragraphs 120-21 below).

119. Secondly, the proceedings in respect of the alleged killing of S.B. and V.B. and the serious wounding of Sl.B. on 20 November 1991 were terminated by a ruling adopted by the Osijek County Court on 24 June 1997 on the basis of the General Amnesty Act (see paragraphs 122 et seq. below).

i. The withdrawal of charges by the prosecutor

120. The Court has already held that the discontinuance of criminal proceedings by a public prosecutor does not amount to either a conviction or an acquittal, and that therefore Article 4 of Protocol No. 7 finds no application in that situation (see *Smirnova and Smirnova v. Russia* (dec.), nos. 46133/99 and 48183/99, 3 October 2002, and *Harutyunyan v. Armenia* (dec.), no. 34334/04, 7 December 2006).

121. Thus, the discontinuance of the proceedings by the prosecutor concerning the killing of N.V. and Ne.V. does not fall under Article 4 of Protocol No. 7 to the Convention. It follows that this part of the complaint is incompatible *ratione materiae*.

ii. The discontinuance of the proceedings under the General Amnesty Act

122. As regards the remaining charges (the killing of V.B. and S.B. and the serious wounding of Sl.B.), the first set of criminal proceedings against the applicant was terminated on the basis of the General Amnesty Act.

123. The Court shall start its assessment as regards the ruling of 24 June 1997 by establishing whether Article 4 of Protocol No. 7 applies at all in the specific circumstances of the present case, where the applicant was granted unconditional amnesty in respect of acts which amounted to grave breaches of fundamental human rights.

α. The position under the Convention

124. The Court notes that the allegations in the criminal proceedings against the applicant included the killing and serious wounding of civilians and thus involved their right to life protected under Article 2 of the Convention and, arguably, their rights under Article 3 of the Convention. In this connection the Court reiterates that Articles 2 and 3 rank as the most fundamental provisions in the Convention. They enshrine some of the basic values of the democratic societies making up the Council of Europe (see, among many other authorities, *Andronicou and Constantinou v. Cyprus*, 9 October 1997, § 171, *Reports* 1997-VI, and *Solomou and Others v. Turkey*, no. 36832/97, § 63, 24 June 2008).

125. The obligations to protect the right to life under Article 2 of the Convention and to ensure protection against ill-treatment under Article 3 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also require by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of

force (see, *mutatis mutandis*, *McCann and Others v. the United Kingdom*, 27 September 1995, § 161, Series A no. 324, and *Kaya v. Turkey*, 19 February 1998, § 86, *Reports* 1998-I) or ill-treated (see, for example, *ElMasri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 182, ECHR 2012). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and to ensure the accountability of the perpetrators.

126. The Court has already held that, where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible (see *Abdülsamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004; *Okkalı v. Turkey*, no. 52067/99, § 76, ECHR 2006-XII; and *Yeşil and Sevim v. Turkey*, no. 34738/04, § 38, 5 June 2007). It has considered in particular that the national authorities should not give the impression that they are willing to allow such treatment to go unpunished (see *Egmez v. Cyprus*, no. 30873/96, § 71, ECHR 2000-XII, and *Turan Cakir v. Belgium*, no. 44256/06, § 69, 10 March 2009). In its decision in the case of *Ould Dah v. France* ((dec.), no. 13113/03, ECHR 2009) the Court held, referring also to the United Nations Human Rights Committee and the International Criminal Tribunal for the former Yugoslavia, that an amnesty was generally incompatible with the duty incumbent on States to investigate acts such as torture and that the obligation to prosecute criminals should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that might be considered contrary to international law.

127. The obligation of States to prosecute acts such as torture and intentional killings is thus well established in the Court's case-law. The Court's case-law affirms that granting amnesty in respect of the killing and ill-treatment of civilians would run contrary to the State's obligations under Articles 2 and 3 of the Convention since it would hamper the investigation of such acts and necessarily lead to impunity for those responsible. Such a result would diminish the purpose of the protection guaranteed under Articles 2 and 3 of the Convention and render illusory the guarantees in respect of an individual's right to life and the right not to be ill-treated. The object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (see *McCann and Others*, cited above, § 146).

128. While the present case does not concern alleged violations of Articles 2 and 3 of the Convention, but of Article 4 of Protocol No. 7, the Court reiterates that the Convention and its Protocols must be read as a

whole, and interpreted in such a way as to promote internal consistency and harmony between their various provisions (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X, and *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, § 54, ECHR 2012). Therefore, the guarantees under Article 4 of Protocol No. 7 and States' obligations under Articles 2 and 3 of the Convention should be regarded as parts of a whole.

β. The position under international law

129. The Court should take into account developments in international law in this area. The Convention and its Protocols cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law of which they form part. Account should be taken, as indicated in Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, of "any relevant rules of international law applicable in the relations between the parties", and in particular the rules concerning the international protection of human rights (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 67, ECHR 2008; *Saadi v. the United Kingdom* [GC], no. 13229/03, § 62, ECHR 2008; *Rantsev v. Cyprus and Russia*, no. 25965/04, §§ 273-74, ECHR 2010; and *Nada v. Switzerland* [GC], no. 10593/08, § 169, ECHR 2012).

130. The Court notes the Chamber's observations to the effect that "[g]ranting amnesty in respect of 'international crimes' – which include crimes against humanity, war crimes and genocide – is increasingly considered to be prohibited by international law" and that "[t]his understanding is drawn from customary rules of international humanitarian law, human rights treaties, as well as the decisions of international and regional courts and developing State practice, as there has been a growing tendency for international, regional and national courts to overturn general amnesties enacted by Governments".

131. It should be observed that so far no international treaty explicitly prohibits the granting of amnesty in respect of grave breaches of fundamental human rights. While Article 6 § 5 of the second Additional Protocol to the Geneva Conventions, relating to the protection of victims of non-international conflicts, provides that "[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict …", the interpretation of the Inter-American Court of Human Rights of that provision excludes its application in respect of the perpetrators of war crimes and crimes against

humanity (see paragraph 66 above, judgment in *The Massacres of El Mozote and Nearby Places*, § 286). The basis for such a conclusion, according to the Inter-American Court of Human Rights, is found in the obligations of the States under international law to investigate and prosecute war crimes. The Inter-American Court found that therefore "persons suspected or accused of having committed war crimes cannot be covered by an amnesty". The same obligation to investigate and prosecute exists as regards grave breaches of fundamental human rights and therefore the amnesties envisaged under Article 6 § 5 of the second Additional Protocol to the Geneva Conventions are likewise not applicable to such acts.

132. The possibility for a State to grant an amnesty in respect of grave breaches of human rights may be circumscribed by treaties to which the State is a party. There are several international conventions that provide for a duty to prosecute crimes defined therein (see the Geneva Conventions of 1949 for the Protection of Victims of Armed Conflicts and their Additional Protocols, in particular common Article 3 of the Geneva Conventions; Articles 49 and 50 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Articles 50 and 51 of the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Articles 129 and 130 of the Convention (III) relative to the Treatment of Prisoners of War; and Articles 146 and 147 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War. See also Articles 4 and 13 of the Additional Protocol (II) to the Geneva Conventions (1977), relating to the Protection of Victims of Non-International Armed Conflicts; Article 5 of the Convention on the Prevention and Punishment of the Crime of Genocide; and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment).

133. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity proscribes statutory limitations in respect of crimes against humanity and war crimes.

134. Various international bodies have issued resolutions, recommendations and comments concerning impunity and the granting of amnesty in respect of grave breaches of human rights, generally agreeing that amnesties should not be granted to those who have committed such violations of human rights and international humanitarian law (see paragraphs 45, 47-49, 51-53 and 56-58 above).

135. In their judgments, several international courts have held that amnesties are inadmissible when they are intended to prevent the investigation and punishment of those responsible for grave human rights

violations or acts constituting crimes under international law (see paragraphs 54 and 59-68 above).

136. Although the wording of Article 4 of Protocol No. 7 restricts its application to the national level, it should be noted that the scope of some international instruments extends to retrial in a second State or before an international tribunal. For instance, Article 20 of the Rome Statute of the International Criminal Court contains an explicit exception to the *ne bis in idem* principle as it allows for prosecution where a person has already been acquitted in respect of the crime of genocide, crimes against humanity or war crimes if the purpose of the proceedings before the other court was to shield the person concerned from criminal responsibility for crimes within the jurisdiction of the International Criminal Court.

137. The Court notes the interveners' argument that there is no agreement among States at the international level when it comes to a ban on granting amnesties without exception for grave breaches of fundamental human rights, including those covered by Articles 2 and 3 of the Convention. The view was expressed that the granting of amnesties as a tool in ending prolonged conflicts may lead to positive outcomes (see the interveners' submissions summarised in paragraphs 108-13 above).

138. The Court also notes the jurisprudence of the Inter-American Court of Human Rights, notably the above-cited cases of *Barrios Altos*, *Gomes Lund et al.*, *Gelman* and *The Massacres of El Mozote and Nearby Places*, where that court took a firmer stance and, relying on its previous findings, as well as those of the Inter-American Commission on Human Rights, the organs of the United Nations and other universal and regional organs for the protection of human rights, found that no amnesties were acceptable in connection with grave breaches of fundamental human rights since any such amnesty would seriously undermine the States' duty to investigate and punish the perpetrators of such acts (see *Gelman*, § 195, and *Gomes Lund et al.*, § 171, both cited above). It emphasised that such amnesties contravene irrevocable rights recognised by international human rights law (see *Gomes Lund et al.*, § 171).

γ. The Court's conclusion

139. In the present case the applicant was granted amnesty for acts which amounted to grave breaches of fundamental human rights such as the intentional killing of civilians and inflicting grave bodily injury on a child, and the County Court's reasoning referred to the applicant's merits as a military officer. A growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave

breaches of fundamental human rights. Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances.

140. The Court considers that by bringing a fresh indictment against the applicant and convicting him of war crimes against the civilian population, the Croatian authorities acted in compliance with the requirements of Articles 2 and 3 of the Convention and in a manner consistent with the requirements and recommendations of the above-mentioned international mechanisms and instruments.

141. Against the above background, the Court concludes that Article 4 of Protocol No. 7 to the Convention is not applicable in the circumstances of the present case.

FOR THESE REASONS, THE COURT

1. *Declares* inadmissible, unanimously, the complaint under Article 4 of Protocol No. 7 to the Convention regarding the applicant's right not to be tried or punished twice in respect of the charges concerning the killing of N.V. and Ne.V. which were discontinued by the prosecutor on 25 January 1996;
2. *Holds*, unanimously, that there has been no violation of Article 6 of the Convention;
3. *Holds*, by sixteen votes to one, that Article 4 of Protocol No. 7 to the Convention is not applicable in respect of the charges relating to the killing of S.B. and V.B. and the serious wounding of Sl.B.

…

EUROPEAN COURT OF HUMAN RIGHTS

CASE OF CENTRE FOR LEGAL RESOURCES ON BEHALF OF VALENTIN CÂMPEANU v. ROMANIA

(Application no. 47848/08)

GRAND CHAMBER

JUDGMENT OF 17 JULY 2014

[Extracts][1]

1. This is an excerpt from the judgment delivered by the Grand Chamber in the case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*. It contains a summary which does not bind the Court. The full English text of the judgment is available in the HUDOC database at: http://hudoc.echr.coe.int/eng?i=001-145577. In addition to the authentic English and French versions of this judgment, HUDOC also contains Spanish translations of select case-law at: http://hudoc.echr.coe.int.

SUMMARY[1]

Failure to provide adequate care for HIV-positive mental patient

For the purposes of Article 34 of the Convention a *de facto* legal representative may in exceptional circumstances be considered to have standing to bring an application before the Court on behalf of persons in a state of extreme vulnerability who would otherwise be prevented from having serious allegations of Convention violations examined at the international level (see paragraph 112 of the judgment).
The State's positive obligation under Article 2 of the Convention to protect life will not be complied with where the domestic authorities unreasonably put a highly vulnerable mental patient's life in danger by placing him in an institution where conditions are known to be wholly inadequate and which is unable to provide appropriate care and treatment for his medical condition (see paragraphs 143-44 of the judgment).

Article 34

Locus standi – *Standing of non-governmental organisation to lodge application on behalf of deceased mental patient – Victim – Absence of direct or indirect victim status – Exceptional circumstances justifying grant of standing to* de facto *legal representative – Person in state of extreme vulnerability, incapable of initiating proceedings by himself, with no next of kin and without proper legal support and advice*

Article 2

Positive obligations – Failure to provide adequate care for HIV-positive mental patient – Obligation to take appropriate measures to protect patients' lives – Knowledge of real and immediate risk to life – Known deficiencies in standard of care afforded in hospital in which highly vulnerable patient was placed

Article 46

Execution of judgment – General measures – Respondent State required to take general measures to ensure independent representation for mentally disabled persons

*

* *

1. This summary by the Registry does not bind the Court.

Facts

The application was lodged by a non-governmental organisation, the Centre for Legal Resources ("the CLR"), on behalf of a young Roma man, Mr Câmpeanu, who died in 2004 at the age of 18. Mr Câmpeanu had been placed in an orphanage at birth after being abandoned by his mother. When still a young child he was diagnosed as being HIV-positive and as suffering from severe mental disability. On reaching adulthood he had to leave the centre for disabled children where he had been staying and underwent a series of assessments with a view to being placed in a specialised institution. After a number of institutions had refused to accept him because of his condition, he was eventually admitted to a medical and social care centre, which found that he was in an advanced state of psychiatric and physical degradation, that he had no antiretroviral medication and that he was suffering from malnutrition. A few days later, he was admitted to a psychiatric hospital after displaying hyperaggressive behaviour. The hospital concerned had previously said that it did not have the facilities for patients with HIV. There he was seen by a team of monitors from the CLR who reported finding him alone in an unheated room, with a bed but no bedding and dressed only in a pyjama top. Although he could not eat or use the toilet without assistance, the hospital staff refused to help him for fear of contracting HIV. He was refusing food and medication and so was only receiving glucose through a drip. The CLR monitors concluded that the hospital had failed to provide him with the most basic treatment and care. Mr Câmpeanu died that same evening.

According to a 2004 report by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), in the winters of 2003 and 2004 some 109 patients died in suspicious circumstances at the psychiatric hospital in question, the main causes of death being cardiac arrest, myocardial infarction and bronchopneumonia, the average age of the patients who died being 56, with a number under 40. The CPT found that some of the patients were not given sufficient care. It also noted a lack of human and material resources at the hospital as well as deficiencies in the quality and quantity of the food and a lack of heating.

Law

1. Article 34: The Court dismissed the Government's preliminary objection that the CLR had no standing to lodge the application. It accepted that the CLR could not be regarded as a victim of the alleged Convention violations, as Mr Câmpeanu was indisputably the direct victim and the CLR had not demonstrated a sufficiently "close link" with him, or established a "personal interest" in pursuing the complaints before the Court, to be considered an indirect victim. However, in the exceptional circumstances of the case and bearing in mind the serious nature of the allegations, it had to have been open to the CLR to act as Mr Câmpeanu's representative, even

though it had no power of attorney to act on his behalf and he had died before the application was lodged.

In so finding, the Court noted that the case concerned a highly vulnerable young Roma man suffering from severe mental disabilities and HIV infection who had spent his entire life in State care and died in hospital through alleged neglect. In view of his extreme vulnerability, he had been incapable of initiating proceedings in the domestic courts without proper legal support and advice. At the time of his death Mr Câmpeanu had no known next of kin. Following his death, the CLR had brought domestic proceedings with a view to elucidating the circumstances of his death. It was of considerable significance that neither its capacity to act nor its representations on Mr Câmpeanu's behalf before the domestic medical and judicial authorities were questioned or challenged in any way. The State had not appointed a competent person or guardian to take care of his interests despite being under a statutory obligation to do so. The CLR had become involved only shortly before his death – at a time when he was manifestly incapable of expressing any wishes or views regarding his own needs and interests, let alone on whether to pursue any remedies. Finding that the CLR could not represent Mr Câmpeanu in these circumstances carried the risk that the respondent State would be allowed to escape accountability through its own failure to comply with its statutory obligation to appoint a legal representative. Moreover, granting the CLR standing to act as Mr Câmpeanu's representative was consonant with the Court's approach in cases concerning the right to judicial review under Article 5 § 4 of the Convention in the case of "persons of unsound mind" (Article 5 § 1 (e)). In such cases, it was essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. The CLR thus had standing as Mr Câmpeanu's *de facto* representative.

Conclusion: preliminary objection dismissed (unanimously).

2. Article 2: The decisions regarding Mr Câmpeanu's placements were mainly based on which establishment was willing to accommodate him rather than on where he would be able to receive appropriate medical care and support. Mr Câmpeanu was first placed in a medical and social care centre which was not equipped to handle patients with mental health problems. Ultimately he was admitted to a psychiatric hospital, despite the fact that it had previously refused to admit him because it did not have facilities to treat HIV. The transfers from one unit to another had taken place without any proper diagnosis or aftercare and in complete disregard of Mr Câmpeanu's actual state of health and most basic medical needs. Of particular note was the authorities' failure to ensure he received antiretroviral medication. He had mainly been treated with sedatives and vitamins and no meaningful examination had been conducted to establish the causes of his mental state, in particular his sudden aggressive behaviour.

The Court pointed to the fact that for his entire life Mr Câmpeanu had been in the hands of the authorities, which were therefore under an obligation to account for

his treatment. They had been aware of the appalling conditions in the psychiatric hospital, where a lack of heating and proper food and a shortage of medical staff and medication had led to an increase in the number of deaths in the winter of 2003. Their response had, however, been inadequate. By deciding to place Mr Câmpeanu in that hospital, notwithstanding his already heightened state of vulnerability, the authorities had unreasonably put his life in danger, while the continuous failure of the medical staff to provide him with appropriate care and treatment was yet another decisive factor leading to his untimely death. In sum, the authorities had failed to provide the requisite standard of protection for Mr Câmpeanu's life.

Conclusion: violation (unanimously).

3. Article 46: Recommendation that Romania envisage general measures to ensure that mentally disabled persons in comparable situations are afforded independent representation, enabling them to have Convention complaints relating to their health and treatment examined before a court or other independent body.

JUDGMENT

In the case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Dean Spielmann, *President*,
Guido Raimondi,
Ineta Ziemele,
Isabelle Berro-Lefèvre,
Alvina Gyulumyan,
Davíd Thór Björgvinsson,
Ján Šikuta,
Päivi Hirvelä,
Luis López Guerra,
Ledi Bianku,
Nona Tsotsoria,
Kristina Pardalos,
Vincent A. de Gaetano,
Angelika Nußberger,
Paulo Pinto de Albuquerque,
Paul Mahoney,
Johannes Silvis, *judges*,

and Michael O'Boyle, *Deputy Registrar*,

…

Delivers the following judgment…:

PROCEDURE

1. The case originated in an application (no. 47848/08) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Romanian non-governmental organisation, the Centre for Legal Resources ("the CLR"), on behalf of Mr Valentin Câmpeanu, on 2 October 2008.

2. Interights, acting until 27 May 2014 as adviser to counsel for the CLR, was represented by Mr C. Cojocariu, a lawyer practising in London. The Romanian Government ("the Government") were represented by their Agent, Ms C. Brumar, from the Ministry of Foreign Affairs.

…

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The death of Valentin Câmpeanu

1. Factual background

7. Valentin Câmpeanu, a man of Roma ethnicity, was born on 15 September 1985. His father was unknown, and his mother, Florica Câmpeanu, who died in 2001, abandoned him at birth. Mr Câmpeanu was therefore placed in an orphanage, the Corlate Centre, where he grew up.

In 1990 Mr Câmpeanu was diagnosed as HIV-positive. He was later diagnosed with "profound intellectual disability, an IQ of 30 and HIV" and was accordingly classified as belonging to the "severe" disability group. In time, he also developed associated symptoms such as pulmonary tuberculosis, pneumonia and chronic hepatitis.

In March 1992 he was transferred to the Craiova Centre for Disabled Children and at a later date to the Craiova no. 7 Placement Centre ("the Placement Centre").

2. Assessments in 2003 and 2004

8. On 30 September 2003 the Dolj County Child Protection Panel ("the Panel") ordered that Mr Câmpeanu should no longer be cared for by the State. The decision was justified on the grounds that Mr Câmpeanu had recently turned eighteen and was not enrolled in any form of education at the time.

Although the social worker dealing with Mr Câmpeanu had recommended transferring him to the local Neuropsychological Recovery and Rehabilitation Centre, the Panel ordered that a competent social worker should take all measures necessary for Mr Câmpeanu to be transferred to the Poiana Mare Neuropsychiatric Hospital ("the PMH"). According to the relevant law, the decision could be challenged before the Craiova District Court.

Mr Câmpeanu was not present in person and was not represented at the hearing held by the Panel.

9. On 14 October 2003 Mr Câmpeanu's health was reassessed by the Dolj County Council Disabled Adults Medical Examination Panel. The assessment resulted solely in a finding of HIV infection, corresponding to the "average" disability group. It was also mentioned that the patient was "socially integrated".

10. Subsequently, on an unspecified date in October or November 2003, a medical and welfare assessment of Mr Câmpeanu was carried out by a social worker and a doctor from the Placement Centre as a prerequisite for his admission to a medical and social care centre. Under the heading "Legal representative" they indicated "abandoned at birth", while the space next to "Person to contact in case of emergency" was left blank. The diagnosis indicated was "severe intellectual disability, HIV-positive", without any reference to the previous diagnosis (see paragraph 9 above). The following information was included in the assessment report: "requires supervision and intermittent assistance with personal care", and the report concluded that Mr Câmpeanu was able to take care of himself, but at the same time required considerable support.

11. By a letter dated 16 October 2003, the PMH informed the Panel that it could not admit Mr Câmpeanu, who had been diagnosed with HIV and mental disability, as the hospital lacked the facilities necessary to treat individuals with such a diagnosis.

12. Following this refusal, between October 2003 and January 2004 the Panel and the County Department for the Protection of the Rights of the Child ("the Child Protection Department") contacted a series of institutions, asking for assistance in identifying a social care or psychiatric establishment willing to admit Mr Câmpeanu. While stating that the PMH had refused to admit the patient because he had HIV, the Child Protection Department asked for the cooperation of the institutions concerned, mentioning that Mr Câmpeanu's condition "did not necessitate hospitalisation, but rather continuous supervision in a specialist institution".

3. Admission to the Cetate-Dolj Medical and Social Care Centre

13. The Panel eventually identified the Cetate-Dolj Medical and Social Care Centre ("the CMSC") as an appropriate establishment where Valentin Câmpeanu could be placed. In its request to the CMSC, the Panel mentioned only that Mr Câmpeanu was HIV-positive, corresponding to the average disability group, without referring to his learning difficulties.

14. On 5 February 2004 Mr Câmpeanu was admitted to the CMSC. According to a report issued by the CMSC and sent to the CLR on 5 March 2004 detailing his condition upon admission, Mr Câmpeanu was in an advanced state of "psychiatric and physical degradation", was dressed in a tattered tracksuit, with no underwear or shoes, and did not have any antiretroviral medication or information concerning his medical condition. It was noted that the patient "refused to cooperate".

In her statement to the prosecutor on 22 July 2004 in the context of the domestic proceedings (described in section B below), Dr M.V., the doctor

who had treated Mr Câmpeanu at the Placement Centre, justified the failure to provide appropriate medication or information on the basis that she did not know whether, depending on the results of the most recent investigation (see paragraph 9 above), it would be necessary to modify his treatment.

A medical examination carried out upon Mr Câmpeanu's admission to the CMSC concluded that he suffered from "severe intellectual disability, HIV infection and malnutrition". At that time, he was 168 centimetres tall and weighed 45 kilograms. It was mentioned that "he could not orient himself in time and space and he could not eat or care for his personal hygiene by himself".

15. During the evening of 6 February 2004 Mr Câmpeanu became agitated. According to the above-mentioned report by the CMSC (see paragraph 14 above), on the morning of 7 February 2004 he "became violent, assaulted other patients, broke a window and tore up a mattress and his clothes and sheets". He was given phenobarbital and then diazepam to calm him down.

4. Examination at the PMH

16. On 9 February 2004 Mr Câmpeanu was taken to the PMH for examination, diagnosis and treatment, as it was the nearest psychiatric establishment. He was again diagnosed with "severe intellectual disability". However, his condition was described as "not a psychiatric emergency", as "he was not agitated". Dr L.G. diagnosed him with "medium intellectual disability" and prescribed sedative medicines (carbamazepine and diazepam).

According to the medical records kept at the PMH, no information regarding Mr Câmpeanu's medical history could be obtained upon his admission to the hospital, as he "would not cooperate". In the statement she gave to the investigative authorities on 8 December 2005, Dr D.M. from the PMH stated that "the patient was different in that it was not possible to communicate with him and he had mental disabilities".

5. Return to the CMSC

17. Mr Câmpeanu was returned to the CMSC on the same day, by which time his health had worsened considerably. At that time, the CMSC had received a supply of antiretroviral medication and thus his treatment was resumed. Despite these measures, his condition did not improve and his medical records noted that he continued to be "agitated" and "violent".

18. The CMSC decided that because it lacked the facilities needed to treat Mr Câmpeanu's condition, it was impossible to keep him there any longer. The hospital sent a request to the Placement Centre asking it to refer

him to a different establishment. However, the Placement Centre refused the request on the ground that he was already "outside its jurisdiction".

19. On 11 February 2004 E.O., the Director of the CMSC, allegedly called the Dolj County Public Health Department and asked it to come up with a solution that would allow Mr Câmpeanu to be transferred to a facility which was more suitable for the treatment of his health problems. It appears that she was advised to transfer him to the PMH for a period of four to five days for psychiatric treatment.

6. Transfer to the PMH

20. On 13 February 2004 Mr Câmpeanu was transferred from the CMSC to the PMH, on the understanding that his stay at the PMH would last for three or four days with the purpose of attempting to provide treatment for his hyperaggressive behaviour. He was placed in Psychiatric Department V.

21. On 15 February 2004 Mr Câmpeanu was placed under the care of Dr L.G. Given the fact that Mr Câmpeanu was HIV-positive, the doctor decided to transfer him to Psychiatric Department VI. She continued to be in charge of his psychiatric treatment, as that department had only two general, non-specialist doctors and no psychiatrists on its staff.

22. On 19 February 2004 Mr Câmpeanu stopped eating and refused to take his medication. He was therefore prescribed an intravenous treatment which included glucose and vitamins. Upon examination by the doctor, he was found to be "generally unwell".

7. Visit by staff of the CLR

23. On 20 February 2004 a team of monitors from the CLR visited the PMH and noticed Mr Câmpeanu's condition. According to the information included in a report by CLR staff on that visit, Mr Câmpeanu was alone in an isolated, unheated and locked room, which contained only a bed without any bedding. He was dressed only in a pyjama top. At the time he could not eat or use the toilet without assistance. However, the staff at the PMH refused to help him, allegedly for fear that they would contract HIV. Consequently, the only nutrition provided to Mr Câmpeanu was glucose, through a drip. The report concluded that the hospital had failed to provide him with the most basic treatment and care services.

The CLR representatives stated that they had asked for him to be transferred immediately to the Infectious Diseases Hospital in Craiova, where he could receive appropriate treatment. However, the hospital manager had decided against that request, believing that the patient was not an

"emergency case, but a social case", and that in any event he would not be able to withstand the trip.

24. Valentin Câmpeanu died on the evening of 20 February 2004. According to his death certificate, issued on 23 February 2004, the immediate cause of death was cardiorespiratory insufficiency. The certificate also noted that his HIV infection was the "original morbid condition" and designated "intellectual disability" as "another important morbid condition".

25. In spite of the legal provisions that made it compulsory to carry out an autopsy when a death occurred in a psychiatric hospital (Joint Order no. 1134/255/2000 of the Minister of Justice and the Minister of Health), the PMH did not carry out an autopsy on the body, stating that "it was not believed to be a suspicious death, taking into consideration the two serious conditions displayed by the patient" (namely intellectual disability and HIV infection).

26. Unaware of Mr Câmpeanu's death, on 21 February 2004 the CLR had drafted several urgent letters and then sent them to a number of local and central officials, including the Minister of Health, the prefect of Dolj County, the mayor of Poiana Mare and the director of the Dolj County Public Health Department, highlighting Mr Câmpeanu's extremely critical condition and the fact that he had been transferred to an institution that was unable to provide him with appropriate care, in view of his HIV infection; the CLR further criticised the inadequate treatment he was receiving and asked for emergency measures to be taken to address the situation. It further stated that Mr Câmpeanu's admission to the CMSC and subsequent transfer to the PMH had been in breach of his human rights, and urged that an appropriate investigation of the matter be launched.

On 22 February 2004 the CLR issued a press release highlighting the conditions and the treatment received by patients at the PMH, making particular reference to the case of Mr Câmpeanu and calling for urgent action.

B. The domestic proceedings

1. Criminal complaints lodged by the CLR

27. In a letter of 15 June 2004 to the Prosecutor General of Romania, the CLR requested an update on the state of proceedings following the criminal complaint it had lodged with that institution on 23 February 2004 in relation to the circumstances leading up to Valentin Câmpeanu's death; in the complaint it had emphasised that Mr Câmpeanu had not been placed

in an appropriate medical institution, as required by his medical and mental condition.

28. On the same day, the CLR lodged two further criminal complaints, one with the prosecutor's office attached to the Craiova District Court and the other with the prosecutor's office attached to the Craiova County Court. The CLR repeated its request for a criminal investigation to be opened in relation to the circumstances leading up to and surrounding Mr Câmpeanu's death, alleging that the following offences had been committed:

(i) negligence, by employees of the Child Protection Department and of the Placement Centre (Article 249 § 1 of the Criminal Code);

(ii) malfeasance and nonfeasance against a person's interests and endangering a person unable to care for himself or herself, by employees of the CMSC (Articles 246 and 314 of the Criminal Code); and

(iii) homicide by negligence or endangering a person unable to care for himself or herself, by employees of the PMH (Article 178 § 2 and Article 314 of the Criminal Code).

The CLR further argued that the Medical Examination Panel had wrongly classified Mr Câmpeanu as being in the medium disability group, contrary to previous and subsequent diagnoses (see paragraph 9 above). In turn, the Child Protection Department had failed to institute proceedings for the appointment of a guardian when Mr Câmpeanu had reached the age of majority, in breach of existing legislation.

Moreover, the Placement Centre had failed to supply the required antiretroviral medication to CMSC staff when Mr Câmpeanu had been transferred there on 5 February 2004, which might have caused his death two weeks later.

The CLR also claimed that the transfer from the CMSC to the PMH had been unnecessary, improper and contrary to existing legislation, the measure having been taken without the patient's or his representative's consent, as required by the Patients' Rights Act (Law no. 46/2003).

Lastly, the CLR argued that Mr Câmpeanu had not received adequate care, treatment or nutrition at the PMH.

29. On 22 August 2004 the General Prosecutor's Office informed the CLR that the case had been sent to the prosecutor's office attached to the Dolj County Court for investigation.

On 31 August 2004 the prosecutor's office attached to the Dolj County Court informed the CLR that a criminal file had been opened in response to its complaint, and that the investigation had been allocated to the Criminal Investigation Department of the Dolj County Police Department ("the Police Department").

2. Forensic report

30. On 14 September 2004, at the request of the prosecutor's office, a forensic report was issued by the Craiova Institute of Forensic Medicine. Based on the medical records submitted, the report concluded as follows:

> "Medical treatment was prescribed for [the patient's] HIV and his psychiatric condition, the treatment [being] correct and appropriate as to the dosage, in connection with the patient's clinical and immunological condition.
>
> It cannot be ascertained whether the patient had indeed taken his prescribed medication, having regard to his advanced state of psychosomatic degradation."

31. On 22 October 2004 Valentin Câmpeanu's body was exhumed and an autopsy carried out. A forensic report was subsequently issued on 2 February 2005, recording that the body showed advanced signs of cachexia and concluding as follows:

> "… the death was not violent. It was due to cardiorespiratory insufficiency caused by pneumonia, a complication suffered during the progression of the HIV infection. Upon exhumation, no traces of violence were noticed."

3. Prosecutors' decisions

32. On 19 July 2005 the prosecutor's office attached to the Dolj County Court issued a decision not to prosecute, holding, *inter alia*, that, according to the evidence produced, the medical treatment provided to the patient had been appropriate, and that the death had not been violent, but rather had been caused by a complication which had occurred during the progression of Mr Câmpeanu's HIV infection.

33. On 8 August 2005 the CLR lodged a complaint against that decision with the Chief Prosecutor of the prosecutor's office attached to the Dolj County Court, claiming, *inter alia*, that some of the submissions it had made concerning the medical treatment given to the patient, the alleged discontinuation of the antiretroviral treatment and the living conditions in the hospitals had not been examined.

On 23 August 2005 the Chief Prosecutor allowed the complaint, set aside the decision of 19 July 2005 and ordered the reopening of the investigation so that all aspects of the case could be examined. Specific instructions were given as to certain medical documents that needed to be examined, once they had been obtained from the Infectious Diseases Hospital in Craiova, the Placement Centre, the CMSC and the PMH. The doctors who had treated Mr Câmpeanu were to be questioned. The circumstances in which the antiretroviral treatment had or had not been provided to the patient while he was in the CMSC and in the PMH were to be clarified, especially as the medical records at the PMH did not mention anything on that account.

34. On 11 December 2006 the prosecutor's office attached to the Dolj County Court decided that, pursuant to new procedural rules in force, it lacked jurisdiction to carry out the investigation, and referred the case file to the prosecutor's office attached to the Calafat District Court.

4. Disciplinary proceedings

35. On 11 January 2006 the Police Department asked the Dolj County Medical Association ("the Medical Association") to provide it with an opinion on "whether the therapeutic approach [adopted] was correct in view of the diagnosis [established in the autopsy report] or whether it contains indications of medical malpractice".

On 20 July 2006, the Disciplinary Board of the Medical Association ruled that there were no grounds for taking disciplinary action against staff at the PMH:

> "… the psychotropic treatment, as noted in the general clinical observation notes from the PMH, was appropriate … [and therefore] … the information received suggests that the doctors' decisions were correct, without any suspicion of medical malpractice [arising from] an opportunistic infection associated with HIV [being] incorrectly treated."

That decision was challenged by the Police Department, but on 23 November 2006 the challenge was rejected as out of time.

5. New decision not to prosecute and subsequent appeals

36. On 30 March 2007 the prosecutor's office attached to the Calafat District Court issued a fresh decision not to prosecute. The prosecutor relied in his reasoning on the evidence adduced in the file, as well as on the decision issued by the Disciplinary Board of the Medical Association.

37. The CLR lodged a complaint against that decision, submitting that the majority of the instructions given in the Chief Prosecutor's decision of 23 August 2005 (see paragraph 33 above) had been ignored. The complaint was dismissed by the Chief Prosecutor of the prosecutor's office attached to the Calafat District Court on 4 June 2007. The brief statement of reasons in the decision referred to the conclusions of the forensic report of 14 September 2004 and the Medical Association's decision of 20 July 2006.

On 10 August 2007 the CLR challenged that decision before the Calafat District Court.

38. On 3 October 2007 the Calafat District Court allowed the complaint, set aside the decisions of 30 March 2007 and 4 June 2007 and ordered the reopening of the investigation, holding that several aspects of Mr Câmpeanu's death had not been examined and that more evidence needed to be produced.

Among the shortcomings highlighted by the court were the following: most of the documents which were supposed to have been obtained from the Infectious Diseases Hospital in Craiova and the Placement Centre had not actually been added to the investigation file (the forensic documents on the basis of which Mr Câmpeanu had been admitted to the CMSC and transferred to the PMH; the clinical and paraclinical tests undertaken; the records of questioning of the doctors and nurses who had been responsible for Mr Câmpeanu's care; and the HIV testing guidelines). Contradictions in the statements of those involved in Mr Câmpeanu's admission to the CMSC had not been clarified, and neither had the circumstances relating to the interruption of his antiretroviral treatment after being transferred to the PMH. In addition, the contradictory claims of medical personnel from the CMSC and the PMH regarding Mr Câmpeanu's alleged "state of agitation" had not been clarified.

The investigators had also failed to ascertain whether the medical staff at the PMH had carried out the necessary tests after Mr Câmpeanu had been admitted there and whether he had received antiretrovirals or any other appropriate medication. The investigators had failed to establish the origin of the oedema noted on Mr Câmpeanu's face and lower limbs and whether the therapeutic approach adopted at the PMH had been correct. Given these failures, the request for an opinion from the Medical Association had been premature and should be resubmitted once the investigation file had been completed.

39. The prosecutor's office attached to the Calafat District Court appealed against that judgment. On 4 April 2008 the Dolj County Court allowed the appeal, quashed the judgment delivered by the Calafat District Court and dismissed the CLR's complaint concerning the decision of 30 March 2007 not to prosecute.

The court mainly relied on the conclusions of the forensic report and the autopsy report, and also on the decision of the Medical Association, all of which had stated that there had been no causal link between the medical treatment given to Mr Câmpeanu and his death.

C. Other proceedings initiated by the CLR

1. In relation to Mr Câmpeanu

40. In response to the complaints lodged by the CLR (see paragraph 26 above), on 8 March 2004 the prefect of Dolj County established

a commission with the task of carrying out an investigation into the circumstances surrounding Valentin Câmpeanu's death. The commission was made up of representatives of the Child Protection Department, the Public Health Department, the Criminal Investigations Department of the Police Department and the prefect's office. The commission was given ten days to complete the investigation and submit a report on its findings.

The commission's report concluded that all procedures relating to Mr Câmpeanu's treatment after his discharge from the Placement Centre had been lawful and justified in view of his diagnosis. The commission found only one irregularity, in that an autopsy had not been carried out immediately after Mr Câmpeanu's death, in breach of existing legislation (see paragraph 25 above).

41. On 26 June 2004 the CLR filed a complaint with the National Authority for the Protection and Adoption of Children ("the National Authority"), criticising several deficiencies concerning mainly the failure to appoint a guardian for Mr Câmpeanu and to place him in an appropriate medical institution. The CLR reiterated its complaint on 4 August 2004, submitting that the wrongful transfer of Mr Câmpeanu to the PMH could raise issues under Article 5 § 1 (e) of the Convention.

In response to those allegations, the National Authority issued a report on 21 October 2004 on the circumstances surrounding Mr Câmpeanu's death. The National Authority acknowledged that the Panel had acted *ultra vires* when ordering Mr Câmpeanu's admission to the PMH. However, it stated that in any event, the order had been of no consequence, given that the institution had initially refused to accept Mr Câmpeanu (see paragraph 11 above).

The National Authority concluded that the Child Protection Department had acted in line with the principles of professional ethics and best practice when it had transferred Mr Câmpeanu to the CMSC. At the same time, the National Authority stated that it was not authorised to pass judgment on Mr Câmpeanu's subsequent transfer to the PMH.

Similarly, the National Authority declined to express an opinion on the allegedly wrongful categorisation of Mr Câmpeanu as belonging to the medium disability group, or on the events which had occurred after his admission to the CMSC.

42. On 24 March 2004 the Dolj County Public Health Department informed the CLR that a commission made up of various county-level officials had concluded that "no human rights were breached" in connection with Mr Câmpeanu's death, as his successive admissions to hospital had been justified by Article 9 of Law no. 584/2002 on measures for the prevention

of the spread of HIV infection and the protection of persons infected with HIV or suffering from AIDS.

2. In relation to other patients

43. On 16 March 2005, following a criminal investigation concerning the death of seventeen patients at the PMH, the General Prosecutor's Office sent a letter to the Ministry of Health, requiring it to take certain administrative measures to address the situation at the hospital. While noting that no criminal wrongdoing was detectable in connection with the deaths in question, the letter highlighted "administrative deficiencies" observed at the hospital and called for appropriate measures to be taken as regards the following problems:

> "[L]ack of heating in the patients' rooms; hypocaloric food; insufficient staff, poorly trained in providing care to mentally disabled patients; lack of effective medication; extremely limited opportunities to carry out paraclinical investigations …, all these factors having encouraged the onset of infectious diseases, as well as their fatal progression …"

44. In a decision of 15 June 2006 concerning a criminal complaint lodged by the CLR on behalf of another patient, P.C., who had died at the PMH, the High Court of Cassation and Justice dismissed an objection by the public prosecutor that the CLR did not have *locus standi*. It found that the CLR did indeed have *locus standi* to pursue proceedings of this nature with a view to elucidating the circumstances in which seventeen patients had died at the PMH in January and February 2004, in view of its field of activity and stated aims as a foundation for the protection of human rights. The court held as follows:

> "The High Court considers that the CLR may be regarded as 'any other person whose legitimate interests are harmed' within the meaning of Article 278[1] of the Code of Criminal Procedure. The legitimacy of its interest lies in the CLR's request that the circumstances which led to the death of seventeen patients at the PMH in January and February 2004 be determined and elucidated; its aim was thus to safeguard the right to life and the prohibition of torture and ill-treatment … by initiating an official criminal investigation that would be effective and exhaustive so as to identify those responsible for breaches of the above-mentioned rights, in accordance with the requirements of Articles 2 and 3 of the European Convention on Human Rights. [It also aimed] to raise the awareness of society as to the need to protect fundamental human rights and freedoms and to ensure access to justice, which corresponds to the NGO's stated goals.
>
> Its legitimate interest has been demonstrated by the initiation of investigations, which are currently pending.
>
> At the same time, the possibility for the CLR to lodge a complaint in accordance with Article 278[1] … represents a judicial remedy of which the complainant availed

itself, also in compliance with the provisions of Article 13 of the European Convention on Human Rights …"

D. Expert report submitted by the CLR

45. The CLR submitted an expert opinion, dated 4 January 2012 and issued by Dr Adriaan van Es, a member of the Forensic Advisory Team and director of the International Federation of Health and Human Rights Organisations (IFHHRO), assisted by Anca Boeriu, Project Officer at the IFHHRO. The opinion was based on copies of the evidence which the CLR also submitted to the Court, including the medical records from the CMSC and the PMH.

The expert opinion referred to the "very poor, substandard, often absent or missing" medical records at the PMH and the CMSC, in which the description of Mr Câmpeanu's clinical situation was "scant". It noted that while at the PMH the patient had never been consulted by an infectious-disease specialist. Also, contrary to Romanian law, no autopsy had taken place immediately after the patient's death.

Concerning the antiretroviral treatment, the documents available did not provide reliable information as to whether it had been received on a continuous basis. Therefore, as a result of inappropriate treatment, Mr Câmpeanu might have suffered from a relapse of HIV, and also from opportunistic infections such as pneumocystis pneumonia (pneumonia appeared in the autopsy report as the cause of death). The opinion noted that pneumonia had not been diagnosed or treated while the patient was at the PMH or the CMSC, even though it was a very common disease in HIV patients. Common laboratory tests to monitor the patient's HIV status had never been carried out.

The expert opinion stated that certain behavioural signs interpreted as psychiatric disorders might have been caused by septicaemia.

Therefore, the risks of discontinued antiretroviral treatment, the possibility of opportunistic infections and the patient's history of tuberculosis should have led to Mr Câmpeanu being admitted to an infectious-disease department of a general hospital, and not to a psychiatric institution.

46. The report concluded that Mr Câmpeanu's death at the PMH had been the result of "gross medical negligence". The management of HIV and opportunistic infections had failed to comply with international standards and medical ethics, as had the counselling and treatment provided to the patient for his severe intellectual disability. Moreover, the disciplinary proceedings before the Disciplinary Board of the Medical Association had been substandard and negligent, in the absence of important medical documentation.

E. Background information concerning the Cetate and Poiana Mare medical institutions

1. Poiana Mare Neuropsychiatric Hospital

47. The PMH is located in Dolj County in southern Romania, 80 km from Craiova, on a former army base occupying thirty-six hectares of land. The PMH has the capacity to admit 500 patients, both on a voluntary and an involuntary basis, in the latter case as a result of either civil or criminal proceedings. Until a few years ago, the hospital also included a ward for patients suffering from tuberculosis. The ward was relocated to a nearby town as a result of pressure from a number of national and international agencies, including the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

At the time of the relevant events, namely in February 2004, there were 436 patients at the PMH. The medical staff included five psychiatrists, four psychiatry residents and six general practitioners.

According to the CPT's report of 2004 (see paragraph 77 below), during two consecutive winters, 109 patients died in suspicious circumstances at the PMH – eighty-one between January and December 2003 and twenty-eight in the first five months of 2004. The CPT had visited the PMH three times, in 1995, 1999 and 2004; its last visit was specifically aimed at investigating the alarming increase in the death rate. After each visit, the CPT issued very critical reports, highlighting the "inhuman and degrading living conditions" at the PMH.

Following a visit to several of the medical institutions indicated as problematic in the CPT's reports, among them the PMH, the Ministry of Health issued a report on 2 September 2003. It concluded that at the PMH the medication provided to patients was inadequate, either because there was no link between the psychiatric diagnosis and the treatment provided, or because the medical examinations were very limited. Several deficiencies were found concerning management efficiency and the insufficient number of medical staff in relation to the number of patients.

2. Cetate Medical and Social Care Centre

48. It appears from the information received from the CLR that the CMSC was a small centre for medical and social care, with a capacity of twenty beds at the beginning of 2004; at the time, there were eighteen patients at the CMSC. Before 1 January 2004 – when it was designated as a medical and social care centre – the CMSC was a psychiatric hospital.

According to its accreditation certificate for 2006 to 2009, the CMSC was authorised to provide services for adults experiencing difficult family situations, with an emphasis on the social component of medical and social care.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Romanian Criminal Code

49. The relevant parts of the Romanian Criminal Code as in force at the time of the impugned events read as follows:

Article 114 – Admission to a medical facility

"1. When an offender is mentally ill or a drug addict and is in a state that presents a danger to society, his or her admission to a specialist medical institution may be ordered until he or she returns to health.

2. This measure may also be taken temporarily during a criminal prosecution or trial."

Article 178 – Negligent homicide

"Negligent homicide as a result of failure to observe legal provisions or preventive measures relating to the practice of a profession or trade, or as a result of the performance of a particular activity, shall be punishable by immediate imprisonment for two to seven years."

Article 246 – Malfeasance and nonfeasance against a person's interests

"A public servant who, in the exercise of official duties, knowingly fails to perform an act or performs it erroneously and in doing so infringes another person's legal interests shall be punishable by immediate imprisonment for six months to three years."

Article 249 § 1 – Negligence in the performance of an official duty

"The breach of an official duty, as a result of negligence on the part of a public servant, by failing to perform it or performing it erroneously, if such breach has caused significant disturbance to the proper operation of a public authority or institution or of a legal entity, or damage to its property or serious damage to another person's legal interests, shall be punishable by imprisonment for one month to two years or by a fine."

Article 314 – Endangering a person unable to look after himself or herself

"1. The act of abandoning, sending away or leaving helpless a child or a person unable to look after himself or herself, committed in any manner by a person entrusted with his or her supervision or care, [or of] placing his or her life, health or bodily integrity in imminent danger, shall be punishable by immediate imprisonment for one to three years …"

B. Romanian Code of Criminal Procedure

50. The procedure governing complaints lodged with a court against decisions taken by a prosecutor during criminal investigations was set out in Articles 275-278[1] of the Code as in force at the time of the impugned events. The relevant parts of these Articles read as follows:

Article 275

"Any person may lodge a complaint in respect of measures and decisions taken during criminal investigation proceedings, if these have harmed his or her legitimate interests …"

Article 278

"Complaints against measures or decisions taken by a prosecutor or implemented at the latter's request shall be examined by … the chief prosecutor in the relevant department. …"

Article 278[1]

"1. Following the dismissal by the prosecutor of a complaint lodged in accordance with Articles 275-278 in respect of the discontinuation of a criminal investigation … through a decision not to prosecute (*neurmărire penală*) …, the injured party, or any other person whose legitimate interests have been harmed, may complain within twenty days following notification of the impugned decision, to the judge of the court that would normally have jurisdiction to deal with the case at first instance. …

4. The person in respect of whom the prosecutor has decided to discontinue the criminal investigation, as well as the person who lodged the complaint against that decision, shall be summoned before the court. If they have been lawfully summoned, the failure of these persons to appear before the court shall not impede the examination of the case. …

5. The presence of the prosecutor before the court is mandatory.

6. The judge shall give the floor to the complainant, and then to the person in respect of whom the criminal investigation has been discontinued, and finally, to the prosecutor.

7. In the examination of the case, the judge shall assess the impugned decision on the basis of the existing acts and material, and on any new documents submitted.

8. The judge shall rule in one of the following ways:

(a) dismiss the complaint as out of time, inadmissible or ill-founded and uphold the decision;

(b) allow the complaint, overturn the decision and send the case back to the prosecutor in order to initiate or reopen the criminal investigation. The judge shall be required to give reasons for such remittal and, at the same time, to indicate the

facts and circumstances that require elucidation, as well as the relevant evidence that needs to be produced;

(c) allow the complaint, overturn the decision and, when the evidence in the file is sufficient, retain the case for further examination, in compliance with the rules of procedure that apply at first instance and, as appropriate, on appeal. …

12. The judge shall examine the complaint within thirty days from the date of receipt.

13. A complaint lodged with the incorrect body shall be sent, as an administrative step, to the body with jurisdiction to examine it." [footnote omitted]

C. Social assistance system

51. Article 2 of the National Social Assistance Act (Law no. 705/2001), as in force at the relevant time, defines the social assistance system as follows:

"… the system of institutions and measures through which the State, the public authorities and civil society ensure the prevention, the limitation or the removal of the temporary or permanent consequences of situations that may cause the marginalisation or social exclusion of some individuals."

Article 3 defines the scope of the social assistance system, which is:

"… to protect individuals who, for economic, physical, mental or social reasons, do not have the ability to meet their social needs and to develop their own capabilities and social integration skills."

52. Ordinance no. 68/2003 concerning social services identifies the objectives of State social services and details the decision-making process concerning the allocation of social services.

D. Legislation regarding the health system

53. A detailed description of the relevant legal provisions on mental health is to be found in *B. v. Romania (no. 2)* (no. 1285/03, §§ 42-66, 19 February 2013).

Law no. 487/2002 on Mental Health and the Protection of People with Psychological Disorders ("the Mental Health Act 2002"), which came into force in August 2002, prescribes the procedure for compulsory treatment of an individual. A special psychiatric panel should approve a treating psychiatrist's decision that a person remain in hospital for compulsory treatment within seventy-two hours of his or her admission to a hospital. In addition, this assessment should be reviewed within twenty-four hours by a public prosecutor, whose decision, in turn, may be appealed against to a court. The implementation of the provisions of the Act was dependent on the adoption of the necessary regulations for its enforcement. The regulations were adopted on 2 May 2006.

54. The Hospitals Act (Law no. 270/2003) provided in Article 4 that hospitals had an obligation to "ensure the provision of adequate accommodation and food and the prevention of infections". It was repealed on 28 May 2006, once the Health Care Reform Act 2006 (Law no. 95/2006) came into force.

55. The Patients' Rights Act (Law no. 46/2003) provides in Article 3 that "the patient shall be entitled to respect as a human being, without discrimination". Article 35 provides that a patient has "the right to continuous medical care until his or her health improves or he or she recovers". Furthermore, "the patient has the right to palliative care in order to be able to die with dignity". The patient's consent is required for any form of medical intervention.

56. Order no. 1134/25.05.2000, issued by the Minister of Justice, and Order no. 255/4.04.2000, issued by the Minister of Health, approved the rules on procedures relating to medical opinions and other forensic medical services, which provide in Article 34 that an autopsy should be conducted when a death occurs in a psychiatric hospital. Article 44 requires the management of medical establishments to inform the criminal investigation authorities, who must request that an autopsy be carried out.

57. Law no. 584/2002 on measures for the prevention of the spread of HIV infection and the protection of persons infected with HIV or suffering from AIDS provides in Article 9 that medical centres and doctors must hospitalise such individuals and provide them with appropriate medical care in view of their specific symptoms.

E. The guardianship system

1. Guardianship of minors

58. Articles 113 to 141 of the Family Code, as in force at the time of the events in question, regulated guardianship of a minor whose parents were dead, unknown, deprived of their parental rights, incapacitated, missing or declared dead by a court. The Family Code regulated the conditions making guardianship necessary, the appointment of a guardian (*tutore*), the responsibilities of the guardian, the dismissal of the guardian, and the end of guardianship. The institution with the widest range of responsibilities in this field was the guardianship authority (*autoritatea tutelară*), entrusted, *inter alia*, with supervising the activity of guardians.

At present, guardianship is governed by Articles 110 to 163 of the Civil Code. The new Civil Code was published in Official Gazette no. 511 of 24 July 2009 and subsequently republished in Official Gazette no. 505 of 15 July 2011. It came into force on 1 October 2011.

2. The incapacitation procedure and guardianship of people with disabilities

59. Articles 142 to 151 of the Family Code, as in force at the time of the facts of the present case, governed the procedure of incapacitation (*interdicție*), whereby a person who has proved to be incapable of managing his or her affairs loses his or her legal capacity.

An incapacitation order could be made and revoked by a court in respect of "those lacking the capacity to take care of their interests because of mental disorder or disability". Incapacitation proceedings could be initiated by a wide group of persons, among which were the relevant State authorities for the protection of minors, or any interested person. Once a person was incapacitated, a guardian was appointed to represent him or her, with powers similar to those of a guardian of a minor.

Although the incapacitation procedure could also be applied to minors, it was particularly geared towards disabled adults.

The above-mentioned provisions have since been included, with amendments, in the Civil Code (Articles 164 to 177).

60. Articles 152 to 157 of the Family Code, as in force at the material time, prescribed the procedure for temporary guardianship (*curatela*), designed to cover the situation of those who, even if not incapacitated, are not able to protect their interests in a satisfactory manner or to appoint a representative. The relevant parts of these provisions read as follows:

Article 152

"Besides the other cases specified by law, the guardianship authority shall appoint a temporary guardian in the following circumstances:

(a) where, on account of old age, illness or physical infirmity, a person, even if he or she retains legal capacity, is unable personally to manage his or her goods or to satisfactorily defend his or her interests and, for good reasons, cannot appoint a representative;

(b) where, on account of illness or for other reasons, a person – even if he or she retains legal capacity – is unable, either personally or through a representative, to take the necessary measures in situations requiring urgent action;

(c) where, because of illness or other reasons, the parent or the appointed guardian (*tutore*) is unable to perform the act in question; …"

Article 153

"In the situations referred to in Article 152, the appointment of a temporary guardian (*curator*) does not affect the capacity of the person represented by the guardian."

Article 154

"(1) Temporary guardianship (*curatela*) may be instituted at the request of the person who wishes to be represented, that person's spouse or relatives, any of the persons referred to in Article 115, or the guardian (*tutore*) in the situation referred to in Article 152 (c). The guardianship authority may also institute the guardianship of its own motion.

(2) The guardianship may only be instituted with the consent of the person to be represented, except in situations when such consent cannot be given. …"

Article 157

"If the reasons that led to the institution of temporary guardianship have ceased, the measure shall be lifted by the guardianship authority at the request of the guardian, the person being represented or any of the persons referred to in Article 115, or of its own motion."

The above-mentioned provisions have since been included, with amendments, in the Civil Code (Articles 178 to 186).

61. Emergency Ordinance no. 26/1997 regarding children in difficult situations, in force at the time of the events in question, derogated from the provisions on guardianship in the Family Code. Article 8 (1) of the Ordinance provided:

"… if the parents of the child are dead, unknown, incapacitated, declared dead by a court, missing or deprived of their parental rights, and if guardianship has not been instituted, if the child has been declared abandoned by a final court judgment, and if a court has not decided to place the child with a family or an individual in accordance with the law, parental rights shall be exercised by the County Council, … through [its Child Protection] Panel".

Emergency Ordinance no. 26/1997 was repealed on 1 January 2005, when new legislation concerning the protection and promotion of children's rights (Law no. 272/2004) came into force.

62. Order no. 726/2002, concerning the criteria on the basis of which the categories of disability for adults were established, described people with "severe intellectual disability" as follows:

"… they have reduced psychomotor development and few or no language skills; they can learn to talk; they can become familiar with the alphabet and basic counting. They may be capable of carrying out simple tasks under strict supervision. They can adapt to living in the community in care homes or in their families, as long as they do not have another disability which necessitates special care."

63. Law no. 519/2002 on the special protection and employment of people with disabilities listed the social rights to which people with disabilities were entitled. It was repealed by the Protection of People with Disabilities Act (Law no. 448/2006), which came into force on 21 December 2006. Article 23 of the Act, as initially in force, provided that people with

disabilities were protected against negligence and abuse, including by means of legal assistance services and, if necessary, by being placed under guardianship. Under Article 25 of the Act as amended in 2008, people with disabilities are protected against negligence and abuse, and against any discrimination based on their location. People who are entirely or partially incapable of managing their affairs are afforded legal protection in the form of full or partial guardianship, as well as legal assistance. Furthermore, if a person with disabilities does not have any parents or any other person who might agree to act as his or her guardian, a court may appoint as guardian the local public authority or private-law entity that provides care for the person concerned.

III. RELEVANT INTERNATIONAL LAW MATERIAL

A. The issue of *locus standi*

1. *United Nations Convention on the Rights of Persons with Disabilities ("the CRPD"), adopted by the United Nations General Assembly on 13 December 2006 (Resolution A/RES/61/106)*

64. The CRPD, designed to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities and to promote respect for their inherent dignity, was ratified by Romania on 31 January 2011. It reads in its relevant parts as follows:

Article 5 – Equality and non-discrimination

"1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve *de facto* equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention."

Article 10 – Right to life

"States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others."

Article 12 – Equal recognition before the law

"1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

…"

Article 13 – Access to justice

"1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff."

2. Relevant Views of the United Nations Human Rights Committee

65. The First Optional Protocol to the International Covenant on Civil and Political Rights gives the Human Rights Committee ("the HRC") competence to examine individual complaints with regard to alleged violations of the Covenant by States Parties to the Protocol (Articles 1 and 2 of the Optional Protocol). This expressly limits to individuals the right to submit a communication. Therefore, complaints submitted by NGOs, associations, political parties or corporations on their own behalf have generally been declared inadmissible for lack of personal standing (see, for instance, *Disabled and handicapped persons in Italy v. Italy* (Communication No. 163/1984)).

66. In exceptional cases, a third party may submit a communication on behalf of a victim. A communication submitted by a third party on behalf of an alleged victim can only be considered if the third party can demonstrate

its authority to submit the communication. The alleged victim may appoint a representative to submit the communication on his or her behalf.

67. A communication submitted on behalf of an alleged victim may also be accepted when it appears that the individual in question is unable to submit the communication personally (see Rule 96 of the Rules of Procedure of the HRC):

Rule 96

"With a view to reaching a decision on the admissibility of a communication, the Committee, or a working group established under rule 95, paragraph 1, of these rules shall ascertain:

…

(b) That the individual claims, in a manner sufficiently substantiated, to be a victim of a violation by that State party of any of the rights set forth in the Covenant. Normally, the communication should be submitted by the individual personally or by that individual's representative; a communication submitted on behalf of an alleged victim may, however, be accepted when it appears that the individual in question is unable to submit the communication personally;

…"

68. Typical examples of this situation would be when the victim has allegedly been abducted, has disappeared or there is no other way of knowing his or her whereabouts, or the victim is imprisoned or in a mental institution. A third party (normally close relatives) may submit a communication on behalf of a deceased person (see, for instance, *Mr Saimijon and Mrs Malokhat Bazarov v. Uzbekistan* (communication no. 959/2000); *Panayote Celal v. Greece* (communication no. 1235/2003); *Yuliya Vasilyevna Telitsina v. Russian Federation* (communication no. 888/1999); *José Antonio Coronel et al. v. Colombia* (communication no. 778/1997); and *Jean Miango Muiyo v. Zaire* (communication no. 194/1985)).

3. The United Nations Special Rapporteur on Disability

69. In her report on the question of monitoring, issued in 2006, the Special Rapporteur stated:

"2. People with developmental disabilities are particularly vulnerable to human rights violations. Also, people with disabilities are rarely taken into account, they have no political voice and are often a sub group of already marginalized social groups, and therefore, have no power to influence governments. They encounter significant problems in accessing the judicial system to protect their rights or to seek remedies for violations; and their access to organizations that may protect their rights is generally limited. While non-disabled people need independent national and international bodies to protect their human rights, additional justifications exist for ensuring that people with disabilities and their rights be given special attention through independent national and international monitoring mechanisms."

4. Relevant case-law of the Inter-American Commission on Human Rights

70. Article 44 of the American Convention on Human Rights gives the Inter-American Commission on Human Rights the competence to receive petitions from any person or group of persons, or any non-governmental entity legally recognised in one or more member States of the Organization of American States (OAS). It provides:

> "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."

Article 23 of the Rules of Procedure of the Inter-American Commission on Human Rights states that such petitions may be brought on behalf of third parties. It reads as follows:

> "Any person or group of persons or nongovernmental entity legally recognized in one or more of the Member States of the OAS may submit petitions to the Commission, on their behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights 'Pact of San José, Costa Rica' …, in accordance with their respective provisions, the Statute of the Commission, and these Rules of Procedure. The petitioner may designate an attorney or other person to represent him or her before the Commission, either in the petition itself or in a separate document."

71. The Inter-American Commission has examined cases brought by NGOs on behalf of direct victims, including disappeared or deceased persons. For instance, in the case of *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil* (report no. 33/01), the petitioner was the Center for Justice and International Law, acting in the name of disappeared persons and their next of kin. Regarding its competence *ratione personae*, the Commission acknowledged that the petitioning entity could lodge petitions on behalf of the direct victims in the case, in accordance with Article 44 of the American Convention on Human Rights. In *Teodoro Cabrera Garcia and Rodolfo Montiel Flores v. Mexico* (report no. 11/04), the Commission affirmed its jurisdiction *ratione personae* to examine claims brought by different organisations and individuals alleging that two other individuals had been illegally detained and tortured, and imprisoned following an unfair trial. In *Arely José Escher et al. v. Brazil* (report no. 18/06), the Commission affirmed its jurisdiction *ratione personae* to examine a petition brought by two associations (the National Popular Lawyers' Network and the Center for Global Justice) alleging violations of the rights to due legal process, to respect for personal honour and dignity, and to recourse to the courts, to

the detriment of members of two cooperatives associated with the Landless Workers' Movement, through the illegal tapping and monitoring of their telephone lines.

72. Cases initially brought by NGOs may subsequently be submitted by the Commission to the Inter-American Court of Human Rights, after the adoption of the Commission's report on the merits (see, for instance, *Case of the "Las Dos Erres" Massacre v. Guatemala* (preliminary objection, merits, reparations and costs), judgment of 24 November 2009, Series C no. 211 brought by the Office of Human Rights of the Archdiocese of Guatemala and the Center for Justice and International Law; see also *Arely José Escher et al.*, cited above).

5. European Union Agency for Fundamental Rights (FRA) report: Access to justice in Europe: an overview of challenges and opportunities

73. The report issued by the FRA in March 2011 emphasises that the ability to seek effective protection of the rights of vulnerable people at the domestic level is often hindered, *inter alia*, by legal costs and a narrow construction of legal standing (see pages 37-54 of the report).

B. Relevant reports concerning the conditions at the PMH

1. European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) reports on Romania

74. The CPT has documented the situation at the PMH during three visits: in 1995, 1999 and 2004.

75. In 1995 the living conditions at the PMH were considered to be so deplorable that the CPT decided to make use of Article 8 § 5 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which enables it in exceptional circumstances to make certain observations to the Government concerned during the visit itself. In particular, the CPT noted that in a period of seven months in 1995 sixty-one patients had died, of whom twenty-five had been "severely malnourished" (see paragraph 177 of the 1995 report). The CPT decided to ask the Romanian Government to take urgent measures to ensure that "basic living conditions" existed at the PMH.

Other areas of concern identified by the CPT on this occasion were the practice of secluding patients in isolation rooms as a form of punishment, and the lack of safeguards in relation to involuntary admission.

76. In 1999 the CPT returned to the PMH. The most serious deficiencies found on this occasion related to the fact that the number of staff – both

specialised and auxiliary – had been reduced from the 1995 levels, and to the lack of progress in relation to involuntary admission.

77. In June 2004 the CPT visited the PMH for the third time, this time in response to reports concerning an increase in the number of patients who had died. At the time of the visit, the hospital, with a capacity of 500 beds, accommodated 472 patients, of whom 246 had been placed there on the basis of Article 114 of the Romanian Criminal Code (compulsory admission ordered by a criminal court).

The CPT noted in its report that eighty-one patients had died in 2003 and twenty-eight in the first five months of 2004. The increase in the number of deaths had occurred despite the transfer from the hospital in 2002 of patients suffering from active tuberculosis. The main causes of death were cardiac arrest, myocardial infarction and bronchopneumonia.

The average age of the patients who had died was 56, with sixteen being under 40. The CPT stated that "such premature deaths could not be explained exclusively on the basis of the symptoms of the patients at the time of their hospitalisation" (see paragraph 13 of the 2004 report). The CPT also noted that some of these patients "were apparently not given sufficient care" (see paragraph 14 of the report).

The CPT noted with concern "the paucity of human and material resources" available to the hospital (see paragraph 16 of the report). It singled out serious deficiencies in the quality and quantity of food provided to the patients and the lack of heating in the hospital.

In view of the deficiencies found at the PMH, the CPT made the following statement in paragraph 20 of the report:

> "… we cannot rule out the possibility that the combined impact of difficult living conditions – in particular the shortages of food and heating – resulted in the progressive deterioration of the general state of health of some of the weakest patients, and that the paucity of medical supplies available could not prevent their death in most cases.
>
> In the opinion of the CPT, the situation found at the Poiana Mare Hospital is very concerning and warrants taking strong measures aimed at improving the living conditions and also the care provided to patients. Following the third visit of the CPT to the Poiana Mare Hospital in less than ten years, it is high time the authorities finally grasped the real extent of the situation prevailing in the establishment."

Finally, in relation to involuntary admission through civil proceedings, the CPT noted that the recently enacted Mental Health Act 2002 had not been implemented comprehensively, as it had encountered patients who had been admitted involuntarily in breach of the safeguards included in the law (see paragraph 32 of the report).

2. The United Nations Special Rapporteur on the Right to Health

78. On 2 March 2004 the Special Rapporteur on the Right to Health, together with the United Nations Special Rapporteur on the Right to Food and the United Nations Special Rapporteur on Torture, wrote to the Romanian Government, expressing concern about alarming reports received with regard to the living conditions at the PMH and asking for clarification on the matter. The response from the Government was as follows (see summary by the Special Rapporteur on the Right to Health in UN Doc. E/CN.4/2005/51/Add.1):

> "54. By letter dated 8 March 2004, the Government responded to the communication sent by the Special Rapporteur regarding the situation of the Poiana Mare Psychiatric Hospital. The Government confirmed that the Romanian authorities fully understood and shared the concerns about the hospital. Ensuring the protection of handicapped persons remained a governmental priority and the Ministry of Health would start inquiries into all similar medical institutions in order to make sure Poiana Mare was an isolated case. Regarding Poiana Mare, immediate measures had been taken to improve the living conditions of the patients and these steps would continue until the hospital was completely rehabilitated. On 25 February 2004, the Minister of Health conducted an enquiry into Poiana Mare. There were deficiencies with the heating and water systems, food preparation, waste disposal, living and sanitary conditions, and medical assistance. Most of the problems connected with medical assistance were caused by the insufficiency of resources and bad management. The Government confirmed that the following measures were required: clarification by forensic specialists of the cause of death of those patients whose death was unrelated to pre-existing disease or advanced age; implementing the hospital's plan of 2004; hiring supplementary specialized health professionals; reorganizing the working schedule of physicians to include night shifts; ensuring specialized medical assistance on a regular basis; and allocating supplementary funding to improve living conditions. The Government also confirmed that the Secretary of State of the Ministry of Health, as well as the Secretary of State of the National Authority for Handicapped Persons, had been discharged following the irregularities found at the Poiana Mare Psychiatric Hospital, and that the Director of the Hospital had been replaced by an interim director until a competitive selection for the vacant position was finalized. The Government confirmed that the hospital would be carefully monitored by representatives of the Ministry of Health throughout 2004 and that representatives of the local administration would be directly involved in improving the situation at the hospital. Finally, the Government confirmed that the Ministry of Health would start very soon an independent investigation of all other similar units, and would take all necessary measures to prevent any such unfortunate situations from ever happening again."

During his official visit to Romania in August 2004, the Special Rapporteur on the Right to Health inspected several mental health facilities, including the PMH. The report (UN Doc. E/CN.4/2005/51.Add.4) following the visit of the Special Rapporteur, issued on 21 February 2005, reads as follows, in so far as relevant:

"61. Nonetheless, during his mission the Special Rapporteur formed the view that, despite the legal and policy commitments of the Government, the enjoyment of the right to mental health care remains more of an aspiration rather than a reality for many people with mental disabilities in Romania.

Poiana Mare Psychiatric Hospital

…

63. During his mission, the Special Rapporteur had the opportunity to visit [the PMH] and to discuss developments which had taken place since February 2004 and the appointment of a new director of the hospital. The director informed the Special Rapporteur that funding (5.7 billion lei) had been received from the Government to make improvements. Food allocations had been increased, the heating system had been repaired, and wards and other buildings at the hospital were being refurbished. While the Special Rapporteur welcomes these improvements and commends all those responsible, he urges the Government to ensure that it provides adequate resources to support the implementation of these changes on a sustainable basis. The Government should also support other needed measures including: making appropriate medication available, providing adequate rehabilitation for patients, ensuring that patients are able to access effective complaint mechanisms, and the provision of human rights training for hospital staff. The Special Rapporteur understands that criminal investigations into the deaths are still ongoing. He will continue to closely monitor all developments at PMH. The Special Rapporteur takes this opportunity to acknowledge the important role that the media and NGOs have played in relation to Poiana Mare."

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 2, 3 AND 13 OF THE CONVENTION

79. The CLR, acting on behalf of Mr Câmpeanu, complained that he had been unlawfully deprived of his life as a result of the combined actions and failures to act by a number of State agencies, in contravention of their legal obligation to provide him with care and treatment. In addition, the authorities had failed to put in place an effective mechanism to safeguard the rights of people with disabilities placed in long-stay institutions, including by initiating investigations into suspicious deaths.

Furthermore, the CLR complained that serious flaws in Mr Câmpeanu's care and treatment at the CMSC and the PMH, the living conditions at the PMH, and the general attitude of the authorities and individuals involved in his care and treatment over the last months of his life, together or separately amounted to inhuman and degrading treatment. In addition, the official investigation into those allegations of ill-treatment had not complied with the State's procedural obligation under Article 3.

Under Article 13 taken in conjunction with Articles 2 and 3, the CLR submitted that no effective remedy existed in the Romanian domestic legal system in respect of suspicious deaths and/or ill-treatment in psychiatric hospitals.

The relevant parts of Articles 2, 3 and 13 of the Convention read as follows:

Article 2

"1. Everyone's right to life shall be protected by law. …"

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

80. The Government contended that the CLR did not have *locus standi* to lodge the present application on behalf of the late Valentin Câmpeanu; the case was therefore inadmissible as incompatible *ratione personae* with the provisions of Article 34 of the Convention, which reads as follows:

"The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

1. The parties' submissions

a. The Government

81. The Government argued that the conditions required by Article 34 for an application to the Court were not met in the present case; on the one hand, the CLR did not have victim status and on the other hand, the association had not shown that it was the valid representative of the direct victim.

Being aware of the dynamic and evolving interpretation of the Convention by the Court in its case-law, the Government nevertheless pointed to the fact that while judicial interpretation was permissible, any sort of legislating by the judiciary, by adding to the text of the Convention, was not acceptable; therefore, Article 34 should still be construed as meaning that the subjects of the individual petition could only be individuals, NGOs or

groups of individuals claiming to be victims, or representatives of alleged victims.

82. The Government disputed that the CLR could be regarded either as a direct victim, or as an indirect or potential victim.

Firstly, in the present case the CLR had not submitted that its own rights had been violated, and therefore it could not be regarded as a direct victim (the Government cited *Čonka and the Human Rights League v. Belgium* (dec.), no. 51564/99, 13 March 2001).

Secondly, according to the Court's case-law, an indirect or potential victim had to demonstrate, with sufficient evidence, either the existence of a risk of a violation, or the effect that a violation of a third party's rights had had on him or her, as a consequence of a pre-existing close link, whether natural (for example, in the case of a family member) or legal (for example, as a result of custody arrangements). The Government therefore submitted that the mere fact that Mr Câmpeanu's vulnerable personal circumstances had come to the attention of the CLR, which had then decided to bring his case before the domestic courts, was not sufficient to transform the CLR into an indirect victim; in the absence of any strong link between the direct victim and the CLR, or of any decision entrusting the CLR with the task of representing or caring for Mr Câmpeanu, the CLR could not claim to be a victim, either directly or indirectly, and this notwithstanding Mr Câmpeanu's undisputed vulnerability, or the fact that he was an orphan and had had no legal guardian appointed (the Government referred, by way of contrast, to *Becker v. Denmark*, no. 7011/75, Commission decision of 3 October 1975, Decisions and Reports (DR) 4, p. 215).

83. Furthermore, in the lack of any evidence of any form of authorisation, the CLR could not claim to be the direct victim's representative either (the Government cited *Skjoldager v. Sweden*, no. 22504/93, Commission decision of 17 May 1995).

The Government argued that the CLR's involvement in the domestic proceedings concerning the death of Mr Câmpeanu did not imply an acknowledgment by the national authorities of its *locus standi* to act on behalf of the direct victim. The CLR's standing before the domestic courts was that of a person whose interests had been harmed by the prosecutor's decision, and not that of a representative of the injured party. In that respect, the domestic law, as interpreted by the Romanian High Court of Cassation and Justice in its decision of 15 June 2006 (see paragraph 44 above), amounted to an acknowledgment of an *actio popularis* in domestic proceedings.

84. The Government argued that the present case before the Court should be dismissed as an *actio popularis*, observing that such cases were

accepted by the Court solely in the context of Article 33 of the Convention in relation to the power of States to supervise one another. While noting that other international bodies did not expressly preclude an *actio popularis* (citing Article 44 of the American Convention on Human Rights), the Government maintained that each mechanism had its own limits, shortcomings and advantages, the model adopted being exclusively the result of negotiations between the Contracting Parties.

85. The Government further maintained that the Romanian authorities had addressed the specific recommendations of the CPT, with the result that a 2013 United Nations Universal Periodic Review had acknowledged positive developments concerning the situation of persons with disabilities in Romania. Further improvements had also been made concerning the domestic legislation on guardianship and protection of persons with disabilities.

Moreover, in so far as several of the Court's judgments had already addressed the issue of the rights of vulnerable patients placed in large-scale institutions (the Government cited *C.B. v. Romania*, no. 21207/03, 20 April 2010, and *Stanev v. Bulgaria* [GC], no. 36760/06, ECHR 2012), the Government argued that no particular reason relating to respect for human rights as defined in the Convention required that the examination of the application be pursued.

b. The CLR

86. The CLR submitted that the exceptional circumstances of this application required an examination on the merits; the Court could make such an assessment either by accepting that the CLR was an indirect victim, or by considering that the CLR was acting as Mr Câmpeanu's representative.

87. In view of the Court's principle of flexible interpretation of its admissibility criteria when this was required by the interests of human rights and by the need to ensure practical and effective access to proceedings before it, the CLR submitted that its *locus standi* to act on behalf of Mr Câmpeanu should be accepted by the Court. In such a decision, regard should be had to the exceptional circumstances of the case, to the fact that it was impossible for Mr Câmpeanu to have access to justice, either directly or through a representative, to the fact that the domestic courts had acknowledged the CLR's standing to act on his behalf and, last but not least, to the CLR's long-standing expertise in acting on behalf of people with disabilities.

The CLR further mentioned that the Court had adapted its rules in order to enable access to its proceedings for victims who found it excessively difficult, or even impossible, to comply with certain admissibility criteria, owing to factors outside their control but linked to the violations complained

of: evidentiary difficulties for victims of secret surveillance measures, or vulnerability due to such factors as age, gender or disability (citing, for instance, *S.P., D.P. and A.T. v. the United Kingdom*, no. 23715/94, Commission decision of 20 May 1996, unreported; *Storck v. Germany*, no. 61603/00, ECHR 2005-V; and *Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV).

The Court had also departed from the "victim status" rule on the basis of the "interests of human rights", holding that its judgments served not only to decide the cases brought before it, but more generally, "to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties" (the CLR referred to *Karner v. Austria*, no. 40016/98, § 26, ECHR 2003-IX).

The CLR further submitted that the State had certain duties under Article 2, for instance, irrespective of the existence of next of kin or their willingness to pursue proceedings on the applicant's behalf; furthermore, to make the supervision of States' compliance with their obligations under Article 2 conditional on the existence of next of kin would entail the risk of disregarding the requirements of Article 19 of the Convention.

88. The CLR referred to the international practice of the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights, which in exceptional circumstances allowed cases lodged by others on behalf of alleged victims if the victims were unable to submit the communication by themselves. NGOs were among the most active human rights defenders in such situations; furthermore, their standing to take cases to court on behalf of or in support of such victims was commonly accepted in many Council of Europe member States (according to a 2011 report by the European Union's Fundamental Rights Agency entitled "Access to Justice in Europe: an overview of challenges and opportunities").

89. Turning to the particularities of the present case, the CLR underlined that a significant factor in the assessment of the *locus standi* issue was that its monitors had established brief visual contact with Mr Câmpeanu during their visit to the PMH and witnessed his plight; consequently, the CLR had taken immediate action and applied to various authorities, urging them to provide solutions to his critical situation. In this context, the association's long-standing expertise in defending the human rights of people with disabilities played an essential role.

Pointing out that at domestic level its *locus standi* was acknowledged, the CLR contended that the Court frequently took into account domestic procedural rules on representation in order to decide who had *locus standi* to lodge applications on behalf of people with disabilities (it cited *Glass v. the*

United Kingdom, no. 61827/00, ECHR 2004-II). Moreover, the Court had found violations in cases when domestic authorities had applied procedural rules in an inflexible manner that restricted access to justice for people with disabilities (for example, *X and Y v. the Netherlands*, 26 March 1985, Series A no. 91).

In this context, the CLR argued that the initiatives it had taken before the domestic authorities essentially differentiated it from the applicant NGO in the recent case of *Nencheva and Others v. Bulgaria* (no. 48609/06, 18 June 2013), concerning the death of fifteen children and young people with disabilities in a social care home. In that case, while observing in general that exceptional measures could be required to ensure that people who could not defend themselves had access to representation, the Court had noted that the Association for European Integration and Human Rights had not previously pursued the case at domestic level. The Court had therefore dismissed the application as incompatible *ratione personae* with the provisions of the Convention in respect of the NGO in question (ibid., § 93).

90. Referring to the comments by the Council of Europe Commissioner for Human Rights highlighting the difficulties that people with disabilities had in securing access to justice, and also to concerns expressed by the United Nations Special Rapporteur on Torture that practices of abuse against people with disabilities secluded in State institutions often "remained invisible", the CLR submitted that the "interests of human rights" would require an assessment of the present case on the merits.

The CLR further indicated a few criteria that it considered useful for the determination of *locus standi* in cases similar to the present one: the vulnerability of the victim, entailing a potential absolute inability to complain; practical or natural obstacles preventing the victim from exhausting domestic remedies, such as deprivation of liberty or inability to contact a lawyer or next of kin; the nature of the violation, especially in the case of Article 2, where the direct victim was *ipso facto* not in a position to provide a written form of authority to third parties; the lack of adequate alternative institutional mechanisms ensuring effective representation for the victim; the nature of the link between the third party claiming *locus standi* and the direct victim; favourable domestic rules on *locus standi*; and whether the allegations raised serious issues of general importance.

91. In the light of the above-mentioned criteria and in so far as it had acted on behalf of the direct victim, Mr Câmpeanu – both prior to his death, by launching an appeal for his transfer from the PMH, and immediately afterwards and throughout the next four years, by seeking accountability for

his death before the domestic courts – the CLR asserted that it had the right to bring his case before the Court.

The CLR concluded that not acknowledging its standing to act on behalf of Mr Câmpeanu would amount to letting the Government take advantage of his unfortunate circumstances in order to escape the Court's scrutiny, thus blocking access to the Court for the most vulnerable members of society.

c. Relevant submissions by the third parties

i. The Council of Europe Commissioner for Human Rights

92. The Council of Europe Commissioner for Human Rights, whose intervention before the Court was limited to the admissibility of the present application, submitted that access to justice for people with disabilities was highly problematic, especially in view of inadequate legal incapacitation procedures and restrictive rules on legal standing. Consequently, the frequent abuses committed against people with disabilities were often not reported to the authorities and were ignored, and an atmosphere of impunity surrounded these violations. In order to prevent and put an end to such abuses, NGOs played an important role, including by facilitating vulnerable people's access to justice. Against that backdrop, allowing NGOs to lodge applications with the Court on behalf of people with disabilities would be fully in line with the principle of effectiveness underlying the Convention, and also with the trends existing at domestic level in many European countries and the case-law of other international courts, such as the Inter-American Court of Human Rights, which granted *locus standi* to NGOs acting on behalf of alleged victims, even when the victims had not appointed these organisations as their representatives (for instance, in the case of *Yatama v. Nicaragua* (preliminary objections, merits, reparations and costs), judgment of 23 June 2005, Series C No. 127).

In the Commissioner's view, a strict approach to *locus standi* requirements concerning people with disabilities (in this case, intellectual) would have the undesired effect of depriving this vulnerable group of any opportunity to seek and obtain redress for breaches of their human rights, thus running counter to the fundamental aims of the Convention.

93. The Commissioner also submitted that in exceptional circumstances, to be defined by the Court, NGOs should be able to lodge applications with the Court on behalf of identified victims who had been directly affected by the alleged violation. Such exceptional circumstances could concern extremely vulnerable victims, for example persons detained in psychiatric and social care institutions, with no family and no alternative means of

representation, whose applications, made on their behalf by a person or organisation with which a sufficient connection was established, gave rise to important questions of general interest.

Such an approach would be in line with the European trend towards expanding legal standing and recognising the invaluable contribution made by NGOs in the field of human rights for people with disabilities; at the same time, it would also be in line with the Court's relevant case-law, which had evolved considerably in recent years, not least as a result of the intervention of NGOs.

ii. The Bulgarian Helsinki Committee

94. The Bulgarian Helsinki Committee contended that, based on its extensive experience as a human rights NGO, institutionalised people with disabilities were devoid of the protection of the criminal law, unless an NGO acted on their behalf using legal remedies in addition to public advocacy, and even in such circumstances, the practical results remained insufficient in that there remained a lack of basic access to the courts for such victims, who at present were often denied justice on procedural grounds. As a result, crime against institutionalised individuals with mental disabilities was shielded from the enforcement of laws designed to ensure its prevention, punishment and redress.

iii. The Mental Disability Advocacy Center

95. The Mental Disability Advocacy Center submitted that the factual or legal inability of individuals with intellectual disabilities to have access to justice, an issue already examined by the Court in several of its cases (for instance, *Stanev*, cited above), could ultimately lead to impunity for violations of their rights. In situations where vulnerable victims were deprived of their legal capacity and/or detained in State institutions, States could "avoid" any responsibility for protecting their lives by not providing them with any assistance in legal matters, including in relation to the protection of their human rights. The case-law of the Canadian Supreme Court, the Irish Supreme Court and the High Court of England and Wales granting legal standing to NGOs in situations where no one else was able to bring an issue of public interest before the courts was cited. The above-mentioned courts' decisions on the issue of the *locus standi* of NGOs had mainly been based on an assessment of whether the case concerned a serious matter, whether the claimant had a genuine interest in bringing the case, the claimant's expertise in the area involved in the matter and whether there was any other reasonable and effective means of bringing the issue before the courts.

2. The Court's assessment

a. The Court's approach in previous cases

i. Direct victims

96. In order to be able to lodge an application in accordance with Article 34, an individual must be able to show that he or she was "directly affected" by the measure complained of (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 33, ECHR 2008, and *İlhan v. Turkey* [GC], no. 22277/93, § 52, ECHR 2000-VII). This is indispensable for putting the protection mechanism of the Convention into motion, although this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings (see *Karner*, cited above, § 25, and *Fairfield and Others v. the United Kingdom* (dec.), no. 24790/04, ECHR 2005-VI).

Moreover, in accordance with the Court's practice and with Article 34 of the Convention, applications can only be lodged by, or in the name of, individuals who are alive (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 111, ECHR 2009). Thus, in a number of cases where the direct victim has died prior to the submission of the application, the Court has not accepted that the direct victim, even when represented, had standing as an applicant for the purposes of Article 34 of the Convention (see *Aizpurua Ortiz and Others v. Spain*, no. 42430/05, § 30, 2 February 2010; *Dvořáček and Dvořáčková v. Slovakia*, no. 30754/04, § 41, 28 July 2009; and *Kaya and Polat v. Turkey* (dec.), nos. 2794/05 and 40345/05, 21 October 2008).

ii. Indirect victims

97. Cases of the above-mentioned type have been distinguished from cases in which an applicant's heirs were permitted to pursue an application which had already been lodged. An authority on this question is *Fairfield and Others* (cited above), where a daughter lodged an application after her father's death, alleging a violation of his rights to freedom of thought, religion and speech (Articles 9 and 10 of the Convention). While the domestic courts granted Ms Fairfield leave to pursue the appeal after her father's death, the Court did not accept the daughter's victim status and distinguished this case from the situation in *Dalban v. Romania* ([GC], no. 28114/95, ECHR 1999-VI), where the application had been brought by the applicant himself, whose widow had pursued it only after his subsequent death.

In this regard, the Court has differentiated between applications where the direct victim has died after the application was lodged with the Court and those where he or she had already died beforehand.

Where the applicant has died *after* the application was lodged, the Court has accepted that the next of kin or heir may in principle pursue the application, provided that he or she has sufficient interest in the case (see, for instance, the widow and children in *Raimondo v. Italy*, 22 February 1994, § 2, Series A no. 281-A, and *Stojkovic v. the former Yugoslav Republic of Macedonia*, no. 14818/02, § 25, 8 November 2007; the parents in *X v. France*, 31 March 1992, § 26, Series A no. 234-C; the nephew and potential heir in *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII; or the unmarried or *de facto* partner in *Velikova v. Bulgaria* (dec.), no. 41488/98, ECHR 1999-V; and contrast the universal legatee not related to the deceased in *Thévenon v. France* (dec.), no. 2476/02, ECHR 2006-III; the niece in *Léger v. France* (striking out) [GC], no. 19324/02, § 50, 30 March 2009; and the daughter of one of the original applicants in a case concerning non-transferable rights under Articles 3 and 8 where no general interest was at stake, in *M.P. and Others v. Bulgaria*, no. 22457/08, §§ 96-100, 15 November 2011).

98. However, the situation varies where the direct victim dies *before* the application is lodged with the Court. In such cases the Court has, with reference to an autonomous interpretation of the concept of "victim", been prepared to recognise the standing of a relative either when the complaints raised an issue of general interest pertaining to "respect for human rights" (Article 37 § 1 *in fine* of the Convention) and the applicants as heirs had a legitimate interest in pursuing the application, or on the basis of the direct effect on the applicant's own rights (see *Micallef v. Malta* [GC], no. 17056/06, §§ 44-51, ECHR 2009, and *Marie-Louise Loyen and Bruneel v. France*, no. 55929/00, §§ 21-31, 5 July 2005). The latter cases, it may be noted, were brought before the Court following or in connection with domestic proceedings in which the direct victim himself or herself had participated while alive.

Thus, the Court has recognised the standing of the victim's next of kin to submit an application where the victim has died or disappeared in circumstances allegedly engaging the responsibility of the State (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 92, ECHR 1999-IV, and *Bazorkina v. Russia* (dec.), no. 69481/01, 15 September 2005).

99. In *Varnava and Others* (cited above) the applicants lodged the applications both in their own name and on behalf of their disappeared relatives. The Court did not consider it necessary to rule on whether the missing men should or should not be granted the status of applicants since, in any event, the close relatives of the missing men were entitled to raise complaints concerning their disappearance (ibid., § 112). The Court

examined the case on the basis that the relatives of the missing persons were the applicants for the purposes of Article 34 of the Convention.

100. In cases where the alleged violation of the Convention was not closely linked to disappearances or deaths giving rise to issues under Article 2, the Court's approach has been more restrictive, as in the case of *Sanles Sanles v. Spain* ((dec.), no. 48335/99, ECHR 2000-XI), which concerned the prohibition of assisted suicide. The Court held that the rights claimed by the applicant under Articles 2, 3, 5, 8, 9 and 14 of the Convention belonged to the category of non-transferable rights, and therefore concluded that the applicant, who was the deceased's sister-in-law and legal heir, could not claim to be the victim of a violation on behalf of her late brother-in-law. The same conclusion has been reached in respect of complaints under Articles 9 and 10 brought by the alleged victim's daughter (see *Fairfield and Others*, cited above).

In other cases concerning complaints under Articles 5, 6 or 8 the Court has granted victim status to close relatives, allowing them to submit an application where they have shown a moral interest in having the late victim exonerated of any finding of guilt (see *Nölkenbockhoff v. Germany*, 25 August 1987, § 33, Series A no. 123, and *Grădinar v. Moldova*, no. 7170/02, §§ 95 and 97-98, 8 April 2008) or in protecting their own reputation and that of their family (see *Brudnicka and Others v. Poland*, no. 54723/00, §§ 27-31, ECHR 2005-II; *Armonienė v. Lithuania*, no. 36919/02, § 29, 25 November 2008; and *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, §§ 31-33, 21 September 2010), or where they have shown a material interest on the basis of the direct effect on their pecuniary rights (see *Ressegatti v. Switzerland*, no. 17671/02, §§ 23-25, 13 July 2006; and *Marie-Louise Loyen and Bruneel*, §§ 29-30; *Nölkenbockhoff*, § 33; *Grădinar*, § 97; and *Micallef*, § 48, all cited above). The existence of a general interest which necessitated proceeding with the consideration of the complaints has also been taken into consideration (see *Marie-Louise Loyen and Bruneel*, § 29; *Ressegatti*, § 26; *Micallef*, §§ 46 and 50, all cited above; and *Biç and Others v. Turkey*, no. 55955/00, §§ 22-23, 2 February 2006).

The applicant's participation in the domestic proceedings has been found to be only one of several relevant criteria (see *Nölkenbockhoff*, § 33; *Micallef*, §§ 48-49; *Polanco Torres and Movilla Polanco*, § 31; and *Grădinar*, §§ 98-99, all cited above; and *Kaburov v. Bulgaria* (dec.), no. 9035/06, §§ 52-53, 19 June 2012).

iii. Potential victims and actio popularis

101. Article 34 of the Convention does not allow complaints *in abstracto* alleging a violation of the Convention. The Convention does not provide

for the institution of an *actio popularis* (see *Klass and Others v. Germany*, 6 September 1978, § 33, Series A no. 28; *The Georgian Labour Party v. Georgia* (dec.), no. 9103/04, 22 May 2007; and *Burden*, cited above, § 33), meaning that applicants may not complain against a provision of domestic law, a domestic practice or public acts simply because they appear to contravene the Convention.

In order for applicants to be able to claim to be a victim, they must produce reasonable and convincing evidence of the likelihood that a violation affecting them personally will occur; mere suspicion or conjecture is insufficient in this respect (see *Tauira and 18 Others v. France*, no. 28204/95, Commission decision of 4 December 1995, DR 83-B, p. 112 at p. 131, and *Monnat v. Switzerland*, no. 73604/01, §§ 31-32, ECHR 2006-X).

iv. Representation

102. According to the Court's well-established case-law (see paragraph 96 above), applications can be lodged with it only by living persons or on their behalf.

Where applicants choose to be represented under Rule 36 § 1 of the Rules of Court, rather than lodging the application themselves, Rule 45 § 3 requires them to produce a written authority to act, duly signed. It is essential for representatives to demonstrate that they have received specific and explicit instructions from the alleged victim, within the meaning of Article 34, on whose behalf they purport to act before the Court (see *Post v. the Netherlands* (dec.), no. 21727/08, 20 January 2009; as regards the validity of an authority to act, see *Aliev v. Georgia,* no. 522/04, §§ 44-49, 13 January 2009).

103. However, the Convention institutions have held that special considerations may arise in the case of victims of alleged breaches of Articles 2, 3 and 8 at the hands of the national authorities.

Applications lodged by individuals on behalf of the victim(s), even though no valid form of authority was presented, have thus been declared admissible. Particular consideration has been shown with regard to the victims' vulnerability on account of their age, sex or disability, which rendered them unable to lodge a complaint on the matter with the Court, due regard also being paid to the connection between the person lodging the application and the victim (see, *mutatis mutandis*, *İlhan*, cited above, § 55, where the complaints were brought by the applicant on behalf of his brother, who had been ill-treated; *Y.F. v. Turkey*, no. 24209/94, § 29, ECHR 2003-IX, where a husband complained that his wife had been compelled to undergo a gynaecological examination; and *S.P., D.P. and A.T. v. the United Kingdom*, cited above, where a complaint was brought by

a solicitor on behalf of children he had represented in domestic proceedings, in which he had been appointed by the guardian *ad litem*).

By contrast, in *Nencheva and Others* (cited above, § 93) the Court did not accept the victim status of the applicant association acting on behalf of the direct victims, noting that it had not pursued the case before the domestic courts and also that the facts complained of did not have any impact on its activities, since the association was able to continue working in pursuance of its goals. The Court, while recognising the standing of the relatives of some of the victims, nevertheless left open the question of the representation of victims who were unable to act on their own behalf before it, accepting that exceptional circumstances might require exceptional measures.

b. Whether the CLR had standing in the present case

104. This case concerns a highly vulnerable person with no next of kin, Mr Câmpeanu, a young Roma man with severe mental disabilities who was infected with HIV, who spent his entire life in the care of the State authorities and who died in hospital, allegedly as a result of neglect. Following his death, and without having had any significant contact with him while he was alive (see paragraph 23 above) or having received any authority or instructions from him or any other competent person, the applicant association (the CLR) is now seeking to bring before the Court a complaint concerning, amongst other things, the circumstances of his death.

105. In the Court's view the present case does not fall easily into any of the categories covered by the above case-law and thus raises a difficult question of interpretation of the Convention relating to the standing of the CLR. In addressing this question the Court will take into account the fact that the Convention must be interpreted as guaranteeing rights which are practical and effective as opposed to theoretical and illusory (see *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37, and the authorities cited therein). It must also bear in mind that the Court's judgments "serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties" (see *Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25, and *Konstantin Markin v. Russia* [GC], no. 30078/06, § 89, ECHR 2012). At the same time and, as reflected in the above case-law concerning victim status and the notion of "standing", the Court must ensure that the conditions of admissibility governing access to it are interpreted in a consistent manner.

106. The Court considers it indisputable that Mr Câmpeanu was the *direct victim*, within the meaning of Article 34 of the Convention, of the circumstances which ultimately led to his death and which are at the heart of the principal grievance brought before the Court in the present case, namely the complaint lodged under Article 2 of the Convention.

107. On the other hand, the Court cannot find sufficiently relevant grounds for regarding the CLR as an indirect victim within the meaning of its case-law. Crucially, the CLR has not demonstrated a sufficiently "close link" with the direct victim; nor has it argued that it has a "personal interest" in pursuing the complaints before the Court, regard being had to the definition of these concepts in the Court's case-law (see paragraphs 97-100 above).

108. While alive, Mr Câmpeanu did not initiate any proceedings before the domestic courts to complain about his medical and legal situation. Although he was considered formally to be a person with full legal capacity, it appears clear that in practice he was treated as a person who did not have such capacity (see paragraphs 14 and 16 above). In any event, in view of his state of extreme vulnerability, the Court considers that he was not capable of initiating any such proceedings by himself, without proper legal support and advice. He was thus in a wholly different and less favourable position than that dealt with by the Court in previous cases. These concerned persons who had legal capacity, or at least were not prevented from bringing proceedings during their lifetime (see paragraphs 98 and 100 above), and on whose behalf applications were lodged after their death.

109. Following the death of Mr Câmpeanu, the CLR brought various sets of domestic proceedings aimed at elucidating the circumstances leading up to and surrounding his death. Finally, once the investigations had concluded that there had been no criminal wrongdoing in connection with Mr Câmpeanu's death, the CLR lodged the present application with the Court.

110. The Court attaches considerable significance to the fact that neither the CLR's capacity to act for Mr Câmpeanu nor their representations on his behalf before the domestic medical and judicial authorities were questioned or challenged in any way (see paragraphs 23, 27-28, 33, 37-38 and 40-41 above); such initiatives, which would normally be the responsibility of a guardian or representative, were thus taken by the CLR without any objections from the appropriate authorities, who acquiesced in these procedures and dealt with all the applications submitted to them.

111. The Court also notes, as mentioned above, that at the time of his death Mr Câmpeanu had no known next of kin, and that when he reached the age of majority no competent person or guardian had been appointed

by the State to take care of his interests, whether legal or otherwise, despite the statutory requirement to do so. At domestic level the CLR became involved as a representative only shortly before his death – at a time when he was manifestly incapable of expressing any wishes or views regarding his own needs and interests, let alone on whether to pursue any remedies. Owing to the failure of the authorities to appoint a legal guardian or other representative, no form of representation was or had been made available for his protection or to make representations on his behalf to the hospital authorities, the national courts and to the Court (see, *mutatis mutandis*, *P., C. and S. v. the United Kingdom* (dec.), no. 56547/00, 11 December 2001, and *B. v. Romania (no. 2)*, no. 1285/03, §§ 96-97, 19 February 2013). It is also significant that the main complaint under the Convention concerns grievances under Article 2 ("Right to life"), which Mr Câmpeanu, although the direct victim, evidently could not pursue by reason of his death.

112. Against the above background, the Court is satisfied that in the exceptional circumstances of this case and bearing in mind the serious nature of the allegations, it should be open to the CLR to act as a representative of Mr Câmpeanu, notwithstanding the fact that it had no power of attorney to act on his behalf and that he died before the application was lodged under the Convention. To find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at an international level, with the risk that the respondent State might escape accountability under the Convention as a result of its own failure to appoint a legal representative to act on his behalf as it was required to do under national law (see paragraphs 59-60 above; see also, *mutatis mutandis*, *P., C. and S. v. the United Kingdom*, cited above; and *The Argeş College of Legal Advisers v. Romania*, no. 2162/05, § 26, 8 March 2011). Allowing the respondent State to escape accountability in this manner would not be consistent with the general spirit of the Convention, nor with the High Contracting Parties' obligation under Article 34 of the Convention not to hinder in any way the effective exercise of the right to bring an application before the Court.

113. Granting standing to the CLR to act as the representative of Mr Câmpeanu is an approach consonant with that applying to the right to judicial review under Article 5 § 4 of the Convention in the case of "persons of unsound mind" (Article 5 § 1 (e)). In this context it may be reiterated that it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded "the fundamental guarantees of procedure applied in matters of deprivation of liberty" (see *De Wilde, Ooms and Versyp v. Belgium*,

18 June 1971, § 76, Series A no. 12). Mental illness may entail restricting or modifying the manner of exercise of such a right (see *Golder v. the United Kingdom*, 21 February 1975, § 39, Series A no. 18), but it cannot justify impairing the very essence of the right. Indeed, special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves (see *Winterwerp v. the Netherlands*, 24 October 1979, § 60, Series A no. 33). A hindrance in fact can contravene the Convention just like a legal impediment (see *Golder*, cited above, § 26).

114. Accordingly, the Court dismisses the Government's objection concerning the lack of *locus standi* of the CLR, in view of the latter's standing as *de facto* representative of Mr Câmpeanu.

The Court further notes that the complaints under this heading are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. *Submissions to the Court*

a. The CLR

115. The CLR submitted that as a result of their inappropriate decisions concerning Mr Câmpeanu's transfer to institutions lacking the requisite skills and facilities to deal with his condition, followed by inappropriate medical actions or omissions, the authorities had contributed, directly or indirectly, to his untimely death.

The CLR emphasised that although the medical examinations undergone by Mr Câmpeanu during the months prior to his admission to the CMSC and subsequently the PMH had attested to his "generally good state" without any major health problems, his health had deteriorated sharply in the two weeks before his death, at a time when he had been under the authorities' supervision. In accordance with the extensive case-law of the Court under Article 2, as relevant to the present case, the State was required to give an explanation as to the medical care provided and the cause of Mr Câmpeanu's death (the CLR cited, among other authorities, *Kats and Others v. Ukraine*, no. 29971/04, § 104, 18 December 2008; *Dodov v. Bulgaria*, no. 59548/00, § 81, 17 January 2008; *Aleksanyan v. Russia*, no. 46468/06, § 147, 22 December 2008; *Khudobin v. Russia*,

no. 59696/00, § 84, 26 October 2006; and *Z.H. v. Hungary*, no. 28973/11, §§ 31-32, 8 November 2012).

This obligation had not been fulfilled by the Government, who on the one hand had failed to submit important medical documents concerning Mr Câmpeanu, and on the other hand had submitted before the Court a duplicate medical record covering the patient's stay at the PMH, in which important information had been altered. While the original medical record – as presented at various stages in the domestic proceedings – had not referred to any antiretroviral medication being provided to Mr Câmpeanu, the new document, written in different handwriting, included references to antiretroviral medication, thus suggesting that such medication had been given to the patient. As the Government had relied on the new document to dispute before the Court the CLR's submissions concerning the lack of antiretroviral treatment (see paragraph 122 below), the CLR submitted that the document had in all likelihood been produced after the event, to support the Government's arguments before the Court.

116. The CLR further submitted that several documents produced in the case, especially in connection with the CPT's on-site visits, proved that the authorities had definitely been aware of the substandard living conditions and provision of care and treatment at the PMH, both prior to 2004 and even around the relevant time (see paragraphs 47, 74 and 78 above).

117. The failure to provide adequate care and treatment to Mr Câmpeanu was highlighted by the very poorly kept medical records and the improperly recorded successive transfers of the patient between different hospital units. Such omissions were significant, since it was obvious that the patient's state of health had deteriorated during the relevant period and thus emergency treatment had been required. Also, as mentioned above, while the patient's antiretroviral medication had been discontinued during his short stay at the CMSC, it was very plausible that during his stay at the PMH Mr Câmpeanu had not received any antiretroviral medication either. At the same time, although a series of medical tests had been required, they had never been carried out. The official investigation had failed to elucidate such crucial aspects of the case, notwithstanding that there might have been more plausible explanations for the patient's alleged psychotic behaviour, such as septicaemia or his enforced segregation in a separate room.

In view of the above, the CLR submitted that the substantive obligations under Article 2 had clearly not been fulfilled by the respondent State.

118. The CLR further maintained that the living conditions at the PMH and the patient's placement in a segregated room amounted to a separate violation of Article 3.

Solid evidence in the file, including documents issued by Romanian authorities, such as the Government, the prosecutor's office attached to the High Court, the National Forensic Institute or the staff of the PMH itself, highlighted the substandard conditions at the PMH at the relevant time, especially concerning the lack of food, lack of heating and presence of infectious diseases.

It was undisputed that Mr Câmpeanu had been placed alone in a separate room; the CLR monitors had noted at the time of their visit to the PMH that the patient was not dressed properly, the room was cold and the staff refused to provide him with any support in meeting his basic personal needs. Whilst the Government alleged that this measure had been taken without any intention to discriminate against the patient, they had failed to provide any valid justification for it. The assertion that the room in question was the only space available was contradicted by numerous reports showing that the hospital had not been operating at full capacity at the time.

119. The CLR contended that the official investigation conducted in the case had not complied with the requirements of the Convention, for the following reasons: its scope was too narrow, focusing only on two doctors, one from the CMSC and the other from the PMH, while ignoring other staff or other agencies involved; only the immediate cause of death and the period immediately before it had been analysed; and the authorities had failed to collect essential evidence in good time or to elucidate disputed facts, including the cause of death in the case. The failure to carry out an autopsy immediately after the patient's death and failures in the provision of medical care were shortcomings emphasised in the first-instance court's decision, which had, however, been overturned by the appellate court.

The CLR submitted in conclusion that the investigation had fallen short of the requirements set out in Articles 2 and 3 of the Convention in that it had failed to establish the facts, identify the cause of death and punish the perpetrators.

120. The CLR argued that in the case of people with disabilities who were confined in State institutions, Article 13 required States to take positive steps to ensure that these people had access to justice, including by creating an independent monitoring mechanism able to receive complaints on such matters, investigate abuse, impose sanctions or refer the case to the appropriate authority.

121. The CLR submitted that in several previous cases against Romania, the Court had found a violation on account of the lack of adequate remedies concerning people with disabilities complaining under Articles 3 or 5 of the Convention (it cited *Filip v. Romania*, no. 41124/02, § 49, 14 December 2006; *C.B. v. Romania*, cited above, §§ 65-67; *Parascineti v. Romania*,

no. 32060/05, §§ 34-38, 13 March 2012; and *B. v. Romania*, cited above, § 97).

The same conclusions emerged from the consistent documentation issued by international NGOs such as Human Rights Watch or Mental Disability Rights International, and the CLR itself had also reported on the lack of safeguards against ill-treatment and the fact that residents of psychiatric institutions were largely unaware of their rights, while staff were not trained in handling allegations of abuse.

The CLR further contended that to its knowledge, despite highly credible allegations concerning suspicious deaths in psychiatric institutions, there had never been any final decision declaring a staff member criminally or civilly liable for misconduct in relation to such deaths. In the case of the 129 deaths reported at the PMH during the period from 2002 to 2004, criminal investigations had not resulted in any finding of wrongdoing, the decisions not to bring charges having been subsequently upheld by the courts.

In conclusion, the Romanian legal system lacked effective remedies within the meaning of Article 13 in relation to people with mental disabilities in general, but more particularly in relation to Mr Câmpeanu's rights as protected by Articles 2 and 3.

b. The Government

122. The Government contended that since HIV was a very serious progressive disease, the fact that Mr Câmpeanu had died from it was not in itself proof that his death had been caused by shortcomings in the medical system.

Furthermore, no evidence had been adduced to show that the authorities had failed to provide Mr Câmpeanu with antiretroviral treatment; on the contrary, the Government submitted a copy of the patient's medical records at the PMH, confirming that he had received the required antiretroviral treatment while at the hospital.

The conclusion of the Disciplinary Board of the Medical Association also confirmed the adequacy of the treatment given to Mr Câmpeanu (see paragraph 35 above). Article 2 under its substantive head was therefore not applicable to the case.

123. Under Article 3, the Government submitted that both at the CMSC and at the PMH, the general conditions (hygiene, nutrition, heating and also human resources) had been adequate and in accordance with the standards existing at the material time.

The medical care received by Mr Câmpeanu had been appropriate to his state of health; he had been admitted to the CMSC while in a "generally

good state" and transferred to the PMH once the "violent outbursts" had begun. The patient had been placed alone in a room at the PMH, not with the intention of isolating him, but because that had been the only spare room. In spite of his treatment through intravenous feeding, the patient had died on 20 February 2004 of cardiorespiratory insufficiency.

In this context, the Government argued that given the short period of time which Mr Câmpeanu had spent at the PMH, Article 3 was not applicable in relation to the material conditions at the hospital.

124. The Government contended that the criminal complaints lodged by the CLR in connection with the circumstances of Mr Câmpeanu's death had been thoroughly considered by the domestic authorities – courts, commissions or investigative bodies – which had all given detailed and compelling reasons for their rulings. Therefore, the State's liability under Articles 2 or 3 could not be engaged.

125. Concerning Article 13, the Government submitted that as this complaint related to the other complaints brought by the CLR, no separate examination was necessary; in any event, the complaints under this Article were ill-founded.

In the alternative, the Government maintained that the domestic legislation provided effective remedies within the meaning of Article 13 for the complaints raised in the application.

The Government indicated the Romanian Ombudsman as one of the available remedies. According to the statistical information available on the Ombudsman's website, the Ombudsman had been involved in several cases concerning alleged human rights infringements between 2003 and 2011.

Referring to two domestic judgments provided as evidence at the Court's request, the Government asserted that when dealing with cases involving people with mental disabilities, the Romanian courts acted very seriously and regularly gave judgments on the merits.

126. On a more specific level, in relation to Article 2, the Government submitted that the situation at the PMH had significantly improved, following complaints relating to the living and medical conditions at the hospital. In that respect a complaint appeared to constitute an effective remedy, in terms of the Convention standards.

Referring to Article 3, the Government argued that the CLR could also have brought an action seeking compensation for medical malpractice.

For the above-mentioned reasons, the Government submitted that Mr Câmpeanu had, either in person or through representation, had various effective remedies for each of the complaints raised in the application; the complaint under Article 13 was therefore inadmissible.

c. Third-party interveners

i. The Mental Disability Advocacy Center

127. The Mental Disability Advocacy Center ("the MDAC") argued that cases of life-threatening conditions in institutions housing children with mental disabilities or HIV had been documented throughout Europe, with reports suggesting that sick children tended not to be admitted to hospital, regardless of the seriousness of their condition, and that they were left to die in those institutions. In its 2009 Human Rights Report on Romania, the US Department of State had drawn attention to the continuing poor conditions at the PMH, referring to overcrowding, shortage of staff and medication, poor hygiene, and the widespread use of sedation and restraint.

Referring to international case-law on the right to life (for example, the judgments of the Inter-American Court of Human Rights in *The "Street Children" (Villagrán-Morales et al.) v. Guatemala* (merits), judgment of 19 November 1999, Series C No. 63, concerning five children who lived on the streets, and *Velásquez Rodríguez v. Honduras*, judgment of 29 July 1988, Series C No. 4), the MDAC submitted that the State's obligation to protect life included providing necessary medical treatment, taking any necessary preventive measures and implementing mechanisms capable of monitoring, investigating and prosecuting those responsible; at the same time, victims should be afforded an effective or practical opportunity to seek protection of their right to life. Failure by the State to provide extremely vulnerable persons with such an opportunity while alive should not ultimately lead to the State's impunity after their death.

ii. The Euroregional Center for Public Initiatives

128. The Euroregional Center for Public Initiatives ("the ECPI") submitted that Romania had one of the largest groups of people living with HIV in central and eastern Europe, mainly because between 1986 and 1991 some 10,000 children institutionalised in public hospitals and orphanages had been exposed to the risks of HIV transmission through multiple use of needles and microtransfusions with unscreened blood. In December 2004 there had been 7,088 cases of AIDS and 4,462 cases of HIV infections registered among children. Out of these, 3,482 children had died of AIDS by the end of 2004.

The ECPI alleged that the high incidence of HIV infection among children was due to the treatment to which they had been subjected in orphanages and hospitals, in view of the fact that children with disabilities were considered "beyond recovery" and "unproductive" and because the

personnel lacked the qualifications and interest to provide them with appropriate medical care.

The ECPI referred to the fact that in 2003 the United Nations Committee on the Rights of the Child had expressed its concern that antiretroviral treatment was accessible to only a limited number of people in Romania and its continuous provision was usually interrupted owing to lack of funds. Moreover, even at the end of 2009, stocks of antiretroviral medication had been scarce because of a lack of financial resources from the National Health Insurance Fund and the mismanagement of the national HIV programme.

The ECPI further submitted that when people living with HIV lived in closed institutions or hospitals for an extended period, their access to antiretroviral medication was heavily reliant on the steps taken by the institution to obtain supplies from the infectious-diseases doctor with whom the patient was registered. Commonly, HIV-infected patients usually lacked the information they needed in order to assert their lawful rights in accessing medical services.

In 2009 the United Nations Committee on the Rights of the Child had expressed concern that children affected by HIV often experienced barriers in accessing health services.

Concerning the particular case of people living with HIV who also suffered from mental health problems, the ECPI alleged that psychiatric hospitals sometimes refused to treat HIV-positive children and young people for fear of infection. Reference was made to a Human Rights Watch document of 2007 reporting on such situations ("Life Doesn't Wait. Romania's Failure to Protect and Support Children and Youth Living with HIV").

iii. Human Rights Watch

129. Human Rights Watch made reference in its written submissions to the conclusions of the United Nations Committee on Economic, Social and Cultural Rights, to the effect that health facilities and services must be accessible to all, especially the most vulnerable population, and that failure by governments to provide such services included the lack of a national health policy designed to ensure the right to health for everyone, bad management in the allocation of available public resources, and failure to reduce infant and maternal mortality rates.

2. The Court's assessment

a. Article 2 of the Convention

i. General principles

130. The first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take

appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-III).

The positive obligations under Article 2 must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake. This is the case, for example, in the health-care sector as regards the acts or omissions of health professionals (see *Dodov*, cited above, §§ 70, 79-83 and 87, and *Vo v. France* [GC], no. 53924/00, §§ 89-90, ECHR 2004-VIII, with further references), States being required to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives (see *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 49, ECHR 2002-I). This applies especially where patients' capacity to look after themselves is limited (see *Dodov*, cited above, § 81); in respect of the management of dangerous activities (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 71, ECHR 2004-XII); in connection with school authorities, which have an obligation to protect the health and well-being of pupils, in particular young children who are especially vulnerable and are under their exclusive control (see *Ilbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, no. 19986/06, § 35, 10 April 2012); or, similarly, regarding the medical care and assistance given to young children institutionalised in State facilities (see *Nencheva and Others*, cited above, §§ 105-16).

Such positive obligations arise where it is known, or ought to have been known to the authorities in view of the circumstances, that the victim was at real and immediate risk from the criminal acts of a third party (see *Nencheva and Others*, cited above, § 108) and, if so, that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (see *A. and Others v. Turkey*, no. 30015/96, §§ 44-45, 27 July 2004).

131. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Where the authorities decide to place and maintain in detention a person with disabilities, they should demonstrate special care in guaranteeing such conditions as correspond to any special needs resulting from his disability (see *Jasinskis v. Latvia*, no. 45744/08, §59, 21 December 2010, with further references). More broadly, the Court has held that States have an obligation to take particular measures to provide effective protection of vulnerable persons from ill-treatment of which the authorities had or ought

to have had knowledge (see *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V). Consequently, where an individual is taken into custody in good health but later dies, it is incumbent on the State to provide a satisfactory and convincing explanation of the events leading to his death (see *Carabulea v. Romania*, no. 45661/99, § 108, 13 July 2010) and to produce evidence casting doubt on the veracity of the victim's allegations, particularly if those allegations are backed up by medical reports (see *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V, and *Abdülsamet Yaman v. Turkey*, no. 32446/96, § 43, 2 November 2004).

In assessing evidence, the Court adopts the standard of proof "beyond reasonable doubt". However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Orhan v. Turkey*, no. 25656/94, § 264, 18 June 2002, and *Ireland v. the United Kingdom*, cited above, § 161).

132. The State's duty to safeguard the right to life must be considered to involve not only the taking of reasonable measures to ensure the safety of individuals in public places but also, in the event of serious injury or death, having in place an effective independent judicial system securing the availability of legal means capable of promptly establishing the facts, holding accountable those at fault and providing appropriate redress to the victim (see *Dodov*, cited above, § 83).

This obligation does not necessarily require the provision of a criminal-law remedy in every case. Where negligence has been shown, for example, the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts. However, Article 2 of the Convention will not be satisfied if the protection afforded by domestic law exists only in theory: above all, it must also operate effectively in practice (see *Calvelli and Ciglio*, cited above, § 53).

133. On the other hand, the national courts should not permit life-endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts (see, *mutatis mutandis*, *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, § 57, 20 December 2007). The Court's task therefore consists in reviewing whether and to what extent the courts, in reaching their conclusion, have carried out the careful scrutiny required by Article 2 of the Convention, so as to maintain the deterrent effect of the judicial system in place and ensure that violations of the right to life are examined and redressed (see *Öneryıldız*, cited above, § 96).

ii. Application of these principles in the present case

α. Substantive head

134. Referring to the background to the case, the Court notes at the outset that Mr Câmpeanu lived his whole life in the hands of the domestic authorities: he grew up in an orphanage after being abandoned at birth, and he was later transferred to the Placement Centre, then to the CMSC and finally to the PMH, where on 20 February 2004 he met his untimely death.

135. Throughout these stages no guardian, whether permanent or temporary, was appointed after Mr Câmpeanu turned eighteen; the presumption therefore was that he had full legal capacity, in spite of his severe mental disability.

If that was indeed so, the Court notes that the manner in which the medical authorities handled Mr Câmpeanu's case ran counter to the requirements of the Mental Health Act in the case of patients with full legal capacity: no consent was obtained for the patient's successive transfers from one medical unit to another, after he had turned eighteen; no consent was given for his admission to the PMH, a psychiatric institution; the patient was neither informed nor consulted regarding the medical care that was given to him, nor was he informed of the possibility for him to challenge any of the above-mentioned measures. The authorities' justification was that the patient "would not cooperate", or that "it was not possible to communicate with him" (see paragraphs 14 and 16 above).

In this context, the Court reiterates that in the case of *B. v. Romania* (cited above, §§ 93-98) it highlighted serious shortcomings in the manner in which the provisions of the Mental Health Act were implemented by the authorities with respect to vulnerable patients who were left without any legal assistance or protection when admitted to psychiatric institutions in Romania.

136. Moreover, the Court observes that the decisions of the domestic authorities to transfer Mr Câmpeanu and to place him firstly in the CMSC and later in the PMH were mainly based on what establishment would be willing to accommodate the patient, rather than on where he would be able to receive appropriate medical care and support (see paragraphs 12-13 above). In this connection, the Court cannot ignore the fact that Mr Câmpeanu was first placed in the CMSC, a unit not equipped to handle patients with mental health problems, and was ultimately admitted to the PMH, despite the fact that that hospital had previously refused to admit him on the ground that it lacked the necessary facilities to treat HIV (see paragraph 11 above).

137. The Court therefore considers that Mr Câmpeanu's transfers from one unit to another took place without any proper diagnosis and aftercare and

in complete disregard of his actual state of health and his most basic medical needs. Of particular note is the authorities' negligence in omitting to ensure the appropriate implementation of the patient's course of antiretroviral treatment, firstly by not providing him with the medication during his first few days in the CMSC, and subsequently by failing altogether to provide him with the medication while in the PMH (see paragraphs 14 and 115 above).

In reaching these conclusions, the Court relies on the CLR's submissions, supported by the medical documents produced before the domestic courts and the conclusions of the expert called to give an opinion on the therapeutic approach applied in Mr Câmpeanu's case (see paragraphs 33, 38 and 45 above), as well as on the information provided by the ECPI concerning the general conditions in which antiretroviral treatment was provided to HIV-infected children (see paragraph 128 above), making the CLR's assertions plausible. In view of these elements, the Court considers that the Government's allegations to the contrary are unconvincing in so far as they are not corroborated by any other evidence proving them beyond reasonable doubt.

138. Furthermore, the facts of the case indicate that, faced with a sudden change in the behaviour of the patient, who became hyperaggressive and agitated, the medical authorities decided to transfer him to a psychiatric institution, namely the PMH, where he was placed in a department that had no psychiatrists on its staff (see paragraph 21 above). As mentioned above, the PMH lacked the appropriate facilities to treat HIV-infected patients at the time; moreover, while at the PMH, the patient was never examined by an infectious-diseases specialist.

The only treatment provided to Mr Câmpeanu included sedatives and vitamins, and no meaningful medical investigation was conducted to establish the causes of the patient's mental state (see paragraphs 16 and 22 above). In fact, no relevant medical documents recording Mr Câmpeanu's clinical condition while at the CMSC and the PMH were produced by the authorities. The information concerning the possible causes of Mr Câmpeanu's death was likewise lacking in detail: the death certificate mentioned HIV and intellectual disability as important factors leading to his death which allegedly justified the authorities' decision not to carry out the compulsory autopsy on the body (see paragraphs 24-25 above).

139. The Court refers to the conclusions of the medical report issued by the expert instructed by the CLR, describing the "very poor and substandard" medical records relating to Mr Câmpeanu's state of health (see paragraph 45 above). According to this report, the medical supervision in both establishments was "scant", while the medical authorities, confronted

with the patient's deteriorating state of health, had taken measures that could at best be described as palliative. The expert further mentioned that several potential causes of death, including pneumocystis pneumonia (which was also mentioned in the autopsy report), had never been investigated or diagnosed, let alone treated, either at the CMSC or at the PMH (ibid.). The report concluded that Mr Câmpeanu's death at the PMH had been caused by "gross medical negligence" (see paragraph 46 above).

140. The Court reiterates in this context that in assessing the evidence adduced before it, particular attention should be paid to Mr Câmpeanu's vulnerable state (see paragraph 7 above) and the fact that for the duration of his whole life he was in the hands of the authorities, which are therefore under an obligation to account for his treatment and to give plausible explanations concerning such treatment (see paragraph 131 above).

The Court notes, firstly, that the CLR's submissions describing the events leading to Mr Câmpeanu's death are strongly supported by the existence of serious shortcomings in the medical authorities' decisions. Such shortcomings were described in the reasoning of the Chief Prosecutor in the decision of 23 August 2005 (see paragraph 33 above); in the first-instance court's decision of 3 October 2007, in which it decided to send the case back for further investigation (see paragraph 38 above); and in the conclusions of the medical report submitted by the CLR in the case.

Secondly, the Government have failed to produce sufficient evidence casting doubt on the veracity of the allegations made on behalf of the victim. While acknowledging that HIV may be a very serious progressive disease, the Court cannot ignore the clear and concordant inferences indicating serious flaws in the decision-making process concerning the provision of appropriate medication and care to Mr Câmpeanu (see paragraphs 137-38 above). The Government have also failed to fill in the gaps relating to the lack of relevant medical documents describing Mr Câmpeanu's situation prior to his death, and the lack of pertinent explanations as to the real cause of his death.

141. Moreover, placing Mr Câmpeanu's individual situation in the general context, the Court notes that at the relevant time, several dozen deaths (eighty-one in 2003 and twenty-eight at the beginning of 2004) had already been reported at the PMH; as mentioned in the CPT report of 2004, serious deficiencies were found at the relevant time in respect of the food given to the patients, and in respect of the insufficient heating and generally difficult living conditions, which had led to a gradual deterioration in the health of patients, especially those who were the most vulnerable (see paragraph 77 above). The appalling conditions at the PMH had been reported by several other international bodies, as described above

(see paragraph 78); the domestic authorities were therefore fully aware of the very difficult situation in the hospital.

Despite the Government's assertions that the living conditions at the PMH were adequate (see paragraph 123 above), the Court notes that at the relevant time, the domestic authorities had acknowledged before the various international bodies the deficiencies at the PMH regarding the heating and water systems, the living and sanitary conditions and the medical assistance provided (see paragraph 78 above).

142. The Court observes that in *Nencheva and Others* (cited above) the Bulgarian State was found to be in breach of its obligations under Article 2 for not having taken sufficiently prompt action to ensure effective and sufficient protection of the lives of young people in a social care home. The Court took into consideration the fact that the children's death was not a sudden event, in so far as the authorities had already been aware of the appalling living conditions in the social care home and of the increase in the mortality rate in the months prior to the relevant time (ibid., §§ 121-23).

143. The Court finds that, similarly, in the present case the domestic authorities' response to the generally difficult situation at the PMH at the relevant time was inadequate, seeing that the authorities were fully aware of the fact that the lack of heating and appropriate food, and the shortage of medical staff and medical resources, including medication, had led to an increase in the number of deaths during the winter of 2003.

The Court considers that in these circumstances, it is all the more evident that by deciding to place Mr Câmpeanu in the PMH, notwithstanding his already heightened state of vulnerability, the domestic authorities unreasonably put his life in danger. The continuous failure of the medical staff to provide Mr Câmpeanu with appropriate care and treatment was yet another decisive factor leading to his untimely death.

144. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities have failed to comply with the substantive requirements of Article 2 of the Convention, by not providing the requisite standard of protection for Mr Câmpeanu's life.

β. Procedural head

145. The Court further considers that the authorities failed not only to meet Mr Câmpeanu's most basic medical needs while he was alive, but also to elucidate the circumstances surrounding his death, including the identification of those responsible.

146. The Court notes that several procedural irregularities were singled out in various reports by the domestic authorities at the time, among them the failure to carry out an autopsy immediately after Mr Câmpeanu's death,

in breach of the domestic legal provisions, and the lack of an effective investigation concerning the therapeutic approach applied in his case (see paragraphs 33, 38 and 40 above).

Moreover, serious procedural shortcomings were highlighted in the Calafat District Court's judgment, including the failure to collect essential medical evidence and to provide an explanation for the contradictory statements by the medical staff (see paragraph 38 above). However, as that judgment was not upheld by the County Court, the shortcomings noted have never been addressed, let alone remedied. In its brief reasoning, the County Court relied mainly on the decision of the Medical Association and the forensic report, which ruled out any medical negligence in the case while concluding that the patient had been provided with appropriate medical treatment.

The Court finds these conclusions to be strikingly terse, in view of the acknowledged scarcity of medical information documenting the treatment provided to Mr Câmpeanu (see paragraph 45 above) and in view of the objective situation of the PMH as regards the human and medical resources available to it (see paragraphs 77-78 above).

The Court further takes note of the CLR's assertion that in the case of the 129 deaths at the PMH reported between 2002 and 2004 the criminal investigations were all terminated without anyone being identified or held civilly or criminally liable for misconduct.

147. Having regard to all these elements, the Court concludes that the authorities have failed to subject Mr Câmpeanu's case to the careful scrutiny required by Article 2 of the Convention and thus to carry out an effective investigation into the circumstances surrounding his death.

There has accordingly also been a violation of Article 2 of the Convention under its procedural limb.

b. Article 13 taken in conjunction with Article 2

i. General principles

148. Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order.

The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are

afforded some discretion as to the manner in which they conform to their Convention obligations under this provision.

The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless the remedy required by Article 13 must be "effective" in practice as well as in law. In particular, its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, §§ 96-97, ECHR 2002-II).

149. Where a right of such fundamental importance as the right to life or the prohibition against torture, inhuman and degrading treatment is at stake, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure. Where alleged failure by the authorities to protect persons from the acts of others is concerned, Article 13 may not always require the authorities to assume responsibility for investigating the allegations. There should, however, be available to the victim or the victim's family a mechanism for establishing any liability of State officials or bodies for acts or omissions involving the breach of their rights under the Convention (see *Z and Others v. the United Kingdom*, cited above, § 109).

In the Court's opinion, the authority referred to in Article 13 may not necessarily in all instances be a judicial authority in the strict sense. Nevertheless, the powers and procedural guarantees an authority possesses are relevant in determining whether the remedy before it is effective (see *Klass and Others*, cited above, § 67). The Court has held that judicial remedies furnish strong guarantees of independence, access for the victim and family, and enforceability of awards in compliance with the requirements of Article 13 (see *Z and Others v. the United Kingdom*, cited above, § 110).

ii. Application of these principles in the present case

150. As mentioned above, Article 13 must be interpreted as guaranteeing an "effective remedy before a national authority" to everyone who claims that his or her rights and freedoms under the Convention have been violated. The fundamental requirement of such a remedy is that the victim has effective access to it.

151. In the present case, the Court has already established that Mr Câmpeanu's vulnerability, coupled with the authorities' failure to implement the existing legislation and to provide him with appropriate legal support, were factors that supported the legal basis for its exceptional

recognition of the *locus standi* of the CLR (see paragraph 112 above). Had it not been for the CLR, the case of Mr Câmpeanu would never have been brought to the attention of the authorities, whether national or international.

However, the Court notes that the CLR's initiatives on behalf of Mr Câmpeanu were of a more *sui generis* nature, rather than falling within the existing legal framework relating to the rights of mentally disabled individuals, in view of the fact that this framework was ill-suited to address the specific needs of such individuals, notably regarding the practical possibility for them to have access to any available remedy. Indeed, the Court has previously found the respondent State to be in breach of Articles 3 or 5 of the Convention on account of the lack of adequate remedies concerning people with disabilities, including their limited access to any such potential remedies (see *C.B. v. Romania*, §§ 65-67; *Parascineti*, §§ 34-38; and *B. v. Romania*, § 97, all cited above).

152. On the basis of the evidence adduced in the present case, the Court has already found that the respondent State was responsible under Article 2 for failing to protect Mr Câmpeanu's life while he was in the care of the domestic medical authorities and for failing to conduct an effective investigation into the circumstances leading to his death. The Government have not referred to any other procedure whereby the liability of the authorities could be established in an independent, public and effective manner.

The Court further considers that the examples mentioned by the Government as indicative of the existence of appropriate remedies under Article 13 (see paragraph 125 above) are either insufficient or lacking in effectiveness, in view of their limited impact and the lack of procedural safeguards they afford.

153. In view of the above-mentioned considerations, the Court considers that the respondent State has failed to provide an appropriate mechanism capable of affording redress to people with mental disabilities claiming to be victims under Article 2 of the Convention.

More particularly, the Court finds a violation of Article 13 of the Convention taken in conjunction with Article 2, on account of the State's failure to secure and implement an appropriate legal framework that would have enabled Mr Câmpeanu's allegations relating to breaches of his right to life to have been examined by an independent authority.

c. Article 3, taken alone and in conjunction with Article 13 of the Convention

154. Having regard to its findings in paragraphs 140 to 147 and its conclusion in paragraph 153 above, the Court considers that no separate

issue arises concerning the alleged breaches of Article 3, taken alone and in conjunction with Article 13 (see, *mutatis mutandis*, *Nikolova and Velichkova*, cited above, § 78, and *Timus and Tarus v. the Republic of Moldova*, no. 70077/11, § 58, 15 October 2013).

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

155. The CLR further submitted that Mr Câmpeanu had suffered a breach of his rights protected by Articles 5, 8 and 14 of the Convention.

156. However, having regard to the facts of the case, the submissions of the parties and its findings under Articles 2 and 13 of the Convention, the Court considers that it has examined the main legal questions raised in the present application and that there is no need to give a separate ruling on the remaining complaints (see, among other authorities, *Kamil Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007; *The Argeş College of Legal Advisers*, cited above, § 47; *Women On Waves and Others v. Portugal*, no. 31276/05, § 47, 3 February 2009; *Velcea and Mazăre v. Romania*, no. 64301/01, § 138, 1 December 2009; *Villa v. Italy*, no. 19675/06, § 55, 20 April 2010; *Ahmet Yıldırım v. Turkey*, no. 3111/10, § 72, ECHR 2012; and *Mehmet Hatip Dicle v. Turkey*, no. 9858/04, § 41, 15 October 2013; see also *Varnava and Others*, cited above, §§ 210-11).

III. ARTICLE 46 … OF THE CONVENTION

A. Article 46 of the Convention

157. The relevant parts of Article 46 read as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
>
> …"

158. The Court reiterates that under Article 46 of the Convention the Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or,

if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII, and *Stanev v. Bulgaria* [GC], no. 36760/06, § 254, ECHR 2012). The Court further notes that it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order to discharge its obligation under Article 46 of the Convention (see *Scozzari and Giunta*, cited above, and *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I).

159. However, with a view to assisting the respondent State to fulfil its obligations under Article 46, the Court may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the situation it has found to exist (see, among many other authorities, *Vlad and Others v. Romania*, nos. 40756/06, 41508/07 and 50806/07, § 162, 26 November 2013).

160. In the present case the Court observes that owing to the failure of the authorities to appoint a legal guardian or other representative, no form of representation was or had been made available for Mr Câmpeanu's protection or to make representations on his behalf to the hospital authorities, the national courts or this Court (see paragraph 111 above). In the exceptional circumstances that prompted it to allow the CLR to act on behalf of Mr Câmpeanu (see conclusion in paragraph 112 above) the Court has also found a violation of Article 13 of the Convention taken in conjunction with Article 2 on account of the State's failure to secure and implement an appropriate legal framework that would have enabled complaints concerning Mr Câmpeanu's allegations to have been examined by an independent authority (see paragraphs 150-53 above; see also paragraph 154 regarding the complaints under Article 3, taken alone and in conjunction with Article 13). Thus, the facts and circumstances in respect of which the Court found a violation of Articles 2 and 13 reveal the existence of a wider problem calling for it to indicate general measures for the execution of its judgment.

161. Against this background, the Court recommends that the respondent State envisage the necessary general measures to ensure that mentally disabled persons in a situation comparable to that of Mr Câmpeanu, are afforded independent representation, enabling them to have Convention complaints relating to their health and treatment examined before a court or other independent body (see, *mutatis mutandis*, paragraph 113 above and *Stanev*, cited above, § 258).

…

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaints under Articles 2, 3 and 13 of the Convention admissible;
2. *Holds*, unanimously, that there has been a violation of Article 2 of the Convention, in both its substantive and procedural aspects;
3. *Holds*, unanimously, that there has been a violation of Article 13 of the Convention taken in conjunction with Article 2;
4. *Holds,* by fourteen votes to three, that it is not necessary to examine the complaint under Article 3, taken alone or in conjunction with Article 13 of the Convention;
5. *Holds,* unanimously, that it is not necessary to examine the admissibility and merits of the complaints under Articles 5 and 8 of the Convention;
6. *Holds,* by fifteen votes to two, that it is not necessary to examine the admissibility and merits of the complaints under Article 14 of the Convention;

…

EUROPEAN COURT OF HUMAN RIGHTS

CASE OF HASSAN v. THE UNITED KINGDOM
(Application no. 29750/09)

GRAND CHAMBER

JUDGMENT OF 16 SEPTEMBER 2014

[Extracts][1]

1. This is an excerpt from the judgment delivered by the Grand Chamber in the case of *Hassan v. the United Kingdom*. It contains a summary which does not bind the Court. The full English text of the judgment is available in the HUDOC database at: http://hudoc.echr.coe.int/eng?i=001-146501. In addition to the authentic English and French versions of this judgment, HUDOC also contains Spanish translations of select case-law at: http://hudoc.echr.coe.int.

SUMMARY[1]

Internment in Iraq under Third and Fourth Geneva Conventions

By reason of the coexistence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in Article 5 § 1 should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions (see paragraph 104 of the judgment).

Article 1

Jurisdiction of States – Territorial jurisdiction in relation to detention of Iraqi national by coalition of armed forces in Iraq – Extraterritorial jurisdiction – Physical power and control criterion – Jurisdiction in active-hostilities phase of international armed conflict

Article 5

Lawful arrest or detention – Internment in Iraq under Third and Fourth Geneva Conventions – International armed conflict – Absence of request for derogation under Article 15 of the Convention – Rules of interpretation under Article 31 § 3 (b) and (c) of Vienna Convention on the Law of Treaties – Subsequent State practice of non-derogation – Interrelationship between international humanitarian law and international human rights law – Grounds of permitted deprivation of liberty under Article 5 § 1 of the Convention – Lawfulness – Arbitrariness – Procedural safeguards

*

* *

Facts

In March 2003 a coalition of armed forces led by the United States of America invaded Iraq. After occupying the region of Basrah, the British army started arresting high-ranking members of the ruling Ba'ath Party and the applicant, a senior member of the party, went into hiding leaving his brother Tarek behind to protect the family home in Umm Qasr. On the morning of 23 April 2003 a British army unit came to the house hoping to arrest the applicant. According to their records, they found Tarek Hassan in the house armed with an AK-47 machine gun and arrested him on suspicion of being a combatant or a civilian posing a threat to security. He was taken later that day to Camp Bucca, a detention facility operated by the United States. Parts of the camp were also used by the United Kingdom

1. This summary by the Registry does not bind the Court.

to detain and interrogate detainees. Following interrogation by both US and UK authorities, Tarek Hassan was deemed to be of no intelligence value and, according to the records, was released on or around 2 May 2003 at a drop-off point in Umm Qasr. His body was discovered, bearing marks of torture and execution, some 700 km away in early September 2003.

In 2007 the applicant, the brother of the deceased, brought proceedings in the English administrative court, but these were dismissed on the ground that Camp Bucca was a US rather than a UK military establishment.

In his application to the European Court, the applicant alleged that his brother was arrested and detained by British forces in Iraq and was subsequently found dead in unexplained circumstances. He complained under Article 5 §§ 1, 2, 3 and 4 of the Convention that the arrest and detention were arbitrary and unlawful and lacking in procedural safeguards and under Articles 2, 3 and 5 that the UK authorities failed to carry out an investigation into the circumstances of the detention, ill-treatment and death.

Law

1. Articles 2 and 3: There was no evidence to suggest that Tarek Hassan was ill-treated while in detention such as to give rise to an obligation under Article 3 to carry out an official investigation. Nor was there any evidence that the UK authorities were responsible in any way, directly or indirectly, for his death, which had occurred some four months after his release from Camp Bucca, in a distant part of the country not controlled by United Kingdom forces. In the absence of any evidence of the involvement of United Kingdom State agents in the death, or even of any evidence that the death occurred within territory controlled by the United Kingdom, no obligation to investigate under Article 2 could arise.

Conclusion: inadmissible (manifestly ill-founded).

2. Article 5 §§ 1, 2, 3 and 4:

a. *Jurisdiction* – i. *Period between capture by British troops and admission to Camp Bucca*: Tarek Hassan was within the physical power and control of the United Kingdom soldiers and therefore fell within United Kingdom jurisdiction. The Court rejected the Government's argument that jurisdiction should not apply in the active-hostilities phase of an international armed conflict, where the agents of the Contracting State were operating in territory of which they were not the occupying power, and where the conduct of the State should instead be subject to the requirements of international humanitarian law. In the Court's view, such a conclusion was inconsistent with its own case-law and with the case-law of the International Court of Justice holding that international human rights law and international humanitarian law could apply concurrently.

ii. *Period after admission to Camp Bucca*: The Court did not accept the Government's argument that jurisdiction should be excluded for the period following Tarek Hassan's

admission to Camp Bucca as it involved a transfer of custody from the United Kingdom to the United States. Tarek Hassan was admitted to the Camp as a United Kingdom prisoner. Shortly after his admission, he was taken to a compound entirely controlled by United Kingdom forces. Under the Memorandum of Arrangement between the United Kingdom, United States and Australian governments relating to the transfer of custody of detainees, it was the United Kingdom which had responsibility for the classification of United Kingdom detainees under the Third and Fourth Geneva Conventions and for deciding whether they should be released. While it was true that certain operational aspects relating to Tarek Hassan's detention at Camp Bucca were transferred to US forces – escorting him to and from the compound and guarding him elsewhere in the camp – the United Kingdom had retained authority and control over all aspects of the detention relevant to the applicant's complaints under Article 5.

Tarek Hassan had thus been within the jurisdiction of the United Kingdom from the moment of his capture on 23 April 2003 until his release, most probably at Umm Qasr on 2 May 2003.

Conclusion: within the jurisdiction (unanimously).

b. *Merits*: There were important differences of context and purpose between arrests carried out during peacetime and the arrest of a combatant in the course of an armed conflict. Detention under the powers provided for in the Third and Fourth Geneva Conventions was not congruent with any of the permitted grounds of deprivation of liberty set out in sub-paragraphs (a) to (f) of Article 5 § 1.

The United Kingdom had not lodged any formal request under Article 15 of the Convention (derogation in time of emergency) allowing it to derogate from its obligations under Article 5 in respect of its operations in Iraq. Instead, the Government had in their submissions requested the Court to disapply the United Kingdom's obligations under Article 5 or in some other way interpret them in the light of the powers of detention available to it under international humanitarian law.

The starting-point for the Court's examination was its constant practice of interpreting the Convention in the light of the 1969 Vienna Convention on the Law of Treaties, Article 31 § 3 of which made it necessary when interpreting a treaty to take into account (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation and (c) any relevant rules of international law applicable in the relations between the parties.

As to Article 31 § 3 (a) of the Vienna Convention, there had been no subsequent agreement between the Contracting States as to the interpretation of Article 5 of the Convention in situations of international armed conflict. However, as regards Article 31 § 3 (b), the Court had previously stated that a consistent practice on the

part of the Contracting States, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention. The practice of the Contracting States was not to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts. That practice was mirrored by State practice in relation to the International Covenant for the Protection of Civil and Political Rights.

As to the criterion contained in Article 31 § 3 (c), the Court reiterated that the Convention had to be interpreted in harmony with other rules of international law, including the rules of international humanitarian law. The Court had to endeavour to interpret and apply the Convention in a manner which was consistent with the framework under international law delineated by the International Court of Justice. Accordingly, the lack of a formal derogation under Article 15 of the Convention did not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in the applicant's case.

Nonetheless, even in situations of international armed conflict, the safeguards under the Convention continued to apply, albeit interpreted against the background of the provisions of international humanitarian law. By reason of the coexistence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out under sub-paragraphs (a) to (f) should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. The Court was mindful of the fact that internment in peacetime did not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15. It could only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security were accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers. As with the grounds of permitted detention set out in those sub-paragraphs, deprivation of liberty pursuant to powers under international humanitarian law had to be "lawful" to preclude a violation of Article 5 § 1. That meant that detention had to comply with the rules of international humanitarian law and, most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which was to protect the individual from arbitrariness.

As regards procedural safeguards, the Court considered that, in relation to detention taking place during an international armed conflict, Article 5 §§ 2 and 4 had also to be interpreted in a manner which took into account the context and the applicable rules of international humanitarian law. Articles 43 and 78 of the Fourth Geneva Convention provide that internment "shall be subject to periodical review, if possible every six months, by a competent body". Whilst it might not

be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent "court" in the sense generally required by Article 5 § 4, nonetheless, if the Contracting State is to comply with its obligations under Article 5 § 4 in this context, the "competent body" should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay. Article 5 § 3, however, had no application in the present case since Tarek Hassan was not detained in accordance with the provisions of paragraph 1 (c) of Article 5.

Turning to the facts of the applicant's case, the Court considered that the UK authorities had had reason to believe that Tarek Hassan, who was found by British troops armed and on the roof of his brother's house, where other weapons and documents of a military-intelligence value had been retrieved, might be either a person who should be detained as a prisoner of war or whose internment was necessary for imperative reasons of security, both of which provided a legitimate ground for capture and detention under the Third and Fourth Geneva Conventions. Almost immediately following his admission to Camp Bucca, he had been subject to a screening process in the form of two interviews by US and UK military intelligence officers, which had led to his being cleared for release since it was established that he was a civilian who did not pose a threat to security. The evidence pointed to his having been physically released from the Camp shortly thereafter.

Against this background, it would appear that Tarek Hassan's capture and detention were consistent with the powers available to the United Kingdom under the Third and Fourth Geneva Conventions, and were not arbitrary. Moreover, in the light of his clearance for release and physical release within a few days of being brought to the Camp, it was unnecessary for the Court to examine whether the screening process constituted an adequate safeguard to protect against arbitrary detention. Finally, it would appear from the context and the questions that Tarek Hassan was asked during the two screening interviews that the reason for his detention would have been apparent to him.

Conclusion: no violation (thirteen votes to four).

JUDGMENT

In the case of *Hassan v. the United Kingdom*,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Dean Spielmann, *President*,
Josep Casadevall,
Guido Raimondi,
Ineta Ziemele,
Mark Villiger,
Isabelle Berro-Lefèvre,
Dragoljub Popović,
George Nicolaou,
Luis López Guerra,
Mirjana Lazarova Trajkovska,
Ledi Bianku,
Zdravka Kalaydjieva,
Vincent A. De Gaetano,
Angelika Nußberger,
Paul Mahoney,
Faris Vehabović,
Robert Spano, *judges*,
and Michael O'Boyle, *Deputy Registrar*,

…

Delivers the following judgment …:

PROCEDURE

1. The case originated in an application (no. 29750/09) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Iraqi national, Mr Khadim Resaan Hassan ("the applicant"), on 5 June 2009.

2. The applicant was represented by Mr P. Shiner, a solicitor practising in Birmingham, together with Mr T. Otty QC and Mr T. Hickman, barristers practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Ms R. Tomlinson, Foreign and Commonwealth Office.

…

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The facts of the case, as submitted by the parties, may be summarised as follows. Where certain facts are in dispute, each party's version of events is set out.

A. The invasion of Iraq

9. On 20 March 2003 a coalition of armed forces under unified command, led by the United States of America with a large force from the United Kingdom and small contingents from Australia, Denmark and Poland, commenced the invasion of Iraq from their assembly point across the border with Kuwait. By 5 April 2003 British forces had captured Basrah and by 9 April 2003 US troops had gained control of Baghdad. Major combat operations in Iraq were declared complete on 1 May 2003.

B. The capture of the applicant's brother by British forces

10. Prior to the invasion, the applicant was a general manager in the national secretariat of the Ba'ath Party and a general in the Al-Quds Army, the army of the Ba'ath Party. He lived in Umm Qasr, a port city in the region of Basrah, near the border with Kuwait and about 50 km from Al-Basrah (Basrah City). After the British army entered into occupation of Basrah, they started arresting high-ranking members of the Ba'ath Party. Other Ba'ath Party members were killed by Iraqi militia. The applicant and his family therefore went into hiding, leaving the applicant's brother, Tarek Resaan Hassan (hereinafter "Tarek Hassan"), and his cousin to protect the family home.

11. According to information given by the Government, members of a British army unit, the 1st Battalion The Black Watch, went to the applicant's house early in the morning of 23 April 2003, hoping to arrest him. The applicant was not there, but the British forces encountered Tarek Hassan, who was described in the contemporaneous report drawn up by the arresting unit ("the battalion record") as a "gunman", found on the roof of the house with an AK-47 machine gun. The battalion record indicated that the "gunman" identified himself as the brother of the applicant and that he was arrested at approximately 6.30 a.m. It further indicated that the house was found by the arresting soldiers to contain other firearms and a number of documents of intelligence value, related to local membership of the Ba'ath Party and the Al-Quds Army.

12. According to a statement made by the applicant and dated 30 November 2006, Tarek Hassan was arrested by British troops on 22 April 2003, in the applicant's absence. According to this statement, "When my sisters approached the British military authority they were told that I had to surrender myself to them before they would release my brother". In a later statement, dated 12 September 2008, the applicant did not mention his sisters but instead stated that he asked his friend, Saeed Teryag, and his neighbour Haj Salem, to ask British forces for information about Tarek Hassan. The applicant asked these friends because he could trust them; Haj Salem was a respected businessman and Saeed Teryag had been to university and spoke English. According to the applicant, "[W]hen they approached the British military authorities the British told them I had to surrender myself to them before they would release my brother".

13. According to a summary of a telephone interview with the applicant's neighbour, Mr Salim Hussain Nassir Al-Ubody, dated 2 February 2007, Tarek Hassan was taken away by British soldiers on an unknown date in April at around 4.30 a.m., with his hands tied behind his back. Mr Al-Ubody stated that he approached one of the Iraqis who accompanied the soldiers to ask what they wanted, and was told that the soldiers had come to arrest the applicant. Three days later, the applicant telephoned Mr Al-Ubody and asked him to find a guard for his house and to find out from the British army what had happened to Tarek Hassan. Two days later, Mr Al-Ubody went to the British headquarters at the Shatt-Al-Arab Hotel. He asked an Iraqi translator if he could find out anything about Tarek Hassan. Two days later, when Mr Al-Ubody returned, the translator informed him that the British forces were keeping Tarek Hassan until the applicant surrendered. The translator further advised Mr Al-Ubody not to return, as this might expose him to questioning.

C. Detention at Camp Bucca

14. Both parties agreed that Tarek Hassan was taken by British forces to Camp Bucca. This Camp, situated about 2.5 km from Umm Qasr and about 70 km south of Al-Basrah, was first established on 23 March 2003 as a UK detention facility. However, it officially became a US facility, known as "Camp Bucca", on 14 April 2003. In April 2003 the Camp was composed of eight compounds, divided by barbed-wire fencing, each with a single entry point. Each compound contained open-sided tents capable of housing several hundred detainees, a water tap, latrines and an uncovered area.

15. For reasons of operational convenience, the United Kingdom continued to detain individuals they had captured at Camp Bucca. One compound was set aside for internees detained by the United Kingdom on

suspicion of criminal offences. In addition, the United Kingdom operated a separate compound at the Camp for its Joint Forward Interrogation Team (JFIT). This compound had been built by British forces and continued to be administered by them. Although detainees captured by both the British and the US armies were interrogated at the JFIT compound, and teams of UK and US interrogators worked there, the United Kingdom JFIT team controlled the detention and interrogation of all prisoners held there. Elsewhere in the Camp, the US army was responsible for guarding and escorting detainees and the United Kingdom was obliged to reimburse the United States for costs involved in maintaining detainees who were captured by the United Kingdom and who were held at the Camp. The British Military Provost Staff (military police) had an "overseeing responsibility" for UK detainees transferred to US custody, except those detained in the JFIT compound. UK detainees who were ill or injured were treated in British field hospitals. The UK authorities were responsible for liaising with the International Committee of the Red Cross (ICRC) about the treatment of UK detainees and the notification of their families regarding the detention (see further paragraph 20 below). The United Kingdom also remained responsible for classifying detainees under Articles 4 and 5 of the Third Geneva Convention (see paragraph 33 below).

16. In anticipation of the United Kingdom using shared facilities to hold UK detainees, on 23 March 2003 the United Kingdom, United States and Australian governments entered into a memorandum of arrangement (MOA) relating to the transfer of custody of detainees, which provided as follows:

> "This arrangement establishes procedures in the event of the transfer from the custody of either the US, UK or Australian forces to the custody of any of the other parties, any Prisoners of War, Civilian Internees, and Civilian Detainees taken during operations against Iraq.
>
> The Parties undertake as follows:
>
> 1. This arrangement will be implemented in accordance with the Geneva Convention Relative to the Treatment of Prisoners of War and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, as well as customary international law.
>
> 2. US, UK, and Australian forces will, as mutually determined, accept (as Accepting Powers) prisoners of war, civilian internees, and civilian detainees who have fallen into the power of any of the other parties (the Detaining Power) and will be responsible for maintaining and safeguarding all such individuals whose custody has been transferred to them. Transfers of prisoners of war, civilian internees and civilian detainees between Accepting Powers may take place as mutually determined by both the Accepting Power and the Detaining Power.

3. Arrangements to transfer prisoners of war, civilian internees, and civilian detainees who are casualties will be expedited, in order that they may be treated according to their medical priority. All such transfers will be administered and recorded within the systems established under this arrangement for the transfer of prisoners of war, civilian internees, and civilian detainees.

4. Any prisoners of war, civilian internees, and civilian detainees transferred by a Detaining Power will be returned by the Accepting Power to the Detaining Power without delay upon request by the Detaining Power.

5. The release or repatriation or removal to territories outside Iraq of transferred prisoners of war, civilian internees, and civilian detainees will only be made upon the mutual arrangement of the Detaining Power and the Accepting Power.

6. The Detaining Power will retain full rights of access to any prisoner of war, civilian internees and civilian detainees transferred from Detaining Power custody while such persons are in the custody of the Accepting Power.

7. The Accepting Power will be responsible for the accurate accountability of all prisoners of war, civilian internees, and civilian detainees transferred to it. Such records will be available for inspection by the Detaining Power upon request. If prisoners of war, civilian internees, or civilian detainees are returned to the Detaining Power, the records (or a true copy of the same) relating to those prisoners of war, civilian internees, and civilian detainees will also be handed over.

8. The Detaining Powers will assign liaison officers to Accepting Powers in order to facilitate the implementation of this arrangement.

9. The Detaining Power will be solely responsible for the classification under Articles 4 and 5 of the Geneva Convention Relative to the Treatment of Prisoners of War of potential prisoners of war captured by its forces. Prior to such a determination being made, such detainees will be treated as prisoners of war and afforded all the rights and protections of the Convention even if transferred to the custody of an Accepting Power.

10. Where there is doubt as to which party is the Detaining Power, all Parties will be jointly responsible for and have full access to all persons detained (and any records concerning their treatment) until the Detaining Power has by mutual arrangement been determined.

11. To the extent that jurisdiction may be exercised for criminal offenses, to include pre-capture offenses, allegedly committed by prisoners of war, civilian internees, and civilian detainees prior to a transfer to an Accepting Power, primary jurisdiction will initially rest with the Detaining Power. Detaining Powers will give favourable consideration to any request by an Accepting Power to waive jurisdiction.

12. Primary jurisdiction over breaches of disciplinary regulations and judicial offenses allegedly committed by prisoners of war, civilian internees, and civilian detainees after transfer to an Accepting Power will rest with the Accepting Power.

13. The Detaining Power will reimburse the Accepting Power for the costs involved in maintaining prisoners of war, civilian internees, and civilian detainees transferred pursuant to this arrangement.

14. At the request of one of the Parties, the Parties will consult on the implementation of this arrangement."

17. According to the witness statement of Major Neil B. Wilson, who served with the Military Provost Staff at Camp Bucca during the period in question, the usual procedure was for a detainee to arrive at the Camp with a military escort from the capturing unit. On arrival he would be held in a temporary holding area while his documents were checked and his personal possessions were taken from him. Medical treatment would be provided at this point if required. The detainee would then be processed through the arrivals tent by UK personnel with the aid of an interpreter. A digital photograph would be taken and this, together with other information about the detainee, would be entered on the database used by the UK authorities to record a wide range of military-personnel information during the operations in Iraq, including detainee information, known as the AP3-Ryan database.

18. Examination of this database showed that there was no entry under the name Tarek Resaan Hassan but there was an entry, with a photograph, for "Tarek Resaan Hashmyh Ali". In his witness statement the applicant explained that for official purposes Iraqis use their own first name, followed by the names of their father, mother, grandfather and great-grandfather. "Ali" was the applicant's great-grandfather's name and it appeared that Hassan (his grandfather's name) was omitted by mistake. Tarek Hassan was issued with a wristband printed with his UK internment serial number UKDF018094IZSM ("DF" denoting "detention facility", "IZ" meaning allegiance to Iraq and "SM" standing for "soldier male"). Screen shots from the AP3-Ryan database also show that Tarek Hassan was asked whether he consented to the national authorities being informed of his detention and that he did not consent to this.

19. Following the UK registration process, detainees would be transferred to the US forces for a second registration. This involved the issue of a US number, printed on a wristband. Tarek Hassan's US registration number was UK912-107276EPW46. The "UK" reference indicated that the United Kingdom was the capturing nation and "EPW" indicated that he was treated by the US forces as an enemy prisoner of war; however, at this stage all detainees were classified as prisoners of war except those captured by British forces on suspicion of having committed criminal offences. After registration, detainees were usually medically examined, then provided with bedding and eating and washing kits and transferred by US forces to the accommodation areas.

20. The Government submitted a witness statement by Mr Timothy Lester, who was charged with running the United Kingdom Prisoner of War Information Bureau (UKPWIB) in respect of Iraq from the start of military operations there in March 2003. He stated that the UKPWIB operated in Iraq as the "National Information Bureau" required by Article 122 of the Third Geneva Convention and monitored details of prisoner-of-war internees and criminal detainees in order to facilitate contact with their next of kin. The Third Geneva Convention also required the establishment of a "Central Prisoners of War Information Agency". This role was subsumed by the Central Tracing Agency of the ICRC. The ICRC collected information about the capture of individuals and, subject to the consent of the prisoner, transmitted it to the prisoner's country of origin or the power on which he depended. In practice, details of all prisoners taken into custody by British forces were entered by staff at the detention facility in Iraq and sent to Mr Lester in London, who then transferred the data to a spreadsheet and downloaded it to the ICRC's secure website. He stated that during the active-combat phase he typically passed data to the ICRC on a weekly basis, and monthly thereafter. However, Tarek Hassan's details were not notified to the ICRC until 25 July 2003, because of a delay caused by the updating of the UKPWIB computer system. In any event, it was noted on Tarek Hassan's record that he did not consent to the Iraqi authorities being notified of his capture (see paragraph 18 above). In the absence of consent, Mr Lester considered it unlikely that the ICRC would have informed the Iraqi authorities and that those authorities would, in turn, have informed the Hassan family.

D. The screening process

21. According to the Government, where the status of a prisoner was uncertain at the time of his arrival at Camp Bucca, he would be registered as a prisoner of war by the UK authorities. Any detainee, such as Tarek Hassan, captured in a deliberate operation was taken immediately to the JFIT compound for a two-stage interview. According to the Government, there were UK and US interrogation teams working in the JFIT compound, and both teams interviewed both UK and US-captured detainees. The first interview may have been undertaken simply by whichever team was available when the detainee arrived. The aim of the interview process was to identify military or paramilitary personnel who might have information pertinent to the military campaign and, where it was established that the detainee was a non-combatant, whether there were grounds to suspect that he was a security risk or a criminal. If no such reasonable grounds existed,

the individual was classified as a civilian not posing a threat to security and ordered to be released immediately.

22. A printout from the JFIT computer database indicated that in Camp Bucca Tarek Hassan was assigned JFIT no. 494 and registration no. UK107276. His arrival was recorded as 23 April 2003 at 16.40 and his departure as 25 April 2003 at 17.00, with his "final destination" recorded as "Registration (Civ Cage)". Under the entry "Release/Keep", the letter "R" was entered. Under the heading "TQ", which stood for "tactical questioning", there was the entry "231830ZAPR03-Steve" and under the heading "Intg 1" was the entry "250500ZAPR03". According to the Government, the first of these entries meant that Tarek Hassan was first subjected to tactical questioning on 23 April 2003 at 18.30 Zulu ("Zulu" in this context meant Coordinated Universal Time, also known as Greenwich Mean Time). On 23 April, 18.30 Zulu would have been 21.30 Iraqi time. The second entry indicated that Tarek Hassan was again subject to questioning on 25 April 2003 at 05.00 Zulu, or 08.00 local time and then released into the civilian pen at Camp Bucca at 20.00 local time on 25 April 2003.

23. The Government provided the Court with a copy of a record of an interview between Tarek Hassan and US agents, dated 23 April 2003, 18.30 Zulu, which stated as follows:

> "EPW [Enemy Prisoner of War] was born in BASRA on August 3, 1981. He currently resides in his home with his father, mother, older brother (Name: Qazm; born in the 1970s), and his little sister (age; unexploited). Home is across from the Khalissa school in the Jamiyat region in N. BASRA. EPW left middle school as a recruit to play soccer. He currently plays in the Basra Soccer Club and his position is attacker/forward. His team receives money from the government and the Olympic committee to pay for team expenses. EPW has no job since soccer is his life and they pay for all of his soccer expenses.
>
> EPW knows that he was brought in because of his brother, Qazm. Qazm is a Othoo Sherba in the Ba'ath party and he fled his home four days ago to an unknown destination. Qazm joined the Ba'ath party in 1990 and is involved in regular meetings and emergency action planning (nothing else exploited). Before the war, Qazm received a pickup from the Ba'ath party. When the coalition forces entered BASRA, Qazm gave the pickup to a neighbour (name not exploited) to safeguard it and Qazm went to a hotel in downtown BASRA (name of hotel is unknown). Qazm made a few phone calls during that time, but never mentioned where he was staying. A problem arose when the original owners of the pickup, the local petroleum company, came to reclaim the vehicle they had lent the Ba'ath party. Qazm became frustrated with the whole mess and fled soon after that.
>
> EPW seems to be a good kid who was probably so involved with soccer that he didn't follow his brother's whereabouts all that much. But it seems they have a close knit

family and EPW could know more about his brother's activities in the Ba'ath party, and some of his friends involved in the party, too. Using any type of harsh approach is not going to be effective. EPW loves his family and soccer. EPW will cooperate, but he needs someone he can trust if he's going to tell information about his brother that is going to harm him. EPW seems to be innocent of anything himself, but may help with information about others around him."

24. A record of the second questioning was provided by the Government in the form of a Tactical Questioning Report. This document indicated that it related to "PW 494" with the "date of information" recorded as "250445ZAPR03", that is 04.45 Zulu or 07.45 local time on 25 April 2003. The report stated:

"1. EPW [Enemy Prisoner of War] is 22 years old, single, living with his 80 year old father (who is a Sheik) and his mother in the Jamiyet district of BASRAH. He works as a handyman and has not done his military service due to his status as a student. He stated that an AK 47 was present in their house at the time of his arrest but it was only kept for personal protection. The EPW and his father are not Ba'ath Party members.

2. EPW says he was arrested at his house by United States troops [*sic*] who were looking for his brother, Kathim. His brother is a Ba'ath Party member, an Uthoo Shooba. He joined the party in 1990 when he became a law student in the school of law in the Shaat Al Arab College. His brother is still a student, in his last year of study, married but with no children. He has alternated study with periods of work as a car trader. His brother was in fear of his life because of fear of reprisals against Ba'ath Party members and so had run away possibly to SYRIA or IRAN. The EPW last spoke with his brother 5 days ago by phone. His brother did not disclose his location.

JFIT COMENT: EPW appears to be telling the truth and has been arrested as a result of mistaken identity. He is of no intelligence value and it is recommended that he is released to the civilian pen. JFIT COMMENT ENDS."

E. Evidence relating to Tarek Hassan's presence in the civilian holding area at Camp Bucca and his possible release

25. The applicant submitted a summary of an interview dated 27 January 2007 with Fouad Awdah Al-Saadoon, the former Chairman of the Iraqi Red Crescent in Basrah and a friend of the applicant's family. Mr Al-Saadoon had been arrested by British troops and detained at Camp Bucca, in a tent holding approximately 400 detainees. He stated that on 24 April 2003 at around 6 p.m. Tarek Hassan was brought to the tent. Mr Al-Saadoon stated that Tarek Hassan seemed scared and confused but did not mention that he complained of having been ill-treated. Tarek Hassan was not interrogated during the time they were together in Camp Bucca. Since Mr Al-Saadoon was in ill-health, Tarek Hassan brought him food and cared for him.

Mr Al-Saadoon was released on 27 April 2003, in a batch of 200 prisoners, since the UK authorities had decided to release all detainees aged 55 or older. The detainees were released at night, on a main road between Al-Basrah and Al-Zubair, and had to walk twenty-five miles to the nearest place they could hire cars. Following his release, he informed the applicant's family that he had seen Tarek Hassan at Camp Bucca. According to the applicant, this was the only information received by the family about his brother's whereabouts following the latter's arrest. In response to this statement, the Government submitted that Mr Al-Saadoon might have been mistaken about the date, because it appeared from the interrogation records that Tarek Hassan was released to the civilian holding area on 25 April 2003. They also emphasised that stringent efforts were made to return individuals to their place of capture or to an alternate location if requested, and that twenty-five miles was much greater than the distance between Al-Basrah and Al-Zubair.

26. According to the witness statement, provided by the Government, of Major Neil Wilson, who commanded a group of soldiers from the Military Provost Staff who advised on detention issues within the UK area of operations in Iraq during the relevant period, the decision to release UK detainees held at Camp Bucca, other than those facing criminal charges, was taken by a tribunal convened by UK military legal officers. Details were then passed to the US guards, before those released were processed out of the Camp, with their details checked and entered on the AP3-Ryan database. According to the orders made by the United Kingdom's Military Divisional Headquarters based in Basrah and applying at that time, the US forces were responsible for the repatriation of all prisoners to the areas within their field of operation and the British forces were responsible for returning prisoners to areas within their field of operation, namely south-east Iraq, regardless of which force had captured the prisoners. The ICRC was to have access to all those being released. Again according to the applicable orders, prisoners repatriated by British forces were to be loaded on to coaches with armed guards onboard and armed military escort vehicles to the front and rear. Release was to be to specific repatriation points in daylight hours, with sufficient food and water to last the individuals being released until they got home. According to the evidence of Major Wilson, efforts were made to return individuals to their point of capture. There were four drop-off points within the UK field of operation, including "Al-Basrah GR TBC [grid reference to be confirmed]". Umm Qasr was not listed as a drop-off point but could be entered as a point of release on the records of individuals being processed for release.

27. The Government also submitted a military order dated 27 April 2003 (FRAGO 001/03), the purpose of which was to ensure the release from

detention of the maximum possible number of civilians and prisoners of war prior to the cessation of hostilities (which was subsequently announced on 1 May 2003). The annex to the order set out the procedures to be followed. A number of individuals would continue to be detained on security grounds or because they were suspected of being criminals; they had already been identified by JFIT, with the decision recorded on the AP3-Ryan database, and a list given to the US authorities to ensure they were not released. The remaining population would stay within the individual compounds and await release processing by the UK authorities. At the processing tent, a three-point check would be made of each detainee's wristband, face and digital profile held on AP3-Ryan. The following information was then required to be entered into the database: "(1) Releasing Force Element; (2) Release Date; (3) Releasing Nation; (4) Selected Place of Release." The text of the order itself referred to four drop-off points (Al-Basrah, Najef, Al-Kut and An Nasariah – the latter three towns were to the north of Al-Basrah), but the annex listed in addition Um Qasr (south of Al-Basrah and 2.5 km from the Camp) as a drop-off point. The British forces would then retain the detainee's identity card and pass him back to the US authorities for final processing, including the issue of food and water and the return of personal belongings. Four holding areas would be established, "one for each release location", from which the detainees would then be transported to the agreed repatriation points and released in daylight hours. The order also required a final audit to be conducted to check that all UK detainees listed on the AP3-Ryan database had either been released or continued to be detained. Should the record be identified of any person who had neither been released nor detained, a board of inquiry had to sit to determine what had happened.

28. In addition, the Government submitted a witness statement dated 29 October 2007 by Warrant Officer Class 2 Kerry Patrick Madison, who had responsibility for the management of the AP3-Ryan database. He stated that, by 22 May 2003, AP3-Ryan showed that the British forces had captured and processed 3,738 detainees in Iraq since the start of hostilities and had released all but 361. Annexed to Warrant Officer Madison's statement were a number of screen shots showing entries on the database relating to Tarek Hassan. They showed that an entry was made on AP3-Ryan on 4 May 2003 at 13.45 recording the release of "Tarek Resaan Hashmyh Ali" at 00.01 on 2 May 2003. The releasing authority was stated to be "United Kingdom (ARMD) DIV SIG REGT"; the place of release was stated to be "Umm Qasr"; the method of release was "By Coach" and the ground of release was recorded as "End of Hostilities". A further entry was made in the UK AP3-Ryan system on 12 May 2003 at 22.13 recording that: "PW was found

to be absent from the internment facility when 100% check was conducted. PW was released on AP3 on 12 May 03". According to the Warrant Officer Madison, some 400 individuals' records included the statement "PW was released on AP3 on 12 May 03", when they had in fact been released earlier and it was therefore likely that the Camp's computer release records were brought up to date on 12 May following a physical check. The US computer system did not record any release until 17 May 2003 but again, according to the Government, this was probably explained by a reconciliation of the US Camp Bucca database with a physical check of occupants of the Camp by the US authorities on 17 May.

F. The discovery of Tarek Hassan's body

29. According to the applicant, Tarek Hassan did not contact his family during the period following his purported release. On 1 September 2003 one of the applicant's cousins received a telephone call from a man unknown to them, from Samara, a town north of Baghdad. This man informed them that a dead man had been found in the nearby countryside, with a plastic ID tag and a piece of paper with the cousin's telephone number written on it in the pocket of the sports top he was wearing. According to the applicant, Tarek Hassan was wearing sportswear when he was captured by British forces. The applicant's cousin called him and, together with another brother, the applicant went to the forensic medical station of the Tekrit General Hospital in Samara. There they saw the body of Tarek Hassan with eight bullet wounds from an AK-47 machine gun in his chest. According to the applicant, Tarek Hassan's hands were tied with plastic wire. The identity tag found in his pocket was that issued to him by the US authorities at Camp Bucca. A death certificate was issued by the Iraqi authorities on 2 September 2003, giving the date of death as 1 September 2003, but the sections reserved for the cause of death were not completed. A police report identified the body as "Tariq Hassan" but gave no information about the cause of death.

G. Correspondence with Treasury Solicitors and legal proceedings

30. The applicant remained in hiding in Iraq until October 2006, when he crossed the border to Syria. In November 2006, through a representative in Syria, he made contact with solicitors in the United Kingdom. The applicant's solicitors wrote to the Government's Treasury Solicitors on 21 December 2006, requesting explanations for the arrest and detention of Tarek Hassan and the circumstances that resulted in his death. It took

some time to identify the applicant's brother, because he was entered in the Camp Bucca databases under the name "Tarek Resaan Hashmyh Ali" (see paragraph 18 above). However, in a letter dated 29 March 2007, Treasury Solicitors stated that a check of the United Kingdom's prisoner-of-war computer records had produced a record of Tarek Resaan Hashmyh Ali being detained at Camp Bucca. In a further letter dated 5 April 2007, Treasury Solicitors stated that further computer records had been recovered which "confirm the handover" of Tarek Hassan from the UK authorities to the US authorities at Camp Bucca and which recorded his release on 12 May 2003.

31. The applicant commenced proceedings in the High Court on 19 July 2007, seeking declarations in respect of breaches of his brother's rights under Articles 2, 3 and 5 of the Convention, as set out in Schedule 1 to the Human Rights Act 1998; financial compensation; and an order requiring the Government to initiate an independent and public investigation into the fate of the deceased after he was detained by British forces on 22 April 2003. The claim was heard on 19 and 20 January 2009 and was rejected in a judgment delivered by Walker J on 25 February 2009 ([2009] EWHC 309 (Admin)). The judge held that, in the light of the judgment of the House of Lords in *Al-Skeini* (see further the summary of the House of Lords' judgment in *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, §§ 83-88, ECHR 2011), it could not be said that Tarek Hassan was within the United Kingdom's jurisdiction under Article 1 of the Convention at any time. In *Al-Skeini* the House of Lords had recognised a number of exceptions to the general rule that a State did not exercise jurisdiction extraterritorially, but these did not include detention of a person unless this took place within a military prison or other comparable facility controlled by the Contracting State. The judge's analysis of the MOA (see paragraph 16 above) indicated that Camp Bucca was a US rather than a British military establishment, for the following reasons:

> "… It is plain that the detaining power [the United Kingdom] relinquishes, until such time as it requires return of the individual in question, responsibility for maintaining and safeguarding those transferred. Accountability in that regard is the responsibility of the accepting power [the United States]. As regards adjudications concerning the individual's contact after transfer to the accepting power the detaining power relinquishes to the accepting power primary jurisdiction. Overall this amounts to a legal regime in which the detaining power has no substantial control over the day to day living conditions of the individual in question."

32. The applicant was advised that an appeal would have no prospect of success.

II. RELEVANT INTERNATIONAL AND DOMESTIC LAW AND PRACTICE

A. Relevant provisions of the Third and Fourth Geneva Conventions

33. The following Articles of the Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949 ("the Third Geneva Convention") and the Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949 ("the Fourth Geneva Convention") are of particular relevance to the issues in the present case.

Article 2, common to all four Geneva Conventions

"In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."

Article 4 of the Third Geneva Convention

"A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

…"

Article 5 of the Third Geneva Convention

"The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

Article 12 of the Third Geneva Convention

"Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.

Nevertheless if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with."

Article 21 of the Third Geneva Convention

"The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter. Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to

safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.

…"

Article 118 of the Third Geneva Convention

"Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities. …

Article 42 of the Fourth Geneva Convention

The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.

…"

Article 43 of the Fourth Geneva Convention

"Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.

…"

Article 78 of the Fourth Geneva Convention

"If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.

Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention."

Article 132 of the Fourth Geneva Convention

"Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.

…"

Article 133 of the Fourth Geneva Convention

"Internment shall cease as soon as possible after the close of hostilities.

…"

B. The Vienna Convention on the Law of Treaties of 1969

34. Article 31 of the Vienna Convention on the Law of Treaties of 1969 ("the Vienna Convention") provides as follows:

Article 31 – General Rule of Interpretation

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

C. Case-law of the International Court of Justice concerning the interrelationship between international humanitarian law and international human rights law

35. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (8 July 1996), the International Court of Justice stated as follows:

"25. The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."

36. In its Advisory Opinion on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004), the International Court of Justice rejected Israel's argument that the human rights instruments to which it was a party were not applicable to occupied territory, and held:

> "106. … the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the [International Covenant on Civil and Political Rights]. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law."

37. In its judgment *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* of 19 December 2005, the International Court of Justice held as follows:

> "215. The Court, having established that the conduct of the UPDF [Uganda People's Defence Force] and of the officers and soldiers of the UPDF is attributable to Uganda, must now examine whether this conduct constitutes a breach of Uganda's international obligations. In this regard, the Court needs to determine the rules and principles of international human rights law and international humanitarian law which are relevant for this purpose.
>
> 216. The Court first recalls that it had occasion to address the issues of the relationship between international humanitarian law and international human rights law and of the applicability of international human rights law instruments outside national territory in its Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In this Advisory Opinion the Court found that
>
> > 'the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.' (I.C.J. Reports 2004, p. 178, para. 106.)
>
> It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its

jurisdiction outside its own territory', particularly in occupied territories (ibid., pp. 178-181, paras. 107-113)."

D. The Report of the Study Group of the International Law Commission on Fragmentation of International Law

38. The Report of the Study Group of the International Law Commission on the topic "Fragmentation of international law: difficulties arising from the diversification and expansion of international law" was adopted by the International Law Commission at its fifty-eighth session, in 2006. The Analytical Study of the Study Group on the same topic, dated 13 April 2006 (A/CN.4/L.682), stated at § 104 as follows:

> "The example of the laws of war focuses on a case where the rule itself identifies the conditions in which it is to apply, namely the presence of an 'armed conflict'. Owing to that condition, the rule appears more 'special' than if no such condition had been identified. To regard this as a situation of *lex specialis* draws attention to an important aspect of the operation of the principle. Even as it works so as to justify recourse to an exception, what is being set aside does not vanish altogether. The [International Court of Justice] was careful to point out that human rights law *continued to apply* within armed conflict. The exception – humanitarian law – only affected one (albeit important) aspect of it, namely the relative assessment of 'arbitrariness'. Humanitarian law as *lex specialis* did not suggest that human rights were abolished in war. It did not function in a formal or absolute way but as an aspect of the pragmatics of the Court's reasoning. However desirable it might be to discard the difference between peace and armed conflict, the exception that war continues to be to the normality of peace could not be simply overlooked when determining what standards should be used to judge behaviour in those (exceptional) circumstances. *Legality of Nuclear Weapons* was a 'hard case' to the extent that a choice had to be made by the [International Court of Justice] between different sets of rules none of which could fully extinguish the others. *Lex specialis* did hardly more than indicate that though it might have been desirable to apply only human rights, such a solution would have been too idealistic, bearing in mind the speciality and persistence of armed conflict. So the Court created a systemic view of the law in which the two sets of rules related to each other as today's reality and tomorrow's promise, with a view to the overriding need to ensure 'the survival of a State'."

E. The House of Lords' judgment in *Al-Jedda*

39. In their judgment of 12 December 2007 in the *Al-Jedda* case (*R. (on the application of Al-Jedda) (FC) (Appellant) v. Secretary of State for Defence (Respondent)* [2007] UKHL 58), the majority of the House of Lords considered that Mr Al-Jedda's internment was authorised by United Nations Security Council Resolution 1546. They further held that Article 103 of the United Nations Charter operated to give the United Kingdom's obligations pursuant to that Resolution primacy over its obligations under Article 5

of the Convention (see further *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, §§ 18-22, ECHR 2011). Lord Bingham, however, made it clear that, despite this conclusion, Article 5 had some continued application:

> "39. Thus there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention. …"

Similarly, Baroness Hale observed:

> "125. … I agree with Lord Bingham, for the reasons he gives, that the only way is by adopting such a qualification of the Convention rights.
>
> 126. That is, however, as far as I would go. The right is qualified but not displaced. This is an important distinction, insufficiently explored in the all or nothing arguments with which we were presented. We can go no further than the UN has implicitly required us to go in restoring peace and security to a troubled land. The right is qualified only to the extent required or authorised by the resolution. What remains of it thereafter must be observed. This may have both substantive and procedural consequences.
>
> 127. It is not clear to me how far UNSC resolution 1546 went when it authorised the [Multi-National Force] to 'take all necessary measures to contribute to the maintenance of security and stability in Iraq, in accordance with the letters annexed to this resolution expressing, *inter alia*, the Iraqi request for the continued presence of the multinational force and setting out its tasks' (para 10). The 'broad range of tasks' were listed by Secretary of State Powell as including 'combat operations against members of these groups [seeking to influence Iraq's political future through violence], internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security'. At the same time, the Secretary of State made clear the commitment of the forces which made up the MNF to 'act consistently with their obligations under the law of armed conflict, including the Geneva Conventions'.
>
> 128. On what basis is it said that the detention of this particular appellant is consistent with our obligations under the law of armed conflict? He is not a 'protected person' under the fourth Geneva Convention because he is one of our own citizens. Nor is the UK any longer in belligerent occupation of any part of Iraq. So resort must be had to some sort of post conflict, post occupation, analogous power to intern anyone where this is thought 'necessary for imperative reasons of security'. Even if the UNSC resolution can be read in this way, it is not immediately obvious why the prolonged detention of this person in Iraq is necessary, given that any problem he presents in Iraq could be solved by repatriating him to this country and dealing with

him here. If we stand back a little from the particular circumstances of this case, this is the response which is so often urged when British people are in trouble with the law in foreign countries, and in this case it is within the power of the British authorities to achieve it.

129. But that is not the way in which the argument has been conducted before us. Why else could Lord Bingham and Lord Brown speak of 'displacing or qualifying' in one breath when clearly they mean very different things? We have been concerned at a more abstract level with attribution to or authorisation by the United Nations. We have devoted little attention to the precise scope of the authorisation. There must still be room for argument about what precisely is covered by the resolution and whether it applies on the facts of this case. Quite how that is to be done remains for decision in the other proceedings. With that caveat, therefore, but otherwise in agreement with Lord Bingham, Lord Carswell and Lord Brown, I would dismiss this appeal."

F. Derogations relating to detention under Article 15 of the European Convention on Human Rights and Article 4 of the International Covenant on Civil and Political Rights

40. Leaving aside a number of declarations made by the United Kingdom between 1954 and 1966 in respect of powers put in place to quell uprisings in a number of its colonies, the derogations made by Contracting States under Article 15 of the Convention have all made reference to emergencies arising within the territory of the derogating State.

41. Article 4 of the International Covenant on Civil and Political Rights (ICCPR) contains a derogation clause similar to Article 15 of the Convention. According to the information available to the Court, since ratifying the ICCPR, eighteen States have lodged declarations derogating from their obligations under Article 9, which provides for "the right to liberty and security of person". Of these, only three declarations could possibly be interpreted as including a reference, by the authorities of the derogating State, to a situation of international armed conflict or military aggression by another State. The States which filed these derogations were Nicaragua, between 1985 and 1988, where the declaration referred to the United States' "unjust, unlawful and immoral aggression against the Nicaraguan people and their revolutionary government"; Azerbaijan, between April and September 1993, where the declaration referred to the "escalating aggression by the armed forces of Armenia"; and Israel, where the declaration made on 3 October 1991 and currently applicable reads as follows:

"Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.

These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings.

> In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4 (1) of the Covenant.
>
> The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention.
>
> In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision."

None of the States explicitly expressed the view that derogation was necessary in order to detain persons under the Third or Fourth Geneva Conventions.

42. As regards State practice, in her book *Captured in War: Lawful Internment in Armed Conflict* (Hart Publishing/Editions A. Pedone, Oxford and Paris, 2013), Els Debuf referred to a study she had undertaken of the derogations notified to the concerned authorities for the Convention and the ICCPR, as reflected in the United Nations' and the Council of Europe's online databases (last verified on 1 October 2010). She noted as follows:

> "Our research of these databases – focused on international armed conflicts and occupations in which States parties to the ICCPR and [the Convention] were involved since their date of ratification – has provided us with the following information … Neither Afghanistan nor the Soviet Union derogated from the ICCPR during the conflict that opposed the two States from 1979 to 1989. Likewise, neither Afghanistan, Australia, Canada, Denmark, France, Germany, Italy, the Netherlands, New Zealand, the UK or the US derogated from the right to liberty under the ICCPR or the [Convention] in relation to the international phase of the recent conflict in Afghanistan (2001-2002); the same is true for the conflict that opposed Iraq to the US, UK and other States from 2003 to 2004. The following States have also interned persons on the basis of the Third and the Fourth Geneva Conventions without derogating from the right to liberty in the ICCPR or [the Convention]: the UK and Argentina in the conflict over the Falklands/Malvinas islands in 1982; the US during its military operations in Grenada in 1983; India and Bangladesh in the conflicts with Pakistan in the 1970's (Pakistan is not a party to the ICCPR); Iran and Iraq during the 1980-1988 war; Israel and the Arab States in any of the international armed conflicts opposing them in the Middle East (1948-today) [but note the derogation filed by Israel, set out in paragraph 40 above]; the States parties to the [Convention] that participated under the umbrella of the UN in the Korean War from 1950 to 1953; Iraq, Kuwait, the US and the UK during the 1991 Gulf War (Saudi-Arabia, which interned many prisoners of war during that conflict, is not a party to the ICCPR); Angola, Burundi, the Democratic Republic of the Congo (DRC), Namibia, Rwanda, Uganda and Zimbabwe in the DRC (1998-2003); Ethiopia in the conflict opposing it to Eritrea from 1998 to 2000 (Eritrea had not yet ratified the ICCPR at the time); Eritrea and Djibouti in the short border conflict in 2008; Georgia and Russia in the

blitz war of August 2008; Russia did not derogate from the ICCPR in relation to the conflict with Moldova over Transdnistria in 1992 (Russia was not yet a party to the [Convention] and Moldova was not yet a party to either the ICCPR or the [Convention] at the time). Neither Cyprus nor Turkey derogated from the ICCPR or the [Convention] to intern on the basis of GC III-IV in Northern-Cyprus (note that Turkey did not consider the ICCPR or the [Convention] to apply extra-territorially); Turkey did derogate from the [Convention] as far as persons within mainland Turkey were concerned but since it did not specify the articles from which it intended to derogate it is unclear whether it thought it necessary to do so in order to intern persons on the basis of GC III and IV. Similarly, Azerbaijan derogated from the ICCPR (it was not a party to the [Convention] yet at the time) to take measures that were necessary as a result of the conflict with Armenia (1988-1994), but it is unclear whether it did so to intern persons on the basis of the Geneva Conventions; Armenia did not derogate from the ICCPR (it was not yet a party to the [Convention] at the time). Likewise, Nicaragua derogated from article 9 ICCPR, saying it was obliged to do so following the US involvement in the conflict with the Contras in the 1980s. It is unclear whether Nicaragua thought it necessary to derogate from the ICCPR to intern on the basis of the Geneva Conventions, in its notices of derogation it insisted that article 9 § 1 was only derogated from for offences against national security and public order."

THE LAW

I. THE COURT'S ASSESSMENT OF THE EVIDENCE AND ESTABLISHMENT OF THE FACTS

A. The parties' submissions

1. The applicant

43. The applicant contended that the evidence of his sisters, friend and neighbour demonstrated that his brother had been captured and detained by British forces with the purpose of inducing the applicant to surrender himself. The first reference made by the Government to the battalion record, which referred to Tarek Hassan's arrest (see paragraph 11 above), was in its observations to the Grand Chamber in September 2013. No good explanation for the recent appearance of this material had been provided, which was surprising given the emphasis placed on the document by the Government. The applicant made no admissions as to whether or not he accepted it was genuine. He underlined, also, that it was the sole document to make any reference to Tarek Hassan's having been found in possession of an AK-47 machine gun and positioned on the roof. Neither of the records of his interviews (see paragraphs 23-24 above) referred to his having been

detained as a suspected combatant or having posed any threat, real or suspected, to British forces at any time.

44. The applicant further contended that the Camp Bucca computer detention records recorded three different release dates, none of which appeared reliable (see paragraph 28 above). Similarly, the place of release was a matter of speculation based on unclear and inconsistent evidence (see paragraphs 27-28 above). It could not even be said with any certainty that Tarek Hassan was not still being detained after the search of Camp Bucca on 12 May 2003, given in particular the release date entered on the US records. The applicant pointed out that his brother was found dead with the US Camp Bucca identity tag still on him (see paragraph 29 above) and that he had not contacted his family at any point after he had been captured by British forces, which strongly suggested that he had had no opportunity to do so.

2. The Government

45. The Government submitted that the applicant had not established an adequate justification for the delay in raising his complaints with the UK authorities. The delay had imposed an inevitable impediment to the effective investigation of Tarek Hassan's death. No adverse inferences should be drawn from the Government's inability to provide an explanation for Tarek Hassan's death in circumstances where the evidence provided a satisfying and convincing explanation of his arrest, detention and release.

46. The Government denied the allegation that Tarek Hassan was detained as a means of putting pressure on the applicant to surrender. They contended that the evidence submitted by the applicant in support of this claim was imprecise and hearsay and that such a purpose on the part of the UK authorities would have been inconsistent with Tarek Hassan's subsequent release from Camp Bucca as soon as his status had been established as a civilian who did not pose a threat to security. Instead, they contended that it was reasonable for the British forces to suspect Tarek Hassan of being a combatant, since he was found, armed, on the roof of the house of a general of the Al-Quds Army, which house contained other firearms and a number of documents of intelligence value relating to local members of the Ba'ath Party (see paragraph 11 above). The Government further pointed out that, apart from the applicant's witness statement, there was no independent evidence of the cause of death because this information had not been entered on the death certificate (see paragraph 29 above). In any event, they emphasised that Samara was some 700 km from Camp Bucca, in an area that had never been occupied by British forces, and that the AK-47 machine gun was not a weapon used by British forces.

B. The Court's evaluation of the facts

47. At the outset, the Court observes that the domestic proceedings were dismissed on the ground that the applicant's brother did not fall within the jurisdiction of the United Kingdom at any material time (see paragraph 31 above). It was not therefore necessary for the national courts to establish the facts in any detail. The Court is generally sensitive to the subsidiary nature of its role and cautious in taking on the role of a first-instance tribunal of fact (see *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000). However, in the present circumstances it is unavoidable that it must make some findings of fact of its own on the basis of the evidence before it.

48. In cases in which there are conflicting accounts of events, the Court is inevitably confronted when establishing the facts with the same difficulties as those faced by any first-instance court. It reiterates that, in assessing evidence, it has adopted the standard of proof "beyond reasonable doubt". However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions the Court's approach to the issues of evidence and proof. In the proceedings before it, there are no procedural barriers to the admissibility of evidence or predetermined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights (see *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 151, ECHR 2012).

49. Furthermore, it is to be recalled that Convention proceedings do not in all cases lend themselves to a strict application of the principle *affirmanti incumbit probatio* (the principle, that is, that the burden of proof lies on the person making the allegation in question). The Court reiterates its case-law under Articles 2 and 3 of the Convention to the effect that where the events

in issue lie within the exclusive knowledge of the authorities, as in the case of persons under their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. The burden of proof in such a case may be regarded as resting on the authorities to provide a satisfactory and convincing explanation. In the absence of such explanation the Court can draw inferences which may be unfavourable for the respondent State. The Court has already found that these considerations apply to disappearances examined under Article 5 of the Convention, where, although it has not been proved that a person has been taken into custody by the authorities, it is possible to establish that he or she was officially summoned by the authorities, entered a place under their control and has not been seen since. In such circumstances, the onus is on the Government to provide a plausible and satisfactory explanation as to what happened on the premises and to show that the person concerned was not detained by the authorities, but left the premises without subsequently being deprived of his or her liberty. Furthermore, the Court reiterates that, again in the context of a complaint under Article 5 § 1 of the Convention, it has required proof in the form of concordant inferences before the burden of proof is shifted to the respondent Government (see *El-Masri*, cited above, §§ 152-53).

50. It is not in dispute in the present case that the applicant's brother was captured by British forces on 23 April 2003, subsequently detained at Camp Bucca and that he died shortly before his body was found in Samara on 1 September 2003. The disagreement over the facts centres on two issues: firstly, whether Tarek Hassan was arrested and detained as a means of exerting pressure on the applicant to surrender himself and, secondly, in what circumstances Tarek Hassan left Camp Bucca. In addition, since the applicant alleges that Tarek Hassan's body had marks of ill-treatment on it, the question arises whether he was ill-treated while in detention.

51. As to the first point, the Court notes that the only evidence before it which supports the claim that Tarek Hassan was taken into detention in an attempt to force the applicant to surrender himself are the two statements made by the applicant and the note of a telephone interview with the applicant's neighbour, both prepared for the purposes of the domestic proceedings (see paragraphs 12-13 above). In the applicant's first statement, he alleged that his sisters had been told by the British military authority that Tarek Hassan would not be released until the applicant gave himself up. In the second statement, the applicant claimed that this information was given to his neighbour and his friend. In neither of the applicant's statements, nor that of his neighbour, Mr Al-Ubody, is the representative of the United Kingdom military who made the alleged assertion identified by name or rank. Given the lack of precision, the hearsay nature of this evidence and

the internal inconsistencies in the applicant's statements, the Court does not find the evidence in support of the applicant's claim to be strong.

52. For their part, the Government were not able to present the Court with any witness evidence relating to Tarek Hassan's capture. However, they provided the Court with the operational log of The Black Watch Battalion which was created contemporaneously with the events in question (see paragraph 11 above). It records that, when British forces arrived at the house, Tarek Hassan was positioned on the roof, armed with an AK-47 machine gun and that other firearms and documents of intelligence value were found in the house. In addition, the Government provided records of interviews at Camp Bucca with Tarek Hassan and screen shots of entries relating to him on the AP3-Ryan database (see, respectively, paragraphs 23-24 and 18, 22 and 28 above). The Court has no grounds on which to question the authenticity of these records. They show that Tarek Hassan was registered at Camp Bucca on 23 April 2003, taken to the JFIT compound at 16.40 on 23 April 2003 and released to the civilian holding area of Camp Bucca on 25 April 2003 at 20.00 local time. The computer records further show that he was questioned once on 23 April 2003 21.30 local time and again on 25 April at 08.00 local time. Records of both interviews have been provided to the Court. They show that Tarek Hassan's identity as the applicant's brother was known and that it was established in the course of questioning that he had no personal involvement with the Ba'ath Party or the Al-Quds Army.

53. In the Court's view, the capture and questioning records are consistent with the Government's submission that Tarek Hassan was captured as a suspected combatant or a civilian posing a threat to security. This view is supported by other evidence which tends to show that Tarek Hassan may well have been armed with, or at least in the possession of, an AK-47 machine gun at the moment of his capture, namely the applicant's assertion that his younger brother had been left to protect the family home (see paragraph 10 above) and Tarek Hassan's reported explanation, during his interrogation by British agents, of the presence of the weapon as being for personal protection (see paragraph 24 above). The Camp Bucca records further indicate that he was cleared for release as soon as it had been established that he was a civilian who did not pose a threat to security.

54. The Court accepts that Tarek Hassan's capture was linked to his relationship with his brother, but only to the extent that the British forces, having been made aware of the relationship by Tarek Hassan himself and finding Tarek Hassan armed at the moment of capture (see paragraph 11 above), may have suspected that he also was involved with the Ba'ath Party and Al-Quds Army. The Court does not find that the evidence supports the claim that Tarek Hassan was taken into custody to be held until the

applicant should surrender. If that had been the intention of the British forces, he would not have been cleared for release immediately after the second interview and less than 38 hours after his admission to Camp Bucca (see paragraph 22 above).

55. As regards the date and place of Tarek Hassan's release, the principal evidence consists of entries from AP3-Ryan (see paragraph 28 above). One entry made on 4 May 2003 recorded that Tarek Hassan had been released on 2 May 2003, by coach, to Umm Qasr, on the ground of the "End of Hostilities". Another entry on 12 May 2003 found that Tarek Hassan was not present in the Camp when a full check of detainees was made. The Court considers, on the basis of these entries, taken together with the decision made following the second screening interview not to continue to detain Tarek Hassan, that he was in all probability released early in May 2003. This view is further supported by the evidence provided by the Government concerning the policy decision taken by British forces to release all detainees prior to or immediately following the cessation of hostilities announced on 1 May 2003, save those suspected of criminal offences or of activities posing a risk to security (see paragraph 27 above). As to the place of release, the Court notes that Camp Bucca was situated only about 2.5 km from Umm Qasr. Although the main text of the relevant military order relating to the release of detainees from Camp Bucca did not list Umm Qasr as a drop-off point (listing only four towns to the north of the Camp), the annex to the order did describe Umm Qasr as a release area. It is impossible to be certain in the absence of more conclusive evidence, but given the town's proximity to the Camp, its mention in the annex, the United Kingdom policy of releasing detainees following the end of hostilities and the computer entries concerning Tarek Hassan's release, the Court finds that it is probable that Tarek Hassan was released in or near Umm Qasr on 2 May 2003.

56. The Court is of the view that, in this case, since the evidence concerning Tarek Hassan's detention and release was, for the most part, accessible only to the Government, the onus is on them to provide a plausible and satisfactory explanation as to what happened to Tarek Hassan in the Camp and to show that he was released and that the release followed a safe procedure (see paragraph 49 above). The computer records show that by 22 May 2003 the United Kingdom had captured and processed some 3,738 detainees in Iraq since the start of hostilities and had released all but 361 (see paragraph 28 above). In the light of the time that had elapsed before the applicant lodged his claim and the large number of UK detainees that were released from Camp Bucca around the end of April and the beginning of May 2003, it is unsurprising that no eyewitness able to remember Tarek Hassan's release has been traced. In the circumstances of the present case,

the Court finds that the evidence referred to above is sufficient to satisfy the burden of proof on the Government.

57. Finally, there is no evidence before the Court to suggest that Tarek Hassan was ill-treated while in detention. The interview records show that he was questioned on two occasions shortly after being admitted to the Camp and found to be a civilian, of no intelligence value and not posing any threat to security. The witness statement submitted by the applicant, of Mr Al-Saadoon, who claimed to have seen Tarek Hassan in the civilian holding area in Camp Bucca in the period after he was questioned and before he was released, makes no mention of any sign of injury on Tarek Hassan or any complaint by him of ill-treatment. Moreover, apart from the applicant's witness statement, there is no evidence before the Court as to the cause of Tarek Hassan's death or the presence of marks of ill-treatment on his body, since the death certificate contains no information on either point. Assuming the applicant's description of his brother's body to be accurate, the lapse of four months between Tarek Hassan's release and his death does not support the view that his injuries were caused during his time in detention.

58. Having established the facts of the case, the Court must next examine the applicant's complaints under the Convention.

II. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION

A. The parties' submissions

1. The applicant

59. The applicant complained that the circumstances of Tarek Hassan's death gave rise to, at least, a prima facie violation of Articles 2 and 3 of the Convention, entailing an obligation on the Government to undertake an effective investigation. Article 2 of the Convention reads as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

Article 3 of the Convention provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

60. The applicant emphasised that it was incumbent on the UK authorities, which had sole knowledge of what happened to Tarek Hassan following his arrest, to establish that he was alive when he left detention and that he was not released into a situation which exposed him to the risk of death or serious mistreatment. His disappearance and death following detention by the United Kingdom gave rise to a prima facie case that Tarek was either killed by or with the involvement of UK personnel or exposed to a real risk of death or mistreatment by UK personnel by being released in a remote or otherwise dangerous environment, or being transferred into the hands of a third party. This engaged two issues under Articles 2 and 3. Firstly, if the Government were unable to provide a plausible alternative explanation of the events leading to Tarek Hassan's death, then the United Kingdom should be held liable for it. Secondly, there was an arguable case of a violation of Articles 2 and 3, engaging the procedural obligation to investigate.

2. The Government

61. The Government submitted that, in a case such as the present, no duty to investigate could arise under Article 2 or 3 unless there was at least an arguable case that the United Kingdom was responsible for ill-treating Tarek Hassan or causing his death, or that Tarek Hassan's death occurred in territory that was controlled by the United Kingdom. This was not, on the evidence, a case in which the death occurred in the custody of the State. Such deaths might warrant a lower threshold or trigger for the investigative duty, but this was not the case here. Tarek Hassan's death occurred many months after his release and in circumstances where there was nothing pointing to United Kingdom State involvement in the death.

B. The Court's assessment

62. According to the Court's case-law, the obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by agents of the State (see *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 163, ECHR 2011). In addition, Article 3 places a duty on

the State to carry out an effective official investigation where an individual makes a "credible assertion" that he has suffered ill-treatment in breach of that provision at the hands of State officials, or, in the absence of an express complaint, where there are other sufficiently clear indications that torture or ill-treatment might have occurred (see *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV, and *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, no. 71156/01, § 97, 3 May 2007, and the cases cited therein).

63. In the present case, with reference to the facts as assessed above by the Court, there is no evidence to suggest that Tarek Hassan was ill-treated while in detention, such as to give rise to an obligation on the respondent State under Article 3 to carry out an official investigation. Nor is there any evidence that the UK authorities were responsible in any way, directly or indirectly, for Tarek Hassan's death, which occurred some four months after he was released from Camp Bucca, in a distant part of the country not controlled by British forces. In the absence of any evidence of the involvement of UK State agents in the death, or even of any evidence that the death occurred within territory controlled by the United Kingdom, no obligation to investigate under Article 2 can arise.

64. In conclusion, the Court considers that the complaints under Articles 2 and 3 of the Convention are manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and must be declared inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 §§ 1, 2, 3 AND 4 OF THE CONVENTION

65. The applicant alleged that his brother's capture by British forces and detention in Camp Bucca gave rise to breaches of his rights under Article 5 §§ 1, 2, 3 and 4 of the Convention, which provide in their relevant parts as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

…

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The Government denied that Tarek Hassan fell within United Kingdom jurisdiction at any material time. In the alternative, they denied that his capture and detention, during an international armed conflict, gave rise to any violation of the provisions of Article 5.

A. Jurisdiction

66. The applicant contended that at all material times his brother was within the jurisdiction of the United Kingdom, within the meaning of Article 1 of the Convention, which provides:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

1. The parties' submissions

a. The applicant

67. The applicant submitted that Tarek Hassan fell within the United Kingdom's jurisdiction under Article 1 by virtue of the application of the "effective control of an area" principle, as articulated by the Court in *Al-Skeini and Others*, cited above, § 138-40. He further submitted that the implication to be drawn from the judgment in *Al-Skeini and Others* was that the United Kingdom had effective control over south-east Iraq following the removal from power of the Ba'ath regime, which had been achieved by 1 May 2003. He pointed out that by 9 April 2003 coalition troops had taken control of Baghdad and that by mid-April 2003, well before the capture of Tarek Hassan, statements made by the Prime Minister of the United Kingdom and by the director of operations for the US Joint Chiefs of Staff indicated that the coalition forces considered the war effectively over. With regard to the criteria identified by the Court as relevant to the question whether a State exercised effective control of an area, namely "the strength of the state's military presence in the area" and "the extent to

which its military, economic and political support for the local subordinate administration provides it with influence and control over the region", there was no evidence of any significant practical difference between 23 April and 1 May 2003, and no good reason why there should be a difference in the legal position.

68. In the alternative, the applicant argued that jurisdiction was clearly established under the principle of State agent authority. It was the applicant's submission that, according to the Court's case-law, jurisdiction on this ground was not dependent on control over a building, area or vehicle but might also arise simply where there was physical control or authority over a person. Such authority and control over individuals did not have to be exclusive or total in order for jurisdiction to arise. Nor was it necessary for the State to be in a position to secure all the Convention rights to the person under its control. On this basis, the Court should reject the Government's argument that bipartite or joint control was not sufficient for the purposes of Article 1 of the Convention.

69. The applicant submitted that, following his brother's arrest during the night of 22/23 April 2003, when the latter was taken into the custody of British soldiers, it could not realistically be disputed that the United Kingdom had authority and control, and therefore Article 1 jurisdiction, over him. In relation to the period after his admission to Camp Bucca, the United Kingdom continued to exercise authority and control over his detention. In particular, he was identified as a UK detainee on both the UK AP3-Ryan database and the US Camp Bucca database. The UK authorities were responsible for preparing a capture report and a detention report. Immediately upon his arrival at the Camp, he was taken to the JFIT compound, which was entirely controlled by British forces, and he remained there until 25 April. Even following his transfer from the JFIT compound, he remained under United Kingdom control, since the UK authorities continued to assume responsibility over the well-being of UK detainees in Camp Bucca; they liaised with the ICRC about their treatment and the notification of their detention to their families; retained full rights of access and had a resident monitoring team at Camp Bucca to ensure compliance with domestic and international standards. The British Military Provost Staff (military police) had an overseeing responsibility for UK detainees, on whom they checked daily, and those requiring medical attention would have been treated in British field hospitals. The United Kingdom also remained responsible for classifying detainees under Articles 4 and 5 of the Third Geneva Convention. There was nothing to suggest that the US authorities asserted any basis of their own for detaining Tarek Hassan. The evidence of Major Wilson was that decisions as to whether

to release a UK detainee were made by the United Kingdom. In Tarek Hassan's case, it was JFIT which recommended he be released. Moreover, if a decision was made by the UK authorities to release a detainee, he could not simply be released by the United States, but had to be processed out of the Camp by the United Kingdom. In the applicant's view, it was clear that in guarding and escorting UK detainees at Camp Bucca, the United States were acting as agents for the United Kingdom. This was confirmed by the fact that the United Kingdom would reimburse the United States for the costs involved in maintaining detainees. Holding detainees at the US base was simply a matter of UK operational convenience. The position was no different in substance from the United Kingdom contracting out the duties of guarding their detainees to private contractors. The United Kingdom could not contract out of its responsibility under the Convention for detainees and could not absolve itself of responsibility by placing detainees in the temporary custody of another organisation.

b. The Government

70. The Government emphasised that, according to the Court's case-law, the exercise of extraterritorial jurisdiction remained exceptional. Furthermore, the concept of jurisdiction was not subject to the "living instrument" doctrine. In *Al-Skeini and Others*, cited above, the Court found that the United Kingdom had jurisdiction in relation to the deaths of the applicants' relatives because of a combination of two fact-specific circumstances. The first key element was the fact that the United Kingdom had, from 1 May 2003 until 24 June 2004, assumed authority and responsibility for the maintenance of security in south-east Iraq as an occupying power. The second element was the fact that the deaths occurred during the course of security operations carried out by British forces pursuant to that assumption of authority and responsibility. In the absence of either of these factors, there would have been no jurisdictional link. In particular, the Court did not find jurisdiction on the basis of the "effective control of an area" doctrine and referred expressly to the findings of the Court of Appeal in the domestic *Al-Skeini* proceedings, that it would have been "utterly unreal" to suggest that in May 2003 the United Kingdom was in effective control and was obliged to secure to everyone in Basrah the rights and freedoms guaranteed by the Convention. On 23 April 2003, when the applicant's brother was arrested, the United Kingdom had not yet assumed responsibility for security operations in south-east Iraq; this did not take place until 1 May 2003.

71. The Government acknowledged that the Court had held that one situation where there might be jurisdiction under Article 1 was where the

Contracting State's agents operating outside its territory exercised "total and exclusive control" or "full and exclusive control" over an individual, for example where an individual was in the custody of the Contracting State's agents abroad. However, they submitted that this basis of jurisdiction did not apply in the active-hostilities phase of an international armed conflict, where the agents of the Contracting State in question were operating in territory of which they were not the occupying power. In such a case, the conduct of the Contracting State would, instead, be subject to all the requirements of international humanitarian law. Thus, anything occurring before 1 May 2003, including Tarek Hassan's capture, transfer to US custody in Camp Bucca and questioning by British forces on 25 April 2003, was not within the United Kingdom's jurisdiction for the purposes of Article 1 of the Convention.

72. In addition, the Government contended that Tarek Hassan did not fall within United Kingdom jurisdiction following his admission to Camp Bucca on the separate ground that, at that time, he was transferred to the custody of the United States and ceased to be exclusively, or even primarily, under UK control. According to the Government, the Court's case-law required that a Contracting State's agents operating outside its territory exercise "total and exclusive control" or "full and exclusive control" over an individual in order for jurisdiction to be established; bipartite or joint control was not sufficient to establish jurisdiction for the purposes of Article 1. These conclusions were not affected by the fact that, under paragraph 4 of the MOA (see paragraph 16 above), the United Kingdom could have requested the return of Tarek Hassan to its custody from the United States. There was no evidence that the United Kingdom had ever made such a request. Moreover, the fact that provision for making such a request was included in the MOA provided the clearest indication that, for as long as the person concerned remained under US custody and control, he was not within the jurisdiction of the United Kingdom. This position of principle was supported by Article 12 of the Third Geneva Convention (see paragraph 33 above). The first paragraph of Article 12 stated that the "Detaining Power is responsible for the treatment given" to prisoners of war. However, the second paragraph made it clear that, following the transfer of a prisoner of war by the Detaining Power to another State Party to the Convention, "responsibility for the application of the Convention rests on the Power accepting them while they are in its custody". Thus, during the time that Tarek Hassan was detained at Camp Bucca, responsibility for the application of the Third and Fourth Geneva Conventions in respect of him rested on the United States.

73. In any event, the Government contended that from 25 April 2003, when Tarek Hassan was determined to be a civilian who should be released, and was moved to the civilian holding area in Camp Bucca, neither the United Kingdom nor the United States purported to exercise a legal right to detain him. He stayed at the Camp only because the security situation rendered it irresponsible simply to have released him immediately. He was no longer being detained, but was in Camp Bucca awaiting transport to his place of capture. Similarly, while he was being transported by coach by British forces to the place of his release, he was a free person and was not in the custody or control, or under the jurisdiction, of the United Kingdom.

2. The Court's assessment

74. The Court notes that in *Al-Skeini and Others* (cited above, §§ 130-42) it summarised the applicable principles on jurisdiction within the meaning of Article 1 of the Convention exercised outside the territory of the Contracting State as follows:

> "130. … As provided by [Article 1 of the Convention], the engagement undertaken by a Contracting State is confined to 'securing' ('*reconnaître*' in the French text) the listed rights and freedoms to persons within its own 'jurisdiction' (see *Soering v. the United Kingdom*, 7 July 1989, § 86, Series A no. 161, and *Banković and Others* [*v. Belgium and Others* (dec.) [GC], no. 52207/99], § 66, [ECHR 2001-XII]). 'Jurisdiction' under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Ilaşcu and Others* [*v. Moldova and Russia* [GC], no. 48787/99], § 311, [ECHR 2004-VII]).
>
> α. The territorial principle
>
> 131. A State's jurisdictional competence under Article 1 is primarily territorial (see *Soering*, cited above, § 86; *Banković and Others*, cited above, §§ 61 and 67; and *Ilaşcu and Others*, cited above, § 312). Jurisdiction is presumed to be exercised normally throughout the State's territory (see *Ilaşcu and Others*, cited above, § 312, and *Assanidze v. Georgia* [GC], no. 71503/01, § 139, ECHR 2004-II). Conversely, acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases (see *Banković and Others*, cited above, § 67).
>
> 132. To date, the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially must be determined with reference to the particular facts.

β. State agent authority and control

133. The Court has recognised in its case-law that, as an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory (see *Drozd and Janousek* [*v. France and Spain*, 26 June 1992], § 91[, Series A no. 240]; *Loizidou* [*v. Turkey*] (preliminary objections), [23 March 1995], § 62, [Series A no. 310]; *Loizidou v. Turkey* (merits), 18 December 1996, § 52, *Reports of Judgments and Decisions* 1996-VI; and *Banković and Others*, cited above, § 69). The statement of principle, as it appears in *Drozd and Janousek* and the other cases just cited, is very broad: the Court states merely that the Contracting Party's responsibility 'can be involved' in these circumstances. It is necessary to examine the Court's case-law to identify the defining principles.

134. Firstly, it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others (see *Banković and Others*, cited above, § 73; see also *X. v. Germany*, no. 1611/62, Commission decision of 25 September 1965, Yearbook 8, p. 158; *X. v. the United Kingdom*, no. 7547/76, Commission decision of 15 December 1977, DR 12, p. 73; and *M. v. Denmark*, no. 17392/90, Commission decision of 14 October 1992, DR 73, p. 193).

135. Secondly, the Court has recognised the exercise of extraterritorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government (see *Banković and Others*, cited above, § 71). Thus, where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State (see *Drozd and Janousek*, cited above; *Gentilhomme and Others v. France*, nos. 48205/99, 48207/99 and 48209/99, 14 May 2002; and also *X. and Y. v. Switzerland*, nos. 7289/75 and 7349/76, Commission decision of 14 July 1977, DR 9, p. 57).

136. In addition, the Court's case-law demonstrates that, in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad. For example, in *Öcalan* [*v. Turkey* [GC], no. 46221/99], § 91, [ECHR 2005-IV], the Court held that 'directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory'. In *Issa and Others v. Turkey*, [no. 31821/96, 16 November 2004], the Court indicated that, had it been established that Turkish soldiers had taken the applicants' relatives into custody in northern Iraq, taken them to a nearby cave and executed them, the deceased would have been within Turkish

jurisdiction by virtue of the soldiers' authority and control over them. In *Al-Saadoon and Mufdhi v. the United Kingdom* ((dec.), no. 61498/08, §§ 86-89, 30 June 2009), the Court held that two Iraqi nationals detained in British-controlled military prisons in Iraq fell within the jurisdiction of the United Kingdom, since the United Kingdom exercised total and exclusive control over the prisons and the individuals detained in them. Finally, in *Medvedyev and Others v. France* ([GC], no. 3394/03, § 67, ECHR 2010), the Court held that the applicants were within French jurisdiction for the purposes of Article 1 of the Convention by virtue of the exercise by French agents of full and exclusive control over a ship and its crew from the time of its interception in international waters. The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.

137. It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored' (compare *Banković and Others*, cited above, § 75).

γ. Effective control over an area

138. Another exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration (see *Loizidou* (preliminary objections), cited above, § 62; *Cyprus v. Turkey* [[GC], no. 25781/94], § 76, [ECHR 2001-IV]; *Banković and Others*, cited above, § 70; *Ilaşcu and Others*, cited above, §§ 314-16; and *Loizidou* (merits), cited above, § 52). Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights (see *Cyprus v. Turkey*, cited above, §§ 76-77).

139. It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area (see *Loizidou* (merits), cited above, §§ 16 and 56, and *Ilaşcu and Others*, cited above, § 387). Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration

provides it with influence and control over the region (see *Ilaşcu and Others*, cited above, §§ 388-94).

140. The 'effective control' principle of jurisdiction set out above does not replace the system of declarations under Article 56 of the Convention (formerly Article 63) which the States decided, when drafting the Convention, to apply to territories overseas for whose international relations they were responsible. Article 56 § 1 provides a mechanism whereby any State may decide to extend the application of the Convention, 'with due regard … to local requirements', to all or any of the territories for whose international relations it is responsible. The existence of this mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term 'jurisdiction' in Article 1. The situations covered by the 'effective control' principle are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible (see *Loizidou* (preliminary objections), cited above, §§ 86-89, and *Quark Fishing Ltd* [*v. the United Kingdom* (dec.), no. 15305/06, ECHR 2006-XIV]).

δ. The legal space ('*espace juridique*') of the Convention

141. The Convention is a constitutional instrument of European public order (see *Loizidou* (preliminary objections), cited above, § 75). It does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States (see *Soering*, cited above, § 86).

142. The Court has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a 'vacuum' of protection within the 'legal space of the Convention' (see *Cyprus v. Turkey*, cited above, § 78, and *Banković and Others*, cited above, § 80). However, the importance of establishing the occupying State's jurisdiction in such cases does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe member States. The Court has not in its case-law applied any such restriction (see, among other examples, *Öcalan*; *Issa and Others*; *Al-Saadoon and Mufdhi*; and *Medvedyev and Others*, all cited above)."

75. In *Al-Skeini and Others*, cited above, the Court found that the applicants' relatives fell within United Kingdom jurisdiction because, during the period from 1 May 2003 to 28 June 2004, the United Kingdom had assumed authority for the maintenance of security in south-east Iraq and their relatives were killed in the course of security operations carried out by British troops pursuant to that assumption of authority (ibid., §§ 143-50). In the light of this finding, it was unnecessary to determine whether jurisdiction also arose on the ground that the United Kingdom

was in effective military control of south-east Iraq during that period. However, the statement of facts in *Al-Skeini and Others* included material which tended to demonstrate that the United Kingdom was far from being in effective control of the south-eastern area which it occupied, and this was also the finding of the Court of Appeal, which heard evidence on this question in the domestic *Al-Skeini* proceedings (see *Al-Skeini and Others*, cited above, §§ 20-23 and § 80). The present case concerns an earlier period, before the United Kingdom and its coalition partners had declared that the active-hostilities phase of the conflict had ended and that they were in occupation, and before the United Kingdom had assumed responsibility for the maintenance of security in the south-east of the country (ibid., §§ 10-11). However, as in *Al-Skeini and Others*, the Court does not find it necessary to decide whether the United Kingdom was in effective control of the area during the relevant period, because it finds that the United Kingdom exercised jurisdiction over Tarek Hassan on another ground.

76. Following his capture by British troops early in the morning of 23 April 2003, until he was admitted to Camp Bucca later that afternoon, Tarek Hassan was within the physical power and control of the British soldiers and therefore fell within United Kingdom jurisdiction under the principles outlined in paragraph 136 of *Al-Skeini and Others*, set out above. The Government, in their observations, acknowledged that where State agents operating extraterritorially take an individual into custody, this is a ground of extraterritorial jurisdiction which has been recognised by the Court. However, they submitted that this basis of jurisdiction should not apply in the active-hostilities phase of an international armed conflict, where the agents of the Contracting State are operating in territory of which they are not the occupying power, and where the conduct of the State will instead be subject to the requirements of international humanitarian law.

77. The Court is not persuaded by this argument. *Al-Skeini and Others* was also concerned with a period when international humanitarian law was applicable, namely the period when the United Kingdom and its coalition partners were in occupation of Iraq. Nonetheless, in that case the Court found that the United Kingdom exercised jurisdiction under Article 1 of the Convention over the applicants' relatives. Moreover, to accept the Government's argument on this point would be inconsistent with the case-law of the International Court of Justice, which has held that international human rights law and international humanitarian law may apply concurrently (see paragraphs 35-37 above). As the Court has observed on many occasions, the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of

international law of which it forms part (see, for example, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI). This applies equally to Article 1 as to the other Articles of the Convention.

78. With regard to the period after Tarek Hassan entered Camp Bucca, the Government raise an alternative ground for excluding jurisdiction, namely that his admission to the Camp involved a transfer of custody from the United Kingdom to the United States. However, notwithstanding the Government's textual arguments based on the terms of the MOA and on Article 12 of the Third Geneva Convention (see paragraphs 16, 33 and 72 above), the Court is of the view that, having regard to the arrangements operating at Camp Bucca, during this period Tarek Hassan continued to fall under the authority and control of British forces. He was admitted to the Camp as a UK prisoner. Shortly after his admission, he was taken to the JFIT compound, which was entirely controlled by British forces (see paragraph 15 above). In accordance with the MOA which set out the various responsibilities of the United Kingdom and the United States in relation to individuals detained at the Camp, the United Kingdom had responsibility for the classification of UK detainees under the Third and Fourth Geneva Conventions and for deciding whether they should be released (see paragraph 16 above). This is what happened following Tarek Hassan's interrogation at the JFIT compound, when the UK authorities decided that he was a civilian who did not pose a threat to security and ordered that he should be released as soon as practicable. While it is true that certain operational aspects relating to Tarek Hassan's detention at Camp Bucca were transferred to US forces, in particular the tasks of escorting him to and from the JFIT compound and guarding him elsewhere in the Camp, the United Kingdom retained authority and control over all aspects of the detention relevant to the applicant's complaints under Article 5.

79. Finally, the Court notes the Government's argument that once Tarek Hassan had been cleared for release and taken to the civilian holding area, he was no longer a detainee and therefore fell outside United Kingdom jurisdiction. In the Court's view, however, it appears clear that Tarek Hassan remained in the custody of armed military personnel and under the authority and control of the United Kingdom until the moment he was let off the coach that took him from the Camp.

80. In conclusion, therefore, the Court finds that Tarek Hassan fell within the jurisdiction of the United Kingdom from the moment of his capture by British troops, at Umm Qasr on 23 April 2003, until his release from the coach that took him from Camp Bucca to the drop-off point, most probably Umm Qasr on 2 May 2003 (see paragraph 55 above).

B. The merits of the complaints under Article 5 §§ 1, 2, 3 and 4

1. The parties' submissions

a. The applicant

81. The applicant did not accept that Tarek Hassan's arrest and detention fell within the active-combat phase of an international armed conflict, since by 9 April 2003 coalition troops had taken control of Baghdad and removed the Ba'ath Party from power. However, even if the arrest and detention of Tarek Hassan had taken place in the active-combat phase, this would not displace the application of the Convention. Article 15 created a specific power to take measures derogating from the Convention to the extent strictly required by the exigencies of "war or other public emergency threatening the life of the nation". There had been no derogation in this case and there could be no implied displacement of Convention rights. It was important to remember the historical context in which the Convention was drafted, namely the aftermath of a global conflict. With the memory of war still fresh, the drafters addressed their minds to the question whether the fundamental rights the Convention recognised should apply differently in wartime and decided that they should only (i) in so far as necessary to deal with the exigencies of a war or public emergency, (ii) provided the State's other obligations under international law were respected and (iii) provided the State derogated formally and openly. The result was Article 15. If the drafters had intended to create a regime under which human rights would automatically be displaced or rewritten in times of international conflict, they would have done so.

82. The applicant did not accept that there was any evidence of State practice by High Contracting Parties to the effect that the Convention need not be complied with in detaining actual or suspected combatants in the course of international armed conflict. Even if there were, there was no evidence of accompanying *opinio juris*. Moreover, even if there were both, the function of the Court under Article 19 was to ensure the observance of the Convention, not to apply it only where States were in the habit of applying it. Nor did the Court's case-law, for example *Varnava and Others v. Turkey* ([GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 185, ECHR 2009), assist the Government's case. In that judgment, the Court held that the relevant rules of international humanitarian law expanded the obligations on States under Article 2; it did not support the proposition that fundamental rights were automatically curtailed in wartime. Inherent

in the concept of "interpreting a provision in so far as possible in the light of general principles of international law" was recognition that there was a range of possible meanings and that some proposed interpretations would fall outside that range. The Government's "displacement" argument was essentially that Convention rights must be read as if they contained a wide "wartime" exception which they did not actually contain. Such an approach was not supported by *Varnava and Others*. Finally, the applicant submitted that the Government's reliance on the International Court of Justice's advisory opinion on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* was hard to understand, since in that opinion the International Court of Justice expressly found that derogation was the only means of displacing a provision of international human rights law (see paragraph 36 above).

83. The Court had often applied the Convention in situations of armed conflict and recognised that in principle it was not displaced (the applicant referred to the following cases: *Ahmet Özkan and Others v. Turkey*, no. 21689/93, §§ 85 and 319, 6 April 2004; *Varnava and Others*, cited above, § 191; *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, § 105, ECHR 2011; *Al-Skeini and Others*, cited above, §§ 164-67). This was, moreover, supported by the Advisory Opinion of the International Court of Justice in *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (§ 106, see paragraph 36 above). In the applicant's submission, the International Court of Justice was recognising in this passage that there might be some rights that fall within the scope of international humanitarian law but to which no human rights convention extended. In the applicant's view, the position was that, at most, the provisions of international humanitarian law might influence the interpretation of the provisions of the Convention. For example, they might be relevant in determining what acts were strictly required by the exigencies of the situation for the purposes of a derogation from Article 2. In the context of Article 5, this might, in an appropriate case, inform the Court's interpretation of "competent legal authority" and "offence" in Article 5 § 1 (c). However, it was not right that Article 5 was displaced in circumstances in which the Geneva Conventions were engaged. The Convention was a treaty aimed at protecting fundamental rights. Its provisions should not be distorted, still less ignored altogether, to make life easier for States which failed to use the mechanism within the Convention that expressly dictated how they were to reconcile its provisions with the exigencies of war.

84. The applicant further contended that, in any event, the Government had not identified anything that British forces were required to do by the

Geneva Conventions that would have obliged them to act contrary to Article 5. The Iraq war was a non-international armed conflict following the collapse of Saddam Hussein's forces and the occupation by coalition forces. There was considerably less treaty law applicable to non-international armed conflicts than to international armed conflicts. International humanitarian law stipulated minimum requirements on States in situations of armed conflict but did not provide powers. In reality, the Government's submission that the Convention should be "displaced" was an attempt to reargue the question of Article 1 jurisdiction which was decided in *Al-Skeini and Others* (cited above). If the Government's position were correct, it would have the effect of wholly depriving victims of a contravention of any effective remedy, since the Third and Fourth Geneva Conventions were not justiciable at the instance of an individual. Such a narrowing of the rights of individuals in respect of their treatment by foreign armed forces would be unprincipled and wrong.

85. Finally, even if the Court were to decide that Article 5 should be interpreted in the light of the Third and Fourth Geneva Conventions, Tarek Hassan was arrested and detained as a means of inducing the applicant to surrender. The detention was arbitrary, it did not fall within any of the lawful categories under Article 5 § 1 and it was not even permissible under international humanitarian law.

b. The Government

86. The Government submitted that the drafters of the Convention did not intend that an alleged victim of extraterritorial action in the active phase of an international armed conflict, such as a prisoner of war protected by the Third Geneva Convention, who might nonetheless wish to allege a breach of Article 5, would benefit from the protections of the Convention. There was nothing to suggest any such intent within the Convention or its *travaux préparatoires*, or indeed in the wording or *travaux préparatoires* of the 1949 Geneva Conventions, which would have been at the forefront of the minds of those drafting the Convention as establishing the relevant applicable legal regime. Furthermore, such intent would be inconsistent with the practical realities of conduct of active hostilities in an international armed conflict, and also with such Convention jurisprudence as there was bearing on the issue.

87. It was the Government's primary contention that the relevant events took place outside the jurisdiction of the United Kingdom. In the alternative, if the Court were to find that the United Kingdom had jurisdiction over Tarek Hassan during his detention, the Government contended that Art-

icle 5 had to be interpreted and applied in conformity and harmony with international law. Where provisions of the Convention fell to be applied in the context of an international armed conflict, and in particular the active phase of such a conflict, the application had to take account of international humanitarian law, which applied as the *lex specialis*, and might operate to modify or even displace a given provision of the Convention. Thus, in *Cyprus v. Turkey* (nos. 6780/74 and 6950/75, Commission's Report of 10 July 1976, unreported), the European Commission of Human Rights did not consider it necessary to address the question of a breach of Article 5 where persons were detained under the Third Geneva Convention in the context of the taking of prisoners of war. Moreover, it had been the consistent approach of the International Court of Justice that international humanitarian law applied as *lex specialis* in the context of an international armed conflict in circumstances where a given human rights treaty also applied. This view was supported by the Report of the Study Group of the International Law Commission on the "Fragmentation of International Law" (see paragraph 38 above) and by academic writers, such as the authors of *The Handbook of International Humanitarian Law* (D. Fleck (ed.), Oxford University Press) and *The Handbook of the International Law of Military Operations* (T. Gill and D. Fleck (eds.), Oxford University Press).

88. The Government argued that the right to liberty under Article 5 of the Convention had to be considered in the context of the fundamental importance of capture and detention of actual or suspected combatants in armed conflict. It could not be, and it was not so, that a Contracting State, when its armed forces were engaged in active hostilities in an armed conflict outside its own territory, had to afford the procedural safeguards of Article 5 to enemy combatants whom it took as prisoners of war, or suspected enemy combatants whom it detained pending determination of whether they were entitled to such status. In addition, in so far as the issue arose in the present case, the same principle had to apply in relation to the detention of civilians where this was "absolutely necessary" for security reasons, in accordance with Article 42 of the Fourth Geneva Convention (see paragraph 33 above). In the present case, since Tarek Hassan had been captured and initially detained as a suspected combatant, Article 5 was displaced by international humanitarian law as *lex specialis*, or modified so as to incorporate or allow for the capture and detention of actual or suspected combatants in accordance with the Third and/or Fourth Geneva Conventions, such that there was no breach by the United Kingdom with respect to the capture and detention of Tarek Hassan.

89. In the alternative, if the Court were to find that Article 5 applied and was not displaced or modified in situations of armed conflict, the

Government submitted that the list in Article 5 § 1 of permissible purposes of detention had to be interpreted in such a way that it took account of and was compatible with the applicable *lex specialis*, namely international humanitarian law. The taking of prisoners of war pursuant to the Third Geneva Convention, and the detention of civilians pursuant to the Fourth Geneva Convention, had to be a lawful category of detention under Article 5 § 1 of the Convention; it fell most readily as a "lawful detention" within Article 5 § 1 (c). In this special context, the concept of "offence" within that provision could correctly be interpreted to include participation as an enemy combatant and/or challenging the security of the Detaining Power within Article 42 of the Fourth Geneva Convention. The key question for the purposes of Article 5 § 1 would then be whether the detention of Tarek Hassan was a "lawful detention" in the context of an international armed conflict; the Government submitted that it evidently was. Tarek Hassan was encountered by British forces as a "gunman", armed with an AK-47 machine gun, on the roof of a house belonging to a general of the Al-Quds Army, where firearms as well as intelligence material were found. He was captured as a suspected combatant and British forces were lawfully entitled under international humanitarian law to capture and detain him until his status was finally determined.

90. The Government recognised that difficult issues might arise as to the applicability of Article 15 in relation to a case such as the present. Consistently with the practice of all other Contracting Parties which had been involved in such operations, the United Kingdom had not derogated; there had been no need to do so, since the Convention could and did accommodate detention in such cases, having regard to the *lex specialis*, international humanitarian law. The inclusion of Article 15 in the Convention in no sense indicated that, in time of war or public emergency threatening the life of the nation, obligations under the Convention would at all times be interpreted in exactly the same way as in peacetime. Any argument that, unless there had been a derogation under Article 15, Article 5 should be interpreted and applied regardless of the context and the detailed rules of international humanitarian law governing detention of suspected combatants would risk diminishing the protections available to combatants or civilians (in effect, by precipitating derogations by concerned States). It would also be inconsistent with a seemingly universal State practice in terms of the detention of actual or suspected combatants in international armed conflicts, as well as the jurisprudence of the Court and the International Court of Justice, which had made it clear that the application of international humanitarian law as *lex specialis* was a general principle, and not one that depended on whether there had been a derogation under an applicable human rights treaty.

c. The third party

91. In the third party's submissions filed in the present case, the Human Rights Centre of the University of Essex emphasised that, as the Court had held in its case-law, the Convention should be interpreted in harmony with other rules of public international law, of which it forms part. Such a principle was desirable and necessary, to avoid States being faced with irreconcilable legal obligations and controversial results. This was particularly important with relation to the detention regime applicable in international armed conflicts, since this regime was specifically designed for the situation in question and since the Third and Fourth Geneva Conventions enjoyed universal ratification. There was one sentence in the Court's judgment in *Al-Jedda*, cited above, § 107, which might be read as suggesting that the Court would only take account of international humanitarian law where it imposed an obligation, and not where it authorised a course of conduct, namely where it was stated: "… the Court does not find it established that international humanitarian law places an obligation on an Occupying Power to use indefinite internment without trial". However, it was the view of the third party that, in the context of the judgment, it appeared that the Court was not looking at international humanitarian law in its own right but as a source of possible rules which could be read into a Security Council resolution. The United Kingdom Government could have chosen to raise international humanitarian law as an independent basis for detention but chose instead to rely exclusively on the Security Council resolution. The sentence quoted from *Al-Jedda* did not indicate that the Court would take account of international humanitarian law only where it imposed an obligation on States.

92. The third party pointed out that, in common with many areas of international law which had been developed as comprehensive regimes for particular fields of activity, the law of armed conflict and international humanitarian law (hereinafter "international humanitarian law") had developed its own internal coherence and understandings. The key underlying assumption was that this law represented a balance between military necessity and humanitarian considerations. This meant that there could be no appeal to military necessity outside the treaty rule, which itself took account of military exigencies. A second underlying principle was that this field of law was based not on rights, but on the obligations of parties to a conflict. Thirdly, the rules applicable to an individual depended on his status as a member of a group, for example a combatant or a civilian. Fourthly, while reference was often made to the "principles" of international humanitarian law, the principles themselves were not legal rules; the rules

were to be found in treaty provisions which represented the articulation of those principles in legally binding form. It was clear, therefore, that the internal coherence of international humanitarian law was significantly different from that of human rights law.

93. Of the relationships between various fields of international law, that between international humanitarian law and international human rights law was not alone in being problematical, but it had received the most attention. By virtue of the express terms of certain human rights treaties, they continued to apply in situations of "war or other public emergency", while the rules on international armed conflicts applied whenever there was an armed conflict between two or more States, including where one State occupied part or all of the territory of another. This meant that certain human rights treaties remained applicable, possibly in a modified way, in circumstances in which the law of armed conflict was also applicable. The International Court of Justice had addressed the relationship on three occasions (see paragraphs 35-37 above). Certain elements emerged clearly from this case-law. Firstly, that the applicability of international humanitarian law did not displace the jurisdiction of a human rights body. That resulted from the finding that human rights law remained applicable in all circumstances. Secondly, where international humanitarian law was applicable, a human rights body had two choices. Either it had to apply human rights law through the lens of international humanitarian law or it had to blend human rights law and international humanitarian law together. That was the only possible interpretation of certain matters being the province of both bodies of rules, whilst others were regulated by international humanitarian law. The reference to *lex specialis* was unhelpful, which might account for the fact that the International Court of Justice did not refer to it in the *Armed Activities on the Territory of the Congo* judgment (see paragraph 37 above). Use of this term had served to obfuscate the debate rather than provide clarification.

94. The International Court of Justice had provided apparently conflicting guidance on the question of the need for derogation before a State could rely on international humanitarian law. If the basis for using international humanitarian law at all was that human rights bodies should take account of other areas of international law, that might be thought to point to its use whether or not a State had derogated and whether or not it invoked international humanitarian law. On the other hand, where the State had done neither, the human rights body might wish to refer to the applicability of international humanitarian law, whilst saying that the State had chosen to be judged by the higher standard of peacetime human rights law, although such an approach might run the risk of appearing

disconnected from reality. Where the State had not derogated but had relied on international humanitarian law, it would be open to the human rights body either to take account of international humanitarian law or to insist that the only way of modifying international human rights obligations was by derogation.

95. As regards the interplay between the two regimes, there could be no single applicable rule. Any given situation was likely to require elements of both bodies of law working together, but the balance and interplay would vary. Accordingly, there might be situations, such as the detention of prisoners of war, in which the combination of criteria lead to the conclusion that international humanitarian law would carry more weight, and determination of human rights violations regarding issues such as grounds and review of detention would be based on the relevant rules of international humanitarian law. Even in such contexts, however, human rights law would not be under absolute subjection to international humanitarian law. For example, if there were allegations of ill-treatment, human rights law would still assist in determining issues such as the specificities of the acts which constituted a violation. From the perspective of the human rights body, it would be advantageous to use human rights law as the first step to identify the issues that needed to be addressed, for example, periodicity of review of lawfulness of detention, access to information about reasons of detention, legal assistance before the review mechanism. The second step would be to undertake a contextual analysis using both international humanitarian law and human rights law, in the light of the circumstances of the case at hand. On condition that the human rights body presented its analysis with sufficient coherence and clarity, the decisions generated would provide guidance to both States and armed forces ahead of future action. It went without saying that the approaches and the result had to be capable of being applied in practice in situations of armed conflict.

2. The Court's assessment

a. The general principles to be applied

96. Article 5 § 1 of the Convention sets out the general rule that "[e]veryone has the right to liberty and security of the person" and that "[n]o one shall be deprived of his liberty" except in one of the circumstances set out in sub-paragraphs (a) to (f) thereof.

97. It has long been established that the list of grounds of permissible detention in Article 5 § 1 does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time (see *Lawless v. Ireland (no. 3)*, 1 July 1961, pp. 51-53,

§§ 13-14, Series A no. 3; *Ireland v. the United Kingdom*, 18 January 1978, § 196, Series A no. 25; *Guzzardi v. Italy*, 6 November 1980, § 102, Series A no. 39; *Jėčius v. Lithuania*, no. 34578/97, §§ 47-52, ECHR 2000-IX; and *Al-Jedda*, cited above, § 100). Moreover, the Court considers that there are important differences of context and purpose between arrests carried out during peacetime and the arrest of a combatant in the course of an armed conflict. It does not take the view that detention under the powers provided for in the Third and Fourth Geneva Conventions is congruent with any of the categories set out in sub-paragraphs (a) to (f). Although Article 5 § 1 (c) might at first glance seem the most relevant provision, there does not need to be any correlation between security internment and suspicion of having committed an offence or risk of the commission of a criminal offence. As regards combatants detained as prisoners of war, since this category of person enjoys combatant privilege, allowing them to participate in hostilities without incurring criminal sanctions, it would not be appropriate for the Court to hold that this form of detention falls within the scope of Article 5 § 1 (c).

98. In addition, Article 5 § 2 requires that every detainee should be informed promptly of the reasons for his arrest and Article 5 § 4 requires that every detainee should be entitled to take proceedings to have the lawfulness of his detention decided speedily by a court. Article 15 of the Convention provides that "[i]n time of war or other public emergency threatening the life of the nation", a Contracting State may take measures derogating from certain of its obligations under the Convention, including Article 5. In the present case, the United Kingdom did not purport to derogate under Article 15 from any of its obligations under Article 5.

99. This is the first case in which a respondent State has requested the Court to disapply its obligations under Article 5 or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law. In particular, in *Al-Jedda*, cited above, the United Kingdom Government did not contend that Article 5 was modified or displaced by the powers of detention provided for by the Third and Fourth Geneva Conventions. Instead they argued that the United Kingdom was under an obligation to the United Nations Security Council to place the applicant in internment and that, because of Article 103 of the United Nations Charter, this obligation had to take primacy over the United Kingdom's obligations under the Convention. It was the Government's case that an obligation to intern the applicant arose from the text of United Nations Security Council Resolution 1546 and annexed letters and also because the Resolution had the effect of maintaining the obligations placed on occupying powers under international humanitarian law, in particular

Article 43 of the Hague Regulations (see *Al-Jedda*, cited above, § 107). The Court found that no such obligation arose. It was only before the European Commission of Human Rights, in *Cyprus v. Turkey* (cited above), that a question arose similar to that in the present case, namely whether it was compatible with the obligations under Article 5 of the Convention to detain a person under the Third and Fourth Geneva Conventions in the absence of a valid derogation under Article 15 of the Convention. In its report, the Commission refused to examine possible violations of Article 5 with regard to detainees accorded prisoner-of-war status, and took account of the fact that both Cyprus and Turkey were parties to the Third Geneva Convention (see § 313 of the report). The Court has not, until now, had the opportunity to review the approach of the Commission and to determine such a question itself.

100. The starting-point for the Court's examination must be its constant practice of interpreting the Convention in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969 (see *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18, and many subsequent cases). Article 31 of the Vienna Convention, which contains the "general rule of interpretation" (see paragraph 34 above), provides in paragraph 3 that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and (c) any relevant rules of international law applicable in the relations between the parties.

101. There has been no subsequent agreement between the High Contracting Parties as to the interpretation of Article 5 in situations of international armed conflict. However, in respect of the criterion set out in Article 31 § 3 (b) of the Vienna Convention (see paragraph 34 above), the Court has previously stated that a consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention (see, *mutatis mutandis*, *Soering*, cited above, §§ 102-03, and *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 120, ECHR 2010). The practice of the High Contracting Parties is not to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts. As the Court noted in *Banković and Others* (cited above, § 62), although there has been a number of military missions involving Contracting States acting extraterritorially since their ratification of the Convention, no State has ever made a derogation pursuant

to Article 15 of the Convention in respect of these activities. The derogations that have been lodged in respect of Article 5 have concerned additional powers of detention claimed by States to have been rendered necessary as a result of internal conflicts or terrorist threats to the Contracting State (see, for example, *Brannigan and McBride v. the United Kingdom*, 26 May 1993, Series A no. 258-B; *Aksoy v. Turkey*, 18 December 1996, *Reports* 1996-VI; and *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009; see also paragraphs 40-41 above). Moreover, it would appear that the practice of not lodging derogations under Article 15 of the Convention in respect of detention under the Third and Fourth Geneva Conventions during international armed conflicts is mirrored by State practice in relation to the International Covenant for the Protection of Civil and Political Rights. Similarly, although many States have interned persons pursuant to powers under the Third and Fourth Geneva Conventions in the context of international armed conflicts subsequent to ratifying the Covenant, no State has explicitly derogated under Article 4 of the Covenant in respect of such detention (see paragraph 42 above), even subsequent to the advisory opinions and judgment referred to above, where the International Court of Justice made it clear that States' obligations under the international human rights instruments to which they were parties continued to apply in situations of international armed conflict (see paragraphs 35-37 above).

102. Turning to the criterion contained in Article 31 § 3 (c) of the Vienna Convention (see paragraph 34 above), the Court has made it clear on many occasions that the Convention must be interpreted in harmony with other rules of international law of which it forms part (see paragraph 77 above). This applies no less to international humanitarian law. The four Geneva Conventions of 1949, intended to mitigate the horrors of war, were drafted in parallel to the European Convention on Human Rights and enjoy universal ratification. The provisions in the Third and Fourth Geneva Conventions relating to internment, in issue in the present application, were designed to protect captured combatants and civilians who pose a security threat. The Court has already held that Article 2 of the Convention should "be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict" (see *Varnava and Others*, cited above, § 185), and it considers that these observations apply equally in relation to Article 5. Moreover, the International Court of Justice has held that the protection offered by human rights conventions and that offered by international humanitarian law coexist in situations of armed conflict (see paragraphs 35-37 above). In its judgment *Armed Activities on*

the Territory of the Congo, the International Court of Justice observed, with reference to its Advisory Opinion concerning *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, that "[a]s regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law" (see paragraphs 36-37 above). The Court must endeavour to interpret and apply the Convention in a manner which is consistent with the framework under international law delineated by the International Court of Justice.

103. In the light of the above considerations, the Court accepts the Government's argument that the lack of a formal derogation under Article 15 does not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in this case.

104. Nonetheless, and consistently with the case-law of the International Court of Justice, the Court considers that, even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law. By reason of the coexistence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in sub-paragraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. The Court is mindful of the fact that internment in peacetime does not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15 (see paragraph 97 above). It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.

105. As with the grounds of permitted detention already set out in those sub-paragraphs, deprivation of liberty pursuant to powers under international humanitarian law must be "lawful" to preclude a violation of Article 5 § 1. This means that the detention must comply with the rules of international humanitarian law and, most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which is to protect the individual from arbitrariness (see, for example, *Kurt v. Turkey*, 25 May

1998, § 122, *Reports* 1998-III, and *El-Masri*, cited above, § 230; see also *Saadi v. the United Kingdom* [GC], no. 13229/03, §§ 67-74, ECHR 2008, and the cases cited therein).

106. As regards procedural safeguards, the Court considers that, in relation to detention taking place during an international armed conflict, Article 5 §§ 2 and 4 must also be interpreted in a manner which takes into account the context and the applicable rules of international humanitarian law. Articles 43 and 78 of the Fourth Geneva Convention provide that internment "shall be subject to periodical review, if possible every six months, by a competent body". Whilst it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent "court" in the sense generally required by Article 5 § 4 (see, in the latter context, *Reinprecht v. Austria*, no. 67175/01, § 31, ECHR 2005-XII), nonetheless, if the Contracting State is to comply with its obligations under Article 5 § 4 in this context, the "competent body" should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay. While the applicant in addition relies on Article 5 § 3, the Court considers that this provision has no application in the present case since Tarek Hassan was not detained in accordance with the provisions of paragraph 1 (c) of Article 5.

107. Finally, although, for the reasons explained above, the Court does not consider it necessary for a formal derogation to be lodged, the provisions of Article 5 will be interpreted and applied in the light of the relevant provisions of international humanitarian law only where this is specifically pleaded by the respondent State. It is not for the Court to assume that a State intends to modify the commitments which it has undertaken by ratifying the Convention in the absence of a clear indication to that effect.

b. Application of these principles to the facts of the case

108. The Court's starting-point is to observe that, during the period in question in Iraq, all parties involved were High Contracting Parties to the four Geneva Conventions, which apply in situations of international armed conflict and partial or total occupation of the territory of a High Contracting Party (see Article 2, common to the four Geneva Conventions, set out in paragraph 33 above). It is clear, therefore, that whether the situation in south-east Iraq in late April and early May 2003 is characterised as one

of occupation or of active international armed conflict, the four Geneva Conventions were applicable.

109. The Court refers to the findings of fact which it made after analysis of all the available evidence (see paragraphs 47-57 above). In particular, it held that Tarek Hassan was found by British troops, armed and on the roof of his brother's house, where other weapons and documents of a military intelligence value were retrieved (see paragraphs 51-54 above). The Court considers that, in these circumstances, the UK authorities had reason to believe that he might be either a person who could be detained as a prisoner of war or whose internment was necessary for imperative reasons of security, both of which provided a legitimate ground for capture and detention (see Articles 4A and 21 of the Third Geneva Convention and Articles 42 and 78 of the Fourth Geneva Convention, all set out in paragraph 33 above). Almost immediately following his admission to Camp Bucca, Tarek Hassan was subject to a screening process in the form of two interviews by US and British military intelligence officers, which led to his being cleared for release since it was established that he was a civilian who did not pose a threat to security (see paragraphs 21-24 above). The Court has also found that the evidence points to his having been physically released from the Camp shortly thereafter (see paragraphs 55-56 above).

110. Against this background, it would appear that Tarek Hassan's capture and detention were consistent with the powers available to the United Kingdom under the Third and Fourth Geneva Conventions, and was not arbitrary. Moreover, in the light of his clearance for release and physical release within a few days of being brought to the Camp, it is unnecessary for the Court to examine whether the screening process constituted an adequate safeguard to protect against arbitrary detention. Finally, it would appear from the context and the questions that Tarek Hassan was asked during the two screening interviews that the reason for his detention would have been apparent to him.

111. It follows from the above analysis that the Court finds no violation of Article 5 §§ 1, 2, 3 or 4 in the circumstances of the present case.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the complaints under Articles 2 and 3 of the Convention inadmissible;
2. *Holds*, unanimously, that the applicant's brother was within the jurisdiction of the United Kingdom between the time of his arrest and the time of his release from the coach that took him from Camp Bucca;

3. *Declares*, unanimously, the complaints under Article 5 §§ 1, 2, 3 and 4 of the Convention admissible;
4. *Holds*, by thirteen votes to four, that there has been no violation of Article 5 §§ 1, 2, 3 or 4 of the Convention.

…

EUROPEAN COURT OF HUMAN RIGHTS

CASE OF MOCANU AND OTHERS v. ROMANIA

(Applications nos. 10865/09, 45886/07 and 32431/08)

GRAND CHAMBER

JUDGMENT OF 17 SEPTEMBER 2014

[Extracts][1]

1. This is an excerpt from the judgment delivered by the Grand Chamber in the case of *Mocanu and Others v. Romania*. It contains a summary which does not bind the Court. The full English text of the judgment is available in the HUDOC database at: http://hudoc.echr.coe.int/eng?i=001-146540. In addition to the authentic English and French versions of this judgment, HUDOC also contains Spanish translations of select case-law at: http://hudoc.echr.coe.int.

SUMMARY[1]

Lack of an effective investigation following death of a man in demonstrations of June 1990 against the Romanian regime in power

The applicant, who had lodged his application with the Court more than seven years after lodging his criminal complaint with the prosecuting authorities, could not be criticised for having waited too long for the purposes of Article 35 § 1 of the Convention: the Court considered that the applicant had not failed in his duty of diligence, having regard to his vulnerability and the feeling of powerlessness which he shared with the other victims of the anti-government demonstrations of June 1990; in addition, the effectiveness of the investigation into the case had not been compromised, given the exceptional context in which it occurred. Moreover, there had been meaningful contact between the authorities and the applicant concerning his complaint, with regard to which the investigation was advancing. The applicant could legitimately have believed that the investigation was effective and could reasonably have awaited its outcome (see paragraphs 270-82 of the judgment).

Article 2

Effective investigation – Lack of an effective investigation following death of a man in demonstrations of June 1990 against the Romanian regime in power

Article 3

Effective investigation – Lack of an effective investigation following ill-treatment of a man by State agents in demonstrations of June 1990 against the Romanian regime in power

Article 35 § 1

Six-month deadline – An applicant's passivity for eleven years before submitting his complaint to the relevant national authorities – Duty of diligence complied with – Effectiveness of the investigation not compromised – Legitimate expectation – Not out of time

1. This summary by the Registry does not bind the Court.

Article 35 § 3 (a)

Ratione temporis – *Four years between the triggering event and the Convention's entry into force in respect of Romania – Relatively short lapse of time, less than ten years and less than the time periods in issue in similar cases examined by the Court – Majority of the proceedings and most important procedural measures carried out after the critical date*

*

* *

Facts

In June 1990 the Romanian government undertook to end the occupation, of several weeks' duration, of University Square in Bucharest by demonstrators protesting about the regime then in power. On 13 June 1990 the security forces intervened and arrested numerous demonstrators; this had the effect of increasing the demonstrations. While the army was being sent into the most sensitive areas, shots were fired from inside the Ministry of the Interior, which was surrounded by demonstrators, striking Mr Mocanu, the first applicant's husband, in the head and resulting in his death. During the evening Mr Stoica (the second applicant) and other persons were arrested and ill-treated by uniformed police officers and men in civilian clothing inside the headquarters of the State television service. The criminal investigation into this crackdown began in 1990 with a very large number of individual files, which were subsequently joined, then transferred to the military prosecutor's office in 1997.

On 18 June 2001, more than eleven years after the events complained of, the second applicant filed a criminal complaint with a prosecutor at the military section of the prosecutor's office at the Supreme Court of Justice. The investigation opened into the ill-treatment inflicted on the second applicant on 13 June 1990 was closed by a decision not to bring a prosecution, dated 17 June 2009, and upheld by a judgment of the High Court of Cassation and Justice of 9 March 2011.

The criminal proceedings into the unlawful killing of the first applicant's husband were still pending when the European Court's judgment was delivered by its Grand Chamber.

Law

1. Article 35 § 3: The Government made no plea before the Grand Chamber as to the Court's lack of jurisdiction *ratione temporis*. However, they submitted that the Court could examine the complaints brought before it only in so far as they related to the period after 20 June 1994, the date on which the Convention came into force in respect of Romania.

The Grand Chamber held that the complaints in respect of the procedural aspect of Articles 2 and 3 of the Convention concerned the investigation into the armed

repression conducted on 13 and 14 June 1990 against the anti-government demonstrations, and that this repression had cost the life of the first applicant's husband and interfered with the second applicant's physical integrity. The investigation had begun in 1990, shortly after those events, giving rise, *inter alia*, to investigative measures, the primary aim of which had been to identify the victims who had been killed by gunfire, including the first applicant's husband.

Four years had passed between the triggering event and the Convention's entry into force in respect of Romania, on 20 June 1994. This lapse of time was relatively short. It was less than ten years and less than the time periods in issue in similar cases examined by the Court, such as *Şandru and Others v. Romania* (no. 22465/03, 8 December 2009). In addition, the majority of the proceedings and the most important procedural measures had been carried out after the critical date.

Consequently, the Court found that it had jurisdiction *ratione temporis* to examine the complaints raised by the first and second applicants under the procedural aspect of Articles 2 and 3 of the Convention, in so far as those complaints related to the criminal investigation conducted after the entry into force of the Convention in respect of Romania on 20 June 1994.

2. Article 35 § 1 (*six-month time-limit*): The Grand Chamber considered that the issue of the diligence incumbent on the second applicant was closely linked to that of any tardiness in lodging a criminal complaint within the domestic legal system. Taken together, these arguments could be regarded as an objection alleging a failure to comply with the six-month time-limit under Article 35 § 1 of the Convention.

The Court acknowledged that the psychological effects of ill-treatment inflicted by State agents could undermine victims' capacity to complain to the domestic authorities. The second applicant's vulnerability and his feeling of powerlessness, which he shared with numerous other victims who, like him, waited for many years before lodging a complaint, amounted to a plausible and acceptable explanation for his inactivity from 1990 to 2001.

Moreover, the second applicant had admittedly lodged his application with the Court more than seven years after lodging his criminal complaint. However, he had not lacked diligence, in that he had regularly enquired about progress, he could legitimately have believed that the investigation was effective and could reasonably have awaited its outcome, so long as there was a realistic possibility that the investigative measures were moving forward. Thus, the application had not been lodged out of time.

Conclusion: preliminary objection dismissed (fourteen votes to three).

3. Articles 2 and 3 (*procedural aspect*): The Court's jurisdiction *ratione temporis* permitted it to consider only that part of the investigation which had occurred after 20 June 1994, the date on which the Convention had come into force in respect of Romania.

With regard to the independence of the investigation, it had been entrusted to military prosecutors who, like the accused, were officers in a relationship of

subordination within the military hierarchy, a finding which had already led the Court to conclude that there had been a violation of the procedural aspect of Article 2 and Article 3 of the Convention in previous cases against Romania.
With regard to the expedition and adequacy of the investigation, the investigation concerning the first applicant had been pending for more than twenty-three years, and for more than nineteen years since the Convention was ratified by Romania. In respect of the second applicant, the investigation had been terminated by a judgment delivered on 9 March 2011, twenty-one years after the opening of the investigation and ten years after the official lodging of the second applicant's complaint and its joinder to the investigation case file. While acknowledging that the case was indisputably complex, the Court considered that the political and societal stakes referred to by the Government could not justify such a long period. On the contrary, the importance of those stakes for Romanian society should have led the authorities to deal with the case promptly and without delay in order to avoid any appearance of collusion in or tolerance of unlawful acts.
Yet lengthy periods of inactivity had occurred in the investigation concerning the first applicant. In addition, the national authorities themselves had found numerous shortcomings in the investigation.
Furthermore, the investigation into the violence inflicted on the second applicant had been terminated by a decision of 17 June 2009 not to bring a prosecution, which was upheld by the judgment of 9 March 2011, that is, ten years after he lodged a complaint. However, in spite of the length of time involved and the investigative acts carried out in respect of the second applicant, none of those decisions had succeeded in establishing the circumstances of the ill-treatment which the applicant and other persons claimed to have sustained at the State television headquarters. This branch of the investigation had been terminated essentially on account of the statutory limitation of criminal liability. However, the procedural obligations arising under Articles 2 and 3 of the Convention could hardly be considered to have been met where an investigation was terminated, as in the present case, through statutory limitation of criminal liability resulting from the authorities' inactivity.
It appeared that the authorities responsible for the investigation had not taken all the measures reasonably capable of leading to the identification and punishment of those responsible.
With regard to the obligation to involve victims' relatives in the proceedings, the first applicant had not been informed of progress in the investigation prior to the decision of 18 May 2000 committing for trial the persons accused of killing her husband. Moreover, she had been questioned by the prosecutor for the first time on 14 February 2007, almost seventeen years after the events, and, following the High Court of Cassation and Justice's judgment of 17 December 2007, she had no longer been informed about developments in the investigation. The Court was not therefore persuaded that her interests in participating in the investigation had been sufficiently protected.

Thus, in the light of the foregoing, the first applicant had not had the benefit of an effective investigation as required by Article 2 of the Convention, and the second applicant had also been deprived of an effective investigation for the purposes of Article 3.

Conclusions: violation of Article 2 (procedural aspect) in respect of the first applicant (sixteen votes to one) and violation of Article 3 (procedural aspect) in respect of the second applicant (fourteen votes to three).

JUDGMENT

In the case of *Mocanu and Others v. Romania*,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Dean Spielmann, *President*,
Guido Raimondi,
Mark Villiger,
Isabelle Berro-Lefèvre,
Peer Lorenzen,
Mirjana Lazarova Trajkovska,
Ledi Bianku,
Nona Tsotsoria,
Ann Power-Forde,
Işıl Karakaş,
Nebojša Vučinić,
Paulo Pinto de Albuquerque,
Paul Lemmens,
Aleš Pejchal,
Johannes Silvis,
Krzysztof Wojtyczek, *judges*,
Florin Streteanu, ad hoc *judge*,
and Johan Callewaert, *Deputy Grand Chamber Registrar*,

…,

Delivers the following judgment …:

PROCEDURE

1. The case originated in three applications against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Romanian nationals, Mrs Anca Mocanu (no. 10865/09), Mr Marin Stoica (no. 32431/08) and Mr Teodor Mărieş, and by the Association "21 December 1989", a legal entity registered under Romanian law and based in Bucharest (no. 45886/07) ("the applicants") on 28 January 2009, 25 June 2008 and 13 July 2007 respectively.

2. Before the Court, Mrs Mocanu, Mr Mărieş and the applicant association were represented by Mr A. Popescu, Ms I. Sfîrăială and Mr I. Matei, lawyers practising in Bucharest. Mrs Mocanu was granted legal aid. Mr Stoica, who was also granted legal aid, was represented until

8 December 2009 by Ms D. Nacea, a lawyer practising in Bucharest, and from 22 January 2013 by Ms D.O. Hatneanu, a lawyer practising in Bucharest. The Romanian Government ("the Government") were represented by their Agents, first by Mr R.H. Radu, then by Ms I. Cambrea, and finally by Ms C. Brumar, of the Ministry of Foreign Affairs.

…

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. Mrs Anca Mocanu and Mr Marin Stoica were born in 1970 and 1948 respectively. They live in Bucharest.

12. The Association "21 December 1989" (*Asociația 21 Decembrie 1989*) was set up on 9 February 1990 and is based in Bucharest.

13. The applicant association brings together mainly individuals who were injured during the violent suppression of the anti-totalitarian demonstrations which took place in Romania in December 1989 and the relatives of persons who died during those events. It was one of the groups which supported the anti-government demonstrations held in Bucharest between April and June 1990, at which demonstrators called, *inter alia*, for the identification of those responsible for the violence committed in December 1989.

A. The events of 13 to 15 June 1990

1. Overview of the main events

14. The main facts concerning the crackdown on anti-government demonstrations from 13 to 15 June 1990 were described in the decisions of 16 September 1998 (see paragraphs 99-110 below) and 17 June 2009 (see paragraphs 152-63 below), issued by the prosecutor's office at the Supreme Court of Justice (which in 2003 became the High Court of Cassation and Justice), and in the decisions to commit for trial (*rechizitoriu*) issued by the same prosecutor's office on 18 May 2000 and 27 July 2007.

15. On 13 June 1990 the security forces' intervention against the demonstrators who were occupying University Square and other areas of the capital resulted in several civilian casualties, including Mrs Mocanu's husband, Mr Mocanu, who was killed by a shot fired from the headquarters of the Ministry of the Interior.

16. On the evening of 13 June 1990 Mr Stoica and other persons, some but not all of whom were demonstrators, were arrested and ill-treated by uniformed police officers and men in civilian clothing, in the area around the headquarters of the State television service and in the basement of that building.

17. On 14 June 1990 thousands of miners were transported to Bucharest, essentially from the Jiu Valley (*Valea Jiului*) mining region, to take part in the crackdown on the demonstrators.

18. At 6.30 a.m. on 14 June 1990 the President of Romania addressed the miners, who had arrived in the square in front of the Government building, inviting them to go to University Square, occupy it and defend it against the demonstrators; they subsequently did so.

19. The violent events of 13 and 14 June 1990 resulted in more than a thousand victims, whose names appear in a list attached to the decision issued on 29 April 2008 by the military section of the prosecutor's office at the High Court of Cassation and Justice.

20. The headquarters of several political parties and other institutions, including those of the applicant association, were attacked and ransacked. The latter association subsequently joined the criminal proceedings as a civil party.

21. The criminal proceedings into the unlawful killing by gunfire of Mr Velicu-Valentin Mocanu are still pending. The investigation opened on 13 June 1990 into the ill-treatment allegedly inflicted on Mr Stoica was closed by a decision not to bring a prosecution, dated 17 June 2009, subsequently upheld by a judgment of the High Court of Cassation and Justice of 9 March 2011.

22. The facts as set out by the prosecutor's office at the High Court of Cassation and Justice in its decisions of 16 September 1998 and 17 June 2009 and in the decisions to commit for trial of 18 May 2000 and 27 July 2007 may be summarised as follows.

2. The demonstrations held in the first months of 1990

23. University Square in Bucharest was considered a symbolic location for the fight against the totalitarian regime of Nicolae Ceauşescu, given the large number of persons who had died or were injured there as a result of the armed repression initiated by the regime on 21 December 1989. It was therefore in this square that several associations – including the applicant association – called on their members to attend protest events in the first months of 1990.

24. Thus, the first demonstrations against the provisional government formed after the fall of the Ceauşescu regime took place in University Square

in Bucharest on 12 and 24 January 1990, as indicated in the decision issued on 17 June 2009 by the prosecutor's office at the High Court of Cassation and Justice. That decision also states that a counter-demonstration was organised by the National Salvation Front (*Frontul Salvării Naţionale* – the FSN) on 29 January 1990. On that occasion, miners from the coal-mining regions of the Jiu Valley, Maramureş and other areas appeared in Bucharest. The headquarters of the National Liberal Party were vandalised at that time.

25. From 25 February 1990, demonstrations were held every Sunday. According to the decision to commit for trial of 27 July 2007, they were intended to denounce the non-democratic attitude of those in power, who were accused of having "betrayed the ideals of the revolution", and sought to alert the population to the threat of a new dictatorial regime.

26. Election campaigns were subsequently launched for parliamentary elections and the office of President of the Republic, to be held on 20 May 1990.

27. It was in this context that unauthorised "marathon demonstrations" (*manifestaţii maraton*) began on 22 April 1990 in University Square, at the initiative of the Students' League and other associations, including the applicant association. These demonstrations lasted fifty-two days, during which the demonstrators occupied University Square. The decisions of 16 September 1998 and 17 June 2009 indicate that the demonstrators, who had gathered in large numbers, were not violent and were essentially demanding that persons who had exercised power during the totalitarian regime be excluded from political life. They also called for a politically independent television station.

28. They called further for the identification of those responsible for the armed repression of December 1989 and demanded the resignation of the country's leaders (particularly the Minister of the Interior), whom they considered responsible for the repression of the anti-communist demonstrations in December 1989.

29. On 22 April 1990 fourteen demonstrators were arrested by the police on the ground that the demonstration had not been authorised. Faced with the reaction of the public, who had arrived to boost the number of demonstrators in University Square, the police released the fourteen arrested demonstrators. The authorities did not use force again over the following days, although the Bucharest City Council had still not authorised the gathering.

30. Negotiations between the demonstrators and the provisional government resulted in stalemate.

31. On 20 May 1990 the presidential and parliamentary elections took place. The FSN and its leader, who was standing for President, won the elections.

32. Following those elections the protests continued in University Square, but were reduced from their original scale. Of the approximately 260 persons still present, 118 had gone on hunger strike.

3. The meeting held by the executive on 11 June 1990

33. On the evening of 11 June 1990 the new President elect of Romania and his Prime Minister convened a government meeting, attended by the Minister of the Interior and his deputy, the Minister of Defence, the director of the Romanian Intelligence Service (*Serviciul Român de Informaţii* – the SRI), the first deputy president of the ruling party (the FSN) and the Procurator General of Romania. This is established in the prosecution service's decisions of 16 September 1998 and 17 June 2009.

34. At that meeting it was decided to take measures to clear University Square on 13 June 1990. In addition, it was proposed that the State organs, namely the police and army, would be assisted by some 5,000 mobilised civilians. Implementation of this measure was entrusted to the first deputy president of the FSN. Two members of that party's steering committee opposed the measure, but without success. According to the decision of 17 June 2009, an action plan drawn up by General C. was approved by the Prime Minister.

35. On the same evening the Procurator General's Office (*Procuratura Generală*) broadcast a statement on State television calling on the government to take measures so that vehicles could circulate again in University Square.

36. At a meeting held on the same evening with the participation of the Minister of the Interior, the head of the SRI and the head of police, General D.C. set out the plans for the police and gendarmerie, in collaboration with civilian forces, to clear University Square. Under this plan, the action was "to begin at 4 a.m. on 13 June 1990 by cordoning off the square, arresting the demonstrators and re-establishing public order".

4. The sequence of events on 13 June 1990

37. At about 4.30 a.m. on 13 June 1990 members of the police and gendarmerie brutally charged the demonstrators in University Square. The arrested demonstrators were driven away and locked up at the Bucharest municipal police station. The 263 arrested individuals (or 262, according to the decision to commit for trial of 18 May 2000) included students from the Architecture Institute, who had been on the premises of their establishment, located on University Square, and who had not taken part

in the demonstrations. The decision of 17 June 2009 indicated that the 263 persons who had been arrested were taken to the Măgurele barracks after being held in the police cells.

38. The police operation led to protests by many people, who demanded that the arrested demonstrators be released. According to the decision of 16 September 1998, those persons launched violent attacks on the security forces, hurling projectiles and setting cars on fire. According to the decision to commit for trial of 18 May 2000, those actions were the work of a few aggressive individuals who had infiltrated groups of peaceful demonstrators.

39. At about 10 a.m., workers from the factories of a large metallurgical company in Bucharest (IMGB) headed en masse for University Square to help the police arrest the demonstrators. According to the decision of 16 September 1998, they acted in a chaotic and heavy-handed manner, hitting out blindly and making no distinction between demonstrators and mere passers-by.

40. On the afternoon of 13 June 1990, the demonstrations intensified around the television building, University Square, the Ministry of the Interior and the municipal police station, all locations where, according to the demonstrators, the persons who had been arrested could be held prisoner.

41. Following those incidents, the army intervened and several armoured vehicles were sent to the headquarters of the Ministry of the Interior.

42. According to a report by the Ministry of the Interior, referred to by the Government in their observations, at about 6 p.m. the headquarters of the Ministry of the Interior were surrounded by between 4,000 and 5,000 demonstrators; on the orders of Generals A.G. and C.M., servicemen posted inside the Ministry fired at the ceilings of the entrance halls with a view to dispersing the demonstrators.

43. Three persons were killed by the shots fired in the Ministry of the Interior.

44. It was in those circumstances that, at about 6 p.m., when he was a few metres away from one of the doors of the Ministry, the first applicant's husband was killed by a bullet which hit the back of his head after having ricocheted. Those events are described in detail in the decisions of 18 May 2000 and 27 July 2007 committing for trial the Minister of the Interior at the relevant time, a general and three colonels. According to the first decision to commit for trial, the applicant's husband and the other victims, who were returning from their workplaces on that day, were unarmed and had not previously taken part in the marathon demonstrations in University Square. Mere spectators of the events, they had been killed by bullets which had ricocheted.

45. The security forces shot and killed a fourth person in another district of Bucharest. Another died shortly after having been stabbed in the area around the television headquarters.

46. On 13 June 1990 no servicemen were subjected to violence by the demonstrators, as attested by the decision to commit for trial of 27 July 2007. According to that document, the army had fired 1,466 bullets from inside the Ministry of the Interior headquarters on that date.

47. In addition, other persons, including Mr Stoica, were beaten and detained by police officers and civilians in the headquarters of the State television station, in the circumstances described below.

48. The headquarters of the State television station were at that time guarded by 82 servicemen, backed by 14 armed vehicles, and subsequently reinforced by other groups of armed forces, the largest of which contained 156 servicemen (who arrived at 7 p.m.), a detachment of parachutists (7.30 p.m.), 646 servicemen (8 p.m.), 118 parachutists (11 p.m.) and 360 servicemen with 13 other armed vehicles (11 p.m.).

49. At about 1 a.m. the demonstrators were chased out of the television headquarters following this mass intervention.

5. Circumstances specific to Mr Marin Stoica

50. Towards the end of the afternoon on 13 June 1990, while he was walking to his workplace along a street near the State television headquarters, the applicant was brutally arrested by a group of armed individuals and taken by force into the television building. In sight of the police officers and servicemen present, civilians struck and bound him, then took him to the basement of the building. He was then led into a television studio, where several dozen other persons were already present. They were filmed in the presence of the then director of the State television station. The recordings were broadcast during the night of 13 to 14 June 1990, accompanied by commentary which described the persons concerned as employees of foreign secret services who had threatened to destroy the television premises and equipment.

51. In the course of the same night the applicant was beaten, struck on the head with blunt objects and threatened with firearms until he lost consciousness.

52. He woke up at around 4.30 a.m. in the Floreasca Hospital in Bucharest. According to the forensic medical report drawn up on 18 October 2002, the medical certificate issued by the hospital's emergency surgery department stated that the applicant had been admitted at about 4.30 a.m. on 14 June 1990 and diagnosed as suffering from bruising on the left side of

the abdomen and ribcage, abrasions on the left side of his ribcage resulting from an assault, and craniocerebral trauma.

53. Fearing further ill-treatment, he fled from the hospital, which was surrounded by police officers, at about 6.30 a.m.

54. His identity papers had been confiscated during the night of 13 to 14 June 1990. Three months later he was invited to collect them from the Directorate of Criminal Investigations at the General Inspectorate of Police. In the meantime, he had remained shut away at home for fear of being arrested again, tortured and imprisoned.

6. The miners' arrival in Bucharest

55. According to the decision of 16 September 1998, witness M.I., an engineer, who at the relevant time was head of department at the Craiova agency of the national railway company (Regionala CFR Craiova), had stated that, on the evening of 13 June 1990, the director of that agency had ordered that the scheduled trains be cancelled and that 4 train convoys, or a total of 57 wagons, be made available to the miners at Petroşani station, in the heart of the Jiu Valley mining area.

56. M.I. had added that the order seemed to him unlawful and that he had attempted to prevent the miners' transportation to Bucharest by cutting the electricity provision to the railway line on the journey indicated. He had stated that, faced with his insubordination, the director of the Craiova CFR agency had ordered that he be replaced and had the railway line restored to use by about 9 p.m. It appears that M.I. was subsequently dismissed and brought before the prosecution service.

57. According to the decision issued on 10 March 2009 by the prosecutor's office at the High Court of Cassation and Justice, on 14 June 1990 11 trains – a total of 120 wagons – transporting workers, especially miners, had travelled to Bucharest from several industrial regions around the country. The first had reached Bucharest at 3.45 a.m., the last at 7.08 p.m.

58. The decision of 16 September 1998 states that the miners had been informed that they were to help the police re-establish public order in Bucharest, and that they were armed with axes, chains, sticks and metal cables.

59. The decision of 10 March 2009 indicates that the miners had been mobilised by the leaders of their trade union. Questioned as a witness, the President of the Federation of Miners' Unions, who became mayor of Lupeni in 1998, stated that 5 trains carrying the miners had arrived at Bucharest station at about 1 a.m. on 14 June 1990, that the miners had been greeted by the deputy Minister for Mines and a Director General from that Ministry, and that these two senior government officials had led them to University Square.

7. The sequence of events on 14 June 1990

60. On the morning of 14 June 1990, groups of miners first stopped at Victory Square (*Piaţa Victoriei*), at the government headquarters.

61. At about 6.30 a.m., the Head of State addressed the miners who were gathered in front of the government building, inviting them to cooperate with the security forces and to restore order in University Square and in other areas where incidents had occurred. In this speech, which is reproduced in full in the decision of 17 June 2009, he urged them to head towards University Square and occupy it, informing them that they would be confronted with "openly fascist elements who had committed acts of vandalism" by setting fire to the headquarters of both the Ministry of the Interior and of the police and "besieging the television building".

62. Immediately afterwards groups of miners were led "by unidentified persons" to the headquarters of opposition parties and associations perceived as hostile to the authorities.

63. The miners were flanked by troops from the Ministry of the Interior, with whom they formed "mixed teams", and set out to look for demonstrators. The decision of 17 June 2009 indicates that "acts of extreme cruelty [took place] on this occasion, with violence being used indiscriminately against demonstrators and Bucharest residents who were totally unconnected with the demonstrations". The decision of 10 March 2009 indicates that the miners also attacked the homes of persons of Roma ethnicity. According to that decision, the miners had "selection criteria" for identifying those persons who, in their opinion, were suspected of taking part in the University Square demonstrations, and attacked "as a general rule, Roma, students, intellectuals, journalists and anyone who did not recognise their legitimacy".

64. The groups of miners and the other persons accompanying them ransacked the headquarters of the National Farmers' Party (*Partidul Naţional Ţărănesc Creştin şi Democrat*) and the National Liberal Party, and the headquarters of other legal entities, such as the Association of Former Political Prisoners (*Asociaţia Foştilor Deţinuţi Politici*), the League for the Protection of Human Rights (*Liga pentru Apărarea Drepturilor Omului*) and the Association "21 December 1989" (the applicant association).

65. According to the decision of 16 September 1998, no one present in the headquarters of those political parties and associations at that time was spared by the miners. All were attacked and had their possessions confiscated. Many were apprehended and handed over to the police – who were there "as though by coincidence" – and detained in an entirely unlawful manner.

66. Other groups of miners had gone to University Square. On arrival, they broke into the University premises and the Architecture Institute, located on University Square. They attacked the staff and students whom they encountered there, subjecting them to violence and humiliating acts. The miners apprehended everyone on the premises and handed them over to the police and gendarmes. The arrested persons were taken by the law-enforcement officers to police stations or to the Băneasa and Măgurele military barracks.

67. The miners then moved into the streets surrounding University Square and continued their activities there.

68. According to the decision of 17 June 2009, 1,021 individuals – including 63 who were then under age – were apprehended in those circumstances. Of those individuals, 182 of them were placed in pre-trial detention, 88 received an administrative penalty and 706 were released "after checks".

69. The decision of 16 September 1998 states that "the miners [ended] their law-enforcement activities on 15 June 1990, after the President of Romania had thanked them publicly for what they had done in the capital, and authorised them to return to their work".

70. That decision also indicates that some of those who were beaten and imprisoned were unlawfully detained for several days and that several of them were released on 19 and 20 June 1990.

71. The other persons in police custody were placed in pre-trial detention, on a decision by the prosecutor, for causing a breach of the peace; their number included the current president of the applicant association, who was subsequently acquitted of all the charges against him.

72. The decision of 17 June 2009 states that the miners acted in close collaboration with the security forces and on the instructions of the State's leaders. The relevant passages read as follows:

> "On 14 and 15 June 1990 the miners, in groups coordinated by civilians on behalf of and with the agreement of the State's leaders [*în numele şi cu acordul conducerii de stat*], committed acts in which the State's law-enforcement forces fully collaborated [*deplină cooperare*] and which caused not only physical harm to the persons who were apprehended for checks, but also significant damage to the premises of the University of Bucharest, the Architecture Institute, several political parties and civilian associations, and the homes of figures from so-called 'historical' parties …
>
> The investigations conducted by the military prosecutors have not permitted identification of the persons in civilian clothing who had infiltrated the miners' groups; the victims who were questioned had distinguished between the miners and their other attackers by describing the first as 'dirty miners' and the second as 'clean miners'."

8. Circumstances specific to the applicant association

73. On 13 June 1990 the applicant association publicly condemned the violent interventions of the same day.

74. At about 11 p.m. the leaders of the association decided, as a security measure, to spend the night in its headquarters. Seven of them remained there during the night.

75. At 7 a.m. on 14 June 1990, a group of miners forcibly entered the applicant association's premises after breaking a window pane. In the first few minutes after entering they were not violent, and were rather reserved. Shortly afterwards an unidentified civilian, who was not a miner, arrived on the scene and began hitting one of the members of the association. The miners followed his lead, brutally attacking the seven members of the association, who were then arrested by the security forces.

76. During that day all of the association's property and documents were seized, in breach of the legal formalities, under the supervision of troops from the Ministry of Defence.

77. On 22 June 1990 the leaders of the association were able to return to the association's premises, accompanied by the police.

9. Developments subsequent to the events of 13 to 15 June 1990

78. The above-cited decisions of the prosecutor's office indicate that, instead of immediately returning to their homes, 958 miners remained in Bucharest, "ready to intervene should the protests recommence", notably with a view to the impending swearing-in of the newly elected President. From 16 to 19 June 1990 those miners were accommodated in military barracks in Bucharest, where they received military uniforms.

79. The decision of 16 September 1998 indicates that the investigation was unable to elucidate who had given the order to house and equip the miners, but specifies that "such a measure had to have been taken at least at Ministry of Defence level".

80. According to a press release issued by the Ministry of Health on 15 June 1990 and reproduced in the decision of 17 June 2009, during the period between 13 June and 6 a.m. on 15 June 1990, 467 persons went to hospital following the violent incidents; 112 were kept in hospital and 5 deaths were recorded.

81. According to the same decision of 17 June 2009, police officers, miners and later the military conscripts responsible for supervising the miners used excessive force against the 574 demonstrators and the other persons – including children, elderly persons and blind people – who had been arrested and detained in the Măgurele military barracks. The decision

states that the detainees on those premises were subjected to violence and assaults of a "psychological, physical and sexual" nature and held in inappropriate conditions, and that they received belated and inadequate medical care.

B. The criminal investigation

82. The violent events of June 1990, in the course of which the husband of the applicant Anca Mocanu was killed and Mr Stoica was allegedly ill-treated, and which resulted in the ransacking of the applicant association's headquarters, gave rise to the opening of an investigation. It was initially divided up into several hundred different case files.

83. On 29 May 2009 the military section of the prosecutor's office at the High Court of Cassation and Justice sent a letter to the Government's Agent, in which the facts were summarised as follows: "Over the period from 1990 to 1997, hundreds of complaints were registered on the rolls of the prosecutor's office at the Bucharest County Court and the district prosecutor's offices concerning the offences of theft, destruction, armed robbery, assault causing bodily harm, unlawful deprivation of liberty and other offences committed in the context of the acts of violence committed by miners in Bucharest on 14 and 15 June 1990. In the majority of those cases, it having proved impossible to identify the perpetrators, a decision was issued not to bring a prosecution."

84. No decision to discontinue the proceedings was communicated to Mrs Mocanu or to the applicant association, which had joined the proceedings as a civil party.

85. Those case files were subsequently joined and the scope of the investigation was broadened from 1997 onwards, the events having been given a different legal classification involving aggravated criminal responsibility. Senior army officers and State officials were successively charged and the entire investigation was transferred to the military section of the prosecutor's office at the Supreme Court of Justice (*Parchetul de pe lângă Curtea Supremă de Justiţie – Secţia Parchetelor Militare*) as case no. 160/P/1997.

86. Between 22 October 1997 and 27 October 1999, 183 previously opened cases were joined to case no. 160/P/1997, of which 46 were joined on 22 October 1997, 90 on 16 September 1998 and 69 on 22 October 1999.

87. On 26 June 2000 the same military prosecutor's section was assigned 748 cases concerning the events of 13 to 15 June 1990, including, in particular, the unlawful deprivations of liberty on 13 June 1990.

88. In the decision of 17 June 2009, the state of the file as it existed after the joinder of all those cases is described as follows:

> "Many of the documents included in the 250 volumes of the file are photocopies which have not been stamped or have not been certified as corresponding to the original. The documents in each of those volumes are not filed by date, subject or another criterion, but in a disorderly fashion. Some of them have nothing to do with the case (for example, volume 150 contains files concerning disappearances which occurred after June 1990)."

89. On 16 September 1998 case no. 160/P/1997 was split into four cases and the subsequent investigation was assigned to the military section of the prosecutor's office at the Supreme Court of Justice.

90. On 8 January 2001 three of those four cases were joined. After that date the investigation focused on two main cases.

91. The first concerned charges of incitement to or participation in aggravated unlawful killing, particularly that of Velicu-Valentin Mocanu. The persons accused of that offence were the President of Romania at the relevant time and five senior army officers, including the Minister of the Interior.

92. The decision of 19 June 2007 to bring charges, and the subsequent decision of 19 July 2007 to sever the charges, state that, on orders from the then President, on the evening of 13 June and the night of 13 to 14 June 1990 the security forces and army personnel used their weapons and heavy ammunition against demonstrators, killing four persons, injuring three others and endangering the lives of other persons.

93. The charges against the former President were subsequently severed from those against the other defendants, who were high-ranking military officers, and a decision to discontinue proceedings against him was issued.

94. At 2 October 2013 this first branch of the investigation was still pending in respect of two of the officers in question, the three others having died in the meantime.

95. The other case concerning the events of June 1990, which investigated, in particular, the criminal complaint for violence lodged by Mr Stoica and the ransacking of the applicant association's premises, concerned charges of incitement to commit or participation in acts of sedition (*subminarea puterii de stat*), sabotage (*actele de diversiune*), inhuman treatment (*tratamentele neomenoase*), propaganda in favour of war (*propaganda pentru război*) and genocide, within the meaning of Article 357 (a) to (c) of the Criminal Code.

96. The persons accused of those acts were the former President, several high-ranking officers and dozens of civilians. Proceedings were brought in

respect of these charges against the former President on 9 September 2005 and against the former head of the SRI on 12 June 2006.

97. This second branch of the investigation was closed by a decision not to bring a prosecution, adopted on 17 June 2009. That decision was upheld by a judgment delivered on 9 March 2011 by the High Court of Cassation and Justice following an appeal by Mr Stoica.

98. The main stages of the investigation are described below.

1. The decision adopted on 16 September 1998

99. On 16 September 1998 the military section of the prosecutor's office at the Supreme Court of Justice issued its decision in case no. 160/P/1997, following an investigation concerning sixty-three persons who had been victims of violence and unlawful arrests, including Mrs Mocanu and three members of the applicant association, as well as the applicant association itself and eleven other legal entities whose premises had been ransacked during the events of 13 to 15 June 1990.

100. Of the sixty-three victims listed in the table contained in the decision of 16 September 1998, three had been assaulted and deprived of their liberty at the headquarters of the State television station. In the final column, indicating the stage reached in the investigations, the table notes that "the case has not been investigated" (*cauza nu este cercetată*) in respect of those three persons.

101. In its decision, the military section of the prosecutor's office indicated that other complaints were pending before the civilian prosecutors' offices.

102. It added that its decision also concerned "the presumed unlawful killing of about one hundred individuals during the events of 13 to 15 June 1990, [whose corpses] were allegedly incinerated or buried in common graves in cemeteries in villages near Bucharest (notably Străuleşti)".

103. It also indicated that, to date, the investigation had been unable to identify the persons who had implemented in practice the executive's decision to summon civilians to restore order in Bucharest. According to the prosecution service, this failing in the investigation was due to the "fact that none of the persons who held posts of responsibility at the relevant time [had] been questioned", particularly the then President of Romania, the Prime Minister and his deputy, the Minister of the Interior, the head of the police, the director of the SRI and the Minister of Defence.

104. In its decision, the military section ordered that the case be split into four separate case files.

105. The first of those files was to focus on the continued investigation into the unlawful killing by gunfire of four civilians, including the first applicant's husband.

106. The second file targeted those persons who had exercised functions pertaining to civilian and military command. The authorities decided to pursue the investigation in respect of them, in particular for abuse of power against the public interest entailing serious consequences, an offence punishable under Article 248 § 2 of the Criminal Code, and also to investigate the fact that one social group had been enlisted alongside the security forces to combat other social groups.

107. The third file concerned the continuing investigations into the possible existence of other victims who had been killed during the violent incidents of 13 to 15 June 1990 (see paragraph 102 above).

108. Lastly, considering that the prosecution was statute-barred, the military section of the prosecutor's office decided to discontinue the proceedings against unidentified members of the security forces and groups of miners in respect of the offences of armed robbery, unlawful deprivation of liberty, abusive conduct, improper investigation, abuse of power against private interests, assault, actual bodily harm, destruction of property, theft, breaking and entering homes, malfeasance and rape, committed between 13 and 15 June 1990.

109. This part of the decision of 16 September 1998 was set aside in a decision issued on 14 October 1999 by the head of the military section of the prosecutor's office (*Şeful Secţiei Parchetelor Militare*) at the Supreme Court of Justice, which ordered that the proceedings and investigations intended to identify all the victims be resumed, specifying in that respect that it had been established that the number of victims greatly exceeded that of the injured parties listed in the impugned decision.

110. In addition, the decision of 14 October 1999 noted that the investigators had so far failed to conduct investigations into the "known collusion" between the Ministry of the Interior and the leaders of the mining companies "with a view to organising a veritable apparatus of unlawful repression", that collusion having been established, according to the decision, by the evidence contained in the case file.

2. Subsequent developments in the investigation in respect of senior army officials for participation in unlawful killing

111. After the decision of 16 September 1998, the investigations into the unlawful killing of Mr Velicu-Valentin Mocanu continued under case no. 74/P/1998 (see paragraph 105 above).

112. Mrs Mocanu and the two children she had had with the victim joined the proceedings as civil parties.

113. Two generals – the former Minister of the Interior and his deputy – and three senior-ranking officials were charged with the unlawful killings committed on 13 June 1990, including that of the applicant's husband, on 12, 18 and 21 January and 23 February 2000 respectively.

114. All five were committed for trial on the basis of a decision to that effect (*rechizitoriu*) of 18 May 2000, on the ground that they had called for – and, in the case of the two generals, ordered – the opening of fire with heavy ammunition, an act which resulted in the death of four individuals and which caused serious injury to nine other persons.

115. By a decision of 30 June 2003, the Supreme Court of Justice remitted the case to the military section of the prosecutor's office at the Supreme Court of Justice for additional investigation intended to remedy various deficiencies, and reclassified the offence as participation in aggravated unlawful killing. It also ordered a series of investigative measures to be taken.

116. Mrs Mocanu, other civil parties and the military section of the prosecutor's office appealed against that decision on points of law. Their appeals were dismissed by the High Court of Cassation and Justice (as the Supreme Court of Justice was renamed in 2003, see paragraph 14 above) in a judgment of 16 February 2004.

117. After the investigation was resumed, the proceedings against the five defendants were discontinued by a decision of 14 October 2005. That decision having been overturned on 10 September 2006, the proceedings were reopened.

118. After carrying out an additional investigation in line with the instructions set out in the judgment of 30 June 2003, the military section of the prosecutor's office at the High Court of Cassation and Justice committed the former Minister of the Interior, his deputy and two other senior army officers for trial in a decision to that effect of 27 July 2007. It discontinued proceedings against the fifth officer, who had died in the meantime.

According to the decision to commit for trial, "the lack of reaction by the public authorities" and the lack of an immediate effective investigation "[had] endangered the very existence of democracy and the rule of law".

119. By a judgment of 17 December 2007, the High Court of Cassation and Justice ordered that the case be sent back to the military section of the prosecutor's office for a breach of procedural rules, primarily on the ground that criminal proceedings against a former minister could only be brought through a special procedure requiring prior authorisation by Parliament.

120. On 15 April 2008 the military section of the prosecutor's office at the High Court of Cassation and Justice lodged an appeal on points of law against that decision, but this was dismissed on 23 June 2008.

121. On 30 April 2009 the military section of the prosecutor's office at the High Court of Cassation and Justice stated that it did not have jurisdiction to examine this branch of the case, mainly because members of the police force – including the Minister of the Interior – had become civil servants following a legislative amendment, and the military courts and prosecutors thus no longer had jurisdiction over their criminal acts, even where those had been committed while they were still military officers. It therefore relinquished jurisdiction to one of the ordinary criminal sections of the same prosecutor's office, namely the Criminal Proceedings and Criminalistics Section (*Secţia de urmărire penală şi criminalistică*).

122. By a decision of 6 June 2013, that Section discontinued the proceedings against the former minister and his deputy, both of whom had died on 2 November 2010 and 4 February 2013 respectively.

123. By the same decision, the same Section of the prosecutor's office declared that it did not have jurisdiction in respect of the last two surviving defendants, Colonels C.V. and C.D., and referred their cases to the military prosecutor's office at the Bucharest regional military court.

124. This investigation was pending before that prosecutor's office on 2 October 2013.

3. The charges against the former President of the Republic in respect of the death of Mrs Mocanu's husband

125. This part of the investigation concerned the charges against the former President of the Romanian Republic with regard to the victims who were killed or injured by gunshots fired by the army on 13 June 1990.

126. The former President of Romania, in office from 1989 to 1996 and from 2000 to 2004, was charged on 19 June 2007, by which date he was exercising the functions of senator and was a member of parliament. He was accused of having "deliberately incited servicemen to use force against the demonstrators in University Square and in other districts of the capital, an act which resulted in the death or injury by gunfire of several persons". Those facts were characterised as participation *lato sensu* in aggravated unlawful killing, a crime punishable under Articles 174, 175 (e) and 176 (b) of the Criminal Code, taken together with Article 31 § 2 of that Code.

127. On 19 July 2007 those charges were severed from case no. 74/P/1998. The investigation continued under case no. 107/P/2007.

128. In the meantime, on 20 June 2007 the Constitutional Court, ruling in a case unrelated to the present one, had delivered a judgment ruling that the military courts did not have jurisdiction to judge or prosecute civilian defendants. In consequence, by a decision of 20 July 2007 the military section of the prosecutor's office held that it did not have jurisdiction to examine case no. 107/P/2007 and relinquished jurisdiction to one of the ordinary criminal sections.

129. On 7 December 2007 the Procurator General of Romania set aside, for procedural errors, the indictment of 19 June 2007, and ordered that the investigation be resumed.

130. By a decision of 10 October 2008, the Criminal Proceedings and Criminalistics Section of the prosecutor's office at the High Court of Cassation and Justice issued a decision not to bring a prosecution, on the ground that there was no causal link between the order to clear University Square issued by the former President and the decision taken by three officers, with the agreement of their superiors – General A. and General C. (Minister of the Interior) – to give the order to open fire on the demonstrators.

In so ruling, the prosecutor's office held that the objectives of the action plan drawn up on 12 June 1990 had been fulfilled by 9 a.m. on the following morning, and that the following events, including the subsequent orders to open fire, had had nothing to do with that plan and could not have been foreseen by those who prepared it.

131. On 3 November 2008 Mrs Mocanu and other injured parties challenged this decision not to bring a prosecution.

132. On 18 December 2009 a three-judge bench of the High Court of Cassation and Justice dismissed their appeals, finding them inadmissible, out of time or unfounded, depending on the case. It concluded that there was no causal link between the acts imputed to the former President and the unpredictable consequences of the demonstrations which had resulted in the deaths of several persons. Moreover, it noted that three of the injured parties – widows or relatives of the victims who died on 13 and 14 June 1990 –, including Mrs Mocanu, had stated at a hearing on 11 December 2009 that they did not intend to challenge the decision not to bring a prosecution in respect of the former President and that they wished only that those responsible for the unlawful killings be identified and that they be held liable. Following an appeal on points of law by the civil parties, that decision was upheld by a nine-judge bench of the High Court in a judgment of 25 October 2010.

4. The investigative measures regarding the circumstances of Mr Velicu-Valentin Mocanu's death

133. According to the forensic autopsy report carried out on Mrs Mocanu's husband, he died as a result of gunshot wounds inflicted by a third party.

134. The applicant made her first specific request to join the proceedings as a civil party on 11 December 2000. On the same date the applicant and the other civil parties – relatives of the three other persons who had been killed during the events of 13 and 14 June 1990 – filed joint pleadings containing their observations as to the identity of those responsible for the deaths of their relatives, and their claims for compensation.

135. On 14 February 2007 the applicant was questioned for the first time by the prosecutor's office for the purposes of the investigation. Assisted by a lawyer of her own choice, she stated that her husband had not returned home on the evening of 13 June 1990, that this had worried her, that she had searched for him the following day without success, and that she had subsequently learned from the press that he had been killed by a shot to the head. No investigator or official representative had visited her, nor had she been summoned for the purposes of the investigation; only a few journalists had come to see her. She stated that, aged 20 and without employment at the relevant time, since her husband's death she had raised their two children, a daughter of two months (born in April 1990) and a two-year-old son, alone.

136. The documents in the file submitted to the Court do not indicate whether Mrs Mocanu was kept informed about developments in the investigation into the aggravated unlawful killing of her husband following the High Court of Cassation and Justice's judgment of 17 December 2007 ordering that the case be remitted to the prosecutor's office.

5. Subsequent developments in the investigation into charges of inhuman treatment

137. Between 26 November 1997 and 12 June 2006, criminal proceedings were brought against 37 persons – 28 civilians and 9 servicemen – essentially for acts of sedition committed in the course of the events of June 1990. The former President of Romania was among those prosecuted. He was charged on 9 June 2005 with participation in genocide (paragraphs (a), (b) and (c) of Article 357 of the Criminal Code), propaganda in favour of war (Article 356), inhuman treatment (Article 358), sedition (Article 162) and acts of sabotage (Article 163).

The vast majority of the 28 civilians charged were directors of mining companies, heads of miners' trade unions and senior civil servants in the Ministry of Mines.

138. On 16 September 1998 this branch of the investigation was allocated the file number 75/P/1998 (see paragraph 106 above).

139. On 19 December 2007 the military section of the prosecutor's office at the High Court of Cassation and Justice ordered that the case in file no. 75/P/1998 be split into two parts, one concerning the criminal charges against the 28 civilians, including the former President of Romania and the former head of the SRI, and the other concerning the charges against the 9 servicemen. The investigation with regard to the 28 civilians was to be pursued before the relevant civilian section of the same prosecutor's office.

140. By a decision of 27 February 2008, the head prosecutor in the military section of the prosecutor's office set aside the decision of 19 December 2007, finding that, given the close connection between the events, a single prosecutor's office, namely the relevant civilian section, was to examine the entirety of the case in respect of all of the defendants, both civilians and servicemen.

141. In line with that decision, on 29 April 2008 the military section of the prosecutor's office at the High Court of Cassation and Justice also relinquished jurisdiction to the relevant civilian section for examination of the criminal charges against the 9 servicemen – including several generals, the former head of police and the former Minister of the Interior.

142. The decision of 29 April 2008 contained a list of more than a thousand victims who had been held and subjected to ill-treatment, notably on the premises of the Băneasa Officers' School and the Măgurele military unit. Mr Stoica was included in this list of victims. The decision also contained a list of the legal entities which had sustained damage during the crackdown of 13 to 15 June 1990, including the applicant association.

143. That decision also referred to "identification of the approximately 100 persons who died during the events of 13 to 15 June 1990".

144. It also contained a list of the State-owned companies which had provided workers for the intervention in Bucharest. That list included, in particular, twenty mining companies from all around the country and factories in eleven towns (Călăraşi, Alexandria, Alba-Iulia, Craiova, Constanţa, Deva, Giurgiu, Galaţi, Braşov, Slatina and Buzău), as well as three factories in Bucharest.

145. Following that decision, on 5 May 2008 the military section of the prosecutor's office sent the 209 volumes, containing a total of some 50,000 pages, from case no. 75/P/1998 to the relevant civilian section of the prosecutor's office.

146. On 26 May 2008 the section of the prosecutor's office at the High Court of Cassation and Justice which had received the entire file, namely the Criminal Proceedings and Criminalistics Section, stated that it did not have jurisdiction, and relinquished jurisdiction to another section of the same prosecutor's office, namely the Directorate for Investigating Organised Crime and Terrorism (*Direcţia de Investigare a Infracţiunilor de Criminalitate Organizată şi Terorism* – DIICOT).

147. By a decision of 10 March 2009, the relevant directorate of the prosecutor's office at the High Court of Cassation and Justice, namely the DIICOT, decided that no prosecution would be brought against the former head of the SRI on the charge of sedition, as that offence had become time-barred, and that no prosecution would be brought against the majority of the 27 civilian defendants – directors of mining companies, heads of miners' trade unions, senior civil servants at the Ministry of Mines and in local government – on the ground that the constituent elements of the offence had not been made out.

148. In so ruling, the prosecutor's office considered that, in their respective capacities as Head of State, Minister of the Interior, deputy minister or Head of Police, some of the defendants exercised State authority, and it would have been illogical to think that they could have committed acts capable of undermining their own power. As to the miners and other workers who had travelled to Bucharest on 14 June 1990, the prosecutor's office considered that they had "turned themselves into security forces" and been persuaded that their actions served State power. In addition, it noted that their intervention had been pointless, since the operation conducted by the parachutists at the television headquarters had enabled order to be restored in the capital at about 1 a.m. on 14 June 1990.

149. The prosecution also discontinued the proceedings against three of the defendants, who had died in the meantime.

150. Lastly, the DIICOT decided to relinquish jurisdiction to the Criminal Proceedings and Criminalistics Section with regard to the remainder of the case, namely the charges of inhuman treatment, propaganda in favour of war and genocide, within the meaning of Article 357 (a) to (c) of the Criminal Code. Those facts concerned only nine of the persons who had been charged during the period 2000-06, including the former president.

151. On 17 June 2009 a decision was taken not to bring a prosecution in respect of those charges; its content is set out below.

6. The decision of 17 June 2009 not to bring a prosecution

152. On 17 June 2009 the prosecutor's office at the High Court of Cassation and Justice issued a decision not to bring a prosecution in the

case, concerning essentially charges of inhuman treatment arising from 856 complaints by persons injured as a result of the violence committed from 13 to 15 June 1990.

153. The decision in question indicated that the former Head of State had not been examined as a defendant in the course of the investigation.

154. It gave a comprehensive description of the violence – classified as extreme cruelty – inflicted on several hundred persons.

155. It was indicated that the investigations conducted over approximately nineteen years by the civilian prosecutor's offices and, subsequently, by the military prosecuting authorities, had not made it possible to establish the identity of the perpetrators or the degree of involvement of the security forces. The relevant passage from the decision reads as follows:

> "The investigations carried out over a period of about nineteen years by the civilian prosecutors' offices and, subsequently, by the military prosecuting authorities, the findings of which are contained in case file … have not made it possible to establish the identity of the miners who committed the attack, the degree of involvement in their actions by the security forces and members and sympathisers of the FSN and their role and degree of involvement in the acts of violence carried out against the residents of the capital on 14 and 15 June 1990."

156. This decision ordered that proceedings be discontinued against one of the defendants, who had died in the meantime, and that no prosecution would be brought (*scoatere de sub urmărire penală*) in respect of the eight remaining defendants for those offences which had become statute-barred, in particular, harbouring a criminal.

157. With regard to the offences which had not become time-barred, especially those of inhuman treatment, the decision stated that there was no case to answer, since the constituent elements of the offences had not been made out or because the reality of the events complained of had not been proven.

158. In this connection, it was indicated that the then Head of State could not be criticised for any form of participation in the joint actions by the miners and the armed forces, as he had merely approved the actions which occurred on the morning of 13 June 1990 and the army's intervention on the afternoon of the same date, for the stated purpose of restoring order. It was also mentioned that there was no information (*date certe*) to substantiate accusations against him with regard to the preparations for the miners' arrival in Bucharest and the instructions they had been given. It was noted that his request to the miners to protect the State institutions and to restore order – following which 1,021 persons had been deprived of their liberty and subjected to physical assault – could only be classified as

incitement to commit assault and that criminal liability in that respect was time-barred.

159. The prosecutor's office considered that the demonstrators and other persons targeted by the miners belonged to various ethnic groups (Romanians, Roma, Hungarians) and social categories (intellectuals, students, school pupils, but also workers), and that they could not therefore be regarded as a single group or an identifiable community on objective geographical, historical, social or other grounds, and for that reason the events complained of could not be classified as genocide. Relying on the case-law of the International Criminal Tribunal for the former Yugoslavia, the prosecutor's office also considered that the persons deprived of liberty had not been systematically subjected to ill-treatment.

160. The decision further indicated that the speech by which the Head of State had encouraged the miners to occupy and defend University Square against the demonstrators camping out there could not be interpreted as propaganda in favour of war, as the accused had not sought to instigate a conflict of any kind, but had, on the contrary, asked the miners "to put an end to excess and acts of bloodshed".

161. It was also indicated that the miners had been motivated by simplistic personal convictions, developed on the basis of collective hysteria, which had led them to act as arbitrators of the political situation and zealous guardians of the political regime – the leaders of which had recognised them as such –, authorised to "correct" those who opposed its legitimacy. The prosecutor further noted the legal requirement that, to be punishable, the inhuman treatment had to target "individuals who [had] fallen into enemy hands" and considered that this criterion had not been met here, since the miners no longer had any enemy against whom to fight on 14 June 1990.

162. With regard to the accusations of torture, the prosecutor considered that Romanian law contained no provisions against torture at the material time.

163. The decision of 17 June 2009 analyses each of the charges in respect of each defendant, but refers to none of the victims by name and does not mention the individual acts of violence complained of by each of them, referring to an appendix which has not been submitted to the Court. It mentions the number of victims and their membership of such or such a category, noting, for example, the 425 persons who were arrested and held on the premises of the Băneasa Officers' School or the 574 demonstrators who were arrested and imprisoned on the premises of the Măgurele military base.

7. Appeals lodged against the decision not to bring a prosecution of 17 June 2009

164. The applicant association, other legal entities and individuals lodged an appeal against the decision of 17 June 2009 not to bring a prosecution, which was dismissed on 3 September 2009 by the head prosecutor of the relevant section of the prosecutor's office at the High Court of Cassation and Justice. In so ruling, the prosecutor's office considered that no actions which could be classified as a crime against humanity, such as inhuman treatment or genocide, had been committed.

165. Mr Stoica and four other injured parties also lodged an appeal against the same decision. It was dismissed on 6 November 2009. Mr Stoica lodged on appeal on points of law before the High Court of Cassation and Justice.

166. On 9 March 2011, having dismissed the plea of *res judicata* raised by the former Head of State, the High Court of Cassation and Justice ruled on the merits of the decision not to bring a prosecution, and dismissed the applicant's appeal.

167. In its judgment, it classified the assault against the applicant as grievous bodily harm (Article 182 of the Criminal Code), unlawful arrest, ill-treatment (Article 267), torture, unjust repression and blackmail. It considered that the decision of 17 June 2009 had been correct in ruling that no prosecution was to be brought, on the ground that the offences in question had become time-barred and that torture had not been a criminal offence at the material time.

168. In contrast, it did not rule on the criminalisation of inhuman treatment (Article 358 of the Criminal Code), which had been the subject of the decision of 29 April 2008, in which the applicant was named as a victim of the inhuman treatment imputed to five generals.

8. Summary and clarifications concerning the investigative measures

169. According to the Government, the main investigative measures carried out in the period between 1990 and 2009 were as follows: more than 840 interviews with injured parties; hearing of witnesses on more than 5,724 occasions; and more than 100 forensic medical reports. The results of those measures were set out in several thousand pages of documents.

a. Investigative measures concerning Mr Stoica in particular

170. On 18 June 2001, when he was received by a prosecutor at the military section of the prosecutor's office at the Supreme Court of Justice,

Mr Stoica lodged an official complaint concerning the violence of which he claimed to have been victim on the night of 13 to 14 June 1990.

171. His complaint was joined to the investigation file already opened in respect of other charges, especially inhuman treatment (case file no. 75/P/1998).

172. On 18 October 2002, for the purposes of the investigation into the alleged assault against him, the applicant underwent an examination at the State Institute of Forensic Medicine, which produced a forensic medical report. That report indicated that the injuries described in the medical file opened by the emergency unit on 14 June 1990 had required three to five days of medical treatment and had not been such as to endanger the applicant's life.

173. It was also indicated that the applicant had been hospitalised for major epileptic fits from 31 October to 28 November 1990, in February 1997, March 2002 and August 2002, and that he had been diagnosed as suffering from post-traumatic secondary epilepsy and other cerebral and vascular disorders (transient ischemic attacks – TIAs). The expert report noted that the post-traumatic epilepsy had appeared following an injury sustained in 1966.

174. On 9 and 17 May 2005 the applicant was questioned and was able to give his point of view on the events complained of and submit his claims for compensation in respect of the alleged pecuniary and non-pecuniary damage.

175. By a letter of 23 May 2005, he was informed by the military section of the prosecutor's office at the High Court of Cassation and Justice that his complaint concerning the injuries inflicted on 13 June 1990 by unidentified servicemen, which had resulted in his hospitalisation "in a coma", was being investigated in the context of case no. 75/P/1998.

176. A certificate issued on 26 April 2006 indicates that, according to the entries in the register held by the military section of the prosecutor's office at the High Court of Justice and Cassation, the applicant had been received by a prosecutor in 2002, 2003, 2004, 2005 and 2006, mainly for the purposes of the investigation or to enquire about progress in the investigation. The applicant lodged two additional complaints, on 12 September and 4 October 2006 respectively.

177. On 23 April 2007 the prosecutor questioned two witnesses indicated by the applicant.

178. When questioned on 9 May 2007 as an injured party, the applicant asked the military prosecutor to order a second forensic medical report, since he considered that the 2002 report had entirely failed to emphasise the

seriousness of the injuries sustained in 1990 and the continuing after-effects of those injuries.

179. The prosecutor ordered a new report. Among other things, he asked the forensic specialists to examine whether a causal link existed between the injury sustained by the applicant in June 1990 and the medical conditions from which he was suffering on the date on which the report was ordered.

180. During his questioning, the applicant was invited to watch a video recording of the events of 13 June 1990, including those at the headquarters of the State television station. He recognised himself, and asked that the video recording be added to the investigation file.

181. On 25 June 2007 the new medical report was added to the case file. It specified, again on the basis of the medical records drawn up on 14 June 1990, that the applicant's injuries had required three to five days of medical treatment and that they had not been life-threatening. It specified that there was no causal link between the injuries sustained on the night of 13 to 14 June 1990 and the applicant's medical problems, which had subsequently required numerous periods of hospitalisation.

182. On 30 October 2007, at the applicant's request, the medical observation files on his condition prepared by the emergency unit of Bucharest Hospital in 1992 were added to the file.

183. The medical board at the National Social Security Fund had previously issued the applicant with a certificate, dated 24 May 2007, indicating that he was suffering from "overall accentuated impairment" resulting in total inability to work. The relevant passages of this certificate read as follows:

> "In view of the medical records in the patient's file, the documents which have been added recently … and the clinical psychiatric examination conducted on 24 May 2007, the specialist committee and the higher committee reach the following clinical diagnosis: mixed personality disorders, aggravated by organic causes. Acute traumatic brain injury 1990 (assault). Epilepsy with partial generalised secondary crises, confirmed clinically and by EEG, currently rare … supraventricular incidents in his medical history (irregular heart rhythm (flutter) and atrioventricular block …, with a return to sinus rhythm … after cardioversion).
>
> Functional diagnosis: overall accentuated impairment.
>
> Fitness for work: totally lost, 2nd level invalidity.
>
> Adaptive incapacity: 72%"

184. In the meantime, on 10 May 2004 the prosecutor's office at the Bucharest County Court had issued a decision not to bring a prosecution in another case, following a complaint of attempted murder lodged by the applicant on the basis of the same facts.

b. Clarifications regarding the examination of the criminal complaint, with a request to join the proceedings as a civil party, lodged by the applicant association

185. On 9 July 1990 Bucharest military unit no. 02515 sent the applicant association a letter informing it that "an inventory of the items found on 14 June 1990 [at the association's headquarters] [had] been drawn up by the representatives of the Procurator General's Office (*Procuratura Generală*) and placed, with an official report, at the headquarters of the Bucharest Prosecutor's Office (*Procuratura Municipiului Bucureşti*)".

186. On 22 July 1990 two police officers went to the applicant association's headquarters. They noted that the windows had been broken and the locks destroyed, and that the items in the headquarters had "all been ransacked". They drew up a report in the presence of the association's leaders and a witness.

187. On 26 July 1990 the applicant association lodged a criminal complaint with the Bucharest Prosecutor's Office, complaining about the ransacking of its headquarters and the attacks sustained by some of its members on 14 June 1990, and demanded the restitution of all the materials and documents which had been confiscated. It requested leave to join the criminal proceedings as a civil party.

188. On 22 October 1997 the General Inspectorate of Police sent the prosecutor's office at the Supreme Court of Justice twenty-one case files, opened following criminal complaints by several individuals and legal entities with regard to the events of 13 and 14 June 1990. Those files included case file no. 1476/P/1990, which concerned the applicant association's complaint regarding the ill-treatment inflicted on several of its members. The General Inspectorate of Police invited the prosecutor's office to inform it of the steps to be taken with a view to conducting interviews for the purpose of the investigation.

189. The applicant association contacted the prosecutor's office at the Supreme Court of Justice, subsequently the High Court of Cassation and Justice, on a regular basis for information concerning progress in the investigation or to request additional investigative measures, until the investigation was closed by the decision of 17 June 2009 not to bring a prosecution.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. International legal documents

…

2. Case-law of the Inter-American Commission of Human Rights and of the Inter-American Court of Human Rights

191. International case-law provides examples of cases where the alleged victims of mass violations of fundamental rights, such as the right to life and the right not to be subjected to ill-treatment, have been authorised to wait many years before bringing proceedings at national level and subsequently applying to the international courts, although the admissibility criteria for their applications, with regard to exhaustion of domestic remedies and time-limits for submitting complaints, were similar to those provided for by the Convention (see, *inter alia*, Inter-American Commission on Human Rights: *Community of Río Negro of the Maya Indigenous People and its Members v. Guatemala*, admissibility report no. 13/08 of 5 March 2008, petition 844/05; and Inter-American Court of Human Rights: *Case of "Las Dos Erres" Massacre v. Guatemala, Preliminary Objection, Merits, Reparations and Costs*, judgment of 24 November 2009, Series C No. 211; and *Case of García Lucero et al. v. Chile, Preliminary Objection, Merits and Reparations*, judgment of 28 August 2013, Series C No. 267).

192. The relevant parts of the first case cited above read as follows:

> "The rule of a reasonable time for filing petitions with the inter-American human rights system must be analyzed in each case, mindful of the activity of the victims' next-of-kin to seek justice, the conduct of the state, and the situation and context in which the alleged violation occurred. Therefore, in view of the context and characteristics of the instant case, as well as of the fact that several investigations and judicial proceedings are still pending, the Commission considers that the petition was presented within a reasonable time, and that the admissibility requirement referring to the time for submission has been met." (*Community of Río Negro of the Maya Indigenous People and its Members v. Guatemala*, §§ 88-89)

…

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION

199. Mrs Anca Mocanu and Mr Marin Stoica alleged that the respondent State had failed in its obligations under the procedural aspect of Articles 2 and 3 of the Convention. They alleged that those provisions required the State to conduct an effective, impartial and thorough investigation capable of leading to the identification and punishment of those responsible for the armed repression of the demonstrations of 13 and 14 June 1990, in the

course of which Mr Mocanu, the first applicant's husband, was killed by gunfire and the second applicant was subjected to ill-treatment.

The relevant part of Article 2 provides:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally …"

Article 3 provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The Court's jurisdiction *ratione temporis*

200. The Court notes that the respondent Government made no plea before the Grand Chamber as to the Court's lack of jurisdiction *ratione temporis*. However, they submitted that the Court could examine the complaints brought before it only in so far as they related to the period after 20 June 1994, the date on which the Convention came into force in respect of Romania.

201. The Court reiterates that it has to satisfy itself that it has jurisdiction in any case brought before it, and is therefore obliged to examine the question of its jurisdiction at every stage of the proceedings even where no objection has been raised in this respect (see *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-III).

1. The Chamber judgment

202. The Chamber held that the procedural obligation to conduct an effective investigation arising out of Articles 2 and 3 of the Convention had evolved into a separate and autonomous duty which could be considered capable of binding the State even when the infringement of life or of personal integrity occurred before the entry into force of the Convention with regard to that State. In so ruling, it reiterated the principles outlined in the *Šilih v. Slovenia* judgment ([GC], no. 71463/01, §§ 159-63, 9 April 2009) and subsequently applied in cases brought against Romania in which the events of December 1989 were in issue (see *Agache and Others v. Romania*, no. 2712/02, §§ 70-73, 20 October 2009; *Şandru and Others v. Romania*, no. 22465/03, § 59, 8 December 2009; and *Association "21 December 1989" and Others v. Romania*, nos. 33810/07 and 18817/08, §§ 114-18, 24 May 2011).

203. It also considered that, in order for this procedural obligation to be applicable, it must be established that a significant proportion of the procedural steps were or ought to have been implemented following ratification of the Convention by the country concerned. Applying those

principles in this case, the Chamber noted that the criminal proceedings concerning the violent suppression of the demonstrations of June 1990 had been instituted in 1990, that they had continued after 20 June 1994 and that a significant proportion of the procedural measures had been carried out after that date.

204. The Chamber therefore declared that it had jurisdiction *ratione temporis* to examine the allegation of a procedural violation of Articles 2 and 3 of the Convention, dismissing the objection which had been raised by the Government in this connection with regard to Mr Stoica's application alone.

2. The Court's assessment

205. In *Janowiec and Others v. Russia* ([GC], nos. 55508/07 and 29520/09, §§ 128-51, ECHR 2013), the Court provided additional clarifications on the temporal limitations of its jurisdiction – previously defined in the *Šilih* judgment (cited above, §§ 162-63) – with regard to the procedural obligation to investigate deaths or ill-treatment which occurred prior to the entry into force of the Convention in respect of the respondent State (the "critical date").

206. It found, in essence, that this temporal jurisdiction was strictly limited to procedural acts which were or ought to have been implemented after the entry into force of the Convention in respect of the respondent State, and that it was subject to the existence of a genuine connection between the event giving rise to the procedural obligation under Articles 2 and 3 and the entry into force of the Convention. It added that such a connection was primarily defined by the temporal proximity between the triggering event and the critical date, which could be separated only by a reasonably short lapse of time that should not normally exceed ten years (see *Janowiec and Others*, cited above, § 146); at the same time, the Court specified that this time period was not in itself decisive. In this regard, it indicated that this connection could be established only if much of the investigation – that is, the undertaking of a significant proportion of the procedural steps to determine the cause of death and hold those responsible to account – took place or ought to have taken place in the period following the entry into force of the Convention (see *Janowiec and Others*, cited above, § 147).

207. In the instant case, the Court reiterates that the complaints in respect of the procedural aspect of Articles 2 and 3 of the Convention concern the investigation into the armed repression conducted on 13 and 14 June 1990 against the anti-government demonstrations, and that this repression cost the life of the first applicant's husband and interfered with

the second applicant's physical integrity. That investigation began in 1990, shortly after those events, giving rise, *inter alia*, to investigative measures, the primary aim of which was to identify the victims who had been killed by gunfire, including the first applicant's husband.

208. It should thus be noted that four years passed between the triggering event and the Convention's entry into force in respect of Romania, on 20 June 1994. This lapse of time is relatively short. It is less than ten years and less than the time periods in issue in similar cases examined by the Court (see *Şandru and Others*, cited above, §§ 55-59; *Paçacı and Others v. Turkey*, no. 3064/07, §§ 63-66, 8 November 2011; and *Jularić v. Croatia*, no. 20106/06, §§ 45-51, 20 January 2011).

209. Prior to the critical date, few procedural acts were carried out in the context of the investigation. It was after that date, and especially from 1997 onwards, that the investigation took shape through the joinder of dozens of cases which had previously been dispersed and the bringing of charges against senior military and civilian figures. Equally, the prosecutors' decisions to commit for trial and judicial decisions concerning this case were all issued after the critical date (see, *inter alia*, the decision to commit for trial of 18 May 2000, the Supreme Court of Justice's judgment of 30 June 2003, the decision to commit for trial of 27 July 2007 and the High Court of Cassation and Justice's judgments of 17 December 2007 and 9 March 2011).

210. In other words, the majority of the proceedings and the most important procedural measures were carried out after the critical date.

211. Consequently, the Court finds that it has jurisdiction *ratione temporis* to examine the complaints raised by Mrs Mocanu and Mr Stoica under the procedural aspect of Articles 2 and 3 of the Convention, in so far as those complaints relate to the criminal investigation conducted in the present case after the entry into force of the Convention in respect of Romania.

…

C. The allegation that Mr Stoica's complaint was lodged out of time

237. Without explicitly reiterating the preliminary objection that they had raised before the Chamber, the Government alleged, with regard to the complaint lodged under Article 3 by Mr Stoica, that he ought to have displayed diligence, firstly in submitting his criminal complaint to the domestic authorities, and secondly in introducing his application before the Court.

1. The Chamber judgment

238. The Chamber considered that this second objection – alleging that Mr Stoica had lodged his criminal complaint with the relevant authorities out of time – should be joined to the examination of the merits of the complaint alleging a violation of the procedural aspect of Article 3 of the Convention, and declared the complaint admissible.

2. The Government's submissions

239. The Government indicated that the criminal investigation into the violent acts committed on 13 and 14 June 1990 had been opened in 1990 and observed that, in spite of the opening of this investigation and the difficulties encountered by the authorities in identifying all the victims, the applicant did not join the proceedings until 2001.

240. In this regard, the Government considered that it was unacceptable for a presumed victim to benefit from steps taken by other persons to obtain the opening of an investigation without calling into question the fundamental principle of the Convention mechanism, namely exhaustion of domestic remedies, focused on the individual dimension of the right of petition.

241. Referring to the cases of *Toma v. Romania* ((dec.), no. 34403/05, 18 September 2012) and *Petyo Popov v. Bulgaria* (no. 75022/01, 22 January 2009), the Government pointed out that the Court had criticised the conduct of applicants who had failed to bring their complaints concerning violations of Article 3 of the Convention before the domestic prosecuting authorities in due form.

242. In so far as the applicant sought to justify his passivity by an alleged vulnerability which prevented him from joining the investigation proceedings, the Government observed that the violence to which the applicant claimed to have been subjected in June 1990 had required only three to five days of medical care, that he had not been hospitalised for long and that he had not submitted medical certificates attesting to a physical or psychological impairment having a causal link with the events complained of.

243. The Government added that, after 1990, the social and political climate had been favourable to the victims and that the fears referred to by the applicant were accordingly unfounded. In this connection, they submitted that the Court had taken victims' vulnerability into account only in extremely critical situations, where the applicants had expressed well-founded fears in the light of the national context.

244. Referring to the cases of *Narin v. Turkey* (no. 18907/02, 15 December 2009) and *Frandes v. Romania* ((dec.), no. 35802/05, 17 May 2011), the Government submitted that the Court, called on to assess the diligence shown by parties in applying to it, had considered that applications could be rejected as out of time even in cases concerning continuing situations. The Government considered that this rule applied to the situation of applicants who, like Mr Stoica in the instant case, had delayed excessively or without apparent reason before applying to the Court after realising that the investigation conducted by the authorities was losing effectiveness, or after the point that they ought to have realised this. In their opinion, Mr Stoica's situation was very different from that of the applicants in *Er and Others v. Turkey* (no. 23016/04, 31 July 2012), as the applicant in the present case had been able at any moment to contact the authorities, who had not attempted to hide the facts or deny the circumstances.

3. The applicant's submissions

245. The applicant explained that he had waited until 18 June 2001 before lodging a criminal complaint with regard to his experiences during the night of 13 to 14 June 1990 on account of the scale of the repression conducted by the authorities at that time, of which he among more than a thousand others had been a victim. He considered that the investigation in issue here did not concern ordinary incidents of unlawful use of force by State agents, but rather mass violations of human rights, orchestrated by the highest State authorities.

In this connection, he alleged that, following the events of June 1990, he was in such a state of distress that he had hardly been able to leave his house for three months, for fear of the oppressive authorities, and that his mental and physical health had subsequently deteriorated to such an extent that he had sustained permanent psychological problems.

246. He pleaded that, in such circumstances, only a prompt reaction by the judicial authorities could have reassured him and encouraged him to lodge a complaint. He alleged that no such reaction had been forthcoming until 2000 and submitted that he had lodged a complaint at that point on learning that, for the first time, high-ranking State officials had been charged and committed for trial.

247. He observed that his complaint had not been dismissed as out of time by the national authorities, that it had been joined immediately to the wider investigation file opened into the impugned events, and that it had given rise to investigative acts in his respect without any allegations of passivity being made.

248. He considered that his failure to lodge a complaint before 2001 had not compromised the effectiveness of the investigation in any way. In this respect, he submitted that the authorities could have identified him from the video recordings that the State television service had made of the events which occurred in its own headquarters, or from the medical records drawn up, *inter alia*, during the night of 13 to 14 June 1990 by the emergency ward in which he was hospitalised.

In addition, he noted that the fourth point of the operative provisions in the decision to commit for trial of 18 May 2000 ordered that the investigation be continued into the deprivation of liberty inflicted on 1,300 persons by servicemen and miners from the morning of 13 June 1990 onwards, and also into the assaults sustained by hundreds of persons during the same period.

249. He claimed to have played a very active part in the investigation from 2001 onwards and to have regularly requested information on progress in the proceedings, submitting as evidence the entries made in the register of the military section of the prosecutor's office at the High Court of Cassation and Justice.

250. Lastly, he considered that lodging a complaint more rapidly would have had no impact on the outcome of that investigation, since the decision not to bring a prosecution, issued on 17 June 2009, also concerned those victims who had had the courage to lodge a complaint prior to 2001.

4. The third party's observations

251. According to the non-governmental organisation Redress, the third-party intervener, the adverse psychological effects of ill-treatment on victims' capacity to complain represented a significant obstacle to redress. The reality of this phenomenon had been recognised, *inter alia*, by the United Nations Committee against Torture (General Comment No. 3 (2012) [on the Implementation by States Parties of Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment], § 38).

252. Moreover, the Court had admitted that where abuses were perpetrated by State agents, their psychological effects could be even greater (*Tyrer v. the United Kingdom*, 25 April 1978, § 33, Series A no. 26).

253. Scientific research showed that the experience of ill-treatment at the hands of social and political institutions charged with responsibility for ensuring individuals' safety and well-being could have particular psychological consequences which could explain a delay in making a complaint, or not making a complaint at all (they referred, among other sources, to L. Piwowarczyk, A. Moreno, M. Grodin, "Health Care of Torture Sur-

vivors", *Journal of the American Medical Association*, vol. 284 (2000), pp. 539-41). From a psychological perspective, the cause of this attitude was to be found in the shattering of the victims' ability to trust others, especially State agents. The victims of State agents felt more vulnerable than those of ordinary criminals, since they had little or no hope that the authorities would investigate their case, *a fortiori* where the State continued to repress peaceful demonstrations or showed no signs of pursuing an effective investigation (A. Burnett, M. Peel, "The Health of Survivors of Torture and Organised Violence", *British Medical Journal*, vol. 322 (2001), pp. 606-09).

254. This research also indicated that victims who did not identify themselves as activists or demonstrators suffered from ill-treatment more greatly, and could even be disproportionally impacted by the violence inflicted.

255. Given the difficult situation of victims, both in terms of their vulnerability and the obstacles to obtaining access to evidence, there was an increased tendency on the part of national courts to take these realities into account and to block limitation periods when agreeing to rule on complaints lodged many years after the events complained of by persons who had been tortured (District Court of The Hague, *Wisah Binti Silan and Others v. the Netherlands*, 14 September 2011, §§ 4.15-4.18, Nederlandse Jurisprudentie 2012, no. 578; High Court (England and Wales), *Mutua and Others v. The Foreign and Commonwealth Office*, 5 October 2012, [2012] EWHC 2678 (QB); and the House of Lords (United Kingdom), *A. v. Hoare*, 30 January 2008, [2008] UKHL 6, §§ 44-49).

5. The Court's assessment

256. The Court notes that the Government referred to the applicant's tardiness in lodging a complaint with the domestic authorities concerning the events at the origin of this application. In this context, they also referred to the duty of diligence on persons wishing to apply to the Court.

257. The Court considers that the issue of the diligence incumbent on the applicant is closely linked to that of any tardiness in lodging a criminal complaint within the domestic legal system. Taken together, these arguments may be regarded as an objection alleging a failure to comply with the six-month time-limit under Article 35 § 1 of the Convention. This objection must therefore now be examined (see *Micu v. Romania*, no. 29883/06, § 108, 8 February 2011).

a. General principles

258. The Court reiterates that the six-month time-limit provided for by Article 35 § 1 of the Convention has a number of aims. Its primary purpose

is to maintain legal certainty by ensuring that cases raising issues under the Convention are examined within a reasonable time, and to prevent the authorities and other persons concerned from being kept in a state of uncertainty for a long period of time (see *Sabri Güneş v. Turkey* [GC], no. 27396/06, § 39, 29 June 2012; *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 135, ECHR 2012; and *Bayram and Yıldırım v. Turkey* (dec.), no. 38587/97, ECHR 2002-III). That rule marks out the temporal limit of the supervision exercised by the Court and signals, both to individuals and State authorities, the period beyond which such supervision is no longer possible (see *Walker v. the United Kingdom* (dec.), no. 34979/97, ECHR 2000-I; *Sabri Güneş*, cited above, § 40; and *El-Masri*, cited above, § 135).

259. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset, however, that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant, and, where the situation is a continuing one, once that situation ends (see, among other authorities, *Dennis and Others v. the United Kingdom* (dec.), no. 76573/01, 2 July 2002; *Sabri Güneş*, cited above, § 54; and *El-Masri*, cited above, § 136).

260. Article 35 § 1 cannot be interpreted in a manner which would require an applicant to seise the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level, otherwise the principle of subsidiarity would be breached. Where an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate for the purposes of Article 35 § 1 to take the start of the six-month period from the date when the applicant first became or ought to have become aware of those circumstances (see *Edwards v. the United Kingdom* (dec.), no. 46477/99, 7 June 2001, and *El-Masri*, cited above, § 136).

261. In cases of a continuing situation, the period starts to run afresh each day and it is in general only when that situation ends that the six-month period actually starts to run (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 159, ECHR 2009, and *Sabri Güneş*, cited above, § 54).

262. However, not all continuing situations are the same. Where time is of the essence in resolving the issues in a case, there is a burden on the applicant to ensure that his or her claims are raised before the Court with the

necessary expedition to ensure that they may be properly, and fairly, resolved (see *Varnava and Others*, cited above, § 160). This is particularly true with respect to complaints relating to any obligation under the Convention to investigate certain events. As the passage of time leads to the deterioration of evidence, time has an effect not only on the fulfilment of the State's obligation to investigate but also on the meaningfulness and effectiveness of the Court's own examination of the case. An applicant has to become active once it is clear that no effective investigation will be provided, in other words once it becomes apparent that the respondent State will not fulfil its obligation under the Convention (see *Chiragov and Others v. Armenia* (dec.) [GC], no. 13216/05, § 136, 14 December 2011, and *Sargsyan v. Azerbaijan* (dec.) [GC], no. 40167/06, § 135, 14 December 2011, both referring to *Varnava and Others*, cited above, § 161).

263. The Court has already held that, in cases concerning an investigation into ill-treatment, as in those concerning an investigation into the suspicious death of a relative, applicants are expected to take steps to keep track of the investigation's progress, or lack thereof, and to lodge their applications with due expedition once they are, or should have become, aware of the lack of any effective criminal investigation (see the decisions in *Bulut and Yavuz v. Turkey* (dec.), no. 73065/01, 28 May 2002; *Bayram and Yıldırım*, cited above; *Frandes*, cited above, §§ 18-23; and *Atallah v. France* (dec.), no. 51987/07, 30 August 2011).

264. It follows that the obligation of diligence incumbent on applicants contains two distinct but closely linked aspects: on the one hand, the applicants must contact the domestic authorities promptly concerning progress in the investigation – which implies the need to apply to them with diligence, since any delay risks compromising the effectiveness of the investigation – and, on the other, they must lodge their application promptly with the Court as soon as they become aware or should have become aware that the investigation is not effective (see *Nasirkhayeva v. Russia* (dec.), no. 1721/07, 31 May 2011; *Akhvlediani and Others v. Georgia* (dec.), nos. 22026/10, 22043/10, 22078/10, 22097/10, 22128/10, 27480/10, 27534/10, 27551/10, 27572/10 and 27583/10, §§ 23-29, 9 April 2013; and *Gusar v. the Republic of Moldova and Romania* (dec.), no. 37204/02, §§ 14-17, 30 April 2013).

265. That being so, the Court reiterates that the first aspect of the duty of diligence – that is, the obligation to apply promptly to the domestic authorities – must be assessed in the light of the circumstances of the case. In this regard, it has held that applicants' delay in lodging a complaint is not decisive where the authorities ought to have been aware that an individual could have been subjected to ill-treatment – particularly in the case of

assault which occurs in the presence of police officers – as the authorities' duty to investigate arises even in the absence of an express complaint (see *Velev v. Bulgaria*, no. 43531/08, §§ 59-60, 16 April 2013). Nor does such a delay affect the admissibility of the application where the applicant was in a particularly vulnerable situation, having regard to the complexity of the case and the nature of the alleged human rights violations at stake, and where it was reasonable for the applicant to wait for developments that could have resolved crucial factual or legal issues (see *El-Masri*, cited above, § 142).

266. With regard to the second aspect of this duty of diligence – that is, the duty on the applicant to lodge an application with the Court as soon as he realises, or ought to have realised, that the investigation is not effective – the Court has stated that the issue of identifying the exact point in time that this stage occurs necessarily depends on the circumstances of the case and that it is difficult to determine it with precision (see the decision in *Nasirkhayeva*, cited above).

267. In establishing the extent of this duty of diligence on applicants who wish to complain about the lack of an effective investigation into deaths or ill-treatment, the Court has been largely guided in recent years by the case-law on the duty of diligence imposed on applicants who complain about the disappearance of individuals in a context of international conflict or state of emergency within a country (see *Varnava and Others*, cited above, § 165; *Yetişen and Others v. Turkey* (dec.), no. 21099/06, §§ 72-85, 10 July 2012; and *Er and Others*, cited above, § 52), despite the differences between those two types of situation.

268. Thus, the Court has rejected as out of time applications where there had been excessive or unexplained delay on the part of applicants once they had, or ought to have, become aware that no investigation had been instigated or that the investigation had lapsed into inaction or become ineffective and, in any of those eventualities, there was no immediate, realistic prospect of an effective investigation being provided in the future (see, *inter alia*, *Narin*, cited above, § 51; *Aydınlar and Others v. Turkey* (dec.), no. 3575/05, 9 March 2010; and the decision in *Frandes*, cited above, §§ 18-23).

In other words, the Court has considered it indispensable that persons who wish to bring a complaint about the ineffectiveness or lack of such investigation before the Court do not delay unduly in lodging their application. Where there has been a considerable lapse of time, and there have been significant delays and lulls in investigative activity, there will come a time when the relatives must realise that no effective investigation has been, or will be, provided.

269. The Court has held, however, that so long as there is some meaningful contact between relatives and authorities concerning complaints and requests for information, or some indication, or realistic possibility, of progress in investigative measures, considerations of undue delay by the applicants will not generally arise (see *Varnava and Others*, cited above, § 165).

b. Application of the above principles to the present case

270. The Court notes that the alleged attack on the applicant at the State television headquarters, in the presence of police officers and servicemen, took place on the night of 13 to 14 June 1990. A criminal investigation was opened shortly afterwards. On 18 June 2001, more than eleven years after the events, the applicant lodged a criminal complaint with a prosecutor at the military section of the prosecutor's office at the Supreme Court of Justice (see paragraph 170 above). On 25 June 2008, more than eighteen years after the events, the applicant lodged his application with the Strasbourg Court. On 17 June 2009 the prosecutor's office at the High Court of Cassation and Justice decided to discontinue the proceedings against the surviving defendants either on the ground that the offences had become statute-barred or that there was no case to answer (see paragraphs 156-62 above). On 9 March 2011 the High Court of Cassation and Justice dismissed the applicant's appeal against that decision (see paragraph 166 above).

271. The Court further notes that, in their objection, the Government criticises the applicant's inactivity from 1990 to 2001.

272. From the point of view of the six-month rule, the Court has to ascertain whether the applicant, at the time of lodging his application with the Court, had been aware, or should have been aware, for more than six months, of the lack of any effective criminal investigation. His inactivity before lodging a criminal complaint at the domestic level is not as such relevant for the assessment of the fulfilment of the six-month requirement. However, if the Court were to conclude that before the applicant petitioned the competent domestic authorities he was already aware, or ought to have been aware, of the lack of any effective criminal investigation, it is obvious that his subsequent application with the Court has *a fortiori* been lodged out of time (see the decisions in *Bayram and Yıldırım*, and *Bulut and Yavuz*, both cited above), unless new evidence or information arose in the meantime which would have given rise to a fresh obligation on the authorities to take further investigative measures (see *Brecknell v. the United Kingdom*, no. 32457/04, § 71, 27 November 2007, and *Gürtekin and Others v. Cyprus* (dec.), nos. 60441/13, 68206/13 and 68667/13, 11 March 2014).

273. Given that he formally lodged his complaint while being interviewed by a prosecutor in the military section of the prosecutor's office at the Supreme Court of Justice, there is evidence that the applicant was keeping track of developments in the criminal investigation prior to 18 June 2001. He justified his reluctance to lodge a complaint by his vulnerability, which was explained not only by the deterioration in his health following the ill-treatment allegedly sustained in June 1990, but also by the feeling of powerlessness which he experienced on account of the large number of victims of the repression conducted by the security forces and the judicial authorities' failure to react in a prompt manner, capable of reassuring him and encouraging him to come forward.

274. Like the United Nations Committee against Torture, quoted by the third-party intervener, the Court acknowledges that the psychological effects of ill-treatment inflicted by State agents may also undermine victims' capacity to complain about treatment inflicted on them, and may thus constitute a significant impediment to the right to redress of victims of torture and other ill-treatment (see General Comment No. 3 (2012), § 38). Such factors may have the effect of rendering the victim incapable of taking the necessary steps to bring proceedings against the perpetrator without delay. Accordingly, as the third-party intervener pointed out, these factors are increasingly taken into account at national level, leading to a certain flexibility with regard to the limitation periods applicable to claims for reparation in respect of claims for compensation for personal injury (see paragraph 255 above).

275. The Court observes that very few victims of the events of 13 to 15 June 1990 lodged a complaint in the first few years (see paragraph 99 above). It does indeed appear that the majority of them found the courage to lodge a complaint only after the developments in the investigation arising from the decision of 16 September 1998 and the decision to commit for trial of 18 May 2000. The Court can only conclude, having regard to the exceptional circumstances in issue, that the applicant was in a situation in which it was not unreasonable for him to wait for developments that could have resolved crucial factual or legal issues (see, by contrast, the decision in *Akhvlediani and Others*, cited above, § 27).

Regard being had to the foregoing, the Court considers that the applicant's vulnerability and his feeling of powerlessness, which he shared with numerous other victims who, like him, waited for many years before lodging a complaint, amount to a plausible and acceptable explanation for his inactivity from 1990 to 2001.

276. The Court also notes that certain other elements – particularly the video recording made by the State television service and the confiscation

of identity documents belonging to the applicant and other persons who were held and filmed at the television station – indicate that the authorities knew or could have discovered without any real difficulties at least some of the names of the victims of the abuses committed on 13 June 1990 on the premises of the State television service and the surrounding area, and those committed over the following night, in the presence of the numerous servicemen who were gradually deployed there (see *Velev*, cited above, §§ 59-60). Furthermore, the decision of 14 October 1999 and the decision to commit for trial of 18 May 2000 had ordered the investigators to identify all of those victims.

277. Moreover, the Court notes that the decision of 17 June 2009 not to bring a prosecution, upheld by the judgment of the High Court of Cassation and Justice of 9 March 2011, applied to all of the victims. The conclusion adopted with regard to the statutory limitation of criminal liability applied equally to those victims who had lodged complaints in the days following their assault and to those who, like the applicant, had complained at a later date.

278. In those circumstances, it cannot be concluded that Mr Stoica's delay in lodging his complaint was capable of undermining the effectiveness of the investigation (see, by contrast, the decision in *Nasirkhayeva*, cited above).

In any event, the applicant's complaint was added to investigation case file no. 75/P/1998, which concerned a large number of victims of the events of 13 to 15 June 1990. The Court also notes that the decision of 29 April 2008, by which the military section of the prosecutor's office stated that it did not have jurisdiction and referred the case to the ordinary criminal section for examination – *inter alia* – of the charges of inhuman treatment made against the highest-ranking army officers and the State leaders of the time, included the names of more than a thousand victims (see paragraph 142 above). Thus, the investigation was undertaken in entirely exceptional circumstances.

279. Moreover, the Court notes that from 2001 onwards, there was meaningful contact between the applicant and the authorities with regard to the former's complaint and his requests for information, which he submitted annually by going to the prosecutor's office in person to enquire about progress in the investigation. In addition, there were tangible indications that the investigation was progressing, particularly the successive decisions to bring charges against high-ranking civilian and military figures and the investigative measures in respect of the applicant, including the two forensic medical examinations which were carried out.

280. Having regard to the developments in the investigation subsequent to 2001, its scope and its complexity, all of which are accepted by the Government, the Court considers that after having lodged his complaint with the competent domestic authorities, the applicant could legitimately have believed that the investigation was effective and could reasonably have awaited its outcome, so long as there was a realistic possibility that the investigative measures were moving forward (see, *mutatis mutandis*, *Palić v. Bosnia and Herzegovina*, no. 4704/04, § 52, 15 February 2011).

281. The applicant lodged his application with the Court on 25 June 2008, more than seven years after he had lodged his criminal complaint with the prosecuting authorities. The investigation was still pending at that time, and investigative steps had been taken. For the reasons indicated above (see paragraph 279), which remained valid at least until the time when the applicant lodged his application before the Court, he cannot be criticised for having waited too long.

282. Moreover, the Court notes that the final domestic decision in the applicant's case is the above-mentioned judgment of 9 March 2011.

283. In the light of the foregoing, the Court considers that the application has not been lodged out of time. The Government's objection must therefore be dismissed.

D. Alleged violation of Articles 2 and 3 of the Convention

1. The Chamber judgment

284. The Chamber examined separately the merits of the complaints under Articles 2 and 3 of the Convention. It concluded that there had been a violation of the procedural aspect of Article 2 in respect of Mrs Mocanu and that there had been no violation of the procedural aspect of Article 3 of the Convention in respect of Mr Stoica.

a. The part of the judgment concerning Mrs Mocanu

285. With regard to Mrs Mocanu, the Chamber noted that the criminal investigation into the unlawful killing of the applicant's husband had been opened in 1990 and that it was still pending more than twenty years later. It concluded that the investigation had not complied with the requirement of promptness.

286. It also noted that in 1994 the case was pending before the military prosecuting authorities, which was not an independent investigative body, and that the shortcomings in the investigation, acknowledged by the national courts themselves, had not subsequently been remedied.

287. It also observed that Mrs Mocanu had been given access to the investigation belatedly, and that she had not been correctly informed about its progress.

288. Further, the Chamber considered that what was at stake in this case – that is, the right of the numerous victims to know what had happened and, by implication, the right to an effective judicial investigation and, where appropriate, compensation – were of such importance for Romanian society that they ought to have prompted the domestic authorities to deal with the case speedily and without unnecessary delay, in order to prevent any appearance of impunity for certain acts.

289. In view of these considerations, the Chamber concluded that there had been a violation of the procedural aspect of Article 2 of the Convention.

b. The part of the judgment concerning Mr Marin Stoica

290. With regard to Mr Stoica, the Chamber considered that, just as it was imperative that the relevant domestic authorities launch an investigation and take measures as soon as allegations of ill-treatment were brought to their attention, it was also incumbent on the persons concerned to display diligence and initiative. Thus, the Chamber attached particular importance to the fact that the applicant had not brought his complaint concerning the violence to which he was subjected on 13 June 1990 to the authorities' attention until eleven years after those events.

291. It noted that the complaint in question had been joined to case file no. 75/P/1998, which concerned, *inter alia*, the investigation into the charges of inhuman treatment, and that, in the context of that case, several investigative acts, including two forensic medical examinations, were carried out in respect of the applicant.

292. However, it noted that the case file indicated that, when the applicant lodged his complaint, certain offences – notably assault and wrongful conduct – had already become statute-barred, in application of domestic law.

293. Although the Chamber could accept that in situations of mass violations of fundamental rights it was appropriate to take account of victims' vulnerability, especially a possible inability to lodge complaints for fear of reprisals, it found no convincing argument that would justify the applicant's passivity and decision to wait eleven years before submitting his complaint to the relevant authorities.

294. Accordingly, the Chamber concluded that there had been no violation of the procedural aspect of Article 3 of the Convention.

2. The applicants' submissions

295. The applicants alleged that the procedural aspect of Articles 2 and 3 of the Convention had been breached in this case. They considered that the duty to investigate of their own motion contained in those Convention provisions was incumbent on the authorities under both domestic and international law. That duty was all the stronger in that the present case did not concern ordinary incidents of unlawful use of force by State agents, but a conflict which was fuelled by the authorities then in power and which set various groups of the population – including ethnic groups – against one another.

296. In this connection, they emphasised that, having regard to the high number of victims of the impugned events, the investigations which concerned them as victims related to crimes that were not subject to statutory limitation, such as genocide or inhuman treatment. They argued that this imposed on the authorities an even greater duty to investigate, which they had not fulfilled.

Mrs Mocanu indicated also that she had not been informed of progress in the investigation after 2009.

297. Mr Stoica considered that the Court ought to examine the entirety of the investigation in the present case, in which senior State officials had been charged, and that it should not limit itself to examining that part of the investigation concerning the violence inflicted on him. He submitted that, for the purpose of evaluating the case under the procedural aspect of Article 3, the investigation ought not to be broken up and that the acts of violence to which he had been subjected could not be viewed in isolation.

298. Mr Stoica submitted that those events – on which the investigation ought to have shed light – were particularly significant in Romania's recent history, since they had occurred in the context of the transition towards a democratic society and were part of a process which dated back to the dictator's fall in December 1989. Adding that those events had affected very many people, the applicant considered that the investigation in question had been the only means for Romanian society to discover the truth about this episode in the country's recent history, a factor which ought to have prompted the competent authorities to take appropriate action, something they had failed to do.

299. In this connection, he submitted in particular that, by closing the investigation into inhuman treatment on the ground that the constituent elements of the offence had not been made out, the prosecutor in his decision not to bring a prosecution of 17 June 2009 had incorrectly interpreted

the law, since his conclusion was not consistent with the High Court of Cassation and Justice's relevant case-law.

300. In addition, with regard to the offences under investigation which had become time-barred, he considered that the limitation period ought to have been suspended as long as the accused leaders held high-ranking public office.

301. Lastly, the applicant submitted that, having regard to the special features of the case, his lateness in bringing a complaint was irrelevant in examining the complaint alleging a violation of the procedural aspect of Article 3 and that it had not been such as to obstruct the investigation. In this connection, he noted that the decision of 14 October 1999 and the fourth point of the decision to commit for trial of 18 May 2000 placed an obligation on the investigators to identify all the victims of the repression. He also alleged that the authorities had been informed directly about his case.

3. The Government's submissions

a. With regard to Mrs Mocanu

302. Referring to certain investigative measures in the domestic proceedings, the Government alleged that the national authorities had complied with their obligation to conduct an effective investigation into the circumstances of the death of Mrs Mocanu's husband, all necessary procedural acts to establish the truth about that death – and particularly the factual circumstances in which it occurred – having been carried out in the context of that investigation.

303. They specified that the judicial authorities had been obliged to separate the investigation into several cases, depending on the accused, the offences or the civil parties concerned, given the complexity of the events which took place in June 1990 in Bucharest, and that for the same reason they had had to bring together a complex body of evidence, including more than 5,700 witness statements.

304. In this connection, they invited the Court to take into consideration the unusual nature of the investigation, which was due not only to the large number of persons involved, but also to the fact that it concerned a sensitive historical event for Romania. They emphasised that the applicants' particular situations represented only one part of the vast nexus of events which occurred at the time of the large-scale demonstrations held in Bucharest and which had led to acts of violence, and that those situations could not therefore be analysed in isolation from the general context of the case file.

305. They submitted that there had not been any period of inactivity imputable to the authorities from 2000 to the present date.

306. They also specified that they did not challenge the Chamber's findings with regard to the length of the investigations, but added that this was explained by the need to remedy the initial shortcomings in the investigation and the wish to ensure that the applicant was involved in the proceedings.

b. With regard to Mr Marin Stoica

307. With regard to Mr Stoica, the Government indicated that the authorities had encountered difficulties in identifying all of the victims and involving them in the proceedings, given that they had not all lodged a complaint promptly.

308. They alleged that the criminal investigation had correctly concluded that criminal liability had become statute-barred, as the ill-treatment inflicted on the applicant did not fall within the category of crimes against humanity. They stressed that that conclusion was not intended to introduce a climate of impunity for the tragic events of 1990, but to apply the procedural rules of domestic law, particularly the reasonable limitation periods, which ranged from three to fifteen years.

309. There were no particular circumstances in this case which would justify imposing on the authorities an enhanced duty to investigate.

310. Furthermore, in the case of multiple violations of fundamental rights, the overall truth was not necessarily established by clarifying each individual situation. In those circumstances, an investigation could attain its objective – establishing the overall truth – even where it was obstructed in a particular individual case by the failure of the victim concerned to take any action.

4. The third party's comments

311. The third-party intervener indicated that, over the past ten years, European and international law had attached increasing importance to the fight against impunity in respect of torture and cruel, inhuman or degrading treatment or sentences, and to the recognition of the right of victims to an effective remedy and to redress. In this regard, it referred to several international texts, in particular the Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations (adopted on 30 March 2011). According to those Guidelines, "the fact that the victim wishes not to lodge an official complaint, later withdraws such a complaint or decides to discontinue the proceedings does not absolve the authorities from their obligation to carry

out an effective investigation, if there are reasons to believe that a serious human rights violation has occurred".

312. The third-party intervener emphasised that Article 3 of the Convention required States to put in place criminal laws which effectively punished serious human rights violations by appropriate sanctions (it referred to the judgments in *M.C. v. Bulgaria*, no. 39272/98, § 150, ECHR 2003-XII; *Çamdereli v. Turkey*, no. 28433/02, § 38, 17 July 2008; and *Gäfgen v. Germany* [GC], no. 22978/05, § 117, ECHR 2010). It concluded that the statutory limitation periods should be adapted to the special features of such cases, which were characterised, *inter alia*, by the victims' vulnerability, particularly in the event of ill-treatment inflicted by State agents.

313. Relying on a case brought before the International Criminal Tribunal for the former Yugoslavia (Trial Chamber, *Prosecutor v. Furundžija*, case no. IT-95-17/1-T, judgment of 10 December 1998), it submitted that the inapplicability of statutory limitation of criminal liability with regard to war crimes and crimes against humanity was a unanimously recognised principle, but that it was not, however, limited to this type of crimes. It added that the United Nations Human Rights Committee shared this position in so far as it concerned flagrant violations of fundamental rights, and that the Committee had also stated that statutes of limitations should not be applicable to other forms of ill-treatment (General Comment No. 3, (2012), § 40, cited above).

5. The Court's assessment

a. General principles

314. The Court will examine together the complaints submitted by Mrs Mocanu and by Mr Stoica under Articles 2 and 3 of the Convention, in the light of the converging principles deriving from both those provisions, principles which are well established and have been summarised, *inter alia*, in the judgments in *Nachova and Others v. Bulgaria* ([GC], nos. 43577/98 and 43579/98, §§ 110 and 112-13, ECHR 2005-VII); *Ramsahai and Others v. the Netherlands* ([GC], no. 52391/99, §§ 324-25, ECHR 2007-II); *Al-Skeini and Others v. the United Kingdom* ([GC], no. 55721/07, §§ 162-67, ECHR 2011); and *El-Masri* (cited above, §§ 182-85).

315. The Court has already stated that, in interpreting Articles 2 and 3, it must be guided by the knowledge that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.

It reiterates that Article 3, like Article 2, must be regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe (see *Soering v. the United Kingdom*, 7 July 1989, § 88, Series A no. 161). In contrast to the other provisions in the Convention, it is cast in absolute terms, without exception or proviso, or the possibility of derogation under Article 15 of the Convention (see *Al-Skeini and Others*, cited above, § 162).

316. The general legal prohibition of arbitrary killing and torture and inhuman or degrading treatment or punishment by agents of the State would be ineffective in practice if there existed no procedure either for reviewing the lawfulness of the use of lethal force by State authorities, or for investigating arbitrary killings and allegations of ill-treatment of persons held by them (see *Al-Skeini and Others*, cited above, § 163, and *El-Masri*, cited above, § 182).

317. Thus, having regard to the general duty on the State under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", the provisions of Articles 2 and 3 require by implication that there should be some form of effective official investigation, both when individuals have been killed as a result of the use of force by, *inter alia*, agents of the State (see *McCann and Others v. the United Kingdom*, 27 September 1995, § 161, Series A no. 324), and where an individual makes a credible assertion that he has suffered treatment infringing Article 3 of the Convention at the hands, *inter alia*, of the police or other similar authorities (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports* 1998-VIII).

318. The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and prohibiting torture and inhuman or degrading treatment and punishment in cases involving State agents or bodies, and to ensure their accountability for deaths and ill-treatment occurring under their responsibility (see *Nachova and Others*, cited above, § 110, and *Ahmet Özkan and Others v. Turkey*, no. 21689/93, §§ 310 and 358, 6 April 2004).

319. The Court has already held that the procedural obligation under Articles 2 and 3 continues to apply in difficult security conditions, including in a context of armed conflict. Even where the events leading to the duty to investigate occur in a context of generalised violence and investigators are confronted with obstacles and constraints which compel the use of less effective measures of investigation or cause an investigation to be delayed, the fact remains that Articles 2 and 3 entail that all reasonable steps must be taken to ensure that an effective and independent investigation is conducted (see *Al-Skeini and Others*, cited above, § 164).

320. Generally speaking, for an investigation to be effective, the persons responsible for carrying it out must be independent from those targeted by it. This means not only a lack of hierarchical or institutional connection but also a practical independence (see *Nachova and Others*, cited above, § 110, and *Halat v. Turkey*, no. 23607/08, § 51, 8 November 2011).

321. Whatever mode is employed, the authorities must act of their own motion. In addition, in order to be effective, the investigation must be capable of leading to the identification and punishment of those responsible. It should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly and unlawfully used lethal force, but also all the surrounding circumstances (see *Al-Skeini and Others*, cited above, § 163).

322. Although this is not an obligation of result, but of means, any deficiency in the investigation which undermines its ability to establish the circumstances of the case or the person responsible will risk falling foul of the required standard of effectiveness (see *El-Masri*, cited above, § 183).

323. A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force or allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see *McKerr v. the United Kingdom*, no. 28883/95, § 114, ECHR 2001-III).

324. In all cases, with regard to the obligations arising under Article 2 of the Convention, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests. Equally, with regard to Article 3 of the Convention, the victim should be able to participate effectively in the investigation (see *McKerr*, cited above, § 115).

325. Lastly, the investigation must be thorough, which means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation (see *El-Masri*, cited above, § 183).

326. The Court has also held that in cases concerning torture or ill-treatment inflicted by State agents, criminal proceedings ought not to be discontinued on account of a limitation period, and also that amnesties and pardons should not be tolerated in such cases (see *Abdülsamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004; *Yeter v. Turkey*, no. 33750/03, § 70, 13 January 2009; and *Association "21 December 1989" and Others*, cited above, § 144). Furthermore, the manner in which the limitation period is

applied must be compatible with the requirements of the Convention. It is therefore difficult to accept inflexible limitation periods admitting of no exceptions (see, *mutatis mutandis*, *Röman v. Finland*, no. 13072/05, § 50, 29 January 2013).

b. Application of the above principles to the present case

327. In the present case, the Court notes that a criminal investigation was opened of the authorities' own motion shortly after the events of June 1990. From the outset, that investigation concerned the death by gunfire of Mrs Mocanu's husband and other persons, and also the ill-treatment inflicted on other individuals in the same circumstances.

The Court also notes that this investigation was initially divided up into several hundred separate case files (see paragraphs 82-87 above), and that it was subsequently brought together before being again split on several occasions into four, two and then three branches.

328. It appears from the decision issued on 14 October 1999 by the military section of the prosecutor's office at the Supreme Court of Justice that that investigation was also tasked with identifying all of the victims of the repression carried out from 13 to 15 June 1990. It therefore concerned Mr Stoica, at least with effect from 18 June 2001, the date on which he officially lodged a complaint.

The Court notes that a very high number of case files were opened at national level. However, given that all of these cases originated in the same events – which indeed resulted in their being regrouped by a decision of the prosecutor's office at the Supreme Court of Justice into one single case in 1997 – the Court considers that it is essentially dealing with one and the same investigation. Even if the Court considered that the case concerns two distinct investigations, one in respect of Mrs Mocanu and the other in respect of Mr Stoica, its findings as to their effectiveness would be the same, for the reasons set out below.

329. The Court notes that this investigation is still pending in respect of Mrs Mocanu. The judgment adopted by the High Court of Cassation and Justice on 17 December 2007, returning to the prosecutor's office the file on the charges initially brought against five army officers, is the most recent judicial decision delivered in respect of the first applicant.

330. The Court notes that the part of the investigation concerning Mr Stoica and implicating thirty-seven high-ranking civilian and military officials – including a former Head of State and two former Ministers of the Interior and of Defence – was terminated by a judgment delivered on 9 March 2011 by the High Court of Cassation and Justice.

331. It reiterates that its competence *ratione temporis* permits it to consider only that part of the investigation which occurred after 20 June 1994, the date on which the Convention came into force in respect of Romania (see paragraph 211 above). Accordingly, it will examine whether, after that date, the investigation conducted in the present case met the criteria of effectiveness set out above.

i. Independence of the investigation

332. The Court notes that from 1997, a few years after the date on which the Convention came into force in respect of Romania, until early 2008 the case was pending before the military section of the prosecutor's office at the Supreme Court of Justice (from 2003, the High Court of Cassation and Justice). It also notes that, with regard to Mrs Mocanu, the investigation is still pending before the military prosecutor's office, after the ordinary prosecutor's office declined jurisdiction on 6 June 2013 (see paragraph 123 above).

333. In this connection, the Grand Chamber endorses the Chamber's finding that the investigation was entrusted to military prosecutors who, like the accused (two of whom were generals), were officers in a relationship of subordination within the military hierarchy, a finding which has already led the Court to conclude that there has been a violation of the procedural aspect of Article 2 and Article 3 of the Convention in previous cases against Romania (see *Barbu Anghelescu v. Romania*, no. 46430/99, § 67, 5 October 2004; *Bursuc v. Romania*, no. 42066/98, § 107, 12 October 2004; and, more recently, *Şandru and Others*, cited above, § 74; *Association "21 December 1989" and Others*, cited above, § 137; and *Crăiniceanu and Frumuşanu v. Romania*, no. 12442/04, § 92, 24 April 2012).

334. The number of violations found in cases similar to the present case is a matter of particular concern and casts serious doubt on the objectivity and impartiality of the investigations that the military prosecutors are called upon to conduct (see, *mutatis mutandis*, *Nachova and Others*, cited above, § 117). The Government have not put forward any fact or argument capable of persuading the Court to conclude otherwise in the present case.

ii. Expedition and adequacy of the investigation

335. The Court notes that the investigation concerning Mrs Mocanu has been pending for more than twenty-three years, and for more than nineteen years since the Convention was ratified by Romania. Over this period, three of the five high-ranking army officers implicated in the killing of the applicant's husband have died.

336. It also notes, in respect of Mr Stoica, that the relevant investigation was terminated by a judgment delivered on 9 March 2011, twenty-one years after the opening of the investigation and ten years after the official lodging of the applicant's complaint and its joinder to the investigation case file.

337. Yet the very passage of time is liable not only to undermine an investigation, but also to compromise definitively its chances of being completed (see *M.B. v. Romania*, no. 43982/06, § 64, 3 November 2011).

338. While acknowledging that the case is indisputably complex, as the Government have themselves emphasised, the Court considers that the political and societal stakes referred to by the latter cannot justify such a long period. On the contrary, the importance of those stakes for Romanian society should have led the authorities to deal with the case promptly and without delay in order to avoid any appearance of collusion in or tolerance of unlawful acts (see, *inter alia*, *Lăpuşan and Others*, cited above, § 94, concerning a lapse of more than sixteen years since the opening of an investigation intended to lead to the identification and punishment of those responsible for repression of the anti-communist demonstrations of 1989, and more than eleven years since the entry into force of the Convention).

339. The Court observes, however, that lengthy periods of inactivity occurred in the investigation in the present case, both at the initial stages and in recent years. It notes, in particular, that no significant progress was made in the investigation from 20 June 1994, date of the Convention's entry into force, to 22 October 1997, the date on which joinder began of the numerous files which had been opened separately but which were part of the same factual context as that in which the present applications originated. It was only after that date that the prosecutor's office began to conduct a wider investigation into all of the circumstances surrounding the concerted use of force by State agents against the civilian population (see *Al-Skeini and Others*, cited above, § 163).

340. Furthermore, the Court notes that the decision of 16 September 1998 mentions that no investigative measure into the complaints of the persons assaulted at the State television headquarters had been conducted prior to that date (see paragraph 100 above).

341. In addition, the only procedural acts carried out in the case concerning Mrs Mocanu since the last referral to the prosecutor's office, ordered on 17 December 2007, are the decision to discontinue proceedings, issued on 6 June 2013 in respect of two co-defendants who had died in the meantime, and two statements declining jurisdiction, issued on 30 April 2009 and 6 June 2013 respectively.

342. The Court also notes that the national authorities themselves found numerous shortcomings in the investigation. Thus, the decision

adopted on 16 September 1998 by the prosecutor's office at the Supreme Court of Justice indicated that none of the individuals who had held high office at the relevant time – in particular, the Head of State, the Prime Minister and his deputy, the Minister of the Interior and the Head of Police – had yet been questioned.

343. Further, the subsequent investigation did not enable all the defects to be remedied, as the Supreme Court of Justice and the High Court of Cassation and Justice noted in their respective decisions of 30 June 2003 and 17 December 2007, referring to the shortcomings in the previous proceedings.

344. Moreover, the Court notes that the investigation – severed since 1998 from the rest of the case – into the violence inflicted on numerous demonstrators and other persons who had been present by chance at the scene of the crackdown was terminated by the decision not to bring a prosecution, issued on 17 June 2009 and upheld by the judgment of 9 March 2011. Those persons included Mr Stoica, who, having lodged a complaint in 2001, had to wait ten years for the investigation to be completed. However, in spite of the length of time involved and the investigative acts carried out in respect of the applicant and listed by the Government, none of the above-cited decisions succeeded in establishing the circumstances of the ill-treatment which the applicant and other persons claimed to have sustained at the State television headquarters.

345. The decision adopted by the prosecutor's office on 17 June 2009 indicated in substance that it had been impossible to establish the assailants' identity and the security forces' degree of involvement at the close of the investigations carried out by the civilian and then the military prosecution services. However, the authorities did not indicate what evidence had been used with a view to establishing the facts and for what tangible reasons their actions had not produced results. Moreover, at domestic level they had never called into question the applicant's conduct in respect of the investigation, and had failed to make any comment concerning the date on which the applicant lodged his complaint.

346. The Court notes that this branch of the investigation was terminated essentially on account of the statutory limitation of criminal liability. In this connection, it reiterates that the procedural obligations arising under Articles 2 and 3 of the Convention can hardly be considered to have been met where an investigation is terminated, as in the present case, through statutory limitation of criminal liability resulting from the authorities' inactivity (see *Association "21 December 1989" and Others*, cited above, § 144).

347. With regard to the other major finding of the investigation, namely the conclusion that the constituent elements of inhuman treatment, punishable under Article 358 of the Romanian Criminal Code, had not been made out in respect of Mr Stoica, the Court considers that the conformity of the prosecutor's interpretation with the relevant domestic case-law is open to doubt, in view of the judgment delivered by the High Court of Cassation and Justice on 7 July 2009. Moreover, the Government have not adduced other examples of case-law in support of the decision given in this case. The Court also considers that the conclusion to the effect that the miners no longer had an enemy against whom to fight on 14 June 1990 (see paragraph 161 above) appears doubtful, since it manifestly disregards the violence which occurred on 13 June 1990 in the presence of large numbers of servicemen, equipped with heavy ammunition and tanks, as attested to in the above-cited decision itself. Furthermore, this conclusion is contrary to the facts established by the same decision, which describes in detail the acts of violence perpetrated on 14 June 1990 by the miners, who targeted, without distinction, the demonstrators, students who were present on the university premises and passers-by. In addition, in its judgment of 9 March 2011 dismissing Mr Stoica's appeal against the decision not to bring a prosecution, the High Court of Cassation and Justice made no assessment whatsoever of the question of the applicability of Article 358 of the Criminal Code, and merely verified how the rules on statutory limitation had been applied in this case.

348. Accordingly, it appears that the authorities responsible for the investigation in this case did not take all the measures reasonably capable of leading to the identification and punishment of those responsible.

iii. The first applicant's involvement in the investigation

349. With regard to the obligation to involve victims' relatives in the proceedings, the Court observes that Mrs Mocanu was not informed of progress in the investigation prior to the decision of 18 May 2000 committing for trial the persons accused of killing her husband.

350. Moreover, the Court notes that the applicant was questioned by the prosecutor for the first time on 14 February 2007, almost seventeen years after the events, and that, following the High Court of Cassation and Justice's judgment of 17 December 2007, she was no longer informed about developments in the investigation.

351. The Court is not therefore persuaded that Mrs Mocanu's interests in participating in the investigation were sufficiently protected (see *Association "21 December 1989" and Others*, cited above, § 141).

iv. Conclusion

352. In the light of the foregoing, the Court considers that Mrs Mocanu did not have the benefit of an effective investigation as required by Article 2 of the Convention, and that Mr Stoica was also deprived of an effective investigation for the purposes of Article 3.

353. There has, accordingly, been a breach of the procedural aspect of those provisions.

…

FOR THESE REASONS, THE COURT

1. *Holds*, by sixteen votes to one, that it has jurisdiction *ratione temporis* to examine the complaints raised by Mrs Anca Mocanu and Mr Marin Stoica under the procedural aspect of Articles 2 and 3 of the Convention, in so far as those complaints relate to the criminal investigation conducted in the present case after the entry into force of the Convention in respect of Romania;

…

3. *Dismisses*, by fourteen votes to three, the Government's objection alleging that the application lodged by Mr Marin Stoica is out of time;
4. *Holds*, by sixteen votes to one, that there has been a violation of the procedural aspect of Article 2 of the Convention in respect of Mrs Anca Mocanu;
5. *Holds*, by fourteen votes to three, that there has been a violation of the procedural aspect of Article 3 of the Convention in respect of Mr Marin Stoica;

…

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF LIAKAT ALI ALIBUX v. SURINAME
Series C No. 276

JUDGMENT OF 30 JANUARY 2014

(Preliminary objections, merits, reparations and costs)

[Extracts][1]

1. This is an excerpt from the judgment on the preliminary objections, merits, reparations and costs in the case of *Liakat Ali Alibux v. Suriname*. It contains a summary of the facts, and only the paragraphs relevant to this publication. The number and length of the footnotes has been reduced. The paragraph numbers correspond to those in the original judgment, but the footnotes have been renumbered. The full text of the judgment is available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_276_eng.pdf.

JUDGMENT

In the case of *Liakat Ali Alibux*,

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

Humberto Antonio Sierra Porto, President;
Roberto F. Caldas, Vice-President;
Manuel E. Ventura Robles, Judge;
Diego García-Sayán, Judge;
Alberto Pérez Pérez, Judge;
Eduardo Vio Grossi, Judge, and
Eduardo Ferrer Mac-Gregor Poisot, Judge;

also present,

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

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and Articles 31, 32, 42, 65, and 67 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), renders this Judgment […]:

[…]

VI. FACTS

[The Court found that Mr. Alibux served as Minister of Finances and Minister of Natural Resources between September of 1996 and August of 2000. He was prosecuted in relation to the purchase of a complex of buildings conducted between June and July of 2000. On October 18, 2001, the Indictment of Political Office Holders Act (hereinafter "IPOHA") was adopted; its purpose was to implement Article 140 of the Constitution of Suriname in order to "establish regulations for indicting those who have held political office, even after their retirement, for punishable acts committed in the discharge of their official duties." Although preliminary investigations were conducted by the police between April and September of 2001, it was not until January 28, 2002, once the IPOHA was in effect, that the Prosecutor formally initiated the criminal process against Mr. Alibux.

Mr. Alibux was subjected to proceedings before the National Assembly and a preliminary investigation. Mr. Alibux was subsequently tried in a

single instance by three judges from the High Court of Justice and convicted on November 5, 2003 for the crime of forgery under Article 278, in relation to Articles 46, 47, and 72 of the Criminal Code, and sentenced to a one-year term of imprisonment and three years' disqualification from holding office as Minister.

At the time of Mr. Alibux's conviction, the legal system did not provide any means for appealing it. On August 27, 2007, the so-called "remedy of appeal" was established by means of an amendment to the IPOHA, which provided that persons indicted pursuant to Article 140 of the Constitution be tried, in the first instance, by three judges from the High Court of Justice, and in the event of an appeal, be heard by five to nine judges of the same court. Moreover, the persons who had been convicted prior to the amendment taking effect were granted the right to appeal within a period of three months. Mr. Alibux, however, did not make use of this remedy. Meanwhile, Article 144 of the Constitution provides for the establishment of a Constitutional Court. Nevertheless, such court had not been created at the time of the present Judgment. Furthermore, on January 3, 2003, whilst criminal proceedings against Mr. Alibux were still underway, he was stopped from leaving the country at the Paramaribo airport while attempting to travel for personal reasons.]

VII. MERITS

[…]

VII-1. THE RIGHT TO FREEDOM FROM EX POST FACTO LAWS

[…]

B. Considerations of the Court

58. The Court notes that there is no dispute between the parties and the Commission that the nature of the IPOHA is to regulatethe procedure laid down in Article 140 of the Constitution. However, the Commission and the representative claim that it also had substantive effects, and thus the legal dispute is over whether the IPOHA violated the the right to freedom from ex post facto laws. In this regard, the Court will rule on a) the scope of the rule of freedom from ex post facto laws b) the temporal application of norms governing the procedure, and c) the application of the IPOHA in the case of Alibux, particularly whether its implementation had substantive effects, that is, in regard to the offense or the severity of punishment.

B.1. Scope of the Right to Freedom from Ex Post Facto Laws

59. Article 9 of the Convention establishes that: "[n]o one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom."

60. In this regard, the jurisprudence of the Court on the matter has held that the definition of an act as unlawful, and the determination of its legal effects must precede the allegedly unlawful conduct. Otherwise, individuals would not be able to orient their behavior to conform with a legal order that is certain and in-force, within which social reproach and its consequences were expressed.[2] Moreover, the principle of the retroactivity of the most favorable criminal norm indicates that if, subsequent to the commission of the offense, the law changes to provide for a more lenient punishment, the guilty person shall benefit from it.[3] The Court has also stated that the right to freedom from ex post facto laws is designed to prevent a person being penalized for an act that, when it was committed, was not an offense or could not be punished or prosecuted.[4]

61. The Court has expressed that when applying criminal legislation, the judge is obliged to adhere strictly to its provisions and observe the greatest rigor to ensure that the behavior of the defendant corresponds to a specific criminal codification, so that the defendant is not penalized for acts that are not punishable by law.[5] The elaboration of a criminal codification implies a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment.[6] Moreover, this Court highlights that the punishable conduct implies that the scope of

2. *Cf. Case of Baena Ricardo et al. v. Panama. Merits, Reparations and Costs.* Judgment of February 2, 2001. Series C No. 72, para. 106, and *Case of J.,* para. 279.

3. *Cf. Case of Ricardo Canese,* para. 178, and *Case of Mémoli,* para. 155.

4. *Cf. Case of Ricardo Canese,* para. 175, and *Case of the Constitutional Court (Camba Campos et al.) v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 28, 2013. Series C No. 268, para. 114.

5. *Cf. Case of De La Cruz Flores v. Peru. Merits, Reparations and Costs*. Judgment of November 18, 2004. Series C No. 115, para. 82, and *Case of Mohamed v. Argentina. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 23, 2012. Series C No. 255, para. 132.

6. *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations and Costs.* Judgment of May 30, 1999. Series C No. 52, para. 121, and *Case of J.,* para. 287.

application of each of the criminal codifications be outlined in as clear a manner as possible;[7] that is, in an explicit, accurate, and restrictive manner.[8]

62. In the same sense, the European Court of Human Rights has ruled on the guarantee enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), equivalent to Article 9 of the American Convention[9] and established in Article 22 of the Rome Statute of the International Criminal Court, which recognizes the principle of ex post facto laws.[10]

63. In view of the abovementioned facts, the Court has assessed in its jurisprudence the principle of the legality of criminal behavior and punishment, as well as favorability in the application of the punishment.

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7. *Cf. Case of Castillo Petruzzi et al. Merits, Reparations and Costs*, para. 121, and *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 20, 2009. Series C No. 207, para. 55.

8. *Cf. Case of Kimel v. Argentina. Merits, Reparations and Costs.* Judgment of May 2, 2008. Series C No. 177, para. 63, and *Case of Usón Ramírez*, para. 55. See also, *Case of López Mendoza v. Venezuela. Merits, Reparations and Costs.* Judgment of September 1, 2011. Series C No. 233, para. 199, wherein in reference to the period had by an authority to decide on the relevant penalty, the Court noted that "under the framework of due process laid down in Article 8(1) of the American Convention, legal certainty must safeguarded regarding the period in time in which a sanction may be imposed. In this regard, the European Court has held that the law should be: i) adequately accessible, ii) with sufficient precision, and iii) foreseeable."

9. Article 7(1) of the ECHR: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed." The European Court has interpreted this provision in the sense that said guarantee is an essential element of the Rule of Law and thus holds an important place in the system of protection of the European Convention. Article 7 is not limited to the prohibition of the retroactive application of the criminal law to the detriment of the accused, rather it incorporates, in a general manner, the principle that only the law can define and establish an offense (*nullum crimen, nulla pena sine lege*). Therefore, the offense and its penalty must be clearly defined by law. *Cf.* ECHR, *Case of Kononov v. Lithuania* [GC], No. 36376/04. Judgment of 17 May 2010, para. 185; ECHR *Case of Del Río Prada v. Spain* [GC], No. 42750/09. Judgment of 21 October 2013, paras. 77 to 79. In the same sense: ECHR, *Case of Kokkinakis v. Greece*, No. 14307/88. Judgment of 25 May 1993, para. 52; ECHR, *Case of Coëme and others v. Belgium*, Nos. 32492/96 et al. Judgment of 22 June 2000, para. 145; ECHR, *Case of Kafkaris v. Cyprus* [GC], No. 21906/04. Judgment of 12 February 2008, para. 138; ECHR, *Case of Cantoni v. France*, No. 17862/91. Judgment of 15 November 1996, para. 29. Moreover, said principle prohibits broadening the scope of the existing offenses to acts that do not constitute offenses; it also establishes that criminal law should not interpret in an extensive manner to the detriment of the accused. Moreover, the Court must verify, that at the time when the accused commited the act that led to his or her prosecution, a legal provision was in force that classified said act as punishable, and that the penality imposed did not exceed the limits established by said provision. *Cf.* ECHR, *Case of Del Río Prada* [GC], para. 78 and 80, and *Case of Coëme and others,* para. 145.

10. Article 22 ICC. Statute: "1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."

In the present case, the Commission argued that this principle may also be applicable to procedural law.

64. The Court notes as a preliminary issue that the Commision´s argument is inconsistent with the case law of the Court. In paragraph 175 of the case of *Ricardo Canese v. Paraguay*, this Court stated that the term "enforceable"[11] made no reference to procedural law, but rather to the prohibition regarding the retroactive application of provisions that increase punishment, or criminal behavior which at the time that the facts took place was not unlawful. In this case, the Court concluded that the failure to retroactively apply the more favorable criminal norm violated Article 9 of the Convention.

65. Similarly, the citations made by the Commission in the case of *Del Río Prada v. Spain* from the European Court of Human Rights,[12] are not relevant because in that case the application of the principle of legality referred to the scope of the punishment and its implementation, and not to procedural law. In regard to the case of *David Michael Nicholas v. Australia* of the Human Rights Committee,[13] the Court notes that that case is similar to

11. The case of *Ricardo Canese v. Paraguay* concerns the conviction to a term of imprisonment for defamation and slander. Subsequent legislation amended the criminal codification and decreased penalties for the crime of defamation and established a fine as an alternative penalty. The Court concluded that the principle of retroactivity of the most favorable norm did not apply in the case, thereby violating Article 9 of the Convention. In this regard, the Court stated that the principle of non-retroactivity prevents a person from being penalized for an act that was not a crime or could not be punished or prosecuted when it took place.

12. *Cf.* ECHR, *Case of Del Río Prada v. Spain* [GC], paras. 117 and 118. The case involves the fact that a prison moved the release date forward of the petitioner because of a Spanish law that permitted the reduction of part of the sentence with work done in prison (Article 100 of Penal Code of 1973). Subsequently, however, the High Court delayed the release date due to a change in the case law of the Supreme Court on remission of sentences (the new jurisprudence of the Supreme Court 2006 called Parot doctrine). The European Court considered whether the change of law in question concerned only the execution or the enforcement of the penalty (to which it would be excluded from the scope of Article 7 of the European Convention) or a measure that in substance constitutes a penalty. The Court found that the jurisprudential turn of 2006 was not foreseeable and modified, in a manner unfavorable to the petitioner, the scope of the penalty itself, thereby violating Article 7 of the European Convention (equivalent to Article 9 of the American Convention). The Commission's arguments referred to the judgment rendered in the the Third Section, of July 10, 2012, which was appealed by the Spanish Government to the Grand Chamber under Article 43 of the ECHR.

13. *Cf.* UN, Human Rights Committee, *Case of David Michael Nicholas v. Australia* (2004). In this case, the Committee considered whether the introduction of an *ex post facto* law violated Article 15 of the Covenant (legality principle). The case concerns the introduction of a law that amended the previous case law on the exclusion of evidence in relation to trafficking offenses of controlled drugs. Subsequent legislation ordered that the evidence demonstrating illegal conduct be considered admissable by the courts. This led to procedures being implemented that had previously been suspended. The Committee noted that the perpetrator was convicted of offenses under the Customs Act, "whose provisions remained unchanged throughout the period in reference from the criminal conduct until the trial and conviction." The effect of the stay of proceedings was that the elements of the offense under section 233B of the Customs Act, could not be determined. However, the illegality had not been eliminated, rather the

the instant one and, contrary to the Commission's conclusion, the Human Rights Committee considered that the elements of the crime existed prior to the facts and were thus foreseeable.

B.2. Temporal application of the regulations governing procedure

66. Below, the Court will assess the temporal application of the regulations governing procedure, in order to determine the purpose and scope for this case. It is important to note that in this case, prior to IPOHA which implemented Article 140 of the Constitution, there was no other law on the matter, thereby creating a normative gap, and thus an interpretation of the more favorable criminal regulation does not apply.

67. In regard to the application of procedural law, the Court notes that there is a tendency in the region to immediately apply the new norm (principle *of tempus regit actum*). That is to say, that the new procedural law is applied to all cases upon its entry into force,[14] and it is the exception

evidence was inadmissible. The Committee considered that in some cases, the changes in the rules of procedure and evidence may be relevant to the determination of the applicability of Article 15, "especially if such changes affect the nature of an offense." In the Committee's view, however, all elements of the offense in question existed at the time of the offense. Thus, it decided that there was no violation of Article 15 of the Covenant.

14. In this sense and in a general manner, in States such as *Mexico, Brazil, Costa Rica, Peru* and *the United States,* as a general rule, norms are applied that regulate procedure in an immediate manner. *In Mexico,* case law has understood that in the case of procedural provisions, these are made up of acts that did not occur in a single moment; that are governed by rules in force at the time of their application, which grant legal possibility and empower the governed to participate in each of the stages of the judicial process. It follows that there cannot be retroactivity, since, if before a stage is carried out, the legislature amended the procedure, broadening a term, suppressing a recourse or modyfing the assessment of the evidence, such powers are not amended, are not affected, and therefore, the parties are not deprived of a power which they initially had within their reach. *Cf.* Supreme Court of Justice of the Nation (Mexico), Second Chamber, Thesis: 2a. XLIX/2009, Judicial Seminar of the Federation and its Gazette: Tome XXIX, May 2009, Ninth, p. 273, Isolated Thesis (Common). Procedural norms in force are applicable at the time the related action is carried out, to which a retroactive application cannot be claimed, available at: http://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e1fcfc000000&Apendice=100000000000&Expresion=NORMAS%2520PROCESALES.%2520SON%2520APLICABLES%2520LAS%2520VIGENTES&Dominio=Rubro,Texto,Precedentes,Localizacion&TA_TJ=2&Orden=1&Clase=DetalleTesisBL&NumTE=4&Epp=20&Desde=100&Hsta=100&Index=0&ID=167230&Hit=3&IDs=2005282,161960,167230,173248&tipoTesis=&Semanario=0&tabla=; Collegiate Circuit Tribunal. Thesis VI.2º J/140. Judicial Seminar of the Federation and its Gazette: Tome VIII, July 1998, Ninth, p. 308, Jurisprudence (Penal). Retroactivity of procedural laws. Non-existence of a general norm, available at: http://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?ID=195906&Clase=DetalleTesisBL. In regard to *Brazil*, see Article 2 of the Code of Criminal Procedure, Decree-Law Nº 3.689 of October 3, 1941, available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/del3689.htm, and see "Agravo de Instrumento em Recurso Especial", ante el Superior Tribunal de Justiça. AgRg no Recurso Especial No. 1.288.971 - SP (2011/0256261-9), inter alia, April 14, 2013 (*Case of Nardoni*). In regard to *Costa Rica,* see Judgment of the Constitutional Chamber of the Supreme Court of Costa Rica, September 2, 2009, available at: http://sitios.poderjudicial.go.cr/salaconstitucional/Constitucion%20Politica/Sentencias/2009/09-14108.html. In regard to *Peru*, see Judgments of the the Constitutional Court, Inconstitutionality Proceeding, Exp. No. 0002-2006-PI/TC, Judgment of May 16, 2007; Hábeas

that some countries instead apply the procedural law that most favors the defendant.[15]

68. Additionally, the Court notes that the European Court has held that the principle of legality does not establish any requirements as to the procedure by which those offenses must be investigated and brought to

Corpus Remedy, Binding Precedent, Exp. No. 2496-2005-PHC/TC, Judgment of May 17, 2005: Hábeas Corpus Remedy, Exp. No. 1805-2005-HC/TC, Judgment of April 29, 2005; Hábeas Corpus Remedy, Exp. No. 02861-2008-PHC/TC, Judgment of September 15, 2008; Hábeas Corpus Remedy, Exp. No. 05786-2007-PHC/TC, Judgment of September 24, 2009, and Hábeas Corpus Remedy, Exp. No. 03754-2012-PHC/TC, Judgment of January 7, 2013, available at: http://www.tc.gob.pe. In regard to *the United States of America,* see United States Supreme Court, *Dobbert v. Florida*, 432 U.S. 282 (1977), June 17, 1977, and *Lindsey v. Washington*, 301 U.S 397 (1937), May 17, 1937.

15. In this sense, see for example, *Colombia, Argentina, Chile, Nicaragua, Dominican Republic, Venezuela* and *Uruguay* governs the immediate application of the procedural norm with the exception of the retroactive application of the more lenient standard referring to either the substantive or procedural norm. In particular, in *Colombia* the general rule is the immediate application of the adjective norm, with the exception of the procedural actions that have already been fulfilled in accordance with the prior law. Likewise, the Constitutional Court of Colombia, in its Judgment C-371-11 reiterated its case law on this matter and concluded that "[the principle of the most favorable norm] is an exception to the general rule that the laws govern into the future, the proper context of application is the succession of laws, and this cannot be ignored under any circumstances." *Cf.* Judgment of the Constitutional Court of Colombia, Judgment C-619/01 of June 14, 2001; Judgment C-371-2011 of May 11, 2011, paras. 32 to 36 of section VI. Grounds for the decision; Judgment C-252-2001 of February 28, 2001; Judgment C-200-2002 of March 19, 2002; Judgment T-272-2005 of March 17, 2005; Judgment T-091-2006 of February 10, 2006, para. 7 of section IV. Grounds of the decision, and Judgment C-633/12 of August 15, 2012, available at: http://www.corteconstitucional.gov.co. In regard to *Argentina*, see Judgments of the Supreme Court of Justice of the Nation (Argentina), *Case of Fundación Emprender v. D.G.I*, Judgment of March 5, 2013, and *Case of Gardebled Brothers v. National Executive Power*, Judgment of August 14, 2007. In regard to *Chile*, see Article 11 of the Code of Criminal Procedure of December 12, 2002, and Article 24 of the Law on retroactive application of laws, of October 7, 1861, available at: http://www.leychile.cl/Navegar?idNorma=225521&idVersion=1861-10.07&buscar=ley+sobre+efecto+retroactivo+de+las+leyes. Similarly, *Cf.* Supreme Court of Chile, Second Criminal Chamber. Cause of Action No. 1777/2005. Resolution No. 28233 of November 2, 2006, available at: http://corte-suprema-justicia.vlex.cl/vid/-255231242. In regard to *Nicaragua* see Supreme Court of Justice, Judgment No. 14. Managua of February 16, 2011, available at: http://www.poderjudicial.gob.ni/pjupload/spenal/pdf/cpp11.pdf, as well as Law 745, Law on Implentation, Benefits and Control of Jurisdiction of the Criminal Penalty, available at: http://legislacion.asamblea.gob.ni/normaweb.nsf/9e314815a08d4a6206257265005d21f9/3c064227c5f969050625783f006a7563?OpenDocument. In regard to *the Dominican Republic,* see Article 110 of the Political Constitution of the Republic, published in the Official Gazette No. 10561, on January 26, 2010. In regard to *Uruguay*, see Article 12 of the General Code of Procedure, Law 15,982, and the Judgments of the Supreme Court of Justice of Uruguay, Judgment of Decemeber 6, 2000, No. 517/2000, cassation recourse; Interlocutary Order of July 25, 2001, No. 685/2001 complaint, and Judgment of February 21, 1994, No. 38/1994, cassation recourse. In regard to *Venezuela*, see Article 24 of the Constitution of the Bolivarian Republic of Venezuela, published in the Extraordinary Official Gazette N. 36.860, of December 30, 1999; Article 2 of the Criminal Code of Venezuela, published in the Extraordinary Official Gazette Nº 5.49420, of October 20, 2000, and the Constitutional Chamber of the Supreme Tribunal of Justice, Judgment No. 3467, of December 10, 2003, case fil 02-3169; Judgment No. 35, of January 25, 2001, case file 00-1775, and Court of Appeals on Regular Criminal Matters, Principle Matter: WP01-P-2007-000374, Asunto: WP01-R-2013-000203, of May 14, 2013.

trial.[16] For example, the absence of a regulation established by law for the prosecution of a criminal offense can be analyzed from the standpoint of the right to due process that is guaranteed by Article 6 of the ECHR, but this does not in itself affect the principle of legality.[17] On the other hand, the immediate application of procedural law (the principle of *tempus regit actum*) is not contrary to the right to freedom from ex post facto laws. However, the European Court in each case determines whether the legislation in question, regardless of its formal denomination, consists strictly of procedural or substantive criminal laws, in regard to the manner in which they affect criminal classification or the severity of the penalty.[18] In this sense, the principle of legality ("no penalty without law") established in Article 7 of the ECHR applies only to the regulations or measures that define criminal offenses and the penalties thereof.

69. This Court considers that the immediate application of procedural law, do not violate Article 9 of the Convention because reference is drawn from the moment in which the procedural act took place and not in

16. *Cf.* ECHR, *Case of Khodorkovkiy and Lebedev v. Rusia*, Nos. 11082/06 and 13772/05. Judgment of 25 July 2013, para. 789.

17. Specifically, in the case of *Coëme and others v. Belgium* (1999), in the decision on admissibility, the European Court examined if whether the lack of implementing a constitutional provision allowing the prosecution of ministers before the Court of Cassation infringed the principle of legality. The constitutional provision stated that a law would determine the cases of responsibility, the penalties and the manner to proceed against them. Although the constitutional provision was not implemented in Belgian law at the time the former Minister was prosected (unlike this case in which the IPOHA entered into force before the trial of the alleged victim), the European Court considered that the common crimes for which he was convicted were foreseable under the ordinary rules of Belgian criminal law. In this sense, it was clearly stated in the wording of "Article 103 of the Constitution that ministers should, like any defendant, be held accountable for their crimes." Therefore, the existing constitutional provisions, to the extent that they established the criminal responsibility of ministers, met the requirements of accountability and forseability of Article 7. Consequently, the European Court declared the complaint relating to Article 7 inadmissible, and discussed the lack of prior procedural rules from the standpoint of Article 6 of the ECHR (equivalent to Article 8 of the American Convention). *Cf.* ECHR, *Case of Coëme and others v. Belgium*, Nos. 32492/96 et al. Decision of 2 March 1999, and Judgment of 22 June 2000.

18. *Cf.* ECHR, *Case of Scoppola v. Italy (No. 2)* [GC], No. 10249/03. Judgment of 17 September 2009, paras. 110 to 113. The European Court considered it reasonable that national courts apply the principle of *tempus regit actum* regarding procedural laws. However, in said case, the European Court held that the applicable criminal procedure provision affected the penalty, since it allowed a reduced sentence in cases where the accused agreed to abbreviated procedure (from life imprisonment to 30 years imprisonment). It concluded that it involved a rule of substantive criminal law to which the legality principle established in Article 7 of the ECHR should apply. Moreover, *cf.* ECHR, *Case of Del Río Prada v. Spain* [GC], para. 89. In the sense that the measures adopted by States (legislative, administrative or judicial) after the final sentence has been imposed or while the sentence is being served can be also included in the scope of the prohibition of the retroactive application of the penalties, if and when they result in an ex post facto redefinition or modification as to the scope of the penalty imposed by the trial court that rendered the sentence.

which the commission of the criminal offense took place. This isunlike the regulations that establish offenses and penalties (substantive regulations), where the pattern regarding application stems specifically from the moment in which the offense was committed. That is, the acts that make up the procedure are completed according to the procedural stage in which they originate and they are governed by the applicable regulation in force.[19] In light of this, and given that the procedure is comprised of a judicial process that is in constant motion, the application of a procedural law after the commission of an alleged crime does not contravene *per se* the principle of legality.

70. Given the aforementioned, the principle of legality (in the sense that a law existed prior to the commission of a crime), does not apply to regulations governing procedure, unless they have an impact on the classification of acts or omissions that at the time of commission were not criminal pursuant to the applicable law or the imposition of a penalty that is more serious than the one in place at the time of the commission of the crime. As such, the Court will assess whether this occurs for purposes of this case.

B.3. Application of the IPOHA in the case of Liakat Alibux

71. Below, the Court will assess whether the crimes for which Mr. Alibux was charged and prosecuted were established by law, prior to the commission of the act in light of the principle of legality, as well as the nature and scope of the procedural laws for trial.

72. The Court notes that the prosecution of Mr. Liakat Alibux was carried out with respect to the purchase of a property, bought between June and July 2000. The IPOHA was adopted for the purpose of implementing Article 140 of the Constitution on October 18, 2001. While preliminary investigations were carried out by the police between April and September 2001, it was not until January 28, 2002, once the IPOHA was in force,that the Prosecutor formally initiated criminal proceedings against Mr. Alibux, once the IPOHA was in force. Mr. Alibux was tried and sentenced for the crime of forgery on November 5, 2003 in accordance with Article 278, in

19. *Cf.* Collegiate Circuit Tribunal, México. Thesis V. 1º. J/14. Judicial Seminary of the Federation, Tome IX, January 1992, Eigth, p. 111, Jurisprudence (Penal). Retroactivity, inadmissible application, dealing in regard to reforms to the Federal Criminal Procedure Code (in force as of the first of February nineteen ninety one), available at: http://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?ID=220701&Clase=DetalleTesisBL; Supreme Court of Justice of the Nation, México. Tésis VI.2º J/140 Judicial Seminary of the Federation and its Gazette: Tome VIII, July 1998, Ninth, p. 308, Jurisprudence (Penal). Retroactivy of procedural laws. Do not exist for general rule, available at: http://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?ID=195906&Clase=DetalleTesisBL.

relation to Articles 46, 47 and 72 of the Penal Code,[20] and sentenced to one year's imprisonment and disqualification from holding the office of Cabinet Minister for a period of three years.

73. In regard to the Commission's argument that the IPOHA had wider and more substantive effects, it is evident that the crime of forgery for which Mr. Alibux was charged and convicted, as well as the establishment of the corresponding penalty, were classified in Article 278 of the Penal Code of 1910, prior to the commission of the offense. Moreover, Article 140 of the Constitution established the applicable procedural provisions in the case, in the sense that political office holders would be subject to trial for punishable acts that were committed in the course of discharging their duties. Moreover, this article established the way in which proceedings are initiated and that those who hold political office would be prosecuted before the High Court of Justice following indictment by the National Assembly. These regulations, particularly the constitutional provision, seek to expressly establish the responsibility of high-ranking officials for the commission of criminal acts. Mr. Liakat Alibux was a high-ranking government official during the period between September 1996 to August 2000. The Court finds that these provisions were established with sufficient notice and specification for Mr. Alibux to be fully aware of the behaviors that could entail criminal responsibility while in the discharge of their duties. Therefore the crime for which Mr. Alibux was charged was established by law prior to the commission of the criminal act.

74. Furthermore, in relation to the content of the IPOHA, the Court finds that this regulation governed the preexisting procedure implemented in Article 140 of the Constitution regarding the trial of high-ranking officials. In this way it defined the persons to whom the regulation applied (specific high-ranking officials), the power of the Prosecutor General to present a request before the National Assembly to assess whether prosecution should be considered in the public interest, from a political and administrative perspective, and if sufficient evidence exists, notify the Prosecutor General so he may initiate criminal proceedings. Therefore, in this case, because the IPOHA governs procedural law and did not affect the substantive nature of the crime that had been previously provided by law or the scope of the severity of the penalty the right to freedom from ex post facto laws

20. Article 278 of the Act of October 14, 1910 established the Penal Code of Suriname (G.B. 1911 No. 1) defines the crime of *forgery*. Article 278 (forgery): "A person who falsifies or falsely produces a written document which establishes a right, an obligation or liberates any debt, or which is intended to constitute evidence of a fact, with intent to use or have it used by a third party as real and not falsified, shall be punished for forgery with a maximum prison sentence of five years, if the use of this document could cause a disadvantage. The same penalty shall be imposed on any person who uses false or forged documents as if real and not falsified, if such use could cause a disadvantage."

does not apply. The applicable law was properly accessible and foreseeable as both the criminal classification and the penalty were established by law in a clear, express, and prior manner, and thus there was no violation of the Convention when the law that regulated the procedure was applied immediately after its entry into force.

75. In regard to the Commission's argument that the IPOHA "was intended to regulate a constitutional provision with the purpose of allowing, for the first time, the prosecution of such officials," the Court notes the State's arguments regarding the prosecution of other political office holders in Suriname in 1977 and 2008, for crimes committed in the discharge of their duties. Notwithstanding the foregoing, this Court does not have sufficient evidence to confirm the type of procedures and sanctions against high-ranking officials that were carried out in Suriname or the law by which they were prosecuted. However, the Court considers that the fact that high-ranking officials are prosecuted and punished for the first time for a particular crime that is established in criminal legislation is not sufficient basis to consider that the resulting penalty is not foreseeable and contrary to the principle of legality.[21] Because of this, the existence of procedural obstacles cannot in itself be an impediment to the exercise of the State's punitive power in regard to criminal behavior that is specifically defined in the law, and is thereby foreseeable.

C. Conclusions

76. The Court found that at the time of commission of the crimes for which Mr. Alibux was charged, the conduct was established as a crime by Article 278 of the Penal Code, and thus said regulation complied with the principle of legality. Furthermore, in Article 140 of the Constitution the procedural regulations for prosecution were established. Meanwhile, the immediate application of IPOHA did not affect the classification nor the severity of the penalty, and thus the Court concludes that the State of Suriname did not violate, to the detriment of Mr. Alibux Ali Liakat, the right to freedom from ex post facto laws established in Article 9 of the American Convention.

VII-2. THE RIGHT TO A FAIR TRIAL[22]

[…]

21. *Cf.* ECHR, *Case of Khodorkovkiy and Lebedev*, paras. 785, 816 to 821, and ECHR, *Case of Soros v. France*, No. 50425/06. Judgment of 6 October 2011, para. 58.

22. Article 8(2) "[…] During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: h. the right to appeal the judgment to a higher court."

B. Considerations of the Court

83. In order to rule on the alleged violation of the right to appeal the judgment on the part of the State, the Court shall determine the following: a) the scope of Article 8(2)(h) of the American Convention; b) the establishment of jurisdictions different from ordinary criminal courts for the prosecution of political officers; c) the regulation of the right to appeal criminal convictions of political office holders within comparative jurisdictions; d) the prosecution of Mr. Liakat Ali Alibux in a sole instance and the right to appeal the judgment; and e) the subsequent adoption of the process of appeal.

B.1. Scope of Article 8(2)(h) of the Convention

84. The Court has set out, in its established case-law, the scope and content of Article 8(2)(h) of the Convention, as well as the standards that must be observed to protect the guarantee of the right to appeal a judgment to a higher judge or court.[23] In this regard, the Court has indicated that this right consists of a crucial and minimum guarantee that "must be respected as part of the due process of law, in order to permit the review of an adverse decision by a different and higher judge or court […]."[24] Bearing in mind that the right to a fair trial seeks to ensure that anyone involved in a proceeding is not subject to arbitrary decisions, the Court considers that the right to appeal a judgment cannot be effective unless it is guaranteed to all those who are convicted[25], since the judgment is a manifestation of the exercise of punitive power of the State.[26]

85. The Court has considered the right to appeal the judgment as one of the minimum guarantees that must be afforded to every person who is subjected to a criminal investigation and proceeding.[27] In light of the foregoing, the Court has been emphatic in stating that the primary purpose

23. *Cf. Case of Castillo Petruzzi et al. Merits, Reparations and Costs*, para. 161; *Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107, paras. 157 to 168; *Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs.* Judgment of November 17, 2009. Series C No. 206, paras. 88 to 91; *Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 23, 2010. Series C No. 218, para. 179; *Case of Mohamed*, paras. 88 to 117, and *Case of Mendoza et al. v. Argentina. Preliminary Objections, Merits and Reparations.* Judgment of May 14, 2013. Series C No. 260, paras. 241 to 261.

24. *Cf. Case of Herrera Ulloa,* para. 158, and *Case of Mendoza et al.*, para. 242.

25. *Cf. Case of Mohamed,* paras. 92 and 93.

26. *Cf. Case of Baena Ricardo et al.*, para. 107, and *Case of Mohamed,* para.92.

27. Moreover, the Court applied Article 8(2)(h) in relation to the review of an administrative sanction that ordered a penalty of deprivation of liberty, noting that the right to appeal the ruling was a specific type of recourse that should be available to all persons sanctioned to a deprivation of liberty, as a guarantee of their right to defense. *Cf. Case of Vélez Loor,* paras. 178 and 179.

of the right to challenge the judgment is to protect the right of defense, inasmuch as it affords the possibility of a remedy to prevent a flawed ruling, containing errors or misinterpretations that are prejudicial to a person's interests without justification, from becoming final, which assumes that the remedy must be guaranteed before the judgment becomes *res judicata*.[28] The right to a review by a higher court allows for the correction of errors or injustices that may have been committed in the decisions in the first instance, confirms the rationale, gives greater credibility to the jurisdictional act of the State, and offers greater security and protection to the rights of the individual who has been convicted.[29] In accordance with the above, for the purposes of the existence of a review by a higher court, the Court has indicated that what matters is that the remedy guarantees a comprehensive examination of the judgment being challenged.[30]

86. Moreover, the Court has established that Article 8(2)(h) of the Convention refers to an ordinary remedy that is accessible and efficient;[31] in other words, it should not require complex formalities that would render this right illusory.[32] In this regard, the formalities required for the appeal to be admitted should be minimal and should not constitute an obstacle for the fulfillment of the remedy's objective of examining and resolving the grievances claimed by the appellant.[33] That is, it must obtain results or answers in relation to the purpose for which it was conceived.[34] "It should be understood that, regardless of the appeals system or regime adopted by the State Parties and the name given to the means of contesting a conviction, for it to be effective, it must constitute an appropriate means of obtaining the rectification of a wrongful conviction […]. Consequently, the reasons for which the remedy is admissible should allow for extensive control of the contested aspects of the sentence."[35]

87. Furthermore, "in the rules that States develop in their respective systems of appeal, they must ensure that this remedy against a conviction respects the minimum procedural guarantees that, under Article 8 of the Convention, are relevant and necessary to decide the grievances claimed by the appellant […]."[36]

28. *Cf. Case of Herrera Ulloa,* para. 158, and *Case of Mendoza et al.,* paras. 243 and 244.
29. *Cf. Case of Barreto Leiva,* para. 89, and *Case of Mendoza et al.,* para. 242.
30. *Cf. Case of Herrera Ulloa,* para. 165, and *Case of Mendoza et al.,* para. 242.
31. *Cf. Case of Herrera Ulloa,* paras. 161, 164 and 165, and *Case of Mendoza et al.,* para. 244.
32. *Cf. Case of Herrera Ulloa*, para. 164, and *Case of Barreto Leiva,* para. 90.
33. *Cf. Case of Mohamed*, para. 99, and *Case of Mendoza et al.,* para. 244.
34. *Cf. Case of Herrera Ulloa*, para. 161, and *Case of Mendoza et al.,* para. 244.
35. *Case of Mohamed,* para. 100, and *Case of Mendoza et al.,* para. 245.
36. *Case of Mohamed,* para. 101, and *Case of Mendoza et al.,* para. 246.

B.2. The establishment of jurisdictions different from ordinary criminal courts for the prosecution of high-ranking officials

88. When dealing with the alleged commission of a crime, the ordinary criminal jurisdiction is engaged in order to investigate and punish the alleged perpetrators through the ordinary criminal forums. However, with respect to certain high-ranking officials, some jurisdictions have established a system different from the ordinary courts as having jurisdiction to prosecute them, by virtue of the high-ranking office they hold and the importance of their appointment. In this sense, the Court established, in the *Case of Barreto Leiva v. Venezuela*, that "[t]he State may establish special judicial privileges for the prosecution of high-ranking government authorities […]."[37] As such, the designation of the highest body of justice for the criminal prosecution of high-ranking officials is not, *per se*, contrary to Article 8(2)(h) of the American Convention.

B.3. Regulation of the right to appeal the judgment of high-ranking officials[38] within comparative jurisdictions

89. Based on the arguments of the parties and given the importance of the controversy for various other citizens and regional States, the Court will now refer to comparative law on the subject with the goal of clarifying the scope and content of the right to appeal the judgment, as applied to high-ranking officials, namely: a) the United Nations Human Rights Committee; b) the ECHR; and c) the practice of the States in the region on the matter.

B.3.1. The Human Rights Committee of the United Nations

90. The United Nations Human Rights Committee has expressly noted, in paragraph 47 of General Comment No. 32, that:

> "Article 14, paragraph 5[39] [of the International Covenant on Civil and Political Rights (hereinafter "ICCPR")] is violated not only if the decision by the court of first instance is final, but also where a conviction imposed by an appeal court or a court of final instance, following acquittal by a lower court, cannot be reviewed by a higher

37. *Case of Barreto Leiva,* para. 90.

38. The domestic regulations of each State define and determine who the authorities considered high-ranking public officials and/or politicians for that purpose. However, within these high-ranking authorities, the following are included in a general manner: high-ranking officials such as: the President of the Republic, the Vice-President, Representatives, Senators, Members of the National Congress, Supreme Court Justices, Judges of the Constitutional Court, the Electoral judges, Ministers, Secretaries of State, the Attorney General, Prosecutors, the Ombudsman, the Comptroller General of the Republic, among other officials of similar classification.

39. UN, International Convenant on Civil and Political Rights, December 16, 1966, Article 14(5) "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law," available at: http://www2.ohchr.org/spanish/law/ccpr.htm.

court. Where the highest court of a country acts as first and only instance, the absence of any right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned; rather, such a system is incompatible with the Covenant, unless the State party concerned has made a reservation to this effect."[40]

91. Similarly, the Human Rights Committee has stated in its decisions that the right to appeal the judgment must be guaranteed regardless of the rank of the accused person. Thus, "[a]lthough [a] State party's legislation provides in certain circumstances for the trial of an individual, because of his position, by a higher court than would normally be the case, this circumstance alone cannot impair the defendant's right to review his conviction and sentence by a court."[41]

92. Furthermore, the Court considers it pertinent to refer to the State's argument that the prosecution of high-ranking public officials in the first and only instance is not, by definition, a violation of the generally accepted principle of the right to appeal the judgment, with basis in the regulation permitted by law of such right, as set forth in Article 14, paragraph 5 of the International Covenant on Civil and Political Rights.

93. In this regard, the Court considers it necessary to emphasize that Article 14, paragraph 5 of the International Covenant on Civil and Political Rights differs from Article 8(2)(h) of the American Convention in that the latter is very clear in referring to the right to appeal the judgment without mention of the phrase "according to law," as is set forth in the article of the ICCPR. Nevertheless, the United Nations Human Rights Committee has interpreted it in paragraph 45 of its General Comment No. 32, in the sense that:

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40. UN, Human Rights Committee, General Comment No. 32, Article 14: *Right to equality before courts and tribunals and right to a fair trial*, UN Doc. CCPR/C/GC/32, August 23, 2007, para. 47, available at: http://www1.umn.edu/humanrts/hrcommittee/S-gencom32.pdf. Nevertheless, it is important to note that the Human Rights Committee has noted that in paragraph 46, paragraph 5 of Article 14, does not apply to any other proceeding that does not form part of an appeal. Moreover, it is important to note that Suriname did not establish a reservation in regard to Article 14, subparagraph 5 of the ICCPR. *Cf.* UN, Declarations and Reservations of the International Covenant on Civil and Political Rights, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

41. UN, Human Rights Committee, *Case of Jesús Terrón v. Spain*, Communication No. 1073/2002, UN Doc. CCPR/C/82/D1073/2002, November 15, 2004, para. 7(4). The Committee has ratified the same criteria in two other similar cases, where based on ancillary jurisdiction, judgments were carried out in a single instance before the Supreme Court of Spain and the Committee decided that such procedures were inconsistent with Article 14 paragraph 5 of the Covenant. *Cf. Case of Luis Hens Serean and Juan Ramón Corujo Rodríguez v. Spain*, Communication No. 1351-1352/2005, UN Doc. CCPR/C/92/D/1351-1352/2005, March 25, 2008, paras. 9(2) and 9(3), and *Case of Luis Oliveró Capellades v. Spain*, Communication No. 1211/2003, UN Doc. CCPR/C/87/D/1211/2003 (2006), July 11, 2006, para. 7.

> "The expression 'according to law' in this provision is not intended to leave the very existence of the right of review to the discretion of the States parties, since this right is recognized by the Covenant, and not merely by domestic law. The term according to law rather relates to the determination of the modalities by which the review by a higher tribunal is to be carried out, as well as which court is responsible for carrying out a review in accordance with the Covenant. Article 14, paragraph 5 does not require States parties to provide for several instances of appeal. However, the reference to domestic law in this provision is to be interpreted to mean that if domestic law provides for further instances of appeal, the convicted person must have effective access to each of them."[42]

94. As a result, although States have a margin of discretion in regulating the exercise of that remedy through their domestic legislation, they may not establish restrictions or requirements that violate the very essence of the right to appeal a judgment[43], or the existence thereof. In this regard, the Court does not consider that reference to domestic law constitutes a mechanism by which the existence of the right of political office holders to appeal the judgment may be affected, especially when such reference is not recognized in the American Convention.

B.3.2. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

95. The Court will now address the argument of the State that the prosecution of officials that hold high-ranking public offices in a first, and only, instance is not, by definition, a violation of the generally accepted principle of the right to appeal the judgment, based on Article 2, paragraph 2 of Protocol 7[44] of the ECHR. Notwithstanding the fact that the ECHR does not apply to the States in the region, the Court observes that it is highly influential and serves as a reference to European law in Suriname given its history.

96. In this regard, Article 2, paragraph 2 of Protocol 7 expressly provides an exception to the right to appeal the judgment in cases in which the person concerned is tried in the first instance by the highest tribunal. However, as established in the case of *Mohamed v. Argentina*, "the Court does not agree with the scope [that is given to that] provision of the

42. UN, Human Rights Committee, *General Comment No. 32,* para. 45.

43. *Cf. Case of Herrera Ulloa,* para. 161, and *Case of Barreto Leiva,* para. 90.

44. Article 2 of Protocol 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms establishes that: "1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law. 2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."

European System to interpret the corresponding provision of the American Convention, precisely because the latter did not provide exceptions as did the European System."[45] In this sense, the Court does not find that the exception contained in the European System can be applied to this case.

B.3.3. Practice of the States in the region in relation to the right to appeal the judgment of high-ranking officials

97. The Court finds that the practice of various State Parties of the Organization of American States (OAS) is to grant their highest authorities the possibility of challenging a condemnatory judgment in criminal proceedings brought against them. To a lesser extent, some States prosecute them in a single instance. This right is recognized by the States, either narrowly, that is, in favor of certain lower rank officials but excluding the President and Vice-President, or broadly, establishing this guarantee to a group of officials of diverse ranks. It should be noted that several States in the region guarantee the right to appeal the judgment notwithstanding the establishment of a court, separate from the ordinary criminal tribunals, as the one with jurisdiction to try their high political and/or public office holders, which, in many cases, is charged to the highest body of justice.[46]

98. Likewise, the Court notes that in such cases where there is no authority superior to the highest body that can perform a comprehensive review of the conviction, certain States in the region have adopted different judicial systems to ensure the right to appeal the ruling. In this regard, the Court notes that the foregoing has been achieved through various practices, such as: a) where a Criminal Chamber of the Supreme Court of Justice is the trier in the first instance, the whole body thereof then acts as the instance of appeal and reviews the action; b) where a certain chamber of the Supreme Court is the trier in the first instance, another chamber, of a different composition, resolves the appeal; and c) where a chamber made up of a certain number of judges is the trier in the first instance, another chamber comprised of a larger number of judges, none of whom participated in the proceedings in the first instance, decides the appeal. Moreover, the Court observes that the reviewing bodies are composed of members that did not hear the case in the first instance, and that the decision issued by the reviewing body may modify or annul the appealed judgment.

45. *Case of Mohamed,* para. 94.

46. It should be noted that many other States do not prosecute their high-ranking authorities by way of a specialized criminal forum, but rather through an ordinary forum established for the average citizen, after the competent authority removes the prerogative of immunity and authorizes the initiation of an investigation and criminal proceeding.

99. Based on the aforementioned, the Court holds that the majority of the State Parties of the OAS allow high-ranking officials the possibility to appeal judgments in the context of criminal proceedings. That is, the need for dual courts, expressed by the appealing of the judgment of conviction, has been recognized by their judicial systems. However, at this time, we will specifically evaluate the criminal proceedings in a sole instance brought against Mr. Alibux before the High Court of Justice of Suriname in light of Article 8(2)(h) of the Convention, without seeking to advance considerations regarding the compatibility of other legal systems, other than the one to be examined, with the Convention. These shall be analyzed on a case-by-case basis, taking into account their nature, particular features, and complexities.

B.4. The prosecution in the single instance of Mr. Liakat Ali Alibux and the right to appeal the judgment

100. The Court reiterates that Mr. Alibux served as Minister of Finance and Minister of Natural Resources between September of 1996 and August of 2000. Furthermore, he was subjected to proceedings before the National Assembly: a preliminary investigation and subsequent prosecution between January of 2002 to November of 2003 for the criminal offenses allegedly committed in the discharge of his duties, using Article 140 of the Constitution and the IPOHA as a legal basis. The trial was conducted in a single instance by three judges of the highest court in the judicial system of Suriname, namely, the High Court of Justice, and ended in a judgment of conviction against Mr. Liakat Alibux, sentencing him to one year of imprisonment and banning him from holding office as minister for a period of three years. Similarly, the Court found that at the time that Mr. Alibux was convicted, the legal system did not provide any process of appeal by which to challenge the condemnatory judgment issued against him.

101. As a result of the foregoing, the Court will examine the compatibility of the criminal proceedings conducted in a single instance by three judges of the High Court of Justice against Mr. Alibux, a high-ranking public official, with the right to appeal the judgment enshrined in Article 8(2)(h) of the American Convention.

102. The Court finds that, as Minister of the State, Mr. Alibux was subjected to a jurisdiction different from ordinary courts for purposes of his criminal proceedings due to the high-ranking public office he held. In this regard, pursuant to Article 140 of the Constitution, the criminal prosecution for the crime of forgery committed in the discharge of his duties was initiated by the Prosecutor General after being indicted by the National Assembly for the High Court of Justice to try him. The Court considers

that the establishment of the High Court of Justice as the tribunal with jurisdiction for the prosecution of Mr. Alibux is compatible, in principle, with the American Convention.

103. However, the Court finds that there was no appeal process against the highest body of justice that tried Mr. Alibux that could be brought in order to guarantee his right to appeal the conviction, contrary to the provisions of Article 8(2)(h) of the Convention. In this regard the Court considers that although it was the High Court of Justice who prosecuted and convicted Mr. Alibux, the rank of the adjudicating tribunal cannot guarantee that a judgment in a sole instance will be delivered free of errors or defects. Based on the foregoing, even where criminal proceedings in a single instance were heard by a court with jurisdiction different from the ordinary, the State should have ensured Mr. Alibux had the possibility to appeal the adverse decision[47], based on the nature of the minimum guarantees of due process that such a right holds. The absence of a remedy resulted in the sentence pronounced against him becoming final and, in turn, Mr. Alibux had to complete a term of imprisonment.

104. In this regard, the Court reiterates the importance of the existence of a remedy allowing the review of a conviction. This is especially so in criminal proceedings, where a separate group of rights may be limited, particularly the right to personal liberty of an individual; in other words, it constitutes a guarantee for the individual in relation to the State.[48]

105. Nevertheless, Article 8(2)(h) of the American Convention establishes the "right to appeal the judgment to a higher court." Mr. Liakat Alibux was tried by the highest court of justice in Suriname and, thus, there was no higher tribunal or judge to perform a comprehensive review of the condemnatory judgment. The Court considers that in cases such as this, the requirement that the reviewing court be "higher" is fulfilled when a plenary or a chamber within the same highest court decides the appeal. The reviewing plenary or chamber must be of a different composition from that which originally heard the case, and it must have the power to annul or amend the conviction.. The Court has found this requirement to be fulfilled where it was established "[...], for example, that the proceedings at first instance would be conducted by the president or a chamber of a superior tribunal, and the appeal would be heard by the whole tribunal, with the exception of those who already issued an opinion on the case."[49] The Court also affirms that this has been the practice of some States in the region. Notwithstanding the foregoing, the Court considers that the State can

47. *Cf. Case of Barreto Leiva*, paras. 88 and 90, and *Case of Mendoza et al.,* para. 243.
48. *Cf. Case of Mohamed*, para. 92, and *Case of Mendoza et al.*, para. 241.
49. *Case of Barreto Leiva*, para. 90.

organize itself in a manner that it deems appropriate in order to guarantee the right to appeal the judgment of relevant high-ranking public officials.

106. Based on the foregoing, the Court finds that, in the instant matter, Mr. Alibux did not enjoy the possibility of appealing his conviction, thereby securing and protecting his rights, regardless of the rank or position held, and regardless of the jurisdiction established as competent for his trial. Moreover, the Court holds that the State failed to demonstrate how, in a trial by a panel of three judges of the highest court of justice, Mr. Alibux was afforded full due process, in particular, the right to appeal the judgment, in violation of Article 8(2)(h) of the Convention.

B.5. The subsequent adoption of a remedy of appeal

107. In regard to the arguments raised by the State in the sense that Mr. Alibux had the opportunity to challenge the conviction handed down against him, the Court finds that, based on the evidence submitted in the present case, at the time of the November 5, 2003 judgment, there was no process of appeal available to Mr. Alibux. Such an action, referred to as "remedy of appeal," was subsequently established in 2007 through an amendment to the IPOHA.

108. Furthermore, according to that legislative amendment, all persons convicted prior to its implementation, among them Mr. Alibux, had the right to appeal their convictions within three months of its enactment. Mr. Alibux, however, did not invoke this amendment to appeal his conviction.

109. As such, the process set out in Article 8(2)(h) must be an efficient mechanism by which to appeal the judgment that effectively protects the right to review the conviction handed down against Mr. Alibux, in order to allow for the possibility to contest the conviction. Nevertheless, in this case, the process of appeal was created in 2007, after Mr. Alibux had already complied with the term of imprisonment on August 14, 2004[50], as well as the penalty of ineligibility to serve as minister for a period of three years.

110. In this sense, by not having access to a remedy at the time of his conviction, Mr. Alibux was unable to file a request for review of the judgment. By contrast, the process was created when the conviction had already become *res judicata* and after the sentence had been carried out. For Mr. Alibux, the possibility of filing an appeal in 2007 against a penalty that had already been served meant nothing more than the mere formal existence of the process of appeal, because the effects of the judgment had already materialized. Pursuant to the foregoing, the Court considers that

50. Mr. Alibux completed six months of the year in prison ordered in the judgment and was released on August 14, 2004.

the creation of a remedy of appeal in 2007 was insufficient to cure the infringing legal situation and incapable of obtaining the result for which it was conceived. Therefore, in the present case, it was neither adequate nor effective.[51]

C. General conclusion

111. Based on the foregoing, in the present case the Court concludes that, due to the absence of an effective judicial remedy to guarantee Mr. Liakat Ali Alibux his right to appeal his judgment of conviction, as well as the fact that the moment of the establishment of the process in 2007, the violation of the right to appeal the judgment of Mr. Alibux had already materialized in such a way that that said remedy could not alleviate the infringing legal situation, the State of Suriname violated Article 8(2)(h) of the American Convention.

VII-3. JUDICIAL PROTECTION

[…]

B. Considerations of the Court

115. In this section the Court will determine if the June 12, 2003 Interlocutory Resolution of the High Court of Justice, in which it ruled on a number of interlocutory objections raised by the representatives of the alleged victim regarding its jurisdiction, constituted an autonomous violation of the judicial protection contemplated in Article 25 of the Convention, in accordance with the case law of this Court.

116. Regarding this, the Inter-American Court has indicated that Article 25(1) of the Convention establishes the obligation of the States Parties to guarantee to all persons subject to their jurisdiction, an effective judicial remedy against acts that violate their fundamental rights.[52] In addition to the formal existence of remedies, such effectiveness supposes that these provide results or responses to the violations of rights provided for in either the Convention, Constitution, or by law.[53] Moreover, the Court has established that for a remedy to be effective, it is not sufficient that it be established by the Constitution or by law, or that it be formally admissible; rather, it

51. *Cf. Case of Velásquez Rodríguez. Merits*, paras. 64 and 66, and *Case of Mendoza et al.*, para. 244.

52. *Cf. Case of Velásquez Rodríguez. Preliminary Objections*, para. 91, and *Case of the Displaced Afro-descendant Communities of the Cuenca of the Río Cacarica (Operation Génesis) v. Colombia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 20, 2013. Series C No. 270, paras. 404 and 405.

53. *Cf. Case of Bámaca Velásquez v. Guatemala. Merits.* Judgment of November 25, 2000. Series C No. 70, para. 191, and *Case of the Constitutional Court (Camba Campos et al.)*, para. 228.

must be truly appropriate to determine whether a human rights violation has been committed and ensure that it is remedied. One cannot consider effective remedies that, owing to the general situation of the country or even the particular circumstances of a given case, are illusory.[54] Based on the foregoing, the State has an obligation to not only draft and enact an effective remedy, but to also ensure the due application of this remedy by its judicial authorities.[55]

117. In the present case, during the initial phase of the trial before the High Court of Justice, the representatives of Mr. Alibux launched five interlocutory objections challenging its jurisdiction to continue hearing the criminal case brought against him. Two of the objections were related to the constitutionality and conformity with the Convention of Article 140 of the Constitution and the IPOHA, namely: i) that Article 140 of the Constitution and the IPOHA were inconsistent with Article 14(5) of the Covenant on Civil and Political Rights and Article 8(2)(h) of the American Convention for creating a proceeding in a sole instance before the High Court of Justice; and ii) that the indictment by the Prosecutor General should be declared inadmissible for retroactively applying the IPOHA, contrary to Article 131 of the Constitution.

118. In relation to the two objections described above, by the June 12, 2003 Resolution, the High Court of Justice ruled that: i) despite having binding effects on the State, the provisions of the Covenant on Civil and Political Rights and the American Convention on Human Rights had no direct legal effect, since a domestic court could not establish processes of appeal that are not recognized by the law, and therefore, had to abide by the terms set forth in Article 140 of the Constitution; and ii) that the IPOHA did not contain any stipulations related to the criminalization of behavior, but rather, consisted of a regulatory mechanism to implement a constitutional provision of a procedural nature and, thus, there was no violation of the principle of legality.

119. Regarding the first objection raised by the representatives of the alleged victim and resolved by the High Court of Justice, notwithstanding that each of the rights contained in the Convention has its own sphere, meaning, and scope,[56] the Court considers that the alleged damages suffered

54. *Cf. Case of Velásquez Rodríguez. Preliminary Objections*, para. 93*, Judicial Guarantees in States of Emergency* (Arts. 27.2, 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24, and *Case of the Constitutional Court (Camba Campos et al.)*, para. 228.

55. *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 237, and *Case of the Constitutional Court (Camba Campos et al.)*, para. 229.

56. *Cf. Case of Manuel Cepeda Vargas v. Colombia. Preliminary Objections, Merits and Reparations.*

by Mr. Alibux are encompassed within the aforementioned violation of the right to appeal the judgment.[57] As a result, the Court does not consider it necessary to make additional determinations with respect to the violation of the right to judicial protection set forth in Article 25 of the Convention, as the consequences of the damages described in his allegations are subsumed in the considerations in chapter VII-2 of this Judgment.

120. In relation to the issues arising from the second preliminary objection, the Court notes that the High Court of Justice ruled on the objection filed. Furthermore, the Court reiterates that the IPOHA consisted of a regulatory instrument that, in this case, did not represent a violation of Article 9 of the Convention.

121. The three other interlocutory objections related to the jurisdiction of the High Court of Justice concerned allegations that: i) the December 27, 2002 Order of the High Court of Justice, in which a brief submitted by the attorneys of the alleged victim was ruled inadmissible, was invalid because Article 230 of the Code of Criminal Procedure did not grant it the power to determine the inadmissibility of briefs presented by the alleged victim; ii) the Prosecutor General submitted the case file of the criminal investigation in its entirety to the National Assembly, contrary to Articles 3 and 5 of the IPOHA; and iii) the Prosecutor General acted pursuant to the instructions of the Speaker of the National Assembly, contrary to the terms established in Article 2 of the IPOHA and Article 145 of the Constitution.

122. In regard to the three formal objections detailed above, the High Court of Justice stated that, due to the fact that the request for the indictment was approved by the National Assembly, they considered it inappropriate to render additional decisions in this regard considering that the Constitution did not grant it jurisdiction for such purposes.

123. In this sense, according to the information provided by the parties, the Court considers that the interlocutory objections that were filed consisted of questions on the proceedings that occurred before the National Assembly, and were not specifically related to any arguments regarding the constitutionality of the IPOHA. Through the Resolution of June 12, 2003, the High Court of Justice held that the Constitution did not grant it jurisdiction to review the actions performed by the National Assembly with regards to the approval process for indictments of political office holders. In light of the foregoing, this Court finds that the High Court of Justice did not state that it lacked jurisdiction to hear matters of a constitutional

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Judgment of May 26, 2010. Series C No. 213, para. 171, and *Case of García and Family v. Guatemala. Merits, Reparations and Costs.* Judgment of November 29, 2012. Series C No. 258, para. 122.

57. *Cf. Case of Barreto Leiva*, para. 102, and *Case of Mohamed*, paras. 118 and 119.

nature, and that the questions posed were answered by the High Court of Justice, with attention to their character as preliminary objections.

124. Finally, in relation to the arguments of the representative and the Commission on the violation of the right to judicial protection due to the absence of a Constitutional Court, although the Court recognizes the importance of such bodies as protectors of constitutional mandates and fundamental rights, the American Convention does not impose a specific model for the regulation of issues of constitutionality and "conventionality control" (control for conformity with the Convention). In this sense, the Court recalls that the obligation to monitor the compliance between domestic legislation and the American Convention is delegated to all bodies of the State, including its judges and other mechanisms related to the administration of justice at all levels.

C. Conclusion

125. Based on all the foregoing, the Court concludes that the State of Suriname did not commit an autonomous violation ofthe right to judicial protection set forth in Article 25 of the American Convention, to the detriment of Mr. Liakat Ali Alibux.

VII-4. THE RIGHT TO FREEDOM OF MOVEMENT AND RESIDENCE[58]

[…]

B. Considerations of the Court

129. In this section, the Court will examine the alleged restriction of the right to leave the country imposed on Mr. Alibux on January 3, 2003, in accordance with Article 22 paragraphs 2 and 3 of the American Convention.

130. The Court found that on January 3, 2003, while he was at the airport in Paramaribo, Mr. Alibux was restricted from leaving the country for a four-day trip for alleged personal reasons. As reported by the representative of the alleged victim during the hearing before the Court, while in the departure gate, military police informed Mr. Alibux that by way of a phone call they had been ordered by the Prosecutor General to ensure that he not leave country. In regard to the restriction, the Court finds that Mr. Alibux did not appeal this in domestic courts.

58. Article 22(1) "Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law."

131. In this regard, Article 22(2) provides that "[e]very person has the right to leave any country freely, including his own," and Article 22(3) states that:

> "the exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others."

132. In this sense, the Court has established that the right to freedom of movement and residence, including the right to leave the country, may be restricted, in accordance with the provisions of Articles 22(3) and 30 of the Convention.[59] Notwithstanding, to establish such restrictions States must comply with the requirements of legality, necessity, and proportionality.[60]

133. Moreover, the Court considered that "In order to guarantee human rights, it is therefore essential that State actions affecting basic rights not be left to the discretion of the government but, rather, that they be surrounded by a set of guarantees designed to ensure that the inviolable attributes of a person not be violated. Perhaps the most important of these guarantees is that restrictions to basic rights only be established by a law passed by the Legislature in accordance with the Constitution."[61]

134. In particular, the Court has noted that the State must define specifically and establish by law the exceptions by which a measure such as the restriction from leaving a country can exist. As such, "the lack of legal regulation prevents such restrictions from being applied, because neither their purpose nor the specific circumstances under which it is necessary to apply the restriction to comply with some of the objectives indicated in Article 22(3) of the Convention have been defined. It also prevents the defendant from submitting any arguments he deems pertinent concerning the imposition of this measure. Yet, when the restriction is established by law, its regulation should lack any ambiguity so that it does not create doubts in those charged with applying the restriction, or the opportunity for them to act arbitrarily and discretionally, interpreting the restriction broadly."[62]

135. In regard to the standard of legality of the restriction, the State established before the Court that it was based on Articles 146 of the Political Constitution; 3, 134, and 136 of the Penal Code of Procedure noted by the State. However, the Court has found that these relate, in general, to the

59. *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs.* Judgment of August 31, 2004. Series C No. 111, para. 117. Moreover, *cf.* The Word "Laws" in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6.

60. *Case of Ricardo Canese,* para. 123.

61. The Word "Laws" in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 22.

62. *Cf. Case of Ricardo Canese*, para. 125.

powers or functions of the Prosecutor General and they do not clearly and precisely define the exceptional circumstances that warranted the restriction imposed on Mr. Alibux. Similarly, no legislation was provided to determine the procedure for applying a restriction nor the procedure that would have allowed the alleged victim to challenge the restriction.[63]

C. Conclusion

136. Taking into account that which is established in Article 22 of the Convention and the information provided by the State, the Court concludes that based on the aforementioned regulations, there is not a clear and specific reguation that establishes the legality of the restriction on the freedom of movement in this case. Therefore, the Court concludes that the State applied a restriction on the right of Mr. Alibux to leave the country without establishing the requirement of legality, in violation of Article 22, sections 2 and 3 of the American Convention.

VIII. REPARATIONS (APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION)

[…]

B. Request for measures to nullify the criminal proceedings and conviction imposed on Mr. Alibux

[…]

144. In accordance with its jurisprudence, the Court reiterates that it is not a criminal court in which the criminal responsibility of individuals can be analyzed.[64] The application of criminal law to those who commit crimes is rather a role of national tribunals. In this sense, the instant case does not refer to the assessment of the innocence or guilt of Mr. Alibux with regard to the acts attributed to him, but instead, to the conformity of the regulations that governed the proceeding with the American Convention and the application thereof in this case.[65]

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63. In this sense, in the public hearing, as well as through various requirements of this Court a request made made upon the State to provide the domestic regulations that govern the restriction on leaving the country imposed on those charged or under investigation for the commission of a crime. However, this information was not provided. Communications of the Secretariat of the Inter-American Court on February 22 and November 12, 2013 (Ref.: CDH-12.608/061 and 071) (case file of Merits, folios 406 and 495).

64. *Cf. Case of Suárez Rosero. Merits.* Judgment of November 12, 1997. Series C No. 35, para. 37, and *Case of J.,* para. 123.

65. *Cf. Case of Fermín Ramírez v. Guatemala. Merits, Reparations and Costs*. Judgment of June 20, 2005, para. 63.

145. However, based on the specific circumstances of this case and that the Court did not establish the international responsibility of the State for the violation of the principle of legality and freedom from ex-post facto laws, enshrined in Article 9 of the American Convention, this Court does not consider it appropriate to order the State to nullify the criminal proceedings and sentence imposed on Mr. Alibux.[66] As such, the Court does not order any reparation in this regard.

C. Measures of satisfaction and guarantees of non-repetition

[…]

C.2. Guarantees of non-repetition

C.2.1. Request to adopt measures under domestic law

[…]

150. Notwithstanding the violations declared in this Judgment, the Court considers that it has been demonstrated that the domestic regulations in Suriname were amended on August 27, 2007, and that, since its entry into force on August 28 of the same year, high-ranking officials have a process by which to file an appeal, thereby annulling the criminal proceedings in the first instance brought against high-ranking officials for crimes committed in the discharge of their official capacity which had previously existed. The Court takes note of and values the adoption of the foregoing amendment and, as such, does not deem it appropriate to order any measure of reparation in this regard.

151. Furthermore, the Court has not established the international responsibility of the State for the violation of the right to judicial protection under Article 25 of the Convention because, to date, the Constitutional Court is not in operation. In light of this, the Court will not order any measure of reparation in this regard. Nevertheless, the Court underlines, as the State itself recognized, the importance of the operation of such an institution, the creation of which is set forth in Article 144 of the Constitution. This importance lies in the role that a court of that nature plays in the protection of the constitutional rights of the citizens subject to its jurisdiction. Notwithstanding the foregoing, the Court reiterates the obligation to exercise an *ex officio* "conventionality control" (control for conformity with the Convention) between domestic law and the American Convention. This obligation is delegated to all bodies of the State, including

66. *Cf. Case of Barreto Leiva*, paras. 129 and 130, and *Case of Mohamed,* paras. 151 and 152.

its judges and other bodies involved in the administration of justice at all levels.

D. Compensation

[…]

D.2. Non-pecuniary damage

156. In its jurisprudence, the Court has developed the concept of non-pecuniary damage and has established that it "may include both the suffering and distress caused to the direct victims and their next of kin, and the impairment of values that are highly significant to them, as well as changes of a non-pecuniary nature in the living conditions of the victims or their family."[67]

157. In chapter VII-2, this Court determined that the State did not guarantee Mr. Alibux's right to appeal the judgment and, thus, violated Article 8(2)(h) of the American Convention by subjecting him to criminal proceedings in a sole instance without the possibility of appealing the sentence imposed upon him, effectively serving seven months in prison[68] and a penalty of ineligibility to serve in the post of cabinet minister for three years. Likewise, the Court concluded, in chapter VII-4, that the State violated the right to freedom of movement and residence established in Article 22, subsections 2 and 3, of the American Convention, by virtue of imposing a restriction on Mr. Alibux of the right to leave the country without showing that it had complied with the requirement of legality. Under the circumstances, the Court determines that Mr. Alibux suffered moral damages and, therefore, fixes, in equity, the sum of U.S. $10,000.00 (ten thousand dollars of the United States of America) by way of compensation for non-pecuniary damage suffered by Mr. Alibux.

[…]

67. *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and Costs.* Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of J.,* para. 415.
68. The deprivation of liberty that was ordered was a year in prison.

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF NORÍN CATRIMÁN ET AL. (LEADERS, MEMBERS AND ACTIVIST OF THE MAPUCHE INDIGENOUS PEOPLE) v. CHILE

Series C No. 279

JUDGMENT OF 29 MAY 2014

(Merits, reparations and costs)

[Extracts][1]

1. This is an excerpt from the judgment on the merits, reparations and costs in the case of *Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*. It contains a summary of the facts, and only the paragraphs relevant to this publication. The number and length of the footnotes has been reduced. The paragraph numbers correspond to those in the original judgment, but the footnotes have been renumbered. The full text of the judgment is available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_279_ing.pdf.

JUDGMENT

In the case of *Norín Catrimán et al.*,

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

Humberto Antonio Sierra Porto, President
Roberto F. Caldas, Vice President
Manuel E. Ventura Robles, Judge
Diego García-Sayán, Judge
Alberto Pérez Pérez, Judge, and
Eduardo Ferrer Mac-Gregor Poisot, Judge;

also present,

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

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and to Articles 31, 32, 65 and 67 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure" or "the Court's Rules of Procedure"), delivers this Judgment […]:

[…]

VI. FACTS

[The eight victims in this case are Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Juan Ciriaco Millacheo Lican, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia and Patricia Roxana Troncoso Robles. They are all Chilean. At the time that the facts of the case took place the first three were traditional leaders of the indigenous Mapuche people. The other four men are members of the indigenous Mapuche people, and Ms. Troncoso Robles was an activist working for the recognition and vindication of their rights as a people. The traditional elected leadership, the "Lonkos"[2] and the "Werkén,"[3] exercise authority in

2. The Lonkos are the principal leaders of their respective communities in both governmental and spiritual matters. They are considered the custodians of ancestral wisdom, and lead the decision-making process as well as presiding over important religious ceremonies.

3. The Werken, whose name means "Messenger," assist the Lonkos and play a complementary leadership role. They are spokespersons on various topics, including political and cultural, to both other Mapuche communities and non-Mapuche society.

the Mapuche community. Mr. Norín Catrimán and Mr. Pichún Paillalao were both Lonkos and Mr. Ancalaf Llaupe was a Werkén.

Criminal proceedings were brought against these eight individuals for acts that occurred between 2001 and 2002 in Regions VII (Bío Bío) and IX (Arauncanía) of Chile, in which they were convicted as perpetrators of terrorist crimes as defined by Law No. 18.314 (known as "the Counterterrorism Act") which "[d]efines terrorist conduct and sets its penalties." None of the acts for which they were tried (concerning the burning of a tree farm, threatening arson, and the burning of a truck belonging to a private company) resulted in loss of life or limb. The criminal proceedings against Mr. Víctor Ancalaf Llaupe occurred under the amended 1906 Code of Criminal Procedure because the acts he was tried for occurred in the Biobío region before the new Code of Criminal Procedure went into effect there. The eight victims in this case were given preventive detention measures throughout the criminal proceedings.

At the beginning of the 2000s, when the acts for which the victims of this case were convicted of occurred, the social climate in southern Chile (the Regions VIII, IX and X), particularly in Region IX (Araucanía), consisted of numerous allegations, demonstrations and social protests by members of the indigenous Mapuche people, their leaders and organizations. The motivation behind these protests was for their claims, which mainly concerned the recovery of their ancestral territories and respect for the use and enjoyment of these lands and natural resources, to be addressed and resolved. In this context of social protest the level of unrest in these regions greatly increased. Apart from social mobilization and other measures creating political pressure, some violent actions classified as "grave" occurred, including the occupation of lands unconnected to the ongoing proceedings; the burning of forest plantations, crops, and employers' homes and facilities; the destruction of equipment, machinery and fences; road closures; and clashes with security forces. Starting in 2001, the number of leaders and members of Mapuche communities investigated and tried by the commission of ordinary crimes for violent acts associated with the aforementioned protests increased significantly. In a minority of cases individuals were investigated and/or convicted of crimes of a terrorist nature under the law No 18.314 (the Counterterrorism Act). Of the 19 cases brought by the State Prosecutor between 2000 and 2013 under the Antiterrorism Act, 12 of them "were related to land claims of Mapuche communities."

The results of the criminal proceedings against the eight victims of this case were the following:

1) The Lonkos, Segundo Aniceto Norín Catrimán and Pascual Huentenqueo Pichún Paillalao were convicted of the crime of terrorist threat

of arson. They were sentenced to five years and one day's imprisonment in a minimum security prison, with additional penalties restricting the exercise of their rights to freedom of expression and public rights.

2) Juan Circiaco Millacheo Licán, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia and Patricia Roxana Troncoso Robles were convicted of the crime of terrorist arson for the act of burning a farm. They were sentenced to ten years and one day's imprisonment in a medium security prison, with additional penalties restricting the exercise of their public rights.

3) Víctor Manuel Ancalaf Llaupe was convicted of the crime of terrorism as defined in Article 2.4 of the Law No. 18.314 in relation to the burning of a truck belonging to a private company. He was sentenced to five years and one day's imprisonment in a minimum security prison, with additional penalties restricting the exercise of his rights to freedom of expression and public rights.]

VII. MERITS

153. The instant case refers to alleged violations suffered by the eight presumed victims related to their criminal prosecution and conviction for terrorist offenses. The presumed victims were leaders, members or an activist of the Mapuche indigenous people. The Court must decide whether the criminal law applied to them (the Counter-terrorism Act) violated the principle of legality and must also rule on whether, during the criminal proceedings, various guarantees of a fair trial were violated, and whether their preventive detention violated their right to personal liberty. The Court must also rule on the allegations made by the Inter-American Commission and the participants that the ethnicity of the presumed victims was taken into consideration in order to apply the Counterterrorism Act to them in a discriminatory manner. This took place in the context of an alleged pattern of "selective application of the anti-terrorist law to members of the Mapuche indigenous people" and as a result the protest by members of the Mapuche people was allegedly criminalized.[4]

[…]

155. The Court underlines that, in this case against Chile, the alleged violation of the right to communal property in relation to Article 21 of the American Convention has not been submitted to its consideration. However, the Court recalls the importance of the criteria it has developed in

4. Merits Report 176/10, paras. 1, 5, 211 and 289; CEJIL brief with motions, arguments and evidence, and FIDH brief with motions, arguments and evidence (merits file, Tome I, folios 2, 10, 11, 67, 76, 97, 269, 270, 351, 352, 401, 425, 507, and 515).

its case law in judgments in cases against Nicaragua,[5] Paraguay,[6] Suriname[7] and Ecuador[8] concerning the content and scope of the right to communal property, taking into account the close relationship of the indigenous peoples with their land. The Court has ruled on the State's obligations to ensure this right, such as the official recognition of ownership by land delimitation, demarcation and titling, the return of indigenous lands, and the establishment of an effective remedy to decide the corresponding claims.[9] The Court has also indicated that "the obligation to consult [the indigenous and tribal communities and peoples], in addition to constituting a treaty-based norm, is also a general principle of international law" and has emphasized the importance of the recognition of that right as "one of the fundamental guarantees to ensure the participation of the indigenous communities and peoples in the decisions concerning measures that affect their rights and, in particular, their right to communal property."[10] These are criteria that States must observe to respect and ensure the rights of indigenous peoples and their members in the domestic sphere.

VII.1. PRINCIPLE OF LEGALITY (ARTICLE 9 OF THE AMERICAN CONVENTION) AND THE RIGHT TO THE PRESUMPTION OF INNOCENCE (ARTICLE 8(2) OF THE AMERICAN CONVENTION), IN RELATION TO THE OBLIGATION TO RESPECT AND ENSURE RIGHTS AND THE OBLIGATION TO ADOPT DOMESTIC LEGAL PROVISIONS

[…]

5. This began, above all, with the 2001 judgment in the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, in which, using an evolutive interpretation of Article 21 of the American Convention, the Court affirmed that this article protects the right to communal property of the members of indigenous communities. *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs*. Judgment of August 31, 2001. Series C No. 79.

6. *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, paras. 125 and 137; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of March 29, 2006. Series C No. 146, paras. 118 and 121, and *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of August 24, 2010. Series C No. 214, paras. 85 to 87.

7. *Cf. Case of the Moiwana Community v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of June 15, 2005. Series C No. 124, para. 131, and *Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of November 28, 2007. Series C No. 172, paras. 87 to 91.

8. *Cf. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations*. Judgment of June 27, 2012. Series C No. 245, paras. 145 to 147.

9. *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs*, para. 153; *Case of the Moiwana Community v. Suriname*, para. 209; *Case of the Yakye Axa Indigenous Community v. Paraguay*, paras. 95 and 96; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, para. 108, and C*ase of the Xákmok Kásek Indigenous Community. v. Paraguay*, para. 131.

10. *Cf. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, paras. 160 and 164.

B. Considerations of the Court

[…]

1. The principle of legality in general and in relation to the codification of terrorist acts

161. The principle of legality, according to which "[n]o one shall be convicted of any act or omission that did not constitute a criminal offense under the applicable law at the time it was committed," (Article 9 of the American Convention) constitutes a central element of the criminal justice system in a democratic society.[11] The classification of an act as illegal and the establishment of its legal effects must pre-exist the action of the person who is considered the wrongdoer because, otherwise, the individual would be unable to adapt their actions to the clear requirements of the applicable law and which expresses the social condemnation and consequences that follow from breaching it.[12]

162. The classification of offenses requires a clear definition of the criminalized act that establishes its elements and allows it to be distinguished from acts that are not penalized or illegal acts that may be punished by non-criminal measures.[13] The sphere of application of each offense must previously be delimited as clearly and precisely as possible,[14] in an explicit, precise, and limited manner.[15]

163. When defining terrorist offenses, the principle of legality requires that a necessary distinction be made between such offenses and ordinary criminal offenses, so that every individual and also the criminal judge have sufficient legal elements to know whether an action is penalized under one or the other offense. This is especially important with regard to terrorist offenses because they merit harsher prison sentences, and additional ancillary penalties and disqualifications with major consequences for the exercise of other fundamental rights, as the case with Law No. 18.314. In addition, the investigation of terrorist offenses has procedural consequences

11. *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*. Judgment of February 2, 2001. Series C No. 72, para. 107, and *Case of Mohamed v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2012. Series C No. 255, para. 130.

12. *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*, para. 106, and *Case of Mohamed v. Argentina*, para. 131.

13. *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs*. Judgment of May 30, 1999. Series C No. 52, para. 121, and *Case of Pacheco Teruel et al. v. Honduras. Merits, reparations and costs*. Judgment of April 27, 2012 Series C No. 241, para. 105.

14. *Cf. Case of Fermín Ramírez v. Guatemala. Merits, reparations and cost*s. Judgment of June 20, 2005. Series C No. 126, para. 90, and *Case of Liakat Ali Alibux v. Suriname*, para. 61.

15. *Cf. Case of Kimel v. Argentina*, para. 63, and *Case of Liakat Ali Alibux v. Suriname*, para. 61.

that, in the case of Chile, may include the restriction of certain rights during the investigation and prosecution stages.

164. Consensus exists at the international level and, in particular, in the Americas about "the threat that terrorism poses to democratic values and international peace and security, [as well as for [...] the enjoyment of human rights and fundamental freedoms."[16] Terrorism is a phenomenon that jeopardizes the rights and freedoms of the persons subject to the jurisdiction of the States Parties to the American Convention. Consequently, Articles 1(1) and 2 of this Convention oblige the States Parties to take all those measures that are adequate, necessary and proportionate to prevent and, as appropriate, to investigate, prosecute and punish these types of acts. According to the Inter-American Convention against Terrorism, "the fight against terrorism must be undertaken with full respect for national and international law, human rights, and democratic institutions, in order to preserve the rule of law, liberties, and democratic values in the Hemisphere."[17]

165. In particular, when States take the necessary measures to prevent and punish terrorism by defining acts of this nature as offenses, they are obliged to respect the principle of legality in the terms mentioned above. Different bodies and experts of the United Nations have underlined that domestic codification and definitions relating to terrorism must not be formulated in an imprecise way that facilitates broad interpretations under which conduct is punished that does not have either the nature or the gravity of that type of offense.[18]

166. When providing their expert opinions before this Court, expert witnesses Scheinin and Andreu-Guzmán referred to Resolution 1566 (2004) of the United Nations Security Council[19] and the "model definition of terrorism" developed in 2010 by Martin Scheinin as Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, and maintained by Ben Emmerson, his successor as Special Rapporteur.[20] Both experts considered it necessary

16. *Cf.* Inter-American Convention against Terrorism, AG/RES. 1840 (XXXII-O/02), adopted at the second plenary session held on June 3, 2002, second and sixth paragraphs of the preamble, available at: http://www.oas.org/juridico/english/ga02/agres_1840.htm.

17. *Cf.* Inter-American Convention against Terrorism, eighth paragraph of the preamble.

18. *Cf.* UN Doc. CCPR/C/CHL/C0/5, 17 April 2007, Human Rights Committee, *Consideration of reports presented by States Parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee*, Chile, para. 7 (file of annexes to the Merits Report 176/10, annex 8, folios 310 to 315), and UN Doc. A/HRC/6/17/Add.1, 28 November 2007, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin,* Addendum, para. 20 (file of annexes to the Merits Report 176/10, annex 10, folios 369 to 373).

19. *Cf.* UN Doc. S/RES/1566 (2004), Security Council, Resolution 1566 (2004), adopted by the Security Council at its 5053rd meeting on 8 October 2004.

20. *Cf.* UN Doc. A/HRC/16/51, December 21, 2010, Human Rights Council, *Report of the Special*

to develop relevant standards to evaluate national definitions of terrorist offenses, because this would allow identifying basic or characteristic elements that determine egregious conduct of a terrorist nature.

167. However, these expert witnesses and expert witness Cancio Meliá agreed that international law does not contain a definition of terrorism that is complete, concise and accepted universally.[21]

2. Application to this specific case

[...]

170. The Court must decide whether the legal presumption of the subjective element of the definition emphasized in Article 1 of the Counterterrorism Act, which establishes that, "unless the contrary is verified, the intent of causing fear to the general population shall be presumed" when the offense is committed by using specified means or devices (including "explosive or incendiary devices") entails a violation of the principle of legality and the principle of the presumption of innocence.

171. The Court reiterates that the codification of offenses means that the criminalized conduct is delineated as clearly and precisely as possible. In this definition, the special intent or purpose of instilling "fear in the general population" is a fundamental element to distinguish conduct of a terrorist nature from conduct that is not, and without which the conduct would not meet the definition. The Court considers that the presumption contained in Article 1 that this intent exists when certain objective elements exist (including "the fact of committing an offense with explosive or incendiary devices") violates the principle of legality established in Article 9 of the Convention, and also the presumption of innocence established in Article 8(2) of this instrument. The principle of the presumption of innocence, as the Court has previously determined, constitutes a cornerstone of the right to a fair trial.[22] The principle signifies that judges should not commence the proceedings with a preconceived idea that the accused has committed the offense that he is charged with, so that the burden of proof rests on the accuser and not on the accused, and any doubt must be used to the benefit

Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Ten areas of best practices in countering terrorism, paras. 23, 27 and 28.

21. Nevertheless, numerous international instruments classify certain conducts as terrorist acts. This is the case of the Inter-American Convention against Terrorism. *Cf.* Inter-American Convention against Terrorism, AG/RES. 1840 (XXXII-O/02), adopted at the first plenary session on June 3, 2002.

22. *Cf. Case of Suárez Rosero v. Ecuador*. *Merits*. Judgment of November 12, 1997. Series C No. 35, para. 77, and *Case of López Mendoza v. Venezuela. Merits, reparations and costs.* Judgment of September 1, 2011. Series C No. 233, para. 128.

of the accused.[23] The irrefutable demonstration of guilt is an essential requirement for criminal punishment.[24]

172. In this regard, the State indicated that, with the 2010 amendment of Law No. 18.314, "the presumption of the intent to instill fear was eliminated" in order "to protect the principle of the presumption of innocence [...] so that [...] any accusation of terrorism must be proved by the accuser and not, as before the amendment of the law, when those charged with such offenses had to disprove the presumption of terrorist intent." Witness Acosta Sánchez, proposed by Chile, explained this amendment similarly, indicating during the public hearing that this presumption "to a great extent, infringed the principle of innocent until proved guilty." Expert witness Scheinin, proposed by the Commission, the FIDH and CEJIL, gave a similar opinion, indicating that, in definitions of offenses, presumptions work to the detriment of the accused and invert the court's reasoning that all the elements of the offense must be proved beyond a reasonable doubt. Expert witness Cancio Meliá, proposed by CEJIL, considered that this presumption "extend[ed] the scope of terrorism without any restriction, by [...] inverting the burden of proof and establishing the [...] principle that any act carried out with an incendiary device [...] was, in principle, considered a terrorist act," which, in his opinion, was "absolutely incompatible not only with the principle of legality, (because it makes [...] it unpredictable to know when it would be considered that 'the contrary has been proved' – in other words, the absence of the intent [of instilling fear]), but also with the most elementary principles of due process of law." Furthermore, expert witness Andreu-Guzmán, proposed by the FIDH, indicated that the presumption of Article 1 of Law No. 18.314 "runs counter to the principle of the presumption of innocence, because it considers proven prima facie the specific criminal intent based merely on the use of certain means or weapons," and that it is "a clear and deeply-rooted principle of contemporary criminal law that criminal intent, and a fortiori, specific criminal intent, is an element of the illegal conduct that must be proved and cannot be presumed." In addition, he clarified that "the wording of article 1, by establishing presumptions of the intentionality (specific criminal intent), places the burden of proof on the accused to prove that he did not have that intention."

23. *Cf. Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 26, 2010. Series C No. 220, para. 184, and *Case of López Mendoza v. Venezuela*, para. 128.

24. *Cf. Case of Ricardo Canese v. Paraguay. Merits, reparations and costs.* Judgment of August 31, 2004. Series C No. 111, para. 204, and *Case of López Mendoza v. Venezuela*, para. 128.

173. The legal recognition of this presumption may have influenced the criteria used by the domestic courts to analyze and confirm the existence of intent during the criminal proceedings. This Court finds that it has been proved that the presumption of the existence of intent was applied in the judgments that decided the criminal responsibility of the eight presumed victims in this case: (a) to convict Messrs. Norín Catrimán and Pichún as perpetrators of the offense of threat of terrorist arson; (b) to convict Messrs. Millacheo Licán and Huenchunao Mariñán, the Marileo Saravia brothers, and Ms. Troncoso Robles as perpetrators of the offense of terrorist arson, and (c) to convict Mr. Ancalaf Llaupe as perpetrator of the terrorist act consisting of "[p]lacing, sending, activating, throwing, detonating or firing bombs or explosive or incendiary devices of any type, weapons or devices of great destructive power, or with toxic, corrosive or infectious effects," for acts during which, after forcing the driver to get out of his truck, a "lighted rag" was thrown at this vehicle.

174. Consequently, the Court concludes that the application of the presumption of terrorist intent with regard to Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe violated the principle of legality and the right to the presumption of innocence, established in Articles 9 and 8(2) of the American Convention, in relation to the obligation to respect and ensure rights, established in Article 1(1) of this instrument.

3. Obligation to adopt domestic legal provisions (Article 2 of the American Convention), in relation to the principle of legality (Article 9 of the Convention) and the right to the presumption of innocence (Article 8(2))

175. Article 2 of the American Convention establishes the general obligation of States Parties to adapt their domestic law to the provisions of the Convention in order to ensure the rights recognized therein. The Court has established that this obligation entails the adoption of two types of measures. On the one hand, the elimination of laws and practices of any nature that result in 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 those guarantees.[25]

25. *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs*, para. 207, and *Case of Mendoza et al. v. Argentina. Preliminary objections, merits and reparations.* Judgment of May 14, 2013. Series C No. 260, para. 293.

176. The Court has concluded that, at the time of the events, a criminal norm included in the Counter-terrorism Act was in force that was contrary to the principle of legality and to the right to the presumption of innocence, as indicated in paragraphs 169 to 174. This norm was applied to the victims in this case in order to determine their criminal responsibility as perpetrators of offenses of a terrorist nature.

177. Therefore, the Court concludes that Chile violated the obligation to adopt domestic legal provisions, established in Article 2 of the American Convention, in relation to Articles 9 (principle of legality) and 8(2) (right to the presumption of innocence) of this instrument, to the detriment of Víctor Manuel Ancalaf Llaupe, Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles.

[...]

180. The Court reiterates the importance that the special criminal offense of terrorism is not used in the investigation, prosecution and punishment of criminal offenses when the wrongful act could be investigated and tried as an ordinary offense because it constitutes less serious conduct.

[...]

VII.2. RIGHT TO EQUAL PROTECTION (ARTICLE 24 OF THE AMERICAN CONVENTION) AND RIGHT TO A FAIR TRIAL (ARTICLE 8(1), 8(2)(F) AND 8(2)(H) OF THE AMERICAN CONVENTION), IN RELATION TO ARTICLE 1(1)

[…]

A. Right to equal protection (Article 24 of the Convention) and right to be tried by an impartial court (Article 8(1) of the Convention), in relation to Article 1(1) of the Convention

[...]

2. Considerations of the Court

[...]

a. General considerations

a.i. The principle of equality and non-discrimination and the right to equal protection of the law

196. As already indicated, Article 1(1) of the Convention establishes that the States Parties "undertake to respect the rights and freedoms recognized

herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." Meanwhile, Article 24 stipulates that "[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law".

197. Regarding the principle of equality before the law and non-discrimination, the Court has indicated that "the notion of equality springs directly from the oneness of the human family, and is linked to the essential dignity of the individual." Thus, any situation is incompatible with this concept if it, by considering one group superior to another group, leads to treating it in a privileged way; or, inversely, by considering a given group to be inferior, treats it with hostility or otherwise subjects it to discrimination in the enjoyment of rights that are accorded to those who are not so classified.[26] The Court's case law has also indicated that, at the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the sphere of jus cogens. It constitutes the foundation for the legal framework of national and international public order and permeates the whole legal system.[27]

198. Regarding the concept of discrimination, the definitions contained in Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 1(1) of the Convention on the Elimination of All Forms of Discrimination Against Women lead to the conclusion that discrimination is any distinction, exclusion, restriction or preference based on the prohibited reasons which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field.[28]

199. Article 24 of the American Convention prohibits any de facto or de jure discrimination, not only in relation to the rights established in this treaty, but with regard to all the laws enacted by the State and their

26. *Cf. Proposed Amendment to the Naturalization Provisions of the Constitution of Costa Rica.* Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 55, and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, para. 79.

27. *Cf. Juridical Status and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 101, *Case of the Xákmok Kásek Indigenous Community. v. Paraguay*, para. 269, and *Case of Atala Riffo and daughters v. Chile*, para. 79.

28. This definition is similar to the one established by the Human Rights Committee. *Cf.* UN Doc. CCPR/C/37, Human Rights Committee, *General Comment No. 18, Non-discrimination,* November 10, 1989, para. 7.

application.[29] In other words, it does not simply repeat the provisions of Article 1(1) of this instrument with regard to the obligation of States to respect and ensure the rights recognized in this treaty without discrimination, but, additionally, establishes a right that also gives rise to the State's obligation to respect and ensure the principle of equality and non-discrimination in order to safeguard other rights and in all domestic laws that it enacts,[30] because it protects the right to "equal protection of the law,"[31] so that it also prohibits discrimination resulting from any inequality derived from domestic law or its application.[32]

200. The Court has determined that a difference of treatment is discriminatory when is has no objective and reasonable justification;[33] in other words, when it does not seek a legitimate purpose and when the means used are disproportionate to the purpose sought.[34]

201. In addition, the Court has established that States must abstain from carrying out actions that are in any way directly or indirectly designed to create situations of de jure or de facto discrimination.[35] States are obliged to take positive measures in order to reverse or change any discriminatory situations in their societies with prejudice towards a specific group of persons. This involves the special obligation of protection that the State must exercise with regard to the actions and practices of third parties who, with its tolerance or acquiescence, create, maintain or encourage discriminatory situations.[36]

202. Taking into account the interpretation criteria stipulated in Article 29 of the American Convention and in the Vienna Convention on

29. *Cf. Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs*. Judgment of June 23, 2005. Series C No. 127, para. 186, and *Case of Atala Riffo and daughters v. Chile*, para. 82.

30. *Cf. Case of Yatama v. Nicaragua*, para. 186.

31. *Cf.* Advisory Opinion OC-4/84 of January 19, 1984, para. 54, and *Case of Atala Riffo and daughters v. Chile*, para. 82.

32. *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 209, and *Case of Atala Riffo and daughters v. Chile*, para. 82.

33. *Cf. Juridical Status and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 46; Advisory Opinion OC-18/03 of September 17, 2003, para. 84, and *Case of Yatama v. Nicaragua*, para. 185.

34. *Cf.* ECHR, *Case of D.H. and others v. the Czech Republic*, No. 57325/00. Judgment of 13 November 2007, para. 196, and ECHR, *Case of Sejdić and Finci v. Bosnia and Herzegovina*, Nos. 27996/06 and 34836/06. Judgment of 22 December 2009, para.42.

35. *Cf.* Advisory Opinion OC-18/03 of September 17, 2003, para. 103, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs*. Judgment of October 24, 2012. Series C No. 251, para. 236.

36. *Cf.* Advisory Opinion OC-18/03 of September 17, 2003, para. 104, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 236. The United Nations Human Rights Committee had stated this previously in its General Comment No. 18, Non-discrimination of 10 November 1989, CCPR/C/37, para. 10.

the Law of Treaties, the Court considers that ethnic origin is a one of the prohibited criteria for discrimination that is included in the expression "any other social condition" of Article 1(1) of the American Convention. The Court has indicated that, when interpreting the content of this expression, "the rule most favorable to the protection of the rights recognized in this treaty must be chosen, based on the principle of the rule most favorable to the individual."[37] The specific criteria for which discrimination is prohibited in this article are not an exhaustive or exclusive list, but merely declarative. The wording of this article "leaves the criteria open-ended with the inclusion of the expression 'any other social condition,' to incorporate other categories that had not been explicitly indicated."[38]

203. Several international treaties expressly prohibit discrimination based on ethnic origin.[39] Moreover, other international instruments reaffirm that indigenous peoples should not be subjected to any form of discrimination.[40]

204. The Court takes into account that "ethnic group" refers to communities of individuals who share, among other aspects, characteristics of a socio-cultural nature, such as cultural, linguistic, and spiritual affinities, and historical and traditional origins. The indigenous peoples fall within this category, and this Court has recognized that they have specific characteristics that constitute their cultural identity,[41] such as their customary law, their economic and social characteristics, and their values, practices and customs.[42]

205. In Chile, the Mapuche indigenous people are recognized as an indigenous ethnic group under Article 1 of Law No. 19,253 ("Indigenous Peoples' Act"), promulgated in September 1993.

206. Article 1(1) of the American Convention prohibits discrimination in general, and includes categories of who may not be discriminated against. Taking into account the criteria described previously, this Court places on record that the ethnic origin of an individual is a category protected by the Convention. Hence, the American Convention prohibits any discrim-

37. *Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights).* Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 52, and *Case of Atala Riffo and daughters v. Chile*, para. 84.

38. *Cf. Case of Atala Riffo and daughters v. Chile*, para. 85.

39. For example, the International Convention for the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

40. *Cf.* UN Doc. A/RES/61/295, September 13, 2007, *United Nations Declaration on the Rights of Indigenous Peoples*, Resolution 61/295 of the General Assembly of the United Nations.

41. *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 51, and *Case of the Afro-descendant Communities Displaced from the Río Cacarica Basin (Operation Genesis) v. Colombia*, para. 354.

42. *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 63, and *Case of the Afro-descendant Communities Displaced from the Río Cacarica Basin (Operation Genesis) v. Colombia*, para. 354.

inatory norm, act or practice based on an individual's ethnic origin. Consequently, no norm, decision or practice of domestic law, applied by either State authorities or by private individuals, may reduce or restrict in any way the rights of an individual based on his ethnic origin.[43] This is equally applicable to the prohibition, under Article 24 of this instrument, of unequal treatment based on ethnic origin under domestic law or in its application.

a.ii. The right to an impartial judge or court

[…]

208. In the instant case, allegations have been submitted to the Court's consideration concerning the supposed lack of impartiality of the judges or courts that handed down the judgments convicting the presumed victims in this case. In this regard, the Court has established that personal impartiality requires that a judge who rules in a specific dispute must approach the events of the proceedings without any subjective bias and, also, offer sufficient guarantees of objectivity that eliminate any doubt that the accused or the community may have concerning the absence of impartiality. The Court has emphasized that personal impartiality is presumed unless there is evidence to the contrary consisting of, for example, a demonstration that a member of a court or a judge has personal prejudices or biases against the litigants. The judge must appear to be acting without being subject to direct or indirect influence, incentives, pressure, threats or interference, but only and exclusively in accordance with – from and driven by – the law.[44]

209. The Court has also determined that "a violation of Article 8(1) owing to the presumed lack of judicial impartiality of the judges must be established based on specific, concrete probative elements that indicate the presence of a case in which the judges have clearly let themselves be influenced by aspects or criteria other than legal norms."[45]

210. Effective measures to combat terrorism must be complementary and not contradictory to the observance of the norms for the protection of human rights.[46] When adopting measures that seek to protect the persons subject to their jurisdiction against acts of terrorism, States have

43. The same is true with regard to the prohibition of discrimination based on sexual orientation. *Cf. Case of Atala Riffo and daughters v. Chile*, para. 91.

44. *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, para. 56, and *Case of Atala Riffo and daughters v. Chile*, para. 189.

45. *Cf. Case of Atala Riffo and daughters v. Chile*, para.190.

46. *Cf.* UN Doc. A/HRC/16/51, December 21, 2010, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Ten areas of best practices in countering terrorism,* paras. 12 and 13. Similarly: *Case of Loayza Tamayo v. Peru. Merits*, paras. 44 and 57; *Case of Cantoral Benavides v. Peru. Merits*. Judgment of August 18, 2000. Series C No. 69, para. 95; *Case of Lori Berenson Mejía v. Peru. Merits, reparations and costs*. Judgment of November 25,

the obligation to ensure that the criminal justice system and respect for procedural guarantees abide by the principle of non-discrimination.[47] States must ensure that the objectives and effects of the measures taken in the criminal prosecution of terrorist actions are not discriminatory in terms of allowing individuals to be subjected to ethnic stereotypes or characterizations.[48]

b. Application to this specific case

[…]

b.ii. Alleged use of stereotypes or social prejudices in the domestic criminal judgments

[…]

223. Criminal law may be applied in a discriminatory manner if the judge or court convicts an individual on the basis of reasoning founded on negative stereotypes that associate an ethnic group with terrorism in order to determine any element of criminal responsibility. It is incumbent on the criminal judge to verify that all the elements of the offense have been proved by the accuser, because, as this Court has stated, the irrefutable proof of guilt is an essential requirement for criminal punishment; thus, the burden of proof evidently falls on the accuser and not on the accused.[49]

224. Stereotypes are pre-conceptions of the attributes, conducts, roles or characteristics of individuals who belong to a specific group.[50] The Court has indicated that discriminatory conditions "based on stereotypes [...] that are socially dominant and socially persistent, [...] are increased when the stereotypes are reflected, implicitly or explicitly, in policies and practices, particularly in the reasoning and the language of [the authorities]."[51]

225. Several of the expert witnesses made important contributions in this regard.[52] Expert witness Stavenhagen, proposed by the Commission

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2004. Series C No. 119, para. 91, and *Case of the Miguel Castro Castro Prison v. Peru. Interpretation of the judgment on merits, reparations and costs.* Judgment of August 2, 2008. Series C No. 181, paras. 76 to 80.

47. *Cf.* UN Doc. A/57/18, 8 March 2001, Committee on the Elimination of Racial Discrimination, *Statement on racial discrimination and measures to combat terrorism*, adopted following the terrorist acts perpetrated in the United States of America on September 11, 2001, p. 102.

48. *Cf.* UN Doc. HRI/GEN/1/Rev.9 (Vol.II), International Human Rights Instruments, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, *General recommendation No. XXX of the Committee on the Elimination of Racial Discrimination (2005)*, para. 10.

49. *Cf. Case of Cabrera García and Montiel Flores v. Mexico*, para. 182, and *Case of J. v. Peru*, para. 233.

50. *Cf. Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 16, 2009. Series C No. 205, para. 401, and *Case of Atala Riffo and daughters v. Chile*, para. 111.

51. *Cf. Case of González et al. ("Cotton Field") v. Mexico*, para. 401.

52. *Cf.* Written statement made by expert witness Rodolfo Stavenhagen on May 26, 2013, and affidavit prepared on May 17, 2013, by expert witness Carlos del Valle Rojas (file of statements of presumed victims, witnesses and expert witnesses, folios 288 to 290, 296 and 696).

and the FIDH, indicated that "[t]he discriminatory application of a law may arise from the grounds for its application, or if the reasons cited in order to apply it are not objective or contain some discriminatory element." Expert witness Carlos del Valle Rojas, proposed by the FIDH, analyzed the "juridical-judicial discourse" in order to determine the possible "existence of stereotypes, prejudices and discrimination in the criminal judgments" against the presumed victims in this case. In doing so, the expert witness concluded that the judgments "used discursive terms, the judgmental, moral and/or political weight of which denote the acceptance and reproduction of stereotypes that include strong social and cultural prejudices against the Mapuche communities and negative elements in favor of the prosecution." The expert witness indicated that "a significant part of the legal arguments" of these judicial decisions reveals "stereotypes and prejudices that reflect negatively on these communities, [...] even though this is not revealed by the facts proved during the proceedings." He also affirmed that "different parts of the judgments [...] use arguments that discriminate against the Mapuche communities" and that, "on various occasions, legal decisions that prejudice Mapuche leaders or community members are substantiated by a line of reasoning that, in turn, are supported by discriminatory terms, stereotypes or preconceived prejudices, in relation to the case examined." The expert witness analyzed different extracts from the domestic judgments that he considered "reveal" this "assimilation of stereotypes and prejudices and the recurrent use of discriminatory reasoning" by the domestic courts.

226. In order to establish whether a difference in treatment is based on a suspect category and to determine whether this constituted discrimination, it is necessary to examine the arguments adduced by the domestic judicial authorities, their actions, the language used, and the context in which the judicial decisions were handed down.[53]

227. The following are among the terms that the Commission and the common interveners of the representatives indicated, in particular, as being discriminatory and, with some variation, they appear in the different judgments:

> "[...] the actions that resulted in these wrongful acts reveal that the form, methods and strategies used had the criminal purpose of causing a generalized state of fear in the region.
>
> The said wrongful acts are inserted in a process of recovering Mapuche lands carried out by committing acts of violence without respecting the legal and institutional order, resorting to the use of force planned, coordinated and prepared in advance by radicalized groups seeking to create a climate of insecurity, instability and fear in different sectors of Regions XIII and IX. These actions can be summarized in the

53. *Cf. Case of Atala Riffo and daughters v. Chile*, para. 95.

formulation of excessive demands, made under pressure by belligerent groups to the owners and proprietors, who are warned that they will suffer different consequences if they do not accede to the groups' demands. Many of these threats have materialized in the forms of attacks on physical integrity, robberies, theft, arson, vandalism and occupation of land, which have affected both the personnel and the property of various owners of agricultural properties and logging companies in this part of the country.

The objective is to instill in the population a justified fear of falling victim to similar attacks and, thereby, to force the owners to cease any further exploitation of their properties and, ultimately, to force them to abandon their properties. The feelings of insecurity and unease that these attacks cause has led to a decrease in the availability of labor and an increase in its cost, an increase in costs and loans both for hiring machinery for exploiting the properties as well as purchasing policies to insure the land, the installations and the crops. Furthermore, it is increasingly common to see workers, machinery, vehicles and operations on the different properties under police protection to safeguard the operations, all of which affect certain Constitutionally-protected rights.

The foregoing was revealed by – although not necessarily with the same characteristics – the corroborating testimonies of Juan and Julio Sagredo Marín, Miguel Ángel Sagredo Vidal, Mauricio Chaparro Melo, Raúl Arnoldo Forcael Silva, Juan Agustín Figueroa Elgueta, Juan Agustín Figueroa Yávar, Armín Enrique Stappung Schwarzlose, Jorge Pablo Luchsinger Villiger, Osvaldo Moisés Carvajal Rondanelli, Gerardo Jequier Shalhlí and Antonio Arnoldo Boisier Cruces, witnesses who stated that they had been direct victims of or knew of threats and attacks against individuals or property perpetrated by individuals belonging to the Mapuche ethnic groupand who expressed in different ways the feelings of fear that these acts caused them. The foregoing is related to the words of expert witness José Muñoz Maulen, who stated that he had backed up from his computer on a compact disc information obtained from the website "http/fortunecety.es/," which describes different activities related to the land claim movement that some of the members of the Mapuche ethnic group are carrying out in the eighth and ninth regions of the country; the information contained in the report of the July 1, 2002, session of the Constitution, Legislation, Justice and Regulation Committee of the Senate of the Republic, which concluded with the finding of lack of service by the State; the distorted information contained in part C, pages 10 and 11 of the edition of El Mercurio of March 10, 2002, about the number of conflicts caused by Mapuche groups by terrorist acts, in online publications of La Tercera, La Segunda and El Mercurio, published on March 26, 1999, December 15, 2001, March 15 and June 15, 2002, respectively, and three tables taken from the webpage of the Chile's Foreign Investment Committee, divided into sectors and by regions, based on the political and administrative division of the country, that allow comparisons to be made between dollars invested in the other regions and in the Ninth, and show that private investment in the region has decreased.[54]

* * *

54. Thirteenth *considerandum* of the judgment delivered on September 27, 2003, convicting Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao. This passage is almost identical to one included in the previous judgment acquitting them, which was annulled; and to another passage contained in the

[...] Regarding the participation of both accused, the following must be considered:

1. As general background and from the evidence that the Public Prosecutor and the private accusers introduced at trial, it is a public and notorious fact that de facto organizations have existed within the area for some time that commit acts of violence or incite violence on the pretext of their territorial claims. Their modus operandi includes various acts of force targeted at the lumber businesses, and small- and medium-size farmers, all of whom have one thing in common: they are owners of properties that are adjacent to, neighboring or nearby to indigenous communities that are asserting historical claims to those properties. The purpose of the measures is to reclaim territories that they believe are their ancestral lands. The illegal occupation of those lands is the means to accomplish theirambitious goal. Through these actions, they believe they will gradually recover a portion of their ancestral territory and thereby strengthen the territorial identity of the Mapuche people. This is what the court learned from the testimony of victims Juan and Julio Sagredo Marin, Juan Agustin Figueroa Elgueta and Juan Agustin Figueroa Yávar, supported by the testimony of Armin Stappung Schwarzlose, Gerardo Jequier Salí, Jorge Pablo Luchsinger Villiger, Antonio Arnaldo Boisier Cruces and Osvaldo Moisés Carvajal Rondanelli, examined previously.

2. It has not been sufficiently established that these acts were caused by persons outside the Mapuche communities, since they were clearly intended to create a climate of harassment towards the property owners in the sector, in order to instill fear and make the owners accede to their demands. Their rationale relates to the so-called "Mapuche problem," because the perpetrators knew the territory that was claimed and no Mapuche community or property has been harmed.

3. It has been established that the defendant, Pascual Pichú, is a Lonko of the "Antonio Ñirripil" community and Segundo Norín is a Lonko of the "Lorenzo Norín" community, and this means that they have authority within the community and some degree of leadership and control over it.

4. It should also be highlighted that the defendants Pichún and Norín have been convicted of other offenses related to land occupation committed prior to these events against wooded properties located near their respective communities. This is revealed by case file No. 22.530 and joined cases in which Pascual Pichún was sentenced to four years ofmaximum security imprisonment, and Segundo Norín to 800 days of medium-security imprisonment and, in both cases, to the legal ancillary penalties and costs for the offense of [sic]. In addition, Pichún Paillalao was also sentenced to 41 days' imprisonment in maximum security prison and to the payment of a fine of 10 monthly tax units for the offense of driving under the influence. This is revealed from

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nineteenth *considerandum* of the Judgment delivered on August 22, 2004, by the same court convicting Juan Patricio and Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán, and Patricia Roxana Troncoso Robles in the criminal proceedings relating to the act of arson on the Poluco Pidenco property. *Cf.* judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court, thirteenth *considerandum*; judgment delivered on April 14, 2003, by the Angol Oral Criminal Trial Court, tenth *considerandum*, and judgment delivered on August 22, 2004, by Angol Oral Criminal Trial Court, second and nineteenth *consideranda* (file of annexes to the Merits Report 176/10, annex 15, 16 and 18, folios 537 to 540, 569 to 571, 679 and 680).

the respective excerpts of his identity documents and record, and from the copies of the final judgments duly certified and incorporated.

5. The Mapuche communities of Didaico and Temulemu are adjacent to the Nancahue forest farm, and

6. According to the testimony of Osvaldo Carvajal, both of the defendants are members of the Coordinadora Arauco Malleco C.A.M, a de facto organization – he repeated – and one of a violent nature.[55]

* * *

That the facts described in the preceding considerandum constitute the terrorist offense established in Article 2.4 of Law No 18,314, in relation to Article 1 of that law. This is because they reveal that actions were taken in order to instill in some of the population a justified fear of falling victim to such crimes, bearing in mind the circumstances, and also the nature and effects of the means employed, as well as the evidence that they were the result of a premeditated plan to attack the property of third parties engaged in work relating to the construction of the Ralco Power Plant of Alto Bío Bío, all with the purpose of forcing the authorities to take decisions that would prevent the construction of this plant.[56]

* * *

19. That the evidence relating to the first, seventh and thirteenth conclusions of the judgment of the first instance constitute judicial presumptions that, carefully assessed, prove that the trucks and the backhoe were set on fire in the context of the Pehuenche conflict, in the Eighth Region province of Biobío, Santa Bárbara commune, in the sector of the cordillera known as Alto Bío Bío. These acts arerelated to the opposition to the construction of the Ralco Hydroelectric Plant, where it is alsos well-known that the sisters Berta and Nicolasa Quintremán Calpán are opposed to the Endesa project because their land – which contains their ancestors, their origins, their culture and their traditions – will be flooded when the Plant is built.

The acts took place withinin this context as a way of compelling the authorities and imposing demands that they make decisionsthat they to halt the construction of the Plant.

20. That, to this end, on September 29, 2001, and March 3 and 17, 2002, two trucks and a backhoe, and subsequently two more trucks were set on fire; all were vehicles working for Endesa. The first incident involved several individuals, all except one of whom wore hoods; they fired a shotgun and hit the truck driver with a stick. The second incident involved at least two individuals with their faces covered; one of them, armed with a shotgun, fired two shots into the air. On the third occasion, a group of hooded individuals was involved, one of whom carried a firearm and fired

55. Fifteenth *considerandum* of the Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court (file of annexes to the Merits Report 176/10, annex 15, folios 513 and 514).
56. Fifteenth *considerandum* of the Judgment delivered on December 30, 2003, by the investigating judge of the Concepción Court of Appeal (file of annexes to the Merits Report 176/10, annex 20, folios 751 and 752).

> shots into the air. In all of these incidents, inflammable fuel, such as gasoline or a similar product, was used.
>
> The illegal acts described above were carried out violently, without respecting the legal and institutional order, resorting to previously planned acts of violence. Considering how the events occurred, their location and their modus operandi, there is concerted agreement that were perpetrated to create situations of insecurity, instability and anxiety,instilling fear in order to exert pressure on the authorities to fulfill their demands and therefore achieve their objectives.[57]"

228. The Court considers that the mere use of this reasoning, which reveals stereotypes and biases, as grounds for the judgments constituted a violation of the principle of equality and non-discrimination and the right to equal protection under the law, recognized in Article 24 of the American Convention, in relation to Article 1(1) of the same instrument.

229. The allegations of a violation of the right to an impartial judge or court, established in Article 8(1) of the American Convention, are closely linked to the presumption of the terrorist intent "to instill [...] fear in the general population" (a subjective element of the definition) that, as the Court has already declared, violates the principle of legality and the guarantee of presumption of innocence established in Articles 9 and 8(2) of the Convention, respectively. The alleged violation of Article 8(1) should be considered subsumed in the previously declared violation of Articles 9 and 8(2). Consequently, the Court considers that it is not necessary to rule in this regard.

230. The Court concludes that the State has violated the principle of equality and non-discrimination and the right to equal protection of the law recognized in Article 24 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe.

B. Right of the defense to examine witnesses (Article 8(2)(f) of the Convention) in relation to the criminal proceedings against Messrs. Norín Catrimán, Pichún Paillalao and Ancalaf Llaupe

[...]

57. Nineteenth and twentieth *consideranda* of the Judgment delivered on June 4, 2004, by the Third Chamber of the Concepción Court of Appeal (file of annexes to the CEJIL motions and arguments brief, annex A, folios 1730 and 1731).

3. Considerations of the Court

241. On previous occasions the Court has ruled on violations of the right of the defense to examine witnesses in cases dealing with measures that, under the military criminal justice system, imposed an absolute prohibition to cross-examine witnesses for the prosecution,[58] others in which there were not only "faceless witnesses" but also "faceless judges,"[59] and another that referred to a political trial held before Congress in which the defendant judges were not allowed to cross-examine the witnesses on whose testimony their dismissal was based.[60]

242. Subparagraph (f) of Article 8(2) of the Convention establishes the "minimum guarantee" of "the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts," which underlies the adversarial principle and the principle of procedural equality. The Court has indicated that, among the guarantees recognized to the accused is that of being able to examine the witnesses for and against them, under the same conditions, in order to defend themselves.[61] The anonymity of the witness restricts the exercise of this right, because it prevents the defense from asking questions related to the possible hostility, prejudice and reliability of the deponent, as well as others that would allow arguing that the testimony is untruthful or erroneous.[62]

243. The State's duty to ensure the rights to life and to personal integrity, liberty and safety of those who testify in criminal proceedings may justify the adoption of special measures for the protection of witnesses. In this regard, the laws of Chile include both procedural measures (such as maintaining the confidentiality of personal information or physical characteristics that identify a person), and extra-procedural (such as protection of personal safety).

244. In the instant case, the Court will limit its analysis to deciding whether the procedural measure of preserving the anonymity of witnesses, which was applied in the criminal proceedings held against three of the presumed victims, entailed a violation of the right of the defense to examine

58. *Cf. Case of Palamara Iribarne v. Chile*, paras.178 and 179.

59. *Cf. Case of Castillo Petruzzi et al. v. Peru, Merits, reparations and costs*, paras. 153 to 155; *Case of Lori Berenson Mejía v. Peru*, para. 184; *Case of García Asto and Ramírez Rojas v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2005. Series C No. 137, para. 152, and *Case of J. v. Peru*, paras. 208 to 210.

60. *Cf. Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, para. 83.

61. *Cf. Case of Castillo Petruzzi et al. v. Peru, Merits, reparations and costs*, para. 154, and *Case of J. v. Peru*, para. 208.

62. *Cf.* ECHR, *Case of Kostovski v. the Netherlands*, No. 11454/85. Judgment of 20 November 1989, para. 42.

the witnesses. This measure is regulated in Chile as described in paragraph 232 and, in this regard, the Supreme Court has stated that:

> [...] such a serious decision may only be taken in each particular case and with complete awareness of the specific circumstances. These are exceptional measures for exceptional situations and are always adopted with absolute control over those who intervene so that the harm to the exercise of any of the rights of the defense in a trial are minimum, and that it never obstructs or limits the exercise of the essence of this guarantee.[63]

245. The Court will now examine whether, in the above-mentioned trials of these three presumed victims in this case, the measure of preserving witness anonymity was adopted subject to judicial control,[64] based on the principles of necessity and proportionality, taking into account that this is an exceptional measure and verifying the existence of a situation of risk for the witness.[65] When making this assessment, the Court will bear in mind the impact that the measures had on the defense rights of the accused.

246. In order to rule in the instant case, the Court will also take into consideration whether, in the specific cases, the State ensured that the effects on the defense rights of the accused that resulted from preserving the anonymity of witnesses were sufficiently offset by counterbalancing measures, such as:[66] (a) the judicial authority must be aware of the identity of the witness and be able to observe his demeanor under questioning in order to form its own impression of the reliability of the witness and of his testimony,[67] and (b) the defense must be granted every opportunity to examine the witness directly at some stage of the proceedings on matters that are not related to his identity or actual residence; this is so that the defense may assess the demeanor of the witness while under cross-examination in order to be able to dispute his version or, at least, raise doubts about the reliability of the testimony.[68]

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63. In its brief with final arguments, the State transcribed parts of a ruling of the Supreme Court of Justice of March 22, 2011, "on the application for a declaration of nullity of the judgment delivered by the Cañete Oral Criminal Court" (merits file, folio 2140 to 2142).

64. *Mutatis mutandis,* ECHR, *Case of Doorson v. the Netherlands*, No. 20524/92. Judgment of 26 March 1996, paras. 70 and 71; ECHR, *Case of Visser v. the Netherlands*, No. 26668/95. Judgment of 14 February 2002, paras. 47 and 48; ECHR, *Case of Birutis and others v. Lithuania*, Nos. 47698/99 and 48115/99. Judgment of 28 June 2002, para. 30, and ECHR, *Case of Krasniki v. the Czech Republic*, No. 51277/99. Judgment of 28 May 2006, paras. 79 to 83.

65. *Cf.* ECHR, *Case of Krasniki v. the Czech Republic*, para. 83, and ECHR, *Case of Al-Khawaja and Tahery v. the United Kingdom*, Nos. 26766/05 and 22228/06. Judgment of 15 December 2011, paras. 124 and 125.

66. *Cf.* ECHR, *Case of Doorson v. the Netherlands*, para. 72; *Case of Van Mechelen and others v. the Netherlands*, Nos. 21363/93, 21364/93, 21427/93 and 22056/93. Judgment of 23 April 1997, paras. 53 and 54, and ECHR, *Case of Jasper v. the United Kingdom*, No. 27052/95. Judgment of 16 February 2000, para. 52.

67. *Cf.* ECHR, *Case of Kostovski v. the Netherlands*, para. 43; ECHR, *Case of Windisch v. Austria*, No. 12489/86, Judgment of 27 September 1990, para. 29, and ECHR, *Case of Doorson v. the Netherlands*, para. 73.

68. *Cf.* International Criminal Tribunal for the Former Yugoslavia (ICTFY), *Prosecutor v. Dusko Tadic a/k/a*

247. Even when counterbalancing procedures have been adopted that appear to be sufficient, a conviction should not be based either solely or to a decisive extent on anonymous statements.[69] To the contrary, it would be possible to convict the accused by the disproportionate use of a probative measure that was obtained while impairing their defense rights. Since this is evidence obtained in conditions in which the rights of the accused have been limited, the testimony of anonymous witnesses must be used with extreme caution,[70] and must be assessed together with the body of evidence, the observations and objections of the defense, and the rules of sound critical judgment.[71] The decision as to whether this type of evidence has weighed decisively in the judgment convicting the accused will depend on the existence of other types of supportive evidence so that, the stronger the corroborative evidence, the less likely that the testimony of the anonymous witness will be treated as decisive evidence.[72]

a. Criminal proceedings against Messrs. Norín Catrimán and Pichún Paillalao

[...]

249. The judicial control of the anonymity of witnesses was insufficient. The judicial decision that ordered it does not contain any explicit justification, and merely admits a request of the Public Prosecution Service that only refers to the "nature," the "characteristics," and "seriousness" of the case, without specifying the objective criteria, the reasoning, and the verifiable evidence that, in the specific case, would substantiate the alleged risk for the witnesses and their families. The Court understands that this decision did not constitute effective judicial control because it did not include criteria that would reasonably justify the need for the measure based on a situation of risk for the witnesses.

250. The counterbalancing measures implemented were adequate to safeguard the right of the defense to examine witnesses. The defense had access to the statements made by these witnesses during the investigation stage, so that they could be contested and, in the case of "witnesses for the prosecution whose testimony had not been recorded during the investigation,

"Dule". Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, August 10, 1995, paras. 67 and 72; ECHR, *Case of Kostovski v. the Netherlands*, para. 42; ECHR, *Case of Windisch v. Austria*, para. 28; ECHR, *Case of Doorson v. the Netherlands*, para. 73; ECHR, *Case of Van Mechelen and others v. the Netherlands*, paras. 59 and 60.

69. *Cf.* ECHR, *Case of Doorson v. the Netherlands*, para. 76, and ECHR, *Case of Van Mechelen and others v. the Netherlands*, paras. 53 to 55.

70. *Cf.* ECHR, *Case of Doorson v. the Netherlands*, para. 76, and ECHR, *Case of Visser v. the Netherlands*, para. 44.

71. *Mutatis mutandis, Case of Velásquez Rodríguez v. Honduras. Merits*, para. 146, and *Case of the Santo Domingo Massacre v. Colombia. Preliminary objections, merits and reparations.* Judgment of November 30, 2012. Series C No. 259, para. 44.

72. *Cf.* ECHR, *Case of Al-Khawaja and Tahery v. the United Kingdom*, para. 131.

[this] motivated a divided accessory decision by the judges noting that their statements would be considered insofar as they did not violate due process and would be assessed freely."[73] The request by the Public Prosecution Service was accompanied by a sealed envelope containing information on the identity of the witnesses for whom anonymity was requested;[74] their statements were made in the hearing before the Oral Trial Court with the reception of the evidence immediately thereafter, and the defense was given the opportunity to examine them during the hearing and to know their identity, with the reservation that they could not inform the accused.

251. On the vital point of whether the convictions were based solely or to a decisive extent on these statements, there are differences between each of those convicted:

a) Regarding the conviction of Mr. Norín Catrimán, the testimony of anonymous witnesses was not used as grounds for the declaration of his responsibility as perpetrator of the offense of threat of terrorist arson against the owners of the San Gregorio property. Although witness anonymity was allowed at the investigation stage, without effective judicial control, in this case it did not lead to a violation of the guarantee established in Article 8(2)(f) of the Convention, because the testimony of this witness was not decisive and, at the trial stage, specific counterbalancing measures were guaranteed so that the defense could examine the anonymous witness and contest his testimony.

b) To the contrary, the criminal conviction of Mr. Pichún Paillalao as perpetrator of the offense of threat of terrorist arson against the administrator and owners of the Nancahue forest farm was based decisively on the testimony of an anonymous witness ("anonymous witness No. 1"), because, even though reference is made to other types of evidence, these alone would not have been sufficient to convict him, since the other three persons who testified only knew about the events indirectly. Furthermore, the judgment referred to an undated letter with supposed threats signed by Mr. Pichún, and a check signed by the administrator of the Nancahue forest farm and made out to the accused.[75] It also mentioned a testimonial statement

73. *Cf.* Judgment delivered on April 14, 2003, by the Angol Oral Criminal Trial Court, thirteenth *considerandum* (file of annexes to the Merits Report 176/10, annex 16, folios 556 to 574).

74. *Cf.* Application of the Public Prosecution Service, Traiguén local prosecutor of September 2, 2002, addressed to the Traiguén guarantees judge (file of annexes to the Merits Report 176/10, appendix 1, folios 4422 to 4424).

75. In the sixteenth *considerandum* of the judgment handed down on September 27, 2003, the Angol Oral Criminal Trial Court indicated that "the following information indicates that the accused Pascual Pichún is guilty as the perpetrator of the offense of threats against the owners and administrator of the Nancahue forest farm: […] [u]ndated letter signed by Pascual Pichún Paillalao, as President of the Antonio Ñirripil community, addressed to Juan Agustín and Aída Figueroa Yávar, requesting permission to thin out their pine forest, to pasture the community's animals in the clearings in the forest and, if there were no trees that needed to be

indicating that the Coordinadora Arauco-Malleco was a de facto terrorist organization, and that Mr. Pichún belonged to it, without analyzing the impact of this on the perpetration of the offense.[76]

252. Based on the above reasons, the Court concludes that, when delivering a guilty verdict, a decisive significance was accorded to the testimony of an anonymous witness, which constitutes a violation of the right of the defense to examine witnesses, established in Article 8(2)(f) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Pascual Huentequeo Pichún Paillalao.

b. Criminal proceedings against Mr. Ancalaf Llaupe

[…]

256. Accordingly, Víctor Ancalaf Llaupe's defense was only able to know the content of the testimony of the anonymous witnesses indirectly and partially based on the references to it in the judgment of December 30, 2003 convicting Mr. Ancalaf. The summary did not copy the statements completely, but merely those parts that served as evidence to convict and sentence Víctor Manuel Ancalaf Llaupe for committing a terrorist offense.[77]

257. Regarding the right of Mr. Ancalaf Llaupe's defense to obtain the appearance of proposed witnesses, on December 10, 2002, the defense asked that the testimony of seven witnesses be ordered "in order to clarify the defendant's situation." The same day, the investigating judge denied the request without providing the reasons for his decision, merely indicating that the witness was "[n]ot admissible for the time being."[78] Subsequently, on July 7, 2003, the defense asked that "[two] witnesses [who he identified]

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thinned out, permission was requested to exploit 100 hectares of closed forest; the letter added that some companies had agreed to grant this benefit, and it was well-known that some that had refused had suffered harm that has caused alarm in the Lumaco sector, and they 'did not want this to happen between us' for any reason. Also copy of cheque No. 1182177 on account No. 62300040301 of Juan A. Figueroa Yávar, signed by Juan A. Figueroa Elgueta in favor of Pascual Pichún for the sum of $130,000 issued on February 26, 2001." The other place in this judgment where reference is made to the letter and the cheque is in subparagraph (C) of the eighth *considerandum* on the evidence provided concerning the "threats of terrorist arson against the owners and administrators of the Nancahue forest farm." In the eighth *considerandum*, when referring to "[t]he documentary evidence […] incorporated," it repeats the content of the sixteenth *considerandum*. With regard to the cheque, there is no record of whether the court analyzed the relationship of this document to the legal analysis of the perpetration of the supposed threats by Mr. Pichún Paillalao. *Cf.* Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court, eighth and sixteenth *considerandum* (file of annexes to the Merits Report 176/10, annex 15, folios 509 to 554).

76. *Cf.* Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court, sixteenth *considerandum* (file of annexes to the Merits Report 176/10, annex 15, folios 509 to 554).

77. *Cf.* Judgment delivered on December 30, 2003, by the investigating judge of the Concepción Court of Appeal (file of annexes to the Merits Report 176/10, annex 20, folios 718 to 759).

78. *Cf.* Judicial case file of the domestic criminal proceedings against Víctor Manuel Ancalaf Llaupe (file of annexes to the CEJIL motions and arguments brief, annex A, tome III, folios 1146 to 1148).

be ordered to appear in order to bring some balance to [Mr. Ancalaf Llaupe's] evidentiary situation," so that they could be questioned as to whether they had seen directly and personally, or whether they knew by some direct and personal means, that Mr. Ancalaf Llaupe had set fire to the trucks in the Alto Bío Bío. The following day, the investigating judge ordered that said witnesses be summoned.[79] However, on July 28, 2003, the captain of the Carabineros' Directorate of Police Intelligence ('DIPOLCAR') of Concepción informed the investigating judge that one of the witnesses had been summoned to appear to testify but the other could not be summoned because "he refused to sign the summons, stating that he did not have the money to travel to Concepción."[80] The body of evidence does not show that the said statements were taken and the Court notes that the State did not provide any explanation or refer to specific evidence in this regard.

258. In this case, the presumed victim had no available means of proof. His arguments are of a negative nature, because they indicate the inexistence of an act. The Court has established on other occasions that, "in proceedings on human rights violations, the State's defense cannot be based on the defendant's impossibility of providing evidence that, in many cases, cannot be obtained without the cooperation of the State."[81] Consequently, the burden of proof fell on the State, and the latter has not proved that the requested measures were taken to allow the defense to obtain the appearance of the proposed witnesses.

259. The evidence that was considered to be "sufficient" to prove the participation of Mr. Ancalaf Llaupe in the acts of which he was convicted consists of four testimonial statements, three of which were provided by anonymous witnesses, to whom his defense did not have access.[82] This means that a decisive significance was given to the statements of anonymous witnesses which is inadmissible based on the considerations set forth previously.

260. Based on the foregoing, the Court concludes that Chile violated the right of the defense to examine witnesses and to obtain the appearance

79. *Cf.* Judicial case file of the domestic criminal proceedings against Víctor Manuel Ancalaf Llaupe (file of annexes to the CEJIL motions and arguments brief, annex A, tome IV, folios 1507 to 1520).

80. *Cf.* Judicial case file of the domestic criminal proceedings against Víctor Manuel Ancalaf Llaupe (file of annexes to the CEJIL motions and arguments brief, annex A, tome IV, folio 1526).

81. *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, para. 135, and *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2007. Series C No. 170, para. 73.

82. *Cf.* Judgment delivered on June 4, 2004, by the Third Chamber of the Concepción Court of Appeal, first, sixteenth and seventeenth *consideranda* (file of annexes to the CEJIL motions and arguments brief, annex A, folios 1723 to 1733), and judgment delivered on December 30, 2003, by the investigating judge of the Concepción Court of Appeal, seventeenth *considerandum* (file of annexes to the Merits Report, annex 20, folios 753 and 754).

of witnesses who might have shed light on the facts, protected in Article 8(2)(f) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Víctor Manuel Ancalaf Llaupe.

[…]

C. The right to appeal the judgment to a higher court (Article 8(2)(h) of the Convention), in relation to the obligations under Articles 1(1) and 2 of this treaty, with regard to Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles

262. Violations of the right to appeal the judgment before a higher court have only been alleged in relation to the two proceedings applying the new Criminal Procedural Code, which establishes that the means to contest a criminal judgment is the appeal for annulment. Neither the Commission nor the representatives alleged a violation of Article 8(2)(h) of the Convention with regard to Mr. Ancalaf Llaupe, in whose proceedings the Code of Criminal Procedure 1906 was applied. In his case it was anticipated that there would be an appeal, as well as the possibility of filing an appeal of cassation.

[…]

2. Considerations of the Court

[…]

269. The scope and content of the right to appeal the judgment have been specified in numerous cases decided by this Court.[83] In general, the Court has determined that it is an essential guarantee that must be respected within the framework of due process of law in order to permit a guilty verdict to be reviewed by a different and higher judge or court.[84] Anyone subjected to an investigation and criminal proceedings must be protected at the different stages of the process, which include the investigation, indictment, trial and sentencing.[85]

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83. *Cf. Case of Castillo Petruzzi et al. Merits, reparations and costs*, para. 161; *Case of Herrera Ulloa v. Costa Rica*, paras. 157 to 168; *Case of Barreto Leiva v. Venezuela. Merits, reparations and costs.* Judgment of November 17, 2009. Series C No. 206, paras. 88 to 91; *Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2010. Series C No. 218, para. 179; *Case of Mohamed v. Argentina*, paras. 88 to 117; *Case of Mendoza et al. v. Argentina*, paras. 241 to 261, and *Case of Liakat Ali Alibux v. Suriname*, paras. 83 to 111.

84. *Cf. Case of Herrera Ulloa v. Costa Rica*, para. 158, and *Case of Liakat Ali Alibux v. Suriname*, para. 84.

85. *Cf. Case of Mohamed v. Argentina*, para. 91, and *Case of Liakat Ali Alibux v. Suriname*, para. 47.

270. In particular, considering that the American Convention must be interpreted taking into account its object and purpose,[86] which is the effective protection of human rights, the Court has determined that it must be: an ordinary, accessible and effective remedy that permits a comprehensive review or examination of the appealed ruling; available to anyone who has been convicted; and observes basic procedural guarantees:

a) *Ordinary*: the right to file an appeal against the judgment must be guaranteed before the judgment becomes res judicata, because it seeks to protect the defense rights by avoiding the adoption of a final decision in flawed proceedings involving errors that unduly prejudice the interests of an individual.[87]

b) *Accessible*: the filing of the appeal should not be so complex that it makes this right illusory.[88] The formalities for its admission must be minimal and should not constitute an obstacle for the remedy to comply with its purpose of examining and deciding the errors claimed by the appellant.[89]

c) *Effective*: it is not sufficient that the remedy exists formally; rather it must permit obtaining results or responses in order to achieve the purpose for which it was conceived.[90] Regardless of the appeal regime or system adopted by the States Parties and the name given to the means of contesting the adverse judgment, it must constitute an appropriate mechanism to rectify an erroneous conviction.[91] This requirement is closely related to the following.

d) *Allowing a comprehensive review or examination of the judgment appealed*: it must ensure the possibility of a comprehensive examination of the decision appealed.[92] Therefore, it must permit an analysis of the factual, probative and legal issues on which the contested judgment was based because, in jurisdictional activities, the determination of the facts and the application of the law are interdependent, so that an erroneous determination of the facts entails an erroneous or inappropriate application of the law. Consequently, the grounds for the admissibility of the appeal should make it possible to carry out a comprehensive examination of the contested aspects of the adverse judgment.[93] In this way, it is possible to

86. According to Article 31(1) of the Vienna Convention on the Law of Treaties, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."
87. *Cf. Case of Herrera Ulloa v. Costa Rica*, para. 158, and *Case of Liakat Ali Alibux v. Suriname*, para. 85.
88. *Cf. Case of Herrera Ulloa v. Costa Rica*, para. 164, and *Case of Liakat Ali Alibux v. Suriname*, para. 55.
89. *Cf. Case of Mohamed v. Argentina*, para. 99, and *Case of Liakat Ali Alibux v. Suriname*, para. 86.
90. *Cf. Case of Herrera Ulloa v. Costa Rica*, para. 161, and *Case of Liakat Ali Alibux v. Suriname*, para. 52.
91. *Cf. Case of Mohamed v. Argentina*, para. 100, and *Case of Liakat Ali Alibux v. Suriname*, para. 86.
92. *Cf. Case of Herrera Ulloa v. Costa Rica*, para. 165, and *Case of Liakat Ali Alibux v. Suriname*, para. 56.
93. *Cf. Case of Mohamed v. Argentina*, para. 100, and *Case of Liakat Ali Alibux v. Suriname*, para. 86.

obtain a two-stage judicial ruling, because the comprehensive review of the judgment permits the reasoning to be confirmed and grants greater credibility to the State's jurisdictional action, while providing greater security and protection to the rights of the person who has been convicted.[94]

e) *Available to anyone who has been convicted*: the right to appeal the judgment cannot be effective if it is not guaranteed to everyone who has been convicted, because the sentence is the expression of the exercise of the State's punitive powers. It must be ensured even to the individual who has been sentenced in a judgment that revokes an acquittal.[95]

f) *Observing the minimum procedural guarantees*: appeal regimes must respect the minimum procedural guarantees that, pursuant to Article 8 of the Convention, are pertinent and necessary to decide the errors asserted by the appellant, without this entailing the need to conduct a new oral trial.[96]

b. The appeal system under the Criminal Procedural Code of Chile (Law No. 19,696 of 2000)

271. The Criminal Procedural Code also introduced substantial variations in the appeals regime adopted. It determined that "decisions issued by an oral criminal trial court could not be appealed" (Article 364) and established the appeal for annulment as the only means of contesting ("to invalidate") the oral trial and the final judgment (Article 372).

[…]

273. In summary, the appeal regime under the Criminal Procedural Code is as follows:

a) A distinction is made between the "reasons for the appeal" for annulment in general (Article 373) and the "absolute grounds for annulment" (Article 374). In the latter, the trial and the judgment will always be annulled. In the other situations, even though, in general, it is established that "[t]he declaration of the nullity of the oral trial and of the judgment shall be admissible," Article 385 authorizes the court to "invalidate the judgment alone."

b) If both the oral trial and the judgment are invalidated, article 386 is applicable and the case will be forwarded to the corresponding competent oral court for a new oral trial to be held.

c) If the judgment alone is invalidated and the requirements of article 385 are met, the higher court must deliver another judgment to replace it.

d) The ruling declaring the annulment must (Article 384.2) "describe the grounds on which its decision is based; rule on the contested issues,

94. *Cf. Case of Barreto Leiva v. Venezuela*, para. 89, and *Case of Liakat Ali Alibux v. Suriname*, para. 49.
95. *Cf. Case of Mohamed v. Argentina*, para. 92, and *Case of Liakat Ali Alibux v. Suriname*, para. 84.
96. *Cf. Case of Mohamed v. Argentina*, para. 101, and *Case of Liakat Ali Alibux v. Suriname*, para. 87.

unless it upholds the appeal, in which case it may merely rule on the grounds that it would have found sufficient, and declare whether or not the oral trial and final judgment that have been appealed are null, or whether only the said judgment is null, in the cases indicated" in Article 385.

e) The replacement judgment "shall repeat the factual considerations, the legal grounds and the decisions of the ruling that was annulled, that do not refer to the issues that were the object of the appeal or that were incompatible with the decision taken on the appeal, as established in the judgment appealed " (article 385.2).

c. Analysis of the judgments denying the appeals for annulment in light of Article 8(2)(h) of the Convention

274. The Court must now analyze whether the appeal system under the Criminal Procedural Code, as it was applied in this case, is consistent with the requirements of Article 8(2)(h) of the Convention. To this end, the Court is not required to rule on each of the aspects contested in the appeals for annulment, but rather to evaluate whether the examination made by the higher courts that decided the appeals was compatible with the requirement of an effective remedy established in the American Convention. Nor does the Court have to rule on other aspects in which an abstract examination of the norms on remedies in criminal proceedings in force in Chile might reveal some contradiction with the minimum procedural guarantees established in the American Convention.

c.i. Criminal proceedings against Norín Catrimán and Pichún Paillalao (judgment delivered by the Second Chamber of the Supreme Court of Justice on December 15, 2003, denying the appeals for annulment)

275. Messrs. Norín Catrimán and Pichún Paillalao filed separate appeals for annulment against the partially guilty verdict of the Angol Oral Criminal Trial Court of September 27, 2003, requesting the annulment of the trial with regard to the offenses for which they had been convicted and the holding of a new trial. In addition, they asked that the judgment be annulled and that a replacement judgment be delivered acquitting those who had been convicted; that it be declared that the offenses were not of a terrorist nature, and that the punishment be amended.

276. On December 15, 2003, the Second Chamber of the Supreme Court of Justice delivered a judgment in which it rejected all the flaws described by the appellants and upheld the partially guilty verdict with regard to Messrs. Pichún Paillalao and Norín Catrimán.

277. In the judgment rejecting the appeals, the Second Chamber summarized the flaws described by the appellants Norín Catrimán and

Pichún Paillalao, and indicated that, "basically, they both complain about the following aspects: (a) violation of constitutional guarantees and international treaties; (b) certain formal errors they believe they see in the judgment; (c) they disagree that the facts that were considered proven constitute criminal threats; and (d) that these threats are not of a terrorist nature." It concluded that none of the foregoing was substantiated; hence, it could not be admitted. It added that "the evidence provided in the hearing on the appeals had no procedural significance that could change the decision." Consequently, it rejected the appeals and declared that the appealed judgment "is not annulled."

278. There is no evidence that, in any part of its verdict, the Second Chamber examined the facts of the case or the legal considerations regarding the definition of the offense to verify that the statements on which the appealed judgment was founded were based on convincing evidence and on correct legal analysis. It merely sought to analyze the internal coherence of the judgment, indicating that:

> [...] The statements analyzed above were made by individuals linked directly to the facts or who knew about them for different reasons, and whose testimony is consistent with the expert opinions and documentary evidence incorporated during the hearing that constitute the background information and that, taken as a whole and freely assessed, lead to the conviction that the facts contained in the private and the prosecutor's indictment have been proved beyond any reasonable doubt. [...]
>
> It also indicated that:
>
> [...] The standard of conviction beyond any reasonable doubt pertains to Anglo-Saxon law and not to that of continental Europe; thus, it is a novelty for the Chilean legal system. However, it is a useful concept, because it is sufficiently evolved and eliminates discussions regarding the degree of conviction required, revealing that is it not an absolute conviction, but one that excludes the most important doubts. Accordingly, the phrase of 'sufficient conviction' was replaced by the phrase of 'beyond any reasonable doubt.' (E. Pfeffer U. Código Procesal Penal, Anotado y Concordado, Editorial Jurídica of Chile, 2001, p. 340). [...]
>
> On these grounds, it concluded that:
>
> [...] it is not found that the judgment contested by the appeals fails to meet the requirements of paragraphs (c) and (d) of article 342 of the Criminal Procedural Code, because a clear, cogent and complete description of the facts can be appreciated, together with the reasons used to define each act legally, beyond any reasonable doubt. [...]

279. It can be seen that, after making a descriptive reference to the facts that the Oral Criminal Trial Court considered proved, and to the opinion on how they were codified, and citing parts of the analysis of the evidence by

said court, the Second Chamber merely concluded the four lines indicated in paragraph 278. The Court has verified that the Second Chamber's ruling did not make a comprehensive analysis to conclude that the guilty verdict met the legal requirements to consider that the facts had been proved, or of the legal grounds that supported their classification under the law. The simple description of the lower court's arguments, without the higher court that decided the appeal setting out its own reasoning that would logically support the operative paragraphs of its decision, means that the latter did not comply with the requirement of an effective remedy protected by Article 8(2)(h) of the Convention, which establishes that the appellants' complaints and disagreements must be decided; that is, that they have effective access to the two-stage judicial ruling. These flaws make the guarantee protected by Article 8(2)(h) of the Convention illusory and prejudice the defense rights of anyone who has been criminally convicted.

280. The foregoing clearly reveals that the judgment of the Second Chamber did not make a comprehensive examination of the ruling appealed, because it did not analyze all the contested factual, evidentiary and legal issues on which the guilty verdict against Messrs. Norín Catrimán and Pichún Paillalao was based. This means that it did not take into account the interdependence that exists between the factual determinations and the application of the law, so that an erroneous determination of the facts entails an erroneous or incorrect application of the law. Consequently, the remedy of appeal for annulment available to Messrs. Norín Catrimán and Pichún Paillalao was not adapted to the basic requirements needed to comply with Article 8(2)(h) of the American Convention, thus violating their right to appeal the guilty verdict.

c.ii. Criminal proceedings against Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán and Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles (judgment delivered by the Temuco Court of Appeal on October 13, 2004, denying the appeals for annulment)

281. The five persons convicted of the offense of terrorist arson filed separate appeals for annulment. The five appeals were rejected together by the Temuco Court of Appeal in a judgment of October 13, 2004.

282. The appellants submitted arguments relating to both the incorrect assessment of the evidence and the erroneous application of the law. Specifically, they affirmed that several testimonies offered by the prosecution had not been assessed, or had not been assessed in an independent manner, and that certain evidence proposed by the defense had been unduly rejected. They also argued that the subjective element of the definition of the offense

of terrorism had not been proved and that the principle of guilt had been violated because the classification of the acts as terrorism had been concluded based on acts carried out by third parties.[97]

[…]

287. The Inter-American Court is not required to analyze whether a judgment of a domestic court interpreted and applied domestic law correctly or incorrectly, but only to determine whether or not this violated a provision of the American Convention. The foregoing reveals with absolute clarity that the Temuco Court of Appeal did not make a comprehensive examination of the decision appealed, because it did not analyze all the contested factual, probative and legal aspects on which the guilty verdict was based. This means that it did not take into account the interdependence that exists between the factual determinations and the application of the law, so that an erroneous determination of the facts entails an erroneous or improper application of the law.

288. In addition, this Court notes that the judgment that denied the appeal interpreted the Criminal Procedural Code so that evidence that the appellants considered relevant to support their defense was not assessed, merely indicating the reasons why it was "rejected." In this regard, it should be emphasized that, when deciding the objections submitted by the appellant, the higher court hearing the appeal to which a person convicted has the right under Article 8(2)(h) of the American Convention must ensure that the guilty verdict provides clear, complete and logical grounds. Those grounds, in addition to describing the content of the evidence, must set out the Court's assessment of the evidence and indicate the reasons why it considered – or did not consider – the evidence reliable and appropriate to prove the elements of criminal responsibility and, therefore, rebut the presumption of innocence.

289. It is also possible to note that, with regard to the argument of the defense regarding the improper assessment of the evidence (alleging that numerous testimonies were not assessed individually, so that the conclusions derived from them did not take into account the particularities of each of these statements and the alleged contradictions between them), the Court of Appeal stated that it "agreed with the Public Prosecution Service that the law makes it obligatory to analyze all the evidence, but not to analyze each piece of evidence individually, thus the criterion of the court was correct in setting

97. *Cf.* Appeals for annulment filed by Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles against the judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court (file of helpful evidence presented by the State, folios 208 to 321 and 1166 to 1199), and Judgment delivered on October 13, 2004, by the Temuco Court of Appeal (file of annexes to the Merits Report 176/10, annex 19, folios 688 to 716).

out the testimony on those aspects on which the statements corroborated each other." By proceeding in this way, the higher court did not resolve the appellants' complaint regarding the evidence, which referred not only to the alleged obligation to make an individual assessment of the evidence, but also to specific objections and comments on the content of explicit evidence and the conclusions that the lower court had derived from this evidence. In this regard, this Court underlines that when a guilty verdict is appealed, and in order not to make the right to be heard in equal conditions purely theoretical and illusory, the appellate court must ensure that the lower court has complied with its obligation to describe an assessment that takes into account both the incriminating and the exculpatory evidence. Even if the lower court chooses to assess the evidence together, it has the duty to explain clearly the points on which agreement exists and those on which there is disagreement, as well as to refer to any objections that the defense may have raised on specific points or aspects of this evidence. These aspects raised by the defense in their appeal against conviction were not adequately decided by the appellate court in this case.

290. Consequently, the appeal for annulment available to Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Florencio Jaime Marileo Saravia, Juan Patricio Marileo and Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles was not adapted to the basic requirements needed to comply with Article 8(2)(h) of the American Convention, and thus their right to appeal their convictions was violated.

291. Based on the above, the Court concludes that the State violated the right to appeal the judgment, established in Article 8(2)(h) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán and Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles.

3. Obligation to adopt domestic legal provisions

292. The Court notes that the dispute over the legislative framework of the appeal for annulment is circumscribed to the grounds for this remedy established in the Criminal Procedural Code. Chile affirmed that, under Article 374.e) of this code, the factual aspects may be examined by reviewing the assessment of the evidence made by the lower court, without it entailing the possibility of the appellate court re-establishing the facts. Additionally, in its final arguments brief, the State also affirmed that the purpose of the grounds established in Article 373.b) is to ensure the correct application of

the law and to permit "the review of factual aspects; for example, when the Court examines the facts that have already been proved and gives them a different legal classification." For their part, the representatives understood that the grounds established in Article 374.e) of this code do not permit the review of "facts or factual presumptions of judgments," and are limited to "legal aspects." The Commission did not offer specific arguments on the compatibility of the grounds for the appeal for annulment with the right to appeal the judgment.

293. Regarding the State's argument concerning article 373.b) of the Criminal Procedural Code, the Court observes that, under the said grounds for nullity, it is possible to contest the judgment based on "erroneous application of the law." From an analysis of the text of this provision, the Court is unable to conclude that it meets the requirement of an effective remedy. This is because the way it is worded does not impose on the judge or court the obligation to make an analysis allowing them to rule rule on the appellants' arguments regarding the assessment of the acts that those convicted were accused of and which constitute the basic presumption for their criminal punishment by the State. These grounds for nullity could have indirect implications in terms of the factual bases of the case, but because of the jurisdictional interdependence that exists between the determination of the facts and the application of the law, and in light of the way the subparagraph is drafted, it does not assure with any legal certaintly the possibility of filing complaints about factual issues to those convicted.

294. In relation to whether the grounds for nullity established in paragraph (e) of article 374 of the Criminal Procedural Code are consistent with the criterion of an effective remedy to which anyone who has been convicted has a right under Article 8(2)(h) of the Convention, the Court notes that the expert opinions in the case file on the scope of these grounds reach contradictory conclusions. It can be observed that these grounds make it possible to contest the verdict when the judgment does not observe the requirements that Article 342 of the code imposes on the judge. These include the obligation to include a "clear, cogent and complete description of each of the facts and circumstances that the Court found proved, whether favorable or unfavorable to the accused, and [that] of the assessment of the evidence that would substantiate these conclusions in accordance with article 297". Meanwhile, Article 297 of the Criminal Procedural Code establishes as criteria for assessing the evidence, "the principles of logic, the lessons of experience, and scientifically established knowledge"; stipulates the obligation to "refer in its reasoning to all the evidence produced, even the evidence that it may have rejected, in that case indicating why it was rejected;" and imposes the need to "indicate the evidence used to substantiate

each of the facts and circumstances that were found proved" and that "[t]his substantiation shall allow the reasoning used to reach the conclusions arrived at in the judgment to be reproduced".

295. The Court notes that the text of Article 374.e) of the Criminal Procedural Code establishes grounds for absolute nullity based on the obligations to assess the evidence and to justify this assessment established in the same procedural code. In addition, this Court is aware that, under Article 381 of the Criminal Procedural Code, it is necessary to forward to the appellate court not only the judgment that is appealed and the brief filing the appeal, but also the measures that are contested or the recording of the hearing of the oral trial which, according to expert witness Fuentes Maureira, correspond to the audio recordings of the public hearing. Thus, under Article 374.e of this code the appellant is allowed to file arguments that not only refer to the rigor of the reasoning of the guilty verdict and its determination based on the evidence, but also allow him or her to offer in support of these arguments the actions and evidence submitted during the oral trial that, according to the appellant, were unduly assessed and the conclusions unduly substantiated in the guilty verdict.

296. With regard to the position held by the parties in relation to the interpretation that the domestic courts have accorded to the grounds for absolute nullity of Article 374.e) of the Criminal Procedural Code, the extracts from judgments cited by the State[98] show that, in those cases, the appellate court made an analysis that went beyond matters that were strictly juridical and that, to the contrary, involved an examination that compared the body of evidence in the case to the assessment made and the legal consequences derived from it by the lower court. The Court notes that these are recent judgments from 2009, 2012 and 2013. The Court notes that the representatives called attention to the existence of other domestic rulings in which the scope of the abovementioned grounds for annulment is restrictive on this point and affirmed that it was impossible to analyze matters relating to the establishment of the facts in the oral trial. These decisions date from 2010, 2011 and 2012. In these judgments, an interpretation was made that reduced the scope of the review to questions that were, above all, related to the appropriate application of the rules of evidentiary law.

98. Both the State and the representatives cited extracts from domestic judgments deciding appeals for annulment in support of their respective positions. The appeals related to the scope of the said grounds in relation to the possibility of examining matters of a factual nature in the context of trials on criminal acts. The Court will take this information on domestic decisions into account, inasmuch as the parties did not contest the veracity of its content, but recalls that the complete text of these decisions was not provided, but rather citations from parts of them; thus they will be assessed with all the evidence before the Court.

297. The Court considers that the elements provided are not sufficient to conclude that the grounds under article 374.e) of the Criminal Procedural Code do not comply with the standard of an effective remedy guaranteed in Article 8(2)(h) of the Convention as regards the possibility of contesting factual matters by means of arguments relating to the lower court's assessment of the evidence. Taking into account that the factual, evidentiary and legal dimensions of the criminal judgment are interrelated, the Court considers that, since it is not a conclusion that can be derived from the text of the said grounds, it has not been proved thatit is not possible to contest matters relating to the factual framework of the judgment by examining the assessment of the evidence in it. Therefore, the Court concludes that in the instant case the State did not violate their obligation under Article 2 of the American Convention to adopt domestic legal provisions in relation to the right to appeal a judgment to a higher court established by Article 8(2)(h) of the American Convention.

298. Nevertheless, the Court insists that the interpretation that the domestic courts make of the said grounds must ensure that the content and criteria developed by this Court regarding the right to appeal the judgment are guaranteed. The Court reiterates that the grounds for the admissibility of the appeal ensured by Article 8(2)(h)) of the Convention must make it possible to contest matters that have an impact on the factual aspect of the guilty verdict, because the appeal should allow an extensive control of the contested aspects, and this calls for the possibility of analyzing the factual, evidentiary and legal issues on which the guilty verdict is based.

VII.3. RIGHTS TO PERSONAL LIBERTY AND TO THE PRESUMPTION OF INNOCENCE (ARTICLES 7(1), 7(3), 7(5) AND 8(2) OF THE AMERICAN CONVENTION)

[…]

C. Considerations of the Court

[...]

1. General considerations on personal liberty, pre-trial detention, and presumption of innocence

a. Pre-trial detention in the American Convention

[...]

308. Thus, paragraph 1 of Article 7 establishes the right to personal liberty and security in general, and the other paragraphs establish specific

aspects of this right. The violation of any one of those paragraphs entails the violation of Article 7(1) of the Convention, "because the failure to respect the guarantees of the individual deprived of liberty results in the failure to protect this person's right to liberty."[99]

309. The general principle in this regard is that liberty is always the rule and its limitation or restriction always the exception.[100] This is the effect of Article 7(2), which stipulates that: "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto." But mere compliance with the legal formalities is not sufficient, because Article 7(3) of the American Convention, by establishing that "[n]o one shall be subject to arbitrary arrest or imprisonment," prohibits arrest or imprisonment by means that may be legal, but that in practice are unreasonable, unpredictable, or disproportionate.[101]

310. The application of this general principle to cases of preventive detention or custody arises from the combined effect of Articles 7(5) and 8(2). Based on these articles, the Court has established that the general rule must be that the accused should remain at liberty while his criminal responsibility is being decided,[102] because he enjoys a legal status of innocence and this requires that the State accord him a treatment in keeping with his situation of someone who has not been convicted. In exceptional cases, the State may resort to a measure of preventive incarceration in order to avoid situations that jeopardize achieving the objectives of the proceedings.[103] For a measure of deprivation of liberty to be in accordance with the guarantees established in the Convention, its application must be exceptional and respect the principle of the presumption of innocence, as well as the principles of legality, necessity and proportionality that are essential in a democratic society.[104]

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99. *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 54, and *Case of Barreto Leiva v. Venezuela*, para. 116.

100. *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 53; *Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114, para. 106, and *Case of Barreto Leiva v. Venezuela*, para. 121.

101. *Cf. Case of Gangaram Panday v. Suriname. Merits, reparations and costs.* Judgment of January 21, 1994. Series C No. 16, para. 47, and *Case of J. v. Peru*, para. 127.

102. *Cf. Case of López Álvarez v. Honduras. Merits, reparations and costs.* Judgment of February 1, 2006. Series C No. 141, para. 67, and *Case of J. v. Peru*, para. 157.

103. *Cf. Case of Suárez Rosero v. Ecuador. Merits*, para. 77; *Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of November 20, 2009. Series C No. 207, para. 144, and *Case of J. v. Peru*, para. 157.

104. *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay. Preliminary objections, merits, reparations and costs*. Judgment of September 2, 2004. Series C No. 112, para. 228, and *Case of J. v. Peru*, para. 158.

311. The Court has also indicated the characteristics that a measure of preventive detention or custody should have in order to adhere to the provisions of the American Convention:

a) *It is a precautionary rather than a punitive measure*: it must be aimed at achieving legitimate purposes that are reasonably related to the criminal proceedings underway. It cannot become a premature punishment or be based on general or special preventive objectives that could be attributed to the punishment.[105]

b) *It must be based on sufficient evidence*: To order and maintain measures such as pre-trial detention, there must be sufficient evidence that supports a reasonable suspicion that the individual subjected to trial has taken part in the unlawful act under investigation.[106] The verification of this important presumption is a necessary first step, because if there is not the slightest evidence linking the individual to the wrongful act investigated, there will be no need to safeguard the objectives of the proceedings. In the Court's opinion, the suspicion must be founded on specific facts and not on mere conjectures or abstract intuitions.[107] Thus, it is evident that the State must not arrest someone in order to then investigate him; it is only authorized to deprive a person of his liberty when it has sufficient information to be able to bring him or her to trial.[108]

c) *It is subject to periodic review*: The Court has underscored that preventive detention should not be continued when the reasons for its adoption no longer exist. The Court has also observed that the domestic authorities are responsible for assessing the pertinence of maintaining any precautionary measures they issue. In this regard, the domestic authorities must provide sufficient reasons to justify why the restriction of liberty has been maintained,[109] and these must be based on the need to ensure that the detainee will not impede the efficient implementation of the investigations or evade the course of justice; to the contrary, it becomes an arbitrary deprivation of liberty according to Article 7(3) of the American Convention.[110] The Court also emphasizes that the judge does not have to wait until an acquittal is delivered for a person who has been detained to recover his freedom, but must periodically assess whether the grounds

105. *Cf. Case of Suárez Rosero v. Ecuador. Merits*, para. 77; *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 103; *Case of Barreto Leiva v. Venezuela*, para. 111, and *Case of J. v. Peru*, para. 159.

106. *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, paras. 101 and 102; *Case of Barreto Leiva v. Venezuela*, paras. 111 and 115, and *Case of J. v. Peru*, para. 159.

107. *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 103.

108. *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 103.

109. *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 107; and *Case of J. v. Peru*, para. 163.

110. *Cf. Case of Bayarri v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of October 30, 2008. Series C No. 187, para. 74, and *Case of J. v. Peru*, para. 163.

for the measure remain, as well as its necessity and proportionality and if the duration of the detention has exceeded the legal and reasonable limits. Whenever it appears that the pre-trial detention does not meet these conditions, the release of the detainee should be ordered, without prejudice to the continuation of the respective proceedings.[111]

312. Pursuant to the above, it is not sufficient that the pre-trial detention is legal; it is essential that it is also not arbitrary, which means that the law and its application must respect the following requirements:

a) *The purpose must be compatible with the Convention*: the purpose of measures that deprive or restrict liberty must be compatible with the Convention. The Court has indicated that "the deprivation of liberty of the accused cannot be based on general or special preventive objectives that can be attributed to the punishment, but can only be based [...] on a legitimate objective, namely: to ensure that the accused will not obstruct the implementation of the proceedings or evade the action of justice."[112] Thus, the Court has indicated repeatedly that the personal characteristics of the supposed perpetrator and the seriousness of the offense he is accused of are not, in themselves, sufficient justification for pre-trial detention.[113] It has also stressed that risks to the proceedings cannot be presumed, but must be verified in each case, based on the objective and precise circumstances of the specific case.[114]

b) *Suitability*: the measures adopted must be suitable to achieve the objective sought.[115]

c) *Necessity*: they must be necessary; in other words, they must be absolutely essential to achieve the objective sought and there must be no alternative, less onerous measure among all those that are equally suitable to achieve this objective.[116] Therefore, even when there is sufficient evidence that allows it to be supposed that the accused has taken part in the illegal act has been determined, the deprivation of liberty must be strictly necessary to ensure that the accused will not obstruct the procedural objectives.[117]

111. *Cf. Case of Bayarri v. Argentina*, para. 76.
112. *Cf. Case of Suárez Rosero v. Ecuador. Merits*, para. 77, and *Case of J. v. Peru*, para. 157.
113 *Cf. Case of López Álvarez v. Honduras. Merits, reparations and costs.* Judgment of February 1, 2006. Series C No. 141, para. 69, and *Case of J. v. Peru*, para. 159.
114. *Cf.* Case of *Barreto Leiva v. Venezuela*, para. 115, and *Case of J. v. Peru*, para.159.
115. *Cf. Case of Chaparro Álvarez and Lapo Íniguez. v. Ecuador*, para. 93.
116. *Cf. Case of Chaparro Álvarez and Lapo Íniguez. v. Ecuador*, para. 93.
117. *Case of Chaparro Álvarez and Lapo Íniguez. v. Ecuador*, para. 103, and *Case of Barreto Leiva v. Venezuela*, para. 111.

d) *Proportionality*: they must be strictly proportionate, so that the restriction of liberty is not disproportionate to the advantages obtained by its restriction and the achievement of the objective sought.[118]

e) Any restriction of liberty that does not contain sufficient justification that allows an assessment of whether it is in keeping with the above conditions will be arbitrary and, therefore, violate Article 7(3) of the Convention.[119] Thus, in order to respect the presumption of innocence when ordering precautionary measures that restrict liberty, in each specific case the State must justify and prove, precisely and in detail, the existence of the requirements established by the Convention.[120]

2. Examination of the alleged violations

a. Pre-trial detention de Víctor Ancalaf Llaupe[121]

[...]

a.ii. Considerations of the Court

318. Having examined the indictment of Víctor Ancalaf Llaupe issued on October 17, 2002, based on which he was deprived of liberty, the Court notes that this decision did not comply with the first element required to restrict the right to personal liberty by means of a precautionary measure, which is that it should indicate the existence of sufficient evidence about participation in the illegal act investigated. The list of evidence gathered and the statement that the background information and "the preliminary statements of Víctor Manuel Ancalaf Llaupe" constitute "well-founded presumptions to consider that he had participated as a perpetrator of the three offenses" investigated, does not allow it to be verified that this requirement had been met. It should be recalled that Mr. Ancalaf Llaupe was unable to examine the case file until June 2003, months after the conclusion of the preliminary proceedings, which had been kept confidential under article 78 of the Code of Criminal Procedure. It was only at the stage of the

118. *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 93.

119. *Cf. Case of García Asto and Ramírez Rojas v. Peru*, para. 128, and *Case of J. v. Peru*, para. 158.

120. *Cf. Case of Palamara Iribarne v. Chile*, para. 198, and *Case of J. v. Peru*, para. 159.

121. The evidence relating to the facts established in this chapter regarding the pre-trial detention of Mr. Ancalaf Llaupe is in the file of the domestic criminal proceedings against Víctor Manuel Ancalaf Llaupe, a copy of which was provided to the Court in these proceedings (file of annexes to the CEJIL motions and arguments brief, annex A, folios 990 to 1018, and 1444 to 1520), and with the helpful evidence presented by the State with briefs of October 17 and 23, 2013, with which it provided a copy of the file of the criminal proceedings held against Mr. Ancalaf Llaupe. This evidence was also provided during the processing of the case before the Commission (file of annexes to the Merits Report, annex 6 and appendix 1).

plenary proceedings that he could have access to the case file; however, he remained without access to the confidential files.

319. The European Court of Human Rights, when ruling on a detention in a case related to the investigation of a terrorist offense, stated that a situation is possible in which a suspect may be arrested "on the basis of information which is reliable but which cannot be disclosed to the suspect or produced in court without jeopardizing the informant." The European Court decided that even though, owing to the difficulties inherent in the investigation and processing of terrorist crimes, the "reasonableness" cannot always be evaluated using the same standards as in ordinary crime, "the exigencies of dealing with a terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the safeguard secured by Article 5 § 1 (c) [of the European Convention] is impaired."[122]

320. In the instant case, there is no evidence that the secrecy of everything relating to the preliminary proceedings (or the "confidential files" even after this) responded to a measure that was necessary in order to protect information that could affect the investigation. Consequently, the accused's defense was not given the opportunity to examine any of the documents and evidence on which his deprivation of liberty was based. In addition, the investigating judge's assertion in the indictment that there were "well-founded presumptions to consider that [Mr. Ancalaf] participated as perpetrator of the three offenses" investigated, was not accompanied by specific information that the accused and his defense could contest.[123]

122. ECHR, *Case of O'Hara v. the United Kingdom*, No. 37555/97. Judgment of 16 October 2001, paras. 33 to 35.

123. ECHR, *Case of A. and others v. The United Kingdom,* No. 3455/05. Judgment of 19 February 2009, para. 220. The European Court has indicated that: "[t]he Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. While this question must be decided on a case-by-case basis, the Court observes generally that, where the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the Secretary of State's belief and suspicions about him. In other cases, even where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations." "Where, however, the open material consisted purely of general assertions and [the competent organ's] decision to […] maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied." In this case, the European Court considered that some detainees were not in a position effectively to challenge the allegations against them and, therefore, found that there had been a violation of Article 5.4 of the European Convention.

Consequently, the Court decides that the State did not comply with the requirement of establishing the existence of sufficient evidence that would allow a reasonable presumption of the identity of those who had taken part in the offense investigated.

321. Furthermore, the pre-trial detention of Víctor Ancalaf Llaupe was not ordered to achieve a legitimate objective, because the indictment did not refer to the need for deprivation of liberty or to the purpose sought by this in the specific case. The objective sought with the pre-trial detention became clear when all the requests for pre-trial release made by Mr. Ancalaf Llaupe, and the corresponding appeals, were denied. The only justification for why the requests were denied was "because he was considered a danger to the security of society," "[t]aking into account the number of offenses the accused is charged with and their nature." The appeals were rejected outright and without any justification.

322. The Court considers that the objective of denying the release of the accused because he would be a danger "to the security of society" has an open-ended meaning that can permit objectives that are not in keeping with the Convention. In this regard, expert witness Duce, proposed by CEJIL, explained that these grounds are open to different interpretations that may include not only legitimate procedural objectives, but also objectives that the Court, in its case law, has considered illegitimate for ordering and maintaining pre-trial detention.[124]

323. This makes it essential to verify whether, in this specific case, the reference to the liberty of the accused being a danger "to the security of society" was supported by any factor or reason that could be considered to seek a preventive objective and that justified the need for the measure in the specific case. Thus, in this case, when referring to the danger, reference was made to only two of the criteria that Article 363 of the Code of Criminal Procedure established must be taken into account "in particular": "the severity of the punishment assigned to the offense" and "the number of offenses that the accused is charged with and their nature." The Court reiterates that the use of these criteria alone are insufficient to justify pre-trial detention.

324. In addition, the failure to provide reasoning for the judicial decisions, aggravated by the confidentiality of the preliminary proceedings, prevented the defense from knowing why the pre-trial detention had been maintained and precluded the defense from presenting evidence and arguments to challenge decisive incriminating evidence or to achieve his

124. *Cf.* Affidavit prepared on May 15, 2013, by expert witness Mauricio Alfredo Duce Julio (file of statements of presumed victims, witnesses and expert witnesses, folios 70 and 71).

pre-trial release.[125] In this regard, expert witness Fierro Morales indicated that "[i]t is in this context, and in absolute secret, that the investigating judge decided that, with regard to Mr. Ancalaf, there were well-founded presumptions that implicated him as perpetrator in the acts investigated as terrorist offenses."[126]

325. Furthermore, in neither the indictment nor the denials of the requests for pre-trial release was it positively assessed that Víctor Ancalaf Llaupe had come forward voluntarily when he was summoned to testify and that, when his defense filed the second request, the investigation against him had concluded.

326. Since his criminal responsibility had not been established legally, Mr. Ancalaf Llaupe had the right to be presumed innocent under Article 8(2) of the American Convention. On this basis, the State had the obligation not to restrict his liberty more than absolutely necessary, because preventive detention is a precautionary rather than a punitive measure. Consequently, the State restricted the liberty of Mr. Ancalaf without respecting his right to presumption of innocence and violated his right not to be subject to arbitrary arrest established in Article 7(3) of the Convention.

327. Based on the above, it must be concluded that the State violated the rights to personal liberty, to not to be subject to arbitrary arrest, and not to suffer preventive detention in conditions that were not adapted to international standards, recognized in Articles 7(1), 7(3) and 7(5) of the American Convention, and the right to presumption of innocence, established in Article 8(2) of the American Convention, all in relation to Article 1(1) of the American Convention, to the detriment of Víctor Manuel Ancalaf Llaupe.

b. Pre-trial detention of Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, José Benicio Huenchunao Mariñán and Patricia Roxana Troncoso Robles127

[...]

125. *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 118.

126. Affidavit prepared on May 17, 2013, by expert witness Claudio Alejandro Fierro (file of statements of presumed victims, witnesses and expert witnesses, folio 8).

127. The evidence relating to the facts established in this chapter on the pre-trial detention of Jaime Marileo Saravia, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, José Benicio Huenchunao Mariñán and Patricia Roxana Troncoso Robles can be found in the file of the domestic criminal proceedings, a copy of which was provided during the processing of the case before the Commission (file of annexes to the Merits Report, appendix 1, folios 7804 to 10016).

b.ii. Considerations of the Court

333. The Court considers that the decisions to adopt and maintain the pre-trial detention were not in accordance with the requirements of the American Convention that they be based on sufficient probative elements – with the exception of the decision regarding Juan Patricio Marileo Saravia, which did comply with this requirement – and seek a legitimate objective, as well as the obligation to conduct periodic reviews.

a. Insufficient probative elements

334. The judicial decision that initially ordered the pre-trial detention of Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Troncoso Robles did not comply with the requirement that it be based on sufficient probative elements to reasonably suspect that said individuals had taken part in the criminal act investigated, because it was based merely on "confidential testimony," without including elements that could corroborate this conclusion. This testimony relates to statements whose contents could not be examined by the defense, because at the stage of the investigation at which the pre-trial detention was requested and ordered, the secrecy of the investigation proceedings had been decreed for 40 days pursuant to article 182 of the Criminal Procedural Code. Moreover, when the judge evaluated the request for pre-trial detention filed by the Public Prosecution Service during the hearing, the defense pointed out that information was being used "which he ha[d] been unable to access."

335. This reference to "confidential testimony" was not accompanied by additional arguments or explanations that, without revealing information that had to be temporarily kept confidential with regard to a probative element, would have provided more information allowing the justification for the judicial decision to be known and enabling the accused and their defense to contest the adoption of the precautionary measure of pre-trial detention. Consequently, the defense of the accused had no knowledge of the evidence and no information concerning the elements that this supposedly gave the judge for basing her considerations regarding possible participation in the criminal act.

336. Regarding Juan Patricio Marileo Saravia, the judicial decision to adopt the measure of pre-trial detention provided sufficient evidence to conclude that it complied with the first requirement indicating the evidence that resulted in a reasonable presumption that the person had taken part in the wrongful act investigated.

b. Lack of a legitimate purpose

337. With regard to the requirement that the need for preventive detention must be justified by a legitimate purpose, the follwoing decisions ordering pre-trial detention were not in keeping with the American Convention:

a) The decision with regard to Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Troncoso Robles did not refer to whether the precautionary measure sought some procedural objective and was necessary in relation to the investigation, but merely ordered it on the basis that the accused were subject to this type of measure in relation to other proceedings. This reasoning does not substantiate the need for the measure in relation to the investigation and prosecution in the specific case.

b) The grounds for the decision with regard to Juan Patricio Marileo was that his release would represent a "danger to the security of society," an open-ended reason that, as already indicated, makes it essential to verify whether, in the specific case, the reference to these grounds was accompanied by a factor or criterion that could be considered to seek a precautionary objective and that would justify the measure, in the specific case. In this regard, the order for preventive detention merely indicated that it was considered necessary "during [the actual] procedural stage" of the case "based on the manner and circumstances of the perpetration of the wrongful act investigated, the importance of the harm caused by this, and the punishment it entailed." With regard to the criterion or factors relating to "the manner [and] circumstances of the perpetration of the wrongful act investigated," the Court notes that this factor was not accompanied by an explanation about how it might entail a procedural risk. The judge did not justify whether it would have any effects on the obstruction of specific measures that were pending at that stage of the proceedings. Regarding the reference to criteria such as the punishment and the "harm caused by the offense," the Court reiterates that the seriousness of the offense is not, in itself, sufficient justification for pre-trial detention. Consequently, the Court finds that the domestic court did not justify the need to order preventive detention based on a procedural risk in the specific case.

338. The decisions that denied the request for review did not cite any legitimate purpose to maintain the pre-trial detention, so that the situation indicated in the preceding paragraphs remained unchanged.

339. Consequently, the Court finds that the judges failed to justify the decision to impose or maintain the pre-trial detention based on a legitimate purpose such as the existence of a procedural risk in the specific case.

c. Inadequate periodic review

340. The judicial decisions denying the requests for review did not comply adequately with the function of analyzing whether it was necessary to maintain the detention measures. The statements that "there is no new information to review" and that "there is no information that would allow it to be presumed that the circumstances that made pre-trial detention advisable have changed," reveal an erroneous notion based on thinking that it would be necessary to prove that the initial circumstances had changed, instead of understanding that it is the judge's task to analyze whether circumstances exist that mean that the preventive detention should be maintained and is a proportionate measure to achieve the procedural objective sought. The judicial decisions ignored the need to justify and to provide the reasons for maintaining the precautionary measures imposed, and failed to mention any procedural objective that would have required maintaining it. Moreover, in one case, the decision to maintain preventive detention was adopted without any justification.

341. With regard to the judicial decision of June 23, 2003, maintaining the pre-trial detention of Jaime Marileo Saravia, Juan Ciriaco Millacheo Licán, Juan Patricio Marileo and Patricia Troncoso Robles, it did not contain an explanation of the information to which it refers that "does not change the circumstances that made the pre-trial detention advisable," and disregarded the fact that the review of the preventive detention entailed justifying and providing the reasons for the need to maintain it. This was particularly serious in the instant case, because the initial adoption of the precautionary measure did not comply with any of the treaty-based requirements. Furthermore, when maintaining the measure, the court did not explain which procedural objectives it was referring to and why there was no other precautionary measure that "permitted ensuring the objectives of the proceedings." In this regard, Article 155 of the Criminal Procedural Code, to which the defense referred, established another seven personal precautionary measures that could be imposed either separately or together, among other matters, "to ensure the success of the investigation" and "to ensure the appearance of the accused at the different stages of the proceedings or for the execution of judgment," which, it would seem, were not considered by the judicial authority.

d. Presumption of innocence

342. In view of the fact that their criminal responsibility had not yet been established legally, the presumed victims had the right to be presumed innocent, pursuant to Article 8(2) of the American Convention. This

gave rise to the State's obligation not to restrict their freedom more than absolutely necessary, because preventive detention is a precautionary rather than a punitive measure. Consequently, the State restricted the freedom of Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán, Florencio Jaime Marileo Saravia, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles without respecting their right to the presumption of innocence and violated their right not to be subject to arbitrary imprisonment established in Article 7(3) of the Convention.

343. Based on the above, it must be concluded that the State violated the rights to personal liberty, not to be subject to arbitrary arrest, and not to suffer pre-trial detention in conditions that were not adapted to international standards, established in Articles 7(1), 7(3) and 7(5) of the American Convention, and the right to the presumption of innocence, established in Article 8(2) of the American Convention, all in relation to Article 1(1) of the American Convention, to the detriment of Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán, Florencio Jaime Marileo Saravia, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles.

c. Preventive detention of Aniceto Norín Catrimán and Pascual Pichún Paillalao[128]

344. The preventive detention of Messrs. Norín Catrimán and Pichún Paillalao was also governed by the provisions of Articles 139 to 154 of the Criminal Procedural Code of 2000. They were both investigated and tried in relation to two offenses of terrorist arson and for the offense of threats of terrorist arson. They were sentenced and convicted as perpetrators of the offense of threats and acquitted of the offenses of terrorist arson.

[…]

c.ii. Considerations of the Court

349. The Court considers that the decisions to adopt and to maintain preventive detention were not in keeping with the requirements of the American Convention that it should be based on sufficient evidence and seek a legitimate objective, and that it must be reviewed periodically.

a. Insufficient probative elements

350. The decision to impose pre-trial detention on Aniceto Norín Catrimán was based on testimony that was "confidential" because it had

128. The evidence relating to the facts established in this chapter on the pre-trial detention of Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao are to be found in the file of the domestic criminal proceedings, a copy of which was provided during the processing of the case before the Commission (file of annexes to the Merits Report, appendix 1, folios 4319 to 5159).

been decided that some of the investigation procedures would be closed. Moreover, additional arguments or explanation were not provided that, without revealing information regarding the evidence that needed to be kept confidential temporarily, would have provided more information that would have allowed the grounds for the judicial decision to be known and enabled the accused and his defense to contest the adoption of the precautionary measure of pre-trial detention. Therefore, it was not consistent with the requirements of the American Convention.

351. The judicial decision ordering the pre-trial detention of Pascual Pichún Paillalao was based on the existence of elements and "presumptions" concerning the perpetration of the criminal act and the accused's participation in it. Even though the written judicial decision does not provide details of the evidence on which this conclusion was based, during the hearing reference was made to elements that, at that stage, could be considered to implicate Mr. Pascual Pichún in the incident investigated. The defense did not contest this aspect in the appeal. Consequently, the Court does not find that the State failed to comply with this first requirement of the measure being based on the existence of sufficient elements implicating the accused in the wrongful act under investigation.

b. Lack of a legitimate objective

352. It has been proved that the grounds for the decision to impose and maintain the preventivel detention of Messrs. Norín Catrimán and Pichún Paillalao was that their release would constitute a "grave danger for society," or "considering [their release] dangerous for the security of society". To this end, criteria such as the "number of offenses investigated," the "severity of the punishment," the "seriousness of the offense investigated" and the "personal history of the accused," were taken into account that, in themselves, do not justify preventive detention, and that were not assessed when evaluating the need for the measure in the circumstances of the specific case. Even though the decision ordering the pre-trial detention of Mr. Pascual Pichún indicated that it was "essential for the success of the investigation," this assertion was not justified in a way that allowed it to be known if it was considered that the release of the accused would in some way affect the implementation of specific measures.

c. Inadequate periodic review

353. None of the judicial decisions adopted in relation to the requests to review the maintaining of of Messrs. Norín Catrimán and Pichún Paillalao's preventive detention analyzed the need to provide the reasons that justified the maintenance of the precautionary measure. Nor was any reference made

to any legitimate procedural objective that made it necessary to maintain them. None of the judicial decisions assessed factors or criteria that could be related to a legitimate objective that would have justified the need for the measure in the specific case.

d. Presumption of innocence

354. Since their criminal responsibility had not yet been established, the victims had the right to be presumed innocent under Article 8(2) of the American Convention. This gave rise to the State's obligation not to restrict their freedom more than absolutely necessary, because pre-trial detention is a precautionary rather than a punitive measure.[129] Consequently, the State restricted the liberty of the presumed victims without respecting the right to the presumption of innocence, and violated their right not to be subject to arbitrary imprisonment established in Article 7(3) of the Convention.

[…]

VII.4. FREEDOM OF THOUGHT AND EXPRESSION, POLITICAL RIGHTS, AND RIGHTS TO PERSONAL INTEGRITY AND TO THE PROTECTION OF THE FAMILY (ARTICLES 13, 23, 5(1) AND 17 OF THE AMERICAN CONVENTION)

365. The alleged violations examined in this chapter are a result of the preventive detention and the main and ancillary punishments imposed on the presumed victims. The Court must determine whether these consequences constituted autonomous violations of the American Convention.

[...]

B. Considerations of the Court

1. Right to freedom of thought and expression

[…]

371. In its case law, the Court has referred to the broad content of the right to freedom of thought and expression established in Article 13 of the Convention. This norm protects the right to seek, receive and impart information and ideas of all kinds.[130] The Court has indicated that freedom of expression has an individual dimension and a social dimension, based on which it has understood that a series of rights are protected by this

129. *Cf. Case of Suárez Rosero v. Ecuador. Merits*, para. 77, and *Case of J. v. Peru*, para. 371.

130. *Cf.* Advisory Opinion OC-5/85 of November 13, 1985, para. 30; *Case of Kimel v. Argentina*, para. 53, and *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 22, 2013. Series C No. 265, para. 119.

article.[131] The two dimensions are equally important and must be fully ensured simultaneously in order to make the right to freedom of expression completely effective in the terms of Article 13 of the Convention.[132] Thus, in light of both dimensions, freedom of expression requires, on the one hand, that no one be arbitrarily prevented from expressing his own opinions and therefore represents a right of each individual, but, on the other hand, it also entails a collective right to receive any type of information and the expression of the opinions of others.[133]

372. The individual dimension of freedom of expression includes the right to use any appropriate means to disseminate opinions, ideas and information so that it reaches the greatest number of persons. Thus, expression and dissemination are indivisible, so that a restriction of the possibilities of dissemination represents directly, and to the same extent, a limit to the right to express oneself freely.[134]

373. In the instant case, the ancillary penalties established in Article 9 of the Chilean Constitution were imposed on Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao and Víctor Manuel Ancalaf Llaupe. Thus, among other matters, "for 15 years, they were disqualified from [...] exploiting a social communication medium or from being a director or administrator of one, or from performing functions related to the emission and diffusion of opinions and information."

374. The Court considers that this ancillary penalty entailed an undue restriction of the exercise of the right to freedom of thought and expression of Messrs. Norín Catrimán, Pichún Paillalao and Ancalaf Llaupe, not only because it was imposed based on judgments that applied a criminal law that violated the principle of legality and several procedural guarantees, but also because, in the circumstances of this case, it is contrary to the principle of the proportionality of the punishment. As the Court has determined, this principles signifies "that the State's response to a wrongful act of the perpetrator of an offense must be proportionate to the right affected and to the responsibility of the perpetrator, so that it should be established based on the different nature and seriousness of the acts."[135]

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131. *Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, reparations and costs.* Judgment of February 5, 2001. Series C No. 73, para. 65, and *Case of Mémoli v. Argentina*, para. 119.

132. *Cf. Case of Ivcher Bronstein v. Peru. Merits, reparations and costs.* Judgment of February 6, 2001. Series C No. 74, para. 149, and *Case of Mémoli v. Argentina*, para. 119.

133. *Cf. Case of Ivcher Bronstein v. Peru. Merits, reparations and costs*, para. 146, and *Case of Mémoli v. Argentina*, para. 119.

134. *Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*, para. 65, and *Case of Vélez Restrepo and family members v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of September 3, 2012. Series C No. 248, para. 138.

135. *Cf. Case of Vargas Areco v. Paraguay. Merits, reparations and costs.* Judgment of September 26, 2006. Series C No. 155, para. 108, and *Case of the La Rochela Massacre v. Colombia. Merits, reparations and costs.* Judgment of May 11, 2007. Series C No. 163, para. 196.

375. The Court has verified that, as traditional authorities of the Mapuche indigenous people, Messrs. Norín Catrimán, Pichún Paillalao and Ancalaf Llaupe played a decisive role in communicating the interests, and in the political, spiritual and social guidance, of their respective communities. The imposition of the abovementioned ancillary penalty has restricted their possibility of taking part in the diffusion of opinions, ideas and information by performing functions in social media, and this could limit the sphere of action of their right to freedom of thought and expression in the exercise of their functions as leaders or representatives of their communities. This, in turn, has a negative impact on the social dimension of the right to freedom of thought and expression, which, as the Court has established in its case law, involves the right of everyone to receive the opinions, reports, and news of third parties.[136]

376. In addition, it could have produced an intimidating and inhibiting effect on the exercise of freedom of expression, derived from the specific effects of the undue application of the Counter-terrorism Act to members of the Mapuche indigenous people. In other cases, the Court has previously referred to the intimidating effect on the exercise of freedom of expression that may result from the fear of being subject to a civil or criminal sanction that is unnecessary or disproportionate in a democratic society, and that may lead to the self-censorship of the person on whom the punishment is imposed, and on other members of society.[137] In the instant case, the Court considers that the way in which the Counterterrorism Act was applied to members of the Mapuche indigenous people could have instilled a reasonable fear in other members of this people involved in actions related to the social protest and the claim for their territorial rights, or who would eventually want to participate in this.

377. Nevertheless, the Court is not persuaded by the argument of CEJIL that the restriction of freedom of expression stipulated in article 9 of the Chilean Constitution constitutes prior censorship prohibited by Article 13 of the Convention. The argument appears not to have taken into account that this was an ancillary penalty established by law, which was imposed by a sentence in a criminal trial.

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136. *Cf. Case of Ivcher Bronstein v. Peru. Merits, reparations and costs*, para. 148, and *Case of Vélez Restrepo and family members v. Colombia*, para. 138.

137. *Mutatis mutandis, Case of Tristán Donoso v. Panama. Preliminary objection, merits, reparations and costs.* Judgment of January 27, 2009. Series C No. 193, para. 129, and *Case of Fontevecchia and D'Amico v. Argentina. Merits, reparations and costs.* Judgment of November 29, 2011. Series C No. 238, para. 74.

378. Based on the foregoing, the Court concludes that Chile violated the right to freedom of thought and expression protected in Article 13(1) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao and Víctor Manuel Ancalaf Llaupe.

2. Political rights

379. The Court reiterates thatthe presumed victims were sentenced in criminal proceedings that were held in conditions that violated the American Convention andit has verified that ancillary penalties were imposed that restricted their political rights. Based on the arguments presented, the Court will rule on the alleged violation of Article 23 of the Convention to the detriment of the presumed victims.

[…]

381. Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao and Víctor Manuel Ancalaf Llaupe were subject to ancillary penalties that restricted their political rights, as established in Articles 28 of the Criminal Code and Article 9 of the Constitution. The other five presumed victims, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, were only subject to the ancillary penalties, which also restricted their political rights, established in Article 28 of the Criminal Code.

382. Article 9 of the Chilean Constitution establishes, among other matters, that those responsible for terrorist offenses "shall be disqualified for 15 years from discharging public duties or holding public office, regardless of whether or not the appointment is by popular election; from being the rector or director of an educational establishment or performing teaching activities therein; from operating a social communications media outlet or being a director or manager thereof, or performing therein functions connected with the broadcast or dissemination of opinions or information; and from being the leader of a political organization, an organization associated with education, or a neighborhood, professional, business, labor, student, or trade association, during that time." It added that this "is understood [...] without prejudice to other disqualifications or those that last longer according to the law." In this regard, Article 28 of the Criminal Code establishes the penalties of "absolute and permanent disqualification from public office or functions and political rights, as well as absolute disqualification from titled professions for the duration of the sentence."

383. To the extent that the effective exercise of political rights constitutes an end in itself anda fundamental means that democratic societies have to

ensure the other human rights established in the Convention,[138] the Court considers that, in the circumstances of this case, the imposition of the said ancillary penalties, which affected the right to vote, direct participation in public affairs, and access to public office, of an absolute and perpetual nature or for a fixed but prolonged term (15 years), is contrary to the principle of the proportionality of the punishment.It constituted a very serious impairment of the political rights of Segundo Aniceto Norín Catrimán, Pascual Huetequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles.

384. The foregoing is particularly serious in the case of Messrs. Ancalaf Llaupe, Norín Catrimán and Pichún Paillalao, due to their status as traditional leaders of their communities. Thus, the imposition of said penalties also had an impact on the representation of the interests of their communities in relation to other communities, as well as in relation to the rest of Chilean society. Specifically, the Court highlights that,because of these penaltiesthey were prevented from taking part in or guiding public activities in State entities that seek to promote, coordinate and execute actions to develop and protect the indigenous communities they represented. Thisconstituted a concrete violation of the rights protected by Article 23 of the Convention. These conclusions, which the Court derives from the nature of the penalties imposed, are confirmed, inter alia, by the testimony of Mr. Ancalaf Llaupe,[139] Ms. Troncoso Robles[140] and Juan Pichún,[141] the son of Pascual Pichún Paillalao.

385. It should also be emphasized that, owing to their status as Mapuche leaders, Messrs. Norín Catrimán and Pichún Paillalao (Lonkos), and Mr. Ancalaf Llaupe (Werken), the restriction of their political rights also affected their communities. Owing to the nature of their functions and their social

138. *Cf. Case of Castañeda Gutman v. United Mexican States*, para. 143, and *Case of López Mendoza v. Venezuela*, para. 108.

139. Mr. Ancalaf Llaupe stated that he "was subject […] to a life-long prohibition to exercise public office [or] the civil right of presiding any department in a company or […] taking office in a municipality or any other State entity." *Cf.* Statement made by presumed victim Víctor Manuel Ancalaf Llaupe before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

140. Ms. Troncoso Robles indicated that, owing to the judgment convicting her, she was "forever disqualified from public office [and] from political rights." *Cf.* Written statement made on May 27, 2013, by presumed victim Patricia Roxana Troncoso Robles (file of statements of presumed victims, witnesses and expert witnesses, folio 657).

141. Juan Pichún stated that when his father had served his term of imprisonment, he could not exercise "the citizen's right to participate, [because] he was denied the right to vote, [and any] participation […] to be able to assume public office." *Cf.* Statement made por Juan Pichún before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

position, not only were their individual rights affected, but so were those of the members of the Mapuche indigenous people they represented.

386. Based on the above considerations, the Court concludes that the State violated the political rights protected by Article 23 of the American Convention, in relation to Article 1(1) of this instrument to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán and Víctor Manuel Ancalaf Llaupe and Patricia Roxana Troncoso Robles.

[…]

4. Right to the protection of the family

[…]

404. The Court has established that the State is obliged to encourage the development and strength of the family unit.[142] It has also asserted that this entails the right of everyone to receive protection from arbitrary or illegal interference in his or her family,[143] and also that States have positive obligations in favor of effective respect for family life.[144] The Court has also recognized that the mutual enjoyment of coexistence between parents and children is a fundamental element of family life.[145]

405. In the case of persons deprived of liberty, Rule 37 of the United Nations Standard Minimum Rules for the Treatment of Prisoners recognizes the importance of the contact of prisoners with the outside world when establishing that "[p]risoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits." Moreover, Rule 79 recognizes that "special attention shall be paid to the maintenance and improvement of [...] relations between a prisoner and his family."[146] Similarly, Principle

142. *Cf. Juridical Status and Human Rights of the Child,* para. 66, and *Case of the Pacheco Tineo Family v. Bolivia*, para. 226.

143. *Cf. Juridical Status and Human Rights of the Child,* para. 72, and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, para. 312.

144. *Cf. Case of the Las Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of November 24, 2009. Series C No. 211, para. 189, and *Case of Vélez Restrepo and family members v. Colombia*, para. 225. Also, ECHR, *Case of Olsson v. Sweden (No. 1)*, No. 10465/83. Judgment of 24 March 1988, para. 81.

145. *Cf. Juridical Status and Human Rights of the Child,* para. 47, and *Case of Vélez Restrepo and family members v. Colombia*, para. 225. Also, ECHR, *Case of Johansen v. Norway*, No. 17383/90. Judgment of 7 August 1996, para. 52, and ECHR, *Case of K. and T. v. Finland*, No. 25702/94. Judgment of 27 April 2000, para. 151.

146. *Cf. Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Available at: https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.

XVIII of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas recognizes the right of such persons "to maintain direct and personal contact through regular visits with members of their family, [...] especially their parents, sons and daughters, and their respective partners."[147]

406. The State occupies a special position of guarantor with regard to persons deprived of liberty, because the prison authorities exercise a strong or special control over those who are in their custody.[148] Thus, there is a special relationship and interaction of subjection between the individual deprived of liberty and the State, characterized by the particular intensity with which the State can regulate his rights and obligations and by the circumstances inherent in imprisonment, where the inmate is impeded from satisfying a series of basic needs that are essential for the development of a decent life for himself.[149]

407. The visits by family members to individuals deprived of liberty is an essential element of the right to the protection of the family, both of the person deprived of liberty and for the family members, not only because it represents an opportunity for contact with the outside world, but also because the support of the family members for those deprived of liberty while they serve their sentence is fundamental in many aspects, ranging from affective and emotional support to financial support. Therefore, based on the provisions of Articles 17(1) and 1(1) of the American Convention, States, as guarantors of the rights of individuals in their custody, have the obligation to adopt the most appropriate measures to facilitate and to implement contact between the individuals deprived of liberty and their families.

408. The Court emphasizes that one of the difficulties in keeping up relationships between those deprived of liberty and their family members may be their confinement in prisons that are very far from their homes, or difficult to access because the geographical conditions and communication routes make it very expensive and complicated for members of the family to make frequent visits. This could eventually result in a violation of both the right to protection of the family and other rights, such as the right to personal integrity, depending on the particularities of each case. Therefore, the State

147. *Cf.* Inter-American Commission on Human Rights, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* Resolution 1/08, approved during its 131st regular period of sessions, held from March 3 to 14, 2008. Available at: http://www.cidh.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm.

148. *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay*, para. 152, and *Case of Mendoza et al. v. Argentina*, para. 188.

149. *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay*, para. 152, and *Case of Mendoza et al. v. Argentina*, para. 188.

must, insofar as possible, facilitate the transfer of prisoners to prisons nearer to their family's place of residence. In the case of indigenous people deprived of liberty, the adoption of this measure is especially important given the significance of the ties that these individuals have with their place of origin or their community.

409. Consequently, it is clear that, by confining Mr. Ancalaf Llaupe in a prison that was very far from his family home and arbitrarily denying the repeated requests to transfer him to a prison that was nearer, to which the Prison Service had agreed, the State violated the right to protection of the family.

410. Based on the above, the Court concludes that the State violated the right to protection of the family established in Article 17(1) of the American Convention, in relation to the obligation to ensure rights established in Article 1(1) of this treaty, to the detriment of Víctor Manuel Ancalaf Llaupe.

VIII. REPARATIONS (APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION)

[...]

B. Measures of restitution, rehabilitation and satisfaction, and guarantees of non-repetition

1. Measure of restitution: nullify the criminal convictions imposed on the victims

[...]

421. As indicated in this Judgment, the sentences convicting the eight victims in this case – determining their criminal responsibility for terrorist offenses – were delivered based on a law that violated the principle of legality and the right to the presumption of innocence, and imposed ancillary penalties that entailed undue and disproportionate restrictions to the right to freedom of thought and expression and to the exercise of political rights. The Court also found that, in the substantiation of the judgments, reasoning was used that revealed stereotypes and prejudices, which constituted a violation of the principle of equality and non-discrimination and the right to equal protection of the law. Added to this, in the case of Messrs. Pichún Paillalao and Ancalaf Llaupe, there were violations of the right of defense protected in Article 8(2)(f) of the Convention and, with regard to seven of the victims in this case, the right to appeal these adverse criminal judgments was violated. This means that the sentences were arbitrary and incompatible with the American Convention.

422. Therefore, in view of the characteristics of this case, and as it has on previous occasions,[150] the Court establishes that the State must adopt, within six months of notification of this Judgment, all the administrative, judicial or any other type of measures necessary to nullify the effects of the criminal judgments convicting Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, José Benicio Huenchunao Mariñán and Patricia Roxana Troncoso Robles that the Court has referred to in this Judgment. This includes: (i) annulling the declaration that the eight victims in this case were perpetrators of terrorist offenses; (ii) annulling the prison sentences and ancillary penalties, consequences and records, as soon as possible, as well as any civil sentences imposed on the victims, and (iii) ordering the release of the victims who are still on parole. In addition, the State must, within six months of notification of this Judgment, eliminate the judicial, administrative, criminal and/or police records that exist against the eight victims in relation to said judgments, and also annul their registration in any type of national or international records linking them to terrorist acts.

2. Measures of rehabilitation: medical and psychological treatment

[...]

425. The Court finds, as it has in other cases,[151] that the State must provide immediately and free of charge, through its specialized health care institutions or personnel, the necessary and appropriate medical and psychological or psychiatric treatment to Segundo Aniceto Norín Catrimán, Víctor Manuel Ancalaf Llaupe, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, following their informed consent, including the provision of any medicines they may eventually require, also free of charge, based on the ailments of each of them in connection to this case; as well as, if appropriate, the transport and other expenses that are strictly necessary and directly related to the medical and psychological treatment.

426. If the State does not have the institutions or personnel who are able to provide the level of care required, it must resort to specialized private institutions or those of civil society. Furthermore, the respective treatment

150. *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs*. Judgment of December 3, 2001. Series C No. 88; *Case of Herrera Ulloa v. Costa Rica*; *Case of Palamara Iribarne v. Chile*; *Case of Kimel v. Argentina*; *Case of Tristán Donoso v. Panama*; *Case of Usón Ramírez v. Venezuela,* and *Case of López Mendoza v. Venezuela*.

151. *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs*, paras. 51.d) and e), operative paragraph 8, and *Case of J. v. Peru*, para. 397.

must be provided, insofar as possible, in the centers nearest to their places of residence[152] in Chile for as long as necessary. When providing this treatment, the particular circumstances and needs of each victim must also be considered, as well as their customs and traditions, as agreed with each of them and following an individual assessment.[153] To this end, the victims must advise the State if they wish to receive this medical, psychological or psychiatric treatment within six months of notification of this Judgment.

3. Measures of satisfaction

[...]

b. Award of scholarships

[...]

432. The Court has verified that the prosecution, arbitrary preventive detention and criminal conviction of the victims based on the application of a law that violates the Convention meant that they could not contribute to the maintenance and care of their families as they were doing prior to the events of this case, and this had repercussions on the financial situation of their family unit and, consequently, on the possibility that their children could attend school or complete their studies. Therefore, and taking the representatives' request into account, as it has in other cases,[154] the Court finds it appropriate to order, as a measure of satisfaction in this case, that the State award scholarships in Chilean public establishments to the children of the eight victims in this case that cover all the costs of their education until the conclusion of their advanced studies, whether these are of a technical or academic nature. The State's compliance with this obligation means that the beneficiaries must take certain steps in order to exercise their right to this measure of reparation.[155] Therefore, those who request this measure of reparation, or their legal representatives, have six months as of notification of this Judgment to advise the State of their scholarship requirements.

4. Guarantee of non-repetition: adaptation of domestic law in relation to the right of the defense to examine witnesses

[...]

152. *Cf. Case of the Las Dos Erres Massacre v. Guatemala,* para. 270, and *Case of Osorio Rivera and family members v. Peru*, para. 256.

153. *Cf. Case of the 19 Tradesmen v. Colombia. Merits, reparations and costs.* Judgment of July 5, 2004. Series C No. 109, para. 278, and *Case of Osorio Rivera and family members v. Peru*, para. 256.

154. *Cf. Case of the Gómez Paquiyauri Brothers v. Peru*, para. 237, *and Case of Osorio Rivera and family members v. Peru*, para. 267.

155. *Cf. Case of Escué Zapata v. Colombia*, paras. 27 and 28, and *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 31, 2010. Series C No. 216, para. 257.

435. When determining that Chile had violated the right of the defense to examine witnesses, protected in Article 8(2)(f) of the Convention, to the detriment of Pascual Huentequeo Pichún Paillalao, the Court noted that witness protection measures consisting of their anonymity were adopted without effective judicial control, and testimony obtained under these conditions was used decisively to justify the guilty verdict. Also, even though, in the criminal proceedings against Mr. Pichún Paillalao, the protection measure of witness anonymity was accompanied in specific cases with counterbalancing measures, the failure to regulate the latter led to legal uncertainty regarding their adoption.

436. The Court finds that, in the context of the Chilean laws applied in this case, it is appropriate to order Chile to regulate clearly and rigorously the procedural measure of witness protection consisting in anonymity in order to avoid violations such as those declared in this Judgment. It must ensure that: this is an exceptional measure; subject to judicial control based on the principles of necessity and proportionality; this type of evidence is not used decisively to justify a guilty verdict; and it must also regulate the corresponding counterbalancing measures which ensure that the impairment of the defense rights is sufficiently offset, as established in this Judgment. In addition, the Court recalls that, in order to ensure the right of the defense to examine witnesses, the judicial authorities must apply the criteria or standards established by the Court in exercise of "conventionality control".

[…]

INTER-AMERICAN COURT OF HUMAN RIGHTS

RIGHTS AND GUARANTEES OF CHILDREN IN THE CONTEXT OF MIGRATION AND/OR IN NEED OF INTERNATIONAL PROTECTION

Series A No. 21

ADVISORY OPINION OC-21/14 OF 19 AUGUST 2014

Requested by the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Oriental Republic of Uruguay

[Extracts][1]

1. This is an excerpt from the Advisory Opinion OC-21/14, entitled *The rights and guarantees of children in the context of migration and/or in need of international protection*. It contains a brief description of the Inter-American Court's advisory function and a summary of information related to the request before the Court, and it includes only the paragraphs relevant to this publication. The number and length of the footnotes has been reduced. The paragraph numbers correspond to those in the original advisory opinion, but the footnotes have been renumbered. The full text of the advisory opinion is available at: http://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.doc.

ADVISORY OPINION

Rights and guarantees of children in the context of migration and/or in need of international protection

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court", "the Court" or "the Tribunal"), composed of the following Judges:

Humberto Antonio Sierra Porto, President;
Roberto F. Caldas, Vice President;
Manuel E. Ventura Robles, Judge;
Diego García-Sayán, Judge;
Eduardo Vio Grossi, Judge, and
Eduardo Ferrer Mac-Gregor Poisot, Judge;

also present,

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

pursuant to Article 64(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and Articles 70 to 75 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), issues the following Advisory Opinion […]:

[…]

[**The advisory function of the Inter-American Court**

The possibility of issuing advisory opinions is part of the advisory function of the Court, in accordance with Article 64(1) of the American Convention and Articles 70 to 75 of the Rules of Procedure of the Court. By virtue of this function the Court responds to requests made my member States of the OAS or their bodies regarding: a) the compatibility of internal norms with the American Convention, and b) the interpretation of the Convention or other treaties regarding the protection of human rights in the American Sates.

In the exercise of this function the Inter-American Court has examined various relevant topics, which has allowed for the clarification of various issues in international American law as they relate to the American Convention, among them: restrictions on the death penalty; the mandatory licensing of journalists, the right to information about consular assistance within the guarantees of legal due process, as well as the legal status and the rights of undocumented immigrants.]

[Summary of information related to the request for an advisory opinion

On July 7, 2011, the Republic of Argentina, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, which from here on shall be referred to together as "the applicant States," on the basis of Article 64(1) of the American Convention and in accordance with what is established in Articles 70(1) and 70(2) of the Rules of Procedure, requested an Advisory Opinion about migrant children so that the Court could "determine more precisely the obligations of States in terms of measures to be taken with respect to children in relation to their migratory status or that of their parents, in light of the authoritative interpretation of Articles 1(1), 2, 4(1), 5, 7, 8, 11, 17, 19, 22(7), 22(8), 25, and 29 of the American Convention on Human Rights and Articles 1, 6, 8, 25 and 27 of the American Declaration of the Rights and Duties of Man and Article 13 of the Inter-American Convention for the Prevention and Punishment of Torture.[2]

2. The applicant States submitted to the Inter-American Court of Human Rights the following specific questions:
[1.] What are, in light of Articles 1, 2, 5, 7, 8, 19, 22.7 and 25 de of the American Convention and Articles 1, 25 and 27 of the American Declaration on the Rights and Duties of Man, the procedures that should be adopted to identify the different risks to the rights of migrant children; to determine the needs for international protection; and adopt, as appropriate, the special protective measures that may be required?
[2.] What are, in light of Articles 1, 2, 7, 8, 19 y 25 of the American Convention and Article 25 of the American Declaration on the Rights and Duties of Man, the due process guarantees that should govern in immigration proceedings involving migrant children?
[3.] How should the ultima ratio principle of detention as a precautionary measure in immigration proceedings be interpreted, in light of Articles 1, 7, 8, 19 y 29 of the American Convention and Article 25 of the American Declaration of the Rights and Duties of Man when the children involved are accompanied by their parents, and when the children involved are unaccompanied or separated from their parents?
[4.] What characteristics should, in light of Articles 2, 7, 19, 25 and 29 of the American Convention and Article 25 of the American Declaration of the Rights and Duties of Man, adequate alternative measures for the protection of the rights of the child have, that should form the State's response in order to avoid any kind of restriction on the freedom of movement? What are the guarantees of due process that should be applied in the procedures for decisions regarding alternatives to detention?
[5.] What are the required basic conditions for the accommodations of migrant children and what are the main obligations of States regarding children (alone or accompanied), who are in the custody of the State for immigration reasons, in light of Articles1, 2, 4.1, 5, 7, 17 and 19 of the Convention?
[6.] If custodial measures are applied to children in immigration proceedings, which are, in light of Articles 1, 2, 7, 8, 19 and 25 of the American Convention and Article 25 of the American Declaration on the Rights and Duties of Man, the due process guarantees that should govern immigration proceedings in which migrant children are involved?
[7.] What is the scope and content of the principle of non-refoulement in light of Articles 1, 2, 4.1, 5, 7, 8, 19, 22(7), 22(8) and 25 of the American Convention, Article 13(4) of the Inter-American Convention to Prevent and Punish Torture and Articles 1, 25 and 27 of the American Declaration on

In accordance with the requirements of the applicant States, on August 19, 2014, the Inter-American Court issued the Advisory Opinion entitled "The rights and guarantees of children in the migratory context and/or in need of international protection." In this Opinion the Court determined as accurately as possible and in accordance with the abovementioned norms, the State's obligations with regard to children, in relation to their immigration status or that of their parents and that, therefore, States must consider them when designing, adopting, implementing and applying their immigration policies, including in them as appropriate the adoption or application of the relevant domestic legal norms, such as the implementation of relevant treaties and/or other international instruments.

The Court understood that its response to the proposed consultation would provide concrete utility within a regional reality in which aspects of State obligations regarding migrant children have not been clearly and systematically established from the interpretation of the relevant standards. This utility is evident through the high levels of interest expressed by all of the participants during the advisory process.]

IV. GENERAL CONSIDERATIONS

[…]

35. Children migrate internationally for a wide variety of reasons: to seek opportunities, whether economic or educational; to seek family reunification, and come back together with family members who have previously migrated; to move from their place of residence because of gradual or sudden changes in the environment that adversely affect their life and living conditions; to flee from the impact caused by organized crime, natural disasters, domestic abuse, or extreme poverty; to be transported in the context of a situation of exploitation, including child trafficking; to flee their country, whether it be for a well founded fear of persecution for specified reasons or because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights, or other circumstances which have seriously disturbed public order. Although

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the Rights and Duties of Man when a measure that may entail the return of a child to certain country is applied?

[8.] In light of Article 22(7) of the American Convention and Article 27 of the American Declaration on the Rights and Duties of Man, what are the characteristics that the procedures to be used when identifying a potential request for asylum or for recognition of the refugee status of a migrant child should have?

[9.] What is the scope that must be given to the protection of the right of the child not to be separated from his/her parents in the case that a deportation measure could be imposed on one or both parents, as a consequence of their migratory status, in light of Articles 8, 17, 19 and 25 of the American Convention and Articles 6 and 25 of the American Declaration on the Rights and Duties of Man?

children usually travel with their parents, members of their extended family, or other adults, currently, a growing and significant number are migrating autonomously and unaccompanied.

[…]

37. International protection is understood as the protection that a State offers to a foreign person because, in her or his country of nationality or habitual residence, that individual's human rights are threatened or violated and she or he is unable to obtain due protection there because it is not accessible, available and/or effective. While international protection of the host State is tied initially to the refugee status of the individual, various sources of international law – and in particular refugee law, international human rights law and international humanitarian law – reveal that this notion also encompasses other types of normative frameworks for protection. Thus, the expression international protection comprises: (a) the protection received by asylum seekers and refugees on the basis of the international conventions or domestic law; (b) the protection received by asylum seekers and refugees on the basis of the broadened definition of the Cartagena Declaration; (c) the protection received by any foreign person based on international human rights obligations, and in particular the principle of *non-refoulement*, as well as complementary protection or other forms of humanitarian protection, and (d) the protection received by stateless persons in accordance with the relevant international instruments.

[…]

39. Given this panorama, in its advisory[3] and contentious jurisprudence,[4] this Court has insisted on the fact that, in the exercise of their authority to establish immigration policies,[5] States may establish mechanisms to control the entry into and departure from their territory of persons who are not their nationals, provided that these policies are compatible with the norms for the protection of human rights established in the American Convention.[6] Indeed, even though States have a margin of discretion when determining

3. *Cf. Juridical Status and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 168.

4. *Cf. Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2010. Series C No. 218, para. 97, and *Case of the Pacheco Tineo Family v. Bolivia. Preliminary objections, merits, reparations and costs.* Judgment of November 25, 2013. Series C No. 272, para. 129.

5. A State's immigration policy consists of any institutional act, measure, or omission (laws, decrees, decisions, directives, administrative actions, etc.) that relate to the entry, departure or permanence of nationals or foreign persons on its territory. *Cf. Juridical Status and Rights of Undocumented Migrants.* OC-18/03, para. 163.

6. *Cf. Matter of Haitians and Dominicans of Haitian Origin in the Dominican Republic with regard to Dominican Republic. Provisional measures.* Order of the Inter-American Court of Human Rights of August 18, 2000, Considering clause 4, and *Case of Vélez Loor v. Panama,* para. 97.

their immigration policies, the objectives sought by such policies must respect the human rights of migrants.[7] This does not mean that States cannot take any action against migrants who fail to comply with their laws but rather that, when adopting the corresponding measures, States must respect human rights and ensure the exercise and enjoyment of these rights to all persons subject to their jurisdiction, without any discrimination. In addition, States must respect the relevant international obligations resulting from international instruments on international humanitarian law and on refugee law.

[…]

41. The foregoing signifies the urgent need to adopt a human rights approach to immigration policies[8] and with regard to the needs for international protection,[9] assuming that these different branches of international law are interrelated and converging. But, even more, in the case of children an approach aimed at the comprehensive protection and guarantee of their rights must prevail.[10]

[…]

VI. GENERAL OBLIGATIONS AND GUIDING PRINCIPLES

61. In this regard, and despite referring to them again below, the Court considers that it is extremely important at this point, as an introduction,to refer explicitly to three provisions of the American Convention that inspire the whole formulation of this Advisory Opinion. The first provision refers to Article 1(1) of the Convention that establishes the State's obligation to respect and ensure the human rights of "all persons subject to [the] jurisdiction" of the State in question, that is, of every person in the territory[11] or who is in any way subjected to its authority, responsibility or control – in

7. *Cf. Juridical Status and Rights of Undocumented Migrants.* OC-18/03, para. 168, and *Case of Vélez Loor v. Panama,* para. 97. Similarly, the Special Rapporteur on the human rights of migrants of the United Nations Human Rights Council has indicated that: "[a]lthough it is the sovereign right of all States to safeguard their borders and regulate their migration policies, States should ensure respect for the human rights of migrants while enacting and implementing national immigration laws." Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development,* UN Doc. A/HRC/20/24, February 25, 2008, para. 14.

8. *Cf. Juridical Status and Rights of Undocumented Migrants.* OC-18/03, paras. 162 to 171.

9. *Cf.* United Nations High Commissioner for Refugees (UNHCR), Executive Committee, *Conclusion on Children at Risk,* UN Doc. 107 (LVIII)-2007, published on 5 October 2007, para. (b)(x).

10. See, similarly, Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development,* UN Doc. A/HRC/11/7, May 14, 2009, para. 43.

11. Evidently, the State also has jurisdiction, certainly more limited, with respect to its nationals who are abroad. However, the Court has deemed it more convenient to exclude such jurisdiction, held within the personal jurisdiction of the State, in the present Advisory Opinion.

this case upon trying to enter the territory – and without any discrimination for the reasons stipulated in the norm.[12] Thus, the word "jurisdiction" used by this article refers to every person regarding whom the State exercises either its territorial jurisdiction[13] or its personal jurisdiction[14] and even its jurisdiction concerning public services.[15] Nevertheless, this Advisory Opinion will only consider the situation as it relates to the first element, particularly in its factual dimension, which is the effective subjection of the person, in this case of the foreign child, to the jurisdiction of the said State from the moment that this child tries to enter its territory.

[…]

64. Although the Court will not delve into the obligations of the State of origin, it is pertinent to remember that these States must observe the general obligations in the matter and in particular their duty of prevention, which requires the State to generate and secure conditions for their nationals so that they are not forced to migrate, and to address the root causes of migration flows.

65. The second provision that should be cited as an introductory element is Article 2 of the Convention. In this regard, the Court has already referred to the general obligation of the States to adapt their domestic law to the provisions of the American Convention established in that article. It stipulates that the States Parties must adapt their domestic law to the provisions of the Convention in order to ensure the rights recognized therein, which means that the measures of domestic law must be effective (principle of the practical effects or *effet utile*).[16] This obligation entails, on the one hand, the elimination of norms and practices of any kind that results

12. The Court has already emphasized that the principle of equality and non-discrimination is fundamental and that all States shall guarantee to its citizens and all foreign persons who are in its territory. Nonetheless, it is permissible that a State provide different treatment to documented migrants that is provided to undocumented immigrants or migrants between migrants and nationals, provided that such treatment is reasonable, objective and proportionate and does not violate human rights. *Cf. Juridical Status and Rights of Undocumented Migrants.* OC-18/03, para. 119, and *Case of Vélez Loor v. Panama,* para. 248.

13. Within this, the State holds the full and exclusive legal power granted to it by International Law over its entire territory, that is, all assets and all situations, activities and people who, for any cause or reason to enter, or are acting on it, thus assuming the necessary functions, whether executive, legislative or judicial, for the sake of organizing the community enters, lives, or operates within it.

14. Because of it, the State exercises its authority over its nationals who are abroad, regulating personal status and exerting its protection over them.

15. This implies the right of the State to regulate the organization, operation, as well as defense and security of their public services, even those who are abroad.

16. *Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, reparations, and costs.* Judgment of February 5, 2001. Series C No. 73, para. 87, and *Case of Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of August 12, 2008. Series C No. 186, para. 179.

in a violation of the guarantees established in the Convention and, on the other hand, the enactment of laws and the implementation of practices that encourage the effective observance of these guarantees.[17] The State's obligation to adapt its domestic laws to the provisions of the Convention is not limited to the constitutional or legislative texts but must permeate all the legal provisions of a regulatory nature and result in the practical application of the standards for the protection of the human rights of migrants.[18]

66. The third provision that, in general terms, imbues this Advisory Opinion is Article 19 of the Convention, that, just as into Article VII of the Declaration,[19] concerns the obligation to adopt measures of protection in favor of all children, based on their condition as such, and this has an impact on the interpretation of all the other rights established when the case relates to children. The Court understands that the protection due to the rights of the child, as subjects of law, must take into consideration their intrinsic characteristics and the need to foster their development, offering them the necessary conditions to live and develop their aptitudes while taking full advantage of their potential.[20] In this regard, it should be emphasized at this point that these provisions are some of the few that are contemplated on the basis of, or that take into consideration, the specific and characteristic condition of the beneficiary.[21] Thus, children exercise their own rights progressively as they develop a greater level of personal autonomy.[22] For this reason the Convention stipulates that the pertinent measures of protection for children must be special or more specific than those established for the rest of the population, i.e., adults. In this regard, it should be recalled that the Court has indicated that children enjoy the same rights as adults and also possess additional rights. Therefore, Article 19 "should be understood as an additional, supplementary right that the treaty establishes for individuals that, owing to their physical and emotional

17. *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations, and costs.* Judgment of May 30, 1999. Series C No. 52, para. 207, and *Case of Mendoza et al. v. Argentina*, para. 293.

18. *Cf. Case of Vélez Loor v. Panama,* para. 286.

19. Article VII. Right to protection for mothers and children. All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.

20. *Cf. Juridical Status and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Serie A No. 17, para. 56, and *Case of the Pacheco Tineo Family v. Bolivia,* para. 218.

21. Other provisions are Articles 4(5) (prohibition to impose capital punishment on children, persons over 70 years of age, and pregnant women); 5(5) (minors who are being prosecuted); 12(4) (right of parents or guardians with regard to the education of their children or wards); 17 (rights of the family); and 23 (right to oarticipate in government).

22. *Cf. Case of Furlan and family members v. Argentina*, para. 203, and *Case of Mendoza et al. v. Argentina,* para. 143. *Cf.* Committee on the Rights of the Child, *General Comment No. 7: Implementing child rights in early childhood*, UN Doc. CRC/C/GC/7/Rev.1, 20 September 2006, para. 17.

development, require special protection."[23] To this end, the Convention and the Declaration vest a preferential treatment for children, precisely because of their special vulnerability and, endeavor to provide them with the adequate mechanism to achieve effective equality before the law as enjoyed by adults, owing to their condition as such.

[…]

68. Based on all the foregoing, the Court finds that, when designing, adopting and implementing their immigration policies for persons under the age of 18 years, the State must accord priority to a human rights-based approach, from a crosscutting perspective that takes into consideration the rights of the child and, in particular, the protection and comprehensive development of the child. The latter should prevail over any consideration of her or his nationality or migratory status, in order to ensure the full exercise of her or his rights[24] in relation to Articles 1(1), 2, and 19 of the American Convention and VII of the American Declaration.

69. When the protection of the rights of the child and the adoption of measures to achieve this protection is involved, the following four guiding principles of the Convention on the Rights of the Child should transversely inspire and be implemented throughout every system of comprehensive protection:[25] the principle of non-discrimination,[26] the principle of the best interest of the child,[27] the principle of respect for the right to life, survival

23. *Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary objections, merits, reparations, and costs.* Judgment of September 2, 2004. Series C No. 112, para. 147, and *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations, and costs.* Judgment of September 4, 2012. Series C No. 250, para. 142.

24. *Cf. Juridical Status and Human Rights of the Child.* OC-17/02, para. 91. See also, UNHCR, Executive Committee, *Conclusion on Children at Risk,* UN Doc. 107 (LVIII)-2007, published on 5 October 2007.

25. *Cf.* Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (Articles 4, 42 and paragraph 6 of Article 44),* UN Doc. CRC/GC/2003/5, 27 November 2003, para. 12.

26. Article 2 of the Convention on the Rights of the Child establishes the obligation of States to respect the rights set forth in the Convention and to ensure their application to each child within their jurisdiction without discrimination of any kind, which "requires States actively to identify individual children and groups of children the recognition and realization of whose rights may demand special measures." Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (Articles 4, 42 and paragraph 6 of Article 44),* para. 12. See also, Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 1.

27. Article 3(1) of the Convention on the Rights of the Child asserts the obligation that the best interests of the child shall be a primary consideration in all actions concerning children. *Cf.* Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (Articles 4, 42 and paragraph 6 of Article 44),* para. 12, and Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (Article 3, paragraph 1),* UN Doc. CRC/C/CG/14, 29 May 2013.

and development,[28] and the principle of respect for the opinion of the child in any procedure that affects her or him in order to ensure the child's participation.[29] When interpreting the provisions cited in the request, the Court will also apply these guiding principles, as appropriate, in order to respond to each question and to identify the special measures that are required to make the rights of the child effective.

[…]

71. However, the Court considers that it is essential to assess not only the requirement of special measures in the terms described above, but also to consider personal factors, such as disability, being a member of an ethnic minority group, or living with HIV/AIDS, as well as the particular characteristics of the situation of vulnerability of the child, such as being a victim of trafficking, or separated or unaccompanied,[30] for the purpose of determining the need for specific additional positive measures. Consequently, in application of the principle of the *effet util* and the need for protection in cases of persons or groups in a vulnerable situation,[31] the Court will also place special emphasis on those conditions and circumstances in which migrant children may find themselves in a situation of additional vulnerability that entails an increased risk of violation of their rights. Consequently, the State must adopt measures to prevent and reverse this type of situation as a priority, as well as to ensure that all children, without exception, may fully enjoy and exercise their rights under equal conditions.

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28. Article 6 of the Convention on the Rights of the Child recognizes the child's inherent right to life, and States Parties' obligation to ensure to the maximum extent possible the survival and development of the child, in its broadest sense, as a holistic concept embracing the child's physical, mental, spiritual, moral, psychological and social development. *Cf.* Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (Articles 4, 42 and paragraph 6 of Article 44),* para. 12.

29. Article 12 of the Convention on the Rights of the Child establishes the child's right to express his or her views freely in "all matters affecting the child," those views being given due weight, taking into account his or her age and degree of maturity. *Cf.* Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (Articles 4, 42 and paragraph 6 of Article 44),* para. 12, and Committee on the Rights of the Child, *General Comment No. 12: The right of the child to be heard*, UN Doc. CRC/C/GC/12, 20 July 2009.

30. *Cf.* Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (Article 3, paragraph 1)*, para. 75. See also, Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development,* UN Doc. A/HRC/11/7, May 14, 2009, para. 23.

31. *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146, para. 189, and *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010. Series C No. 214, para. 250.

VII. PROCEDURES TO IDENTIFY INTERNATIONAL PROTECTION NEEDS OF MIGRANT CHILDREN AND, AS APPROPRIATE, TO ADOPT MEASURES OF SPECIAL PROTECTION

[…]

78. In sum, by a harmonious interpretation of the internal and international laws that permeate, in a converging and complementary manner, the content of the right established in Articles 22(7) of the Convention and XXVII of the Declaration, and taking into account the specific standards of interpretation contained in Article 29 of the American Convention the Court is of the opinion that the right to seek and receive asylum in the context of the inter-American system is enshrined as an individual human right to seek and receive international protection on foreign territory, including with this expression refugee status in accordance with pertinent instruments of the United Nations or corresponding domestic legislation, as well as asylum in accordance with the different inter-American conventions on this matter.

79. Additionally, the Court notes that the developments produced in refugee law in recent decades have led to State practices which have consisted of granting international protection as refugees to persons fleeing their countries of origin due to generalized violence, foreign aggression, internal conflicts, massive violations of human rights, or other circumstances which have seriously disturbed public order. Bearing in mind the progressive development of international law, the Court considers that the obligations under the right to seek and receive asylum are operative with respect to those persons who meet the components of the expanded definition of the Cartagena Declaration, which responds not only to the dynamics of forced displacement that it originated from, but also meets the challenges of protection derived from other displacement patterns that currently take place. This criterion reflects a regional tendency to strengthen a more inclusive definition that must be taken into account by the States to grant refugee protection to persons whose need for international protection is evident.

80. Nevertheless, it should be recognized that the elements of the definition of refugee were traditionally interpreted based on the experiences of adults or persons over 18 years of age.[32] Hence, in view of the fact that children are entitled to the right to seek and receive asylum[33] and may, in

32. *Cf.* UNHCR, *Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees,* 22 December 2009, UN Doc. HCR/GIP/09/08, para. 1.

33. According to UNHCR, even at a young age, a child may be considered the principal asylum applicant. *Cf.* UNHCR, *Guidelines on international protection: Child Asylum Claims under Articles 1(A)2*

consequence, submit applications for recognition of refugee status in their own capacity, whether or not they are accompanied, the elements of the definition should be interpreted taking into account the specific forms that child persecution may adopt, such as recruitment, trafficking, and female genital mutilation,[34] as well as the way in which they may experience these situations.[35] Thus, the Committee on the Rights of the Child has stressed that the definition of "refugee" must be interpreted in light of age and gender.[36] Moreover, in addition to the traditional reasons for seeking refuge mentioned above, it is pertinent to be aware of the new factors that lead individuals and, in particular children, to be forcibly displaced from their countries of origin, among which transnational organized crime and the violence associated with the actions of non-State groups stand out.

81. In the terms of Articles 1(1)[37] and 2[38] of the American Convention, this right to seek and receive asylum entails certain specific obligations on the part of the host State, which include: (i) allowing children to request asylum or refugee status, which consequently means they may not be rejected at the border without an adequate and individualized analysis of their requests with due guarantees by the respective procedure; (ii) not returning children

and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, UN Doc. HCR/GIP/09/08, para. 8.

34. According to UNHCR, "[o]ther examples include, but are not limited to, family and domestic violence, forced or underage marriage, bonded or hazardous child labour, forced labour, forced prostitution and child pornography. Such forms of persecution also encompass violations of survival and development rights as well as severe discrimination of children born outside strict family planning rules and of stateless children as a result of loss of nationality and attendant rights." *Cf.* UNHCR, *Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees,* 22 December 2009, UN Doc. HCR/GIP/09/08, para. 18. See also, UNHCR, Executive Committee, *Conclusion on Children at Risk,* UN Doc. 107 (LVIII)-2007, published on 5 October 2007, para. (g)(viii).

35. *Cf.* UNHCR, *Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees,* 22 December 2009, UN Doc. HCR/GIP/09/08, paras. 2 to 5.

36. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 59.

37. In light of Article 1(1) of the American Convention, States Parties are obliged to respect and ensure the rights and freedoms recognized therein and to ensure the free and full exercise to all persons subject to their jurisdiction, without discrimination. That is, this is also applicable to all children, whether asylum seekers, refugees and migrants, regardless of their nationality or statelessness, and regardless of whether they are unaccompanied or separated from family, or of their immigration status or that of their family. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* paras. 12 and 18.

38. In turn, Article 2 of the Convention requires States Parties the general obligation to adapt its domestic law to the provisions of the Convention itself, to guarantee the rights recognized therein. The provisions of national law which serve this purpose must be effective (principle of *effet utile*), which means that the State must take all necessary measures to ensure that the provisions of the Convention is truly fulfilled. *Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile,* para. 87, and *Case of Heliodoro Portugal v. Panama,* para. 179.

to a country in which their life, freedom, security or personal integrity may be at risk, or to a third country from which they may later be returned to the State where they suffer this risk; and (iii) granting international protection when children qualify for this and granting the benefit of this recognition to other members of the family, based on the principle of family unity.[39] All the above signifies, as the Court has previously underlined, the corresponding right of those seeking asylum is to be ensured by a proper assessment by the national authorities of their requests and of the risk that they may suffer in case of return to the country of origin.[40]

82. Consequently, owing to the range of situations that may lead a child to emigrate from her or his country of origin, it is relevant to distinguish between those who emigrate in search of opportunities to improve their standard of living from those who require a form of international protection including, but not limited to protection for refugees and asylum seekers. Therefore, in order to comply with international undertakings, States are obliged to identify foreign children who require international protection within their jurisdictions, either as refugees or of another type, through an initial evaluation with guarantees of safety and confidentiality, in order to provide them with the adequate and individualized treatment required by means of special measures of protection. The Court considers that the establishment of procedures to identify the needs for protection is a positive obligation of the States and failing to institute them represents a lack of due diligence.[41]

[…]

85. This initial assessment procedure must be performed in a friendly environment and must provide guarantees of security and privacy, as well as be performed by qualified professionals who are trained in age and gender-sensitive related interviewing techniques.[42] In addition, States must take into account the basic procedural guarantees in keeping with the principles of the child's best interest and comprehensive protection, which include, but are not limited to, the following: that the interview is conducted in a

39. *Cf. Case of the Pacheco Tineo Family v. Bolivia,* para. 225. See, generally, UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate,* and UNHCR, *Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees,* 22 December 2009, UN Doc. HCR/GIP/09/08, paras. 8 and 9.

40. *Cf. Case of the Pacheco Tineo Family v. Bolivia,* para. 139, citing ECHR, *Case of Jabari v. Turkey*, No. 40035/98. Judgment of 11 July 2000, paras. 48 to 50.

41. In the case of *Velásquez Rodríguez*, the Court established that an omission of the State that results in a violation of human rights may entail its international responsibility. *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, paras. 164 to 177.

42. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 20.

language the child understands;[43] that it should be child-centered, gender-sensitive, and guarantee the child's participation;[44] that the analysis takes into account safety and possible family reunification;[45] that the child's culture and any reluctance to speak in the presence of adults or family members[46] is acknowledged;[47] that an interpreter is provided if required;[48] that adequate installations and highly qualified personnel are available for interviewing children;[49] that legal assistance is provided if required;[50] that clear and comprehensive information is provided on the child's rights and obligations and on the follow-up to the process.[51]

86. Since this is an initial stage of identification and assessment, the Court considers that apart from offering certain minimum guarantees, the procedural mechanisms that the States adopt must be designed, in accordance with the practice generally followed, to achieve the following basic priority objectives: (i) treatment in keeping with the child's condition as such and, in case of doubt about the age, assessment and determination of this; (ii) determination of whether the child is unaccompanied or separated; (iii) determination of the nationality of the child or, where appropriate, of her or his statelessness; (iv) obtaining information on the reasons for the child's departure from the country of origin, on her or his separation from the family if this is the case, on the child's vulnerabilities and any other element that reveals or refutes the need for some type of international protection, and (v) adoption of special measures of protection, if necessary and pertinent in view of the best interest of the child. The data should be collected during the initial interview and recorded adequately so as to ensure the confidentiality of the information.[52]

[…]

43. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 31(ii).
44. *Cf.* UNHCR, *UNHCR Guidelines on determining the best interests of the child*, May 2008, p. 58.
45. *Cf.* UNHCR, *UNHCR Guidelines on determining the best interests of the child*, May 2008, pp. 31 and 32.
46. *Cf.* UNHCR, *UNHCR Guidelines on determining the best interests of the child*, May 2008, p. 68.
47. *Cf.* UNHCR, *UNHCR Guidelines on determining the best interests of the child*, May 2008, pp. 60 and 61.
48. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 71.
49. *Cf. Juridical Status and Human Rights of the Child*. OC-17/02, paras. 78 and 79.
50. *Cf.* UNHCR, Executive Committee, *Conclusion on Children at Risk,* UN Doc. 107 (LVIII)-2007, published on 5 October 2007, para. (g)(viii), and UNHCR, *Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees,* 22 December 2009, UN Doc. HCR/GIP/09/08, para. 69.
51. *Cf.* UNHCR, *UNHCR Guidelines on determining the best interests of the child*, May 2008, pp. 59 and 60.
52. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* paras. 29 and 30.

Treatment in keeping with the child's condition as such and, in case of doubt about the age, assessment and determination of this

88. Verification of a person's age is a crucial matter, because determination that the person concerned is under 18 years of age requires that the treatment provided by the State must be urgent, differentiated, and exclusively in keeping with this condition. If there are any doubts about the age,[53] this must be determined based not only on the physical appearance, but also on the psychological maturity of the individual.[54] If it is appropriate, an assessment must be conducted in a scientific and safe manner, respecting human dignity that is gender-based and culturally appropriate.[55] If uncertainty remains about the age, it should be considered that the individual is a child, and she or he should be treated as such, i.e., the State must grant "the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such."[56]

Determination of whether the child is unaccompanied or separated

89. An early determination of whether a child is unaccompanied or separated from her or his family must be conducted immediately upon arrival,[57] owing to the child's heightened vulnerability in these circumstances;[58] accordingly, the State must be more thoroughgoing and several differentiated guarantees apply, which will be described in the following chapters. The reasons for being separated from the family or unaccompanied should also be recorded.[59]

[…]

53. *Cf.* UNHCR, Executive Committee, *Conclusion on Children at Risk,* UN Doc. 107 (LVIII)-2007, published on 5 October 2007, para. (g)(ix).
54. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 31.
55. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 31.
56. Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 31.
57. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 31.
58. See Article 20 of the Convention on the Rights of the Child, and Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 16. See also, Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development,* UN Doc. A/HRC/11/7, May 14, 2009, para. 23.
59. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 31.

92. In particular, States have the obligation to adopt specific border control measures in order to prevent, detect, and prosecute any type of trafficking of persons.[60] To this end, they must have available specialized officials responsible for identifying all victims of trafficking in persons, paying special attention to women and/or child victims.[61] It is essential that the victims' declarations are received in order to establish their identities and to discover the reasons why theyleft their countries of origin,[62] taking into consideration that victims of trafficking can be refugees where all conditions are met.[63] To ensure adequate treatment of victims or potential victims of child trafficking, States must provide adequate training for those officials who work at the border, especially concerning matters relating to child trafficking, so as to be able to provide children with effective counseling and comprehensive assistance.[64]

93. When children are accompanied by adults, the border or other authorities must ensure that the children know those accompanying them in order to avoid cases of trafficking and exploitation.[65] This does not mean, in any way, that in all cases in which a child is traveling independently and is accompanied by an adult who is not a relative, the corresponding authorities

60. See Article 11 of the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime. According to the United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, all the States Parties undertake: "to take appropriate measures to ensure supervision of railway stations, airports, seaports and *en route*, and of other public places, in order to prevent international traffic in persons for the purpose of prostitution," as well as "to take appropriate measures in order that the appropriate authorities be informed of the arrival of persons who appear, *prima facie*, to be the principals and accomplices in or victims of such traffic." *United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others,* adopted on 21 March 1950, entry into force 25 July 1951, Article 17. The following 10 OAS Member States are party to this Convention: Argentina, Bolivia, Brazil, Cuba, Ecuador, Guatemala, Haiti, Honduras, Mexico, and Venezuela. See also United Nations High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking,* UN Doc. E/2002/68/Add.1, published on 20 May 2002.

61. *Cf.* OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking,* UN Doc. E/2002/68/Add.1, published on 20 May 2002.

62. See Article 18 of the United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. See also, OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking,* UN Doc. E/2002/68/Add.1, published on 20 May 2002.

63. *Cf.* UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked,* UN Doc. HCR/GIP/06/07, published on 7 April 2006.

64. See Article 10(2) of the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime.

65. *Cf.* UNHCR, *UNHCR Guidelines on determining the best interests of the child*, May 2008, pp. 51 and 69.

should automatically consider this to be a case of trafficking and return the child to her or his country of origin. In this regard, the strictest diligence is required of the border authorities to identify the different situations that require them to intervene in a timely, adequate and fair manner.

Determination of the nationality of the child or, where appropriate, of her or his statelessness

[…]

96. In the context of migration, the host State of the migrant child is obliged to establish if the child is stateless, whether a refugee or not, in order to provide the adequate protection.[66] Depending on the reasons for leaving the country of habitual residence, the State should refer the child to a procedure for determining refugee status and/or statelessness, or to a complementary protection mechanism.[67]

Obtaining information on the reasons for the child's departure from the country of origin, on her or his separation from the family if this is the case, and on the child's vulnerabilities and any other element that reveals or refutes the need for some type of international protection

[…]

98. If the need for international protection is identified because the inclusion criteria of the refugee definition have been verified, it is the State's obligation to explain to the child her or his right to seek and receive asylum under Articles 22(7) of the American Convention and XXVII of the American Declaration in a language that the child can understand, and to refer the child to the entity responsible for this, either a State entity or an international agency such as UNHCR.[68] In this regard, the Court has previously interpreted that the right to seek and receive asylum, read together with Articles 8 and 25 of the American Convention, guarantees effective access to a fair and efficient procedure for determining refugee status, so that the person applying for refugee status must be heard by the State to which she or he is applying, with due guarantees, by means of the respective procedure[69].

66. *Cf.* UNHCR, *Guidelines on Statelessness No. 2: Procedures for determining whether an individual is a stateless person*, published on 5 April 2012, UN Doc. HCR/GS/12/02, para. 6.
67. *Cf.* UNHCR, *Guidelines on Statelessness No. 2: Procedures for determining whether an individual is a stateless person*, published on 5 April 2012, UN Doc. HCR/GS/12/02, paras. 26 and 27.
68. In some cases, exceptionally, UNHCR may determine that a person should have refugee status, but this is a practice that has occurred only in those countries that have not signed any international instrument on refugees, where the national authorities have asked UNHCR to play this role. *Cf. Case of the Pacheco Tineo Family v. Bolivia,* footnote 185.
69. *Cf. Case of the Pacheco Tineo Family v. Bolivia,* para. 154.

[…]

101. Nevertheless, the Court recognizes that not all cases of child migrants reach the level of requiring international protection in the terms of the preceding paragraphs. However, situations may arise where the rights of the child, which are protected internationally, are impaired and result in displacement from the country of origin. For this reason, it is necessary to gather personal information, such as the personal history and physical and psychological health conditions, as well as the environment in which the migration took place, in order to determine the specific situation of risk of violation of rights in the child's country of origin, of transit or recipient, that warrants complementary protection or reveals other needs for protection or humanitarian assistance, such as those resulting from torture, domestic violence, trafficking or trauma.[70]

[…]

Adoption of special measures of protection, if necessary and pertinent in view of the best interest of the child

[…]

104. In this regard, the host State must evaluate – using adequate procedures that allow an individualized determination of the best interest of the child in each specific case – the need and pertinence of adopting comprehensive measures of protection, including those that are conducive to access to health care, both physical and psychosocial, that are culturally appropriate and gender sensitive;[71] that provide a standard of living adequate for their physical, mental, spiritual and moral development through material assistance and support programs, particularly with regard to nutrition, clothing and housing;[72] and that ensure full access to education under equal conditions.[73] And certainly this and the other obligations previously indicated acquire particular relevance in the case of migrant children affected by any physical or mental disability; hence, the host State must be diligent in according them special attention.[74]

70. *Cf.* Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development,* UN Doc. A/HRC/11/7, May 14, 2009, para. 35.

71. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* paras. 31, 47 and 48.

72. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 44.

73. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* paras. 41 and 42.

74. *Cf.* Committee on the Rights of the Child, *General Comment No. 9: The rights of children with disabilities*, UN Doc. CRC/C/GC/9, 27 February 2007, paras. 42 and 43.

105. In the case of children who are unaccompanied or separated from their family, it is essential that States try to trace the members of their family, as long as this has been assessed as being in the best interest of the child. If possible and in keeping with the child's best interest, the State should proceed to reunify such children with their families as soon as possible.[75]

[…]

107. Lastly, the Court considers that it is crucial that States clearly define, within their institutional structure, the corresponding assignment of responsibilities while respecting the competences of the relevant State organs. If necessary, States should: adopt pertinent measures to achieve effective inter-institutional coordination in the determination and adoption of the special measures of protection required; grant the competent authorities the adequate budgetary resources; and provide specialized training for its personnel.

VIII. GUARANTEES OF DUE PROCESS APPLICABLE IN IMMIGRATION PROCEEDINGS INVOLVING CHILDREN

[…]

110. Although, under the American Convention, due process is expressed, above all, by the right to a fair trial recognized in Article 8 of the American Convention, it is also true that several other provisions of this international instrument, such as Articles 4, 5, 7, 9, 19, 25 and 27 of the Convention, also contain regulations that correspond, substantially, to the procedural and substantive components of due process. Similarly, in the American Declaration due process is expressed in the regulation of Articles XVIII (Right to a fair trial), XXV (Right of protection from arbitrary arrest), and XXVI (Right to due process of law). In this chapter, the Court will focus mainly on due process guarantees, interpreted in conjunction with Articles 19 of the Convention and VII of the American Declaration, applicable to migration proceedings, in the understanding that by means of such proceedings controversies are settled regarding the migratory status of a person and may, depending on such determination, result in an expulsion or deportation. Additionally, decisions in this matter can have a profound impact on the life and development of migrant children.

[…]

114. The guarantees recognized in Article 8 of the Convention must be respected and ensured to all persons, without distinction, and must be

75. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* paras. 13 and 31. See also, Article 10 of the Convention on the Rights of the Child.

correlated with the specific rights established in Article 19 of this instrument, so that they are reflected in any administrative or judicial proceedings in which any right of a child is in dispute.[76] Thus, the special protection derived from Articles 19 of the Convention and VII of the Declaration, signifies that the State's observance of the guarantees of due process result in some guarantees or components that are differentiated in the case of children, based on the recognition that they do not participate in migratory proceedings under the same conditions as an adult.[77] Consequently, such proceedings must be adapted to children and accessible to them.[78]

115. In short, as this Court has maintained previously,[79] although due process and its correlative guarantees are applicable to everyone, in the case of child migrants their exercise supposes, owing to the special conditions in which children find themselves, the adoption of certain specific measures in order to ensure access to justice in conditions of equality, to guarantee effective due process, and to ensure that the best interest of the child is a paramount consideration in all the administrative or judicial decisions adopted.[80] The administrative or judicial proceedings during which decisions are taken on the rights of child migrants and, if applicable, of the persons whose protection or authority they are under[81], should be based on the foregoing considerations and be adapted to their situation, needs and rights.

[…]

Right to be notified of the existence of proceedings and of the decision adopted during the immigration proceedings

117. All migrants have the right to be notified of proceedings against them because, otherwise, it would not be possible to guarantee their right to defend themselves. In the case of child migrants, this extends to every kind of procedure that involves them. For this reason, trained personnel are needed to communicate to the child, according to her or his cognitive development, that her or his case is being subjected to administrative or judicial determination. This will ensure that the child can exercise the right

76. *Cf. Juridical Status and Human Rights of the Child*. OC-17/02, para. 95, and *Case of Mendoza et al. v. Argentina,* para. 148.
77. *Cf. Juridical Status and Human Rights of the Child*. OC-17/02, para. 96.
78. *Cf.* Committee on the Rights of the Child, *General Comment No. 12: The right of the child to be heard,* para. 66.
79. *Cf. Juridical Status and Human Rights of the Child.* OC-17/02, paras. 96 to 98, and *Case of Mendoza et al. v. Argentina,* para. 148.
80. *Cf.* Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (Article 3, paragraph 1),* para. 14(b).
81. *Cf. Juridical Status and Human Rights of the Child*. OC-17/02, para. 94.

to defense; in the sense that the child can understand the proceedings taking place and can contribute with her or his opinions as deemed pertinent.[82]

[…]

Right that immigration proceedings are conducted by a specialized official or judge

[…]

121. If the immigration proceedings are conducted by a judge or panel of judges, these must evidently comply with the essentials of impartiality and independence. If administrative officials take this type of decision, they must respond before the law, their superiors and, if appropriate, the control mechanisms, for the legality of their decisions.

Right of the child to be heard and to participate in the different stages of the proceedings

[…]

123. In the case of child migrants, and particularly in the case of those who are unaccompanied or separated from their family, the right to be heard is especially relevant. Furthermore, any statement by a child must be subject to the corresponding procedural measures of protection, including the possibility of not making a statement, the assistance of legal counsel, and making the statement before the authority legally authorized to receive it.[83] In this regard, in order to ensure the right to be heard, States must guarantee that the proceedings are conducted in an environment that is not intimidating, hostile, insensitive, or inappropriate for the child's age and that the staff responsible for receiving the declaration are appropriately trained[84] so that the child feels respected and safe when expressing her or his views in an appropriate physical, mental, and emotional environment.

Right to be assisted without charge by a translator or interpreter

124. To be able to guarantee the right to be heard, States must ensure that every child may be assisted by a translator or interpreter if she or he does not understand or does not speak the language of the decision-maker.[85] In

82. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 25, and Committee on the Rights of the Child, *General Comment No. 12: The right of the child to be heard,* paras. 40 to 47 and 82.

83. *Cf. Juridical Status and Human Rights of the Child*. OC-17/02, para. 129.

84. *Cf.* Committee on the Rights of the Child, *General Comment No. 12: The right of the child to be heard,* para. 34.

85. See Article 40(2)(VI) of the Convention on the Rights of the Child. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 31. See also, Inter-American Commission on Human Rights (IACHR), *Second*

this regard, the assistance of a translator or interpreter shall be considered a basic and essential procedural guarantee in order to comply with the child's right to be heard and to ensure that its best interest constitutes a paramount consideration.[86] To the contrary, the child's effective participation in the proceedings becomes illusory.

125. This guarantee must receive particular attention in the case of children who belong to indigenous communities, in order to respect their cultural identity and to guarantee real access to justice. In this regard, the Court has interpreted previously that, in order to ensure the access to justice of members of indigenous communities, "it is essential that States grant effective protection that takes into account their specific particularities, their economic and social characteristics, and also their situation of special vulnerability, their customary law, values, practices and customs."[87]

Effective access to communication with consular authorities and to consular assistance

[…]

127. In the case of children, paragraphs (e) and (h) of Article 5[88] of the abovementioned international instrument, read in light of the Convention on the Rights of the Child, impose on the consular official the obligation to safeguard the interests of the child, in the sense of ensuring that any administrative or judicial decisions adopted by the receiving country has evaluated and taken into consideration the child's best interest.

128. Owing to the special vulnerability of children who are away from their country of origin, especially for those who are unaccompanied or separated, access to communication with consular authorities and to consular assistance becomes a right that has particular relevance and that must be guaranteed and implemented on a priority basis by all States. Especially, because of its possible implications on the process of gathering information and documentation in the country of origin, to ensure that

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Progress Report of the Rapporteurship on Migrant Workers and Members of their Families, OEA/Ser./L/V/II.111 doc. 20 rev., April 16, 2000, para. 99(c).

86. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 71.

87. *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 63, and *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 31, 2010. Series C No. 216, para. 184.

88. This Article establishes that consular functions consist in:

e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;

[…]

h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons."

voluntary repatriation is only ordered if it is recommended as the result of proceedings held with due guarantees to determine the best interest of the child and once it has been verified that this can be carried out in safe conditions, so that the child will receive care and attention on her or his return.

Right to be assisted by a legal representative and to communicate freely with said representative

[…]

130. The Court considers that States have the obligation to ensure to any child involved in immigration proceedings the right of legal counsel by the offer of free State legal representation services.[89]

131. Moreover, this type of legal assistance must be specialized, with regard to the rights of the migrant[90] and, specifically, with regard to age, in order to guarantee true access to justice to the child migrant and to ensure that the child's best interest prevails in every decision that concerns the child.

Obligation to appoint a guardian in the case of unaccompanied or separated children

[…]

133. Indeed, States have the duty to appoint a guardian for children who are identified as being unaccompanied or separated from their family, even in border areas, as promptly as possible. States also have a duty to maintain such guardianship arrangements: until they reach the age of majority, which is usually at 18 years of age; until they permanently leave the territory or jurisdiction of the State;[91] or when appropriate, until the reason for which the guardian was appointed ceases to exist. The guardian must be sufficiently aware of the interests and situation of the child and should have the authority to be present in all planning and decision-making processes, including immigration and appeal hearings, care arrangements and all efforts to search for a durable solution.[92]

89. *Cf.* Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development,* UN Doc. A/HRC/20/24, 2 April 2012, para. 38.

90. *Cf.* IACHR, *Second Progress Report of the Rapporteurship on Migrant Workers and Members of their Families*, OEA/Ser./L/V/II.111 doc. 20 rev., April 16, 2001, para. 99(d).

91. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 33.

92. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 33.

134. Furthermore, the guardian should have the necessary expertise in the field of child care to ensure that the best interest of the child is safeguarded. In addition, the guardian should act as a link between the child and the pertinent entities in order to ensure that the child's legal, social, health, psychological, material and educational needs are covered appropriately.[93]

[…]

Right that the decision adopted has assessed the child's best interest and is duly reasoned

137. It is also essential that all decisions taken in migratory proceedings involving children must be duly justified, that is to say, are accompanied by the exteriorization of the reasoned justification that allows conclusions to be reached.[94] The duty to provide said reasoning is one of the due guarantees to safeguard the right to a fair trial.[95] The Court recalls that the obligation to provide the reasons for a decision is a guarantee related to the proper administration of justice, which protects the right of the individual to be tried for the causes established by law, and accords credibility to juridical decisions in a democratic society[96]. Accordingly, the decisions adopted by the domestic organs that may affect human rights must be duly reasoned because, otherwise, they would be arbitrary.[97]

[…]

Right to appeal the decision before a higher court with suspensive effect

[…]

141. The Court underscores that this right has special relevance in cases in which children consider that they have not been duly heard or that their views have not been taken into consideration. Thus, the reviewing body must permit, among other matters, ascertaining whether the decision gave due weight to the principle of the best interest of the child.[98]

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93. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 33.
94. *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 107, and *Case of J. v. Peru,* para. 224.
95. *Cf. Case of López Mendoza v. Venezuela. Merits Reparations and costs.* Judgment of September 1, 2011. Series C No. 233, para. 141.
96. *Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations, and Costs.* Judgment of August 5, 2008. Series C No. 182, para. 77, and *Case of J. v. Peru,* para. 224.
97. *Cf. Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of June 23, 2005. Series C No. 127, para. 152, and *Case of J. v. Peru,* para. 224.
98. *Cf.* Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (Article 3, paragraph 1),* para. 98.

142. In addition, in order to ensure that the right to file an appeal before a judicial authority and to judicial protection are effective, the judicial remedy by which a migratory decision is contested must have an effect of suspension, so that if a deportation order is involved, it must be suspended until the court before which the appeal was filed has issued a judicial ruling.[99] Only in this way can the rights of child migrants be truly protected.

Reasonable time for the duration of the proceedings

143. Lastly, and owing to the particular degree of harm that this type of proceeding could have on a child, it is particularly important to emphasize that the duration of the proceedings up until the adoption of the final decision must respect a reasonable time, which means that the administrative or judicial proceedings relating to the protection of the human rights of the child "must be handled with exceptional diligence and speed by the authorities."[100] This not only reveals the need to defend and to protect the best interest of the child[101] but also contributes to maintaining the situation of uncertainty for the least possible time in order to lessen the impact on the child's physical, mental and emotional integrity to the greatest extent possible. Nevertheless, the duration should be sufficient to ensure that the child is heard adequately. Thus, the right of the child to be heard cannot be impaired based merely on justifications related to the speed of the proceedings.

IX. PRINCIPLE OF NON-DEPRIVATION OF LIBERTY OF CHILDREN OWING TO THEIR IRREGULAR MIGRATORY SITUATION

[…]

145. In order to deal with this issue, the central purpose of which is the interpretation of the right to personal liberty recognized in Articles 7 of the American Convention and XXV of the Declaration, it is pertinent to establish that when referring to the word "detention," the question employs

99. *Cf.* ECHR, *Case of Čonka v. Belgium*, No. 51564/99. Judgment of 5 February 2002, para. 79, and ECHR, *Case of Gebremedhin [Gaberamadhien] v. France*, No. 25389/05, Judgment of 26 April 2007, para. 58.

100. *Matter of L.M. with regard to Paraguay. Provisional Measures.* Order of the Inter-American Court of Human Rights of July 1, 2011, Considering paragraph 16. See also, ECHR, *Case of H v. the United Kingdom*, No. 9580/81. Judgment of 8 July 1987, para. 85; ECHR, *Case of Paulsen-Medalen and Svensson v. Sweden*, No. 16817/90. Judgment of 19 February 1998, paras. 39 and 42; ECHR, *Case of Laino v. Italy*, No. 33158/96. Judgment of 18 February 1999, para. 18; ECHR, *Case of Monory v. Romania and Hungary*, No. 71099/01. Judgment of 5 April 2005, para. 82; and ECHR, *Case of V.A.M. v. Serbia*, No. 39177/05. Judgment of 13 March 2007, paras. 99 and 101.

101. *Cf. Matter of L.M. with regard to Paraguay. Provisional Measures,* Considering paragraph 16.

it in a broad sense, equivalent to deprivation of liberty. Thus, the Court will proceed to use the concept of deprivation of liberty, because it is more inclusive. In this regard, the Court adopts a broad approach, in keeping with the development of international human rights law and autonomous from the provisions of national legislation,[102] in the understanding that the particular element that allows a measure to be identified as one that deprives a person of liberty, regardless of the specific name it is given at the local level,[103] is the fact that the person, in this case the child, cannot or is unable to leave or abandon at will the place or establishment where she or he has been placed. Hence, any situation or measure that is characterized by this definition will turn operational the associated guarantees.

[…]

149. It is a principle of international human rights law[104] established in the Convention on the Rights of the Child[105] and developed by this Court in its case law in relation to the right to personal liberty in cases concerning juveniles in conflict with the law,[106] that the deprivation of liberty, either on remand or as a punishment, constitutes a measure of last resort that should be used, when appropriate, for the shortest appropriate period of time,[107] since the purpose of criminal proceedings in the case of children is fundamentally pedagogical.[108] Thus, deprivation of liberty in the

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102. In particular, considering the provisions of Article 27 of the Vienna Convention on the Law of Treaties, which refers to internal law and the observance of treaties, and establishes that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46."

103. In other words, whether this is called arrest, detention, imprisonment, internment, institutionalization, etc.

104. See Rule 13(1) of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (*The Beijing Rules*), UN Doc. A/RES/40/33, adopted on 29 November 1985; Rule 6(1) of the *United Nations Standard Minimum Rules for Non-custodial Measures* (Tokyo Rules), UN Doc. A/RES/45/110, adopted on 14 December 1990; Rule 17 of the *United Nations Rules for the Protection of Juveniles deprived of their Liberty (Rules of Havana),* UN Doc. A/RES/45/113, adopted on 14 December 1990; and, *Principle III of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas of the Inter-American Commission on Human Rights,* adopted during the 131st regular period of sessions, held from March 3-14, 2008.

105. Article 37(b) of the Convention on the Rights of the Child stipulates that the States Parties must ensure that: No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

106. *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay,* paras. 230 and 231, and *Case of Mendoza et al. v. Argentina,* para. 162.

107. *Cf.* Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, UN Doc. CRC/C/GC/10, 25 April 2007, paras. 77, 79 and 80. See also, Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 61.

108. *Cf.* Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, para. 51.

context of juvenile criminal justice must respect the principles of legality, exceptionality, and the shortest appropriate period of time.[109] Moreover, the exceptional nature of detention on remand operates more strictly because the rule should be liberty and, if the need for a precautionary measure is verified, the application of alternative measures should be given priority.[110]

150. On the grounds that the offenses concerning the entry or stay in one country may not, under any circumstances, have the same or similar consequences to those derived from the commission of a crime, and in recalling the different procedural purposes between migration and criminal proceedings, the Court considers that the principle of *ultima ratio* of the imprisonment of children is not within the scope of the consultation that was put forward, namely in the arena of immigration proceedings.[111]

[…]

154. Thus, although deprivation of liberty may seek a legitimate purpose and be appropriate to achieve this, on combining the criteria developed above and based on the principle of the best interest of the child the Court finds that the deprivation of liberty of children based exclusively on migratory reasons exceeds the requirement of necessity,[112] because this measure is not absolutely essential in order to ensure their appearance at the immigration proceedings or to guarantee the implementation of a deportation order. Adding to this, the Court finds that the deprivation of liberty of a child in this context can never be understood as a measure that corresponds with the child's best interest.[113] Thus, the Court observes that measures exist that are less severe and that could be appropriate to achieve such an objective and,

109. See Article 37(b) and (d) of the Convention on the Rights of the Child.

110. *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay,* para. 230. See also, Rule 13(1) and 13(2) of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (*The Beijing Rules*).

111. In fact, the Committee on the Rights of the Child has emphasized that compliance with the requirements of paragraph (b) of Article 37 of the Convention, in stating that "[t]he arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time", shall proceed in cases where deprivation of liberty of unaccompanied and separated children outside their country of origin is exceptionally justified "for other reasons." Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 61.

112. This requirement means that the measure must be absolutely essential to achieve the objective sought and that there is no measure that is less severe in relation to the right restricted, among all those measures that are equally appropriate, to achieve the proposed objective. *Cf. Case of Vélez Loor v. Panama,* para. 166.

113. See, similarly, STEPS Consulting Social, *The conditions in centres for third country nationals (detention camps, open centres as well as transit centres and transit zones) with a particular focus on provisions and facilities for persons with special needs in the 25 EU member states*, study prepared at the request of the European Parliament Committee on Civil Liberties, Justice and Home Affairs, Ref. IP/C/LIBE/IC/2006-181, Ref. 12/2007, December 2007 p. 22, affirming that "The confinement of minors should be banned. The best interests of the child should form the basis of any decision made about that child.

at the same time, satisfy the child's best interest. In sum, the Court finds that the deprivation of liberty of a child migrant in an irregular situation, ordered on this basis alone, is arbitrary and, consequently, contrary to both the Convention and the American Declaration.

155. In view of the special condition of vulnerability of child migrants in an irregular situation, States are obliged, under Articles 19 of the American Convention and VII of the Declaration, to choose measures[114] that promote the care and well-being of the child to ensure its comprehensive protection, rather than the deprivation of her or his liberty[115]. The Court considers that the parameter for the State's actions should, therefore aim at ensuring insofar as possible the prevalence of the best interests of the child migrant and the guiding principles of respect for the child's right to life, survival, and development, in the terms set out in the following chapter, by measures adapted to the child's needs.[116]

156. Based on the above, the Court understands that the scope of the State's response in light of the best interest of the child acquires specific characteristics depending on the child's particular situation;[117] in other words, if accompanied by her or his parents or, to the contrary, if unaccompanied or separated from her or his parents. And this is due, on the one hand, to the special vulnerability of children who are unaccompanied or separated and, on the other, to the fact that the primary responsibility for the care and development of the child corresponds to the parents and, subsidiarily, the State must "undertake to ensure the child such protection and care as is necessary for her or his well-being, taking into account the rights and duties of her or his parents, legal guardians, or other individuals legally responsible for him or her."[118]

157. Based on the preceding considerations, the Court finds that, in light of international human rights law, deprivation of liberty is inappropriate

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Depriving a child of their freedom can in no way be in their best interests, other practices can be used and have already been implemented in some countries."

114. *Cf.* Working Group on Arbitrary Detention, Report of the Working Group, *Civil and political rights, including questions of Torture and Detention*, UN Doc. E/CN.4/1999/63/Add.3, 18 December 1998, para. 33, and Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, *Specific Groups and Individuals: Migrant Workers,* pursuant to Commission on Human Rights resolution 2002/62, UN Doc. E/CN.4/2003/85, 30 December 2002, paras. 39 and 40.

115. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 63.

116. *Cf.* Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development,* UN Doc. A/HRC/11/7, May 14, 2009, paras. 60 to 62.

117. *Cf. Case of Furlan and family members v. Argentina,* para. 126.

118. See Article 3(2), and its relation to Articles 18 and 27 of the Convention on the Rights of the Child.

when children are unaccompanied or separated from their family. This is because in this situation the State is obliged to give priority to facilitating the measures of special protection based on the principle of the best interest of the child,[119] assuming its position as guarantor with the greatest care and responsibility.[120] Likewise, the Committee on the Rights of the Child has stated:

> In application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. […] In consequence, all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation.[121]

158. In addition, the Court has stressed that "[t]he child has the right to life with his or her family, which is responsible for satisfying his or her material, emotional and psychological needs."[122] In this way, in the case of children who are with their parents, keeping the family together owing to the child's best interest does not represent a sufficient reason to legitimate or justify the exceptional admissibility of the deprivation of liberty of children together with their parents, because of the prejudicial effects on their emotional development and physical well-being. To the contrary, when the child's best interest requires keeping the family together, the imperative requirement not to deprive the child of liberty extends to her or his parents and obliges the authorities to choose alternative measures to detention for the family, which are appropriate to the needs of the children.[123] Evidently,

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119. See Article 20(1) of the Convention on the Rights of the Child, which establishes "[a] child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State."

120. *Cf. Case of Furlan and family members v. Argentina,* para. 126.

121. Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 61. See also, Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, *Specific Groups and Individuals: Migrant Workers,* pursuant to Commission on Human Rights resolution 2002/62, UN Doc. E/CN.4/2003/85, 30 December 2002, para. 75(a).

122. *Juridical Status and Human Rights of the Child.* OC-17/02, para. 71, and *Case of Fornerón and daughter v. Argentina. Merits, reparations and costs.* Judgment of April 27, 2012. Series C No. 242, para. 46. See also, Article 9 of the Convention on the Rights of the Child.

123. *Cf.* Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development,* UN Doc. A/HRC/20/24, 2 April 2012, para. 40. See also, Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion on the rights of all children in the context of international migration*, 28 September 2012, recommendation in paragraph 78 provides that "[c]hildren should not be criminalized or subject to punitive measures because of their or their parents' migration status. The detention of a child because of their or their parent's migration status

this entails a correlative State obligation to design, adopt and implement alternative measures to closed detention centers in order to preserve and maintain the family unit and to promote the protection of the family without imposing an excessive sacrifice on the rights of the child by the deprivation of liberty of all or part of the family.[124]

[…]

160. On the contrary, and also in the Court's opinion, States may not resort to the deprivation of liberty of children who are with their parents, or those who are unaccompanied or separated from their parents, as a precautionary measure in immigration proceedings; nor may States base this measure on failure to comply with the requirements to enter and to remain in a country, on the fact that the child is alone or separated from her or his family, or on the objective of ensuring family unity, because States can and should have other less harmful alternatives and, at the same time, protect the rights of the child integrally and as a priority.

X. CHARACTERISTICS OF THE PRIORITY MEASURES FOR THE COMPREHENSIVE PROTECTION OF THE RIGHTS OF CHILD MIGRANTS AND GUARANTEES FOR THEIR APPLICATION

[…]

164. In this regard, the preamble to the Convention on the Rights of the Child establishes that the child requires "special care," and Articles 19 of the American Convention and VII of the Declaration stipulate, respectively, that a child should receive special "measures of protection" and "special protection, care and aid." These measures of protection must, in the Court's opinion, be defined from the perspective of comprehensive protection, i.e. they must promote the full enjoyment of all the rights recognized in the Convention on the Rights of the Child and in other applicable instruments,[125] especially the right to health, to adequate nutrition, to

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constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status."

124. *Cf.* Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development,* UN Doc. A/HRC/11/7, May 14, 2009, para. 62; Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, UN Doc. A/65/222, 3 August 2010, para. 48; and ECHR, *Case of Popov v. France,* Nos. 39472/07 and 39474/07. Judgment of 19 January 2013, paras. 140, 141 and 147. See also, Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, *Addendum: Mission to the United States of America*, UN Doc. A/HRC/7/12/Add.2, 5 March 2008, para. 125.

125. *Cf. Juridical Status and Human Rights of the Child.* OC-17/02, paras. 26 and 88.

education,[126] as well as to play and the recreational activities appropriate to the child's age. In particular, the Court considers that they must be motivated by the promotion of the well-being and development of the child based on three main elements: (i) satisfaction of basic material, physical and educational needs; (ii) emotional care, and (iii) safety, as regards effective protection against any type of abuse, exploitation or form of violence.[127]

[…]

166. Despite the fact that the decision on the legislative and institutional structure for the implementation of said measures corresponds to each State, international human rights law has established an approach to the issue considering that its main objective is the attention and care required by children owing to their special status. Therefore, the Court finds that, in this sphere, the use of the child protection system with its associated services should prevail over that of institutions exercising control of immigration.[128]

167. In the case of unaccompanied or separated children, international law imposes specific obligations on the State based on their particular situation.[129] Even when specific laws or regulations do not exist for the protection of children in an irregular migratory situation, the guidelines for the alternative care of children[130] contain standards relating to arrangements for children who are abroad "for whatever reason"[131] and, in particular, for those who are unaccompanied or separated. Since States must guarantee that the child has an appropriate place to stay, it is pertinent to consider said guidelines in relation to reception arrangements. In this regard, solutions based on the family and the community should be given priority

126. In this regard, the Court has indicated that "according to the obligation of special protection for children established in Article 19 of the American Convention, interpreted in light of the Convention on the Rights of the Child and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, in relation to the progressive development stipulated in Article 26 of the Convention, the State must provide free primary education to all children, in an environment and under conditions appropriate to their full intellectual development." *Case of the Yean and Bosico Girls v. Dominican Republic,* para. 185.

127. *Cf.* Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (Article 3, paragraph 1),* paras. 71 to 74.

128. See also, Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion on the rights of all children in the context of international migration*, 28 September 2012, para. 57.

129. See Article 20 of the Convention on the Rights of the Child. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*.

130. *Cf. Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*, UN Doc. A/RES/41/85, adopted on 3 December 1986, and *Guidelines for the Alternative Care of Children*, UN Doc. A/RES/64/142, adopted on 18 December 2009.

131. *Guidelines for the Alternative Care of Children*, para. 139.

over institutionalization.[132] In addition, States are obliged to adopt the necessary measures to determine the identity and composition of the family of the child in this situation; to trace the family and to promote family reunification,[133] taking into account the child's views and best interest;[134] and to ensure safe and voluntary repatriation to the country of origin. If this is not possible, other durable solutions should be taken into account.[135]

[…]

170. In sum, the Court considers that child migrants and, in particular, those in an irregular migratory situation, who are in more vulnerable circumstances, require host States to take actions specifically designed to provide priority protection for their rights. Thismust be defined in accordance with the particular circumstances of each specific case; in other words, whether the children are with their family, separated or unaccompanied, and based on their best interests. To this end, States, in compliance with their international obligations in this matter, must design and incorporate into their internal law a set of non-custodial measures to be ordered and implemented while the immigration proceedings are held that promote, above all, the comprehensive protection of the rights of the child, in keeping with the characteristics described above, with strict respect for their human rights and the principle of legality.

XI. BASIC CONDITIONS FOR PLACES TO ACCOMMODATE CHILD MIGRANTS AND STATE OBLIGATIONS CORRESPONDING TO CUSTODY FOR MIGRATORY REASONS

[…]

Principle of separation and right to family unity

[…]

178. In short, in the case of child migrants, under international human rights law, the principle of separation has two dimensions: (i) unaccompanied or separated children should be lodged in places apart from those for adults, and (ii) accompanied children should be lodged with their family members, unless it is more appropriate to separate them in application of the principle of the child's best interest.

132. *Cf.* International Committee of the Red Cross and others, *Inter-Agency Guiding Principles on Unaccompanied or Separated Children*, January 2004, p. 26.

133. *Cf.* ECHR, *Case of Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03. Judgment of 12 October 2006, para. 85.

134. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 80.

135. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* paras. 89 to 92.

[…]

Open accommodation centers

180. In the Court's opinion, according to international law in this area and based on the preceding considerations on the scope of Articles 7 of the Convention and XXV of the American Declaration, any measure concerning accommodation should allow entry into and exit from the place where the child is lodged, i.e., accommodation should be provided in an environment of non-deprivation of liberty. Likewise, the European Court of Human Rights has affirmed that closed centers are not adapted to the extreme vulnerability of an unaccompanied child migrant, *inter alia*, because the conditions do not meet their special needs.[136] Thus, the Court finds that the measures must represent and offer an alternative that is materially and qualitatively different from deprivation of liberty in closed centers, according priority to a treatment that is adapted to the needs for comprehensive protection.

Material conditions and an adequate regime that ensure the comprehensive protection of rights

181. The obligatory basic conditions that the State must provide for the persons in its custody, according to the norms cited above, include the condition that the accommodation of children should – based on the principle of the child's best interest and comprehensive protection – permit their holistic development. Accordingly, it is essential that the accommodations for child migrants, whether they are with their family or unaccompanied or separated, ensure material conditions and an adequate regime for the children, that at all times ensure the protection of their rights.[137] In this regard, it is relevant to take into account, in each case, the diversity of the children as regards their ethnic, cultural, linguistic and religious background.[138]

182. The Court also understands from the international norms that these centers must guarantee lodging, maintenance, medical care, legal

136. *Cf.* ECHR, *Case of Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, para. 103.

137. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 12, and Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development,* UN Doc. A/HRC/14/30, 16 April 2010, paras. 56 and 57.

138. *Cf. Guidelines for the Alternative Care of Children*, para. 141, and Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development,* UN Doc. A/HRC/14/30, 16 April 2010, para. 61.

assistance, educational support and integral attention to the children. They must also have available a series of specialized care services owing to the specific needs of each child, in order to respond, for example, to children with disabilities,[139] children living with HIV/AIDS,[140] babies or infants,[141] and victims of child trafficking, among others. In addition, they must ensure that they do not create a situation in which children can be subjected to violence, exploitation or abuse.

183. The Court considers that for a place of accommodation to comply with the conditions for the exercise of the rights established in the Convention on the Rights of the Child, it must have a physical infrastructure that permits said development. Some of these conditions are: ensuring that children have a certain degree of separateness so that their privacy is respected; ensuring that the living quarters should provide a place where they can keep their possessions in safety; ensuring that all meals are provided during the child's stay and that they meet her or his nutritional needs; ensuring access to health care services, both physical and/or psychosocial; ensuring continuous access to education outside the center; ensuring that there is a place for recreation and play; and ensuring that children who wish to take part in cultural, social, and religious activities should have a guardian to accompany them.

184. The personnel of the center must be specialized and receive training in child psychology, protection of the child, and the human rights of the child.[142]

XII. GUARANTEES OF DUE PROCESS IN MEASURES THAT ENTAIL RESTRICTION OR DEPRIVATION OF PERSONAL LIBERTY OF CHILDREN FOR MIGRATORY REASONS

[…]

190. Children, especially when they are foreigners detained in a different social and legal environment from their own and, frequently, in a country with a language they do not know, experience a situation of extreme vulnerability.[143] This presence of circumstances of real inequality make it compulsory to adopt compensatory measures that help reduce or eliminate the obstacles and deficiencies that impede or reduce the effective defense

139. *Cf.* Committee on the Rights of the Child, *General Comment No. 9, The rights of children with disabilities*, UN Doc. CRC/C/GC/9, 27 February 2007.
140. *Cf.* Committee on the Rights of the Child, *General Comment No. 3 (2003), HIV/AIDS and the Rights of the Child*, UN Doc. CRC/GC/2003/3, 17 March 2003.
141. *Cf.* Committee on the Rights of the Child, *General Comment No. 7: Implementing child rights in early childhood*, UN Doc. CRC/C/GC/7/Rev.1, 20 September 2006.
142. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 96.
143. *Cf. Case of Vélez Loor v. Panama,* para. 152.

of their interests.[144] This is how the State should ensure the principle of equality before the law and the courts, and the corresponding prohibition of discrimination.[145] Consequently, the Court will refer to the following aspects: (i) lawfulness of the deprivation of liberty; (ii) prohibition of arbitrary detention or imprisonment; (iii) right to be informed of the reasons for the arrest or detention in a language that the person understands; (iv) right to be taken promptly before a judge or other competent official; (v) right to notify a family member, guardian or legal representative and to communicate with the exterior and, in particular, with the specialized international agencies; (vi) right to information and effective access to consular assistance; (vii) right to legal assistance by a legal representative, and in the case of unaccompanied or separated children, the right to the appointment of a guardian; and (viii) right to have recourse to a competent judge or court for a decision to be taken, without delay, on the lawfulness of the arrest or detention.

[…]

Prohibition of arbitrary detention or imprisonment

[…]

193. In the migratory context, and taking into account Article 1(1) of the Convention, the Court places special emphasis on the fact that detention should not have a disproportionate effect on a specific racial, religious, or any other type of group or social condition, without a reasonable and objective justification.[146] This means that the laws, policies and practices relating to the deprivation of liberty may not establish *de jure* or generate *de facto* discrimination against any nationality in particular and, specifically, result in discrimination against anyone for reasons, such as their race, color or national origin.[147]

[…]

Right to be informed of the reasons for the arrest or detention in a language that the person understands

[…]

144. *Cf. The Right to Information on Consular Assistance within the framework of the Guarantees of Due Process of Law,* para. 119; *Juridical Status and Rights of Undocumented Migrants.* OC-18/03, para. 121, and *Case of Vélez Loor v. Panama,* para. 152.

145. *Cf. Case of Vélez Loor v. Panama,* para. 152.

146. *Cf.* Committee on the Elimination of Racial Discrimination (CERD), *General recommendation No. 30: Discrimination against Non-citizens,* UN Doc. A/59/18, 1 October 2004, paras. 19 and 21.

147. *Cf.* Committee on the Elimination of Racial Discrimination (CERD), *General recommendation No. 30: Discrimination against Non-citizens,* paras. 19 and 21.

196. The information on the reasons for the arrest or detention necessarily presumes, first, providing information on the detention itself; the person must understand that she or he is being arrested or detained.[148] Second, the agent making the arrest or detention must provide information, in a simple language free of technical terminology, on the essential facts and legal grounds on which the measure is based.[149] Likewise, in immigration matters, the Court finds that it is relevant that the person be informed of the procedures available to challenge the restriction or deprivation of liberty, in order to obtain her or his release.

197. In this regard, since aliens are involved, the Court considers it relevant to establish that the language used must be one that the person understands. Moreover, in the case of children, a language that is adapted to their maturity and age should be used. Children must be provided with all the necessary information, adapted to their age and maturity, on their rights, the services available to them, and the procedures they may assert. In particular, they should be informed of: their right to request asylum; their right to have legal assistance; their right to be heard; their right of access to information on consular assistance; and, if appropriate, their right to be appointed a guardian. Added to this, States must guarantee that any child subjected to proceedings that may result in an eventual interference in their right to personal liberty is assisted by a translator or interpreter if the child does not understand or does not speak the language of the receiving country.

Right to be taken promptly before a judge or other competent official

198. Under Articles 7(5) of the American Convention and XXV of the American Declaration, any person detained must be brought promptly before a judge or other official authorized law to exercise judicial functions.[150] This Court has already interpreted that this guarantee must be met whenever a person is retained or detained for a migratory situation, based on the principles of judicial control and procedural immediacy.[151]

148. *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador,* para. 71.

149. *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador,* para. 71.

150. In this regard, it should be indicated that the United Nations Working Group on Arbitrary Detention has established that: "[a]ny […] immigrant placed in custody must be brought promptly before a judicial or other authority." Working Group on Arbitrary Detention, Report of the Working Group Annex II, *Deliberation No. 5: Situation regarding immigrants and asylum seekers*, UN Doc. E/CN.4/2000/4, 18 December 1998, Principle 3. See also, Working Group on Arbitrary Detention, Report of the Working Group, *Civil and political rights, including questions of Torture and Detention*, UN Doc. E/CN.4/1999/63, 18 December 1998, para. 69, Guarantee 3.

151. *Cf. Case of Vélez Loor v. Panama,* para. 107, and *Case of Nadege Dorzema et al. v. Dominican Republic,* para. 136.

To ensure that this constitutes a real mechanism for controlling illegal or arbitrary detentions, the judicial review must be carried out promptly and in such a way as to guarantee compliance with the law and the detainee's effective enjoyment of his rights, taking into account his or her special vulnerability.[152] Furthermore, this Court has already indicated that in order to satisfy the guarantee established in Article 7(5) of the Convention in immigration matters, domestic law must ensure that the official authorized by law complies with the characteristics of impartiality and independence that must govern any organ responsible for deciding the rights and obligations of the individual.[153] In the case of this guarantee, since said official has the task of preventing or ending illegal or arbitrary detentions,[154] it is essential that she or he is authorized to release the person if the detention is illegal or arbitrary.[155]

Right to notify a family member, guardian or legal representative and to communicate with the exterior and, in particular, with the specialized international agencies

[…]

200. The right to establish contact with a family member, guardian, or legal representative, is particularly important in the case of children[156] and especially in the cases of unaccompanied children. Information on the right to establish contact with a family member, guardian, or legal representative, must be provided at the time of the detention;[157] however, in the case of children, the necessary measures must also be taken to implement the notification,[158] taking into account the best interest of the child.

201. In addition, it must be ensured that children are able to communicate with the exterior by any means and, in particular, to contact

152. *Cf. Case of Vélez Loor v. Panama,* para. 107, and *Case of Nadege Dorzema et al. v. Dominican Republic,* para. 136.

153. *Cf. Case of Vélez Loor v. Panama,* para. 108, and *Case of Nadege Dorzema et al. v. Dominican Republic,* para. 137.

154. *Cf. Case of Bayarri v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of October 30, 2008. Series C No. 187, para. 67, and *Case of Nadege Dorzema et al. v. Dominican Republic,* para. 137.

155. *Cf. Case of Vélez Loor v. Panama,* para. 108, and *Case of Nadege Dorzema et al. v. Dominican Republic,* para. 137.

156. The Court has indicated that "The right to establish contact with a family member is particularly important in the case of detentions of minors. In this situation, the authority that carries out the detention and the one in charge of the place where the child is located, must immediately notify the family members or, failing this, their representatives so that the child may receive promptly the assistance of the person notified." *Case of Bulacio v. Argentina,* para. 130.

157. *Cf. The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law,* para. 106.

158. *Cf. Case of Bulacio v. Argentina,* para. 130.

their family, friends, legal representatives, and, if applicable, their guardian. Furthermore, they must be able to receive visits from such persons.[159] The Court also emphasizes that, when appropriate, the child must be able to contact international agencies such as the United Nations High Commissioner for Refugees (UNHCR), the International Committee of the Red Cross (ICRC), the United Nations Children's Fund (UNICEF) or the International Organization for Migration (IOM).[160]

Right to information and effective access to consular assistance

202. First, it is pertinent to indicate that child migrants enjoy the right to consular assistance recognized to any individual detained outside his country of origin.[161] The Court has already stipulated that, from the perspective of the rights of the detainee, there are three essential components of this right that the State must grant the individual:[162] (i) the right to be notified of her or his rights under the Vienna Convention on Consular Relations;[163] (ii) the right to effective access to communication with a consular official; and (iii) the right to consular assistance.

[…]

159. *Cf.* Working Group on Arbitrary Detention, Report of the Working Group Annex II, *Deliberation No. 5: Situation regarding immigrants and asylum seekers*, UN Doc. E/CN.4/2000/4, 18 December 1998, Principle 2, and Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 63.

160. *Cf.* Working Group on Arbitrary Detention, Report of the Working Group Annex II, *Deliberation No. 5: Situation regarding immigrants and asylum seekers*, UN Doc. E/CN.4/2000/4, 18 December 1998, Principle 10, and Working Group on Arbitrary Detention, Report of the Working Group, *Civil and political rights, including questions of Torture and Detention*, UN Doc. E/CN.4/1999/63, 18 December 1998, para. 69, Guarantee 14.

161. See Article 36 of the 1963 *Vienna Convention on Consular Relations*, adopted on 24 April 1963, entry into force on 19 march 1967, of which 35 Member States of the OAS are party to this Convention; and, Article 16(7) of the *Convention for the Protection of the Rights of All Migrant Workers and Members of their Families*, UN Doc. A/RES/45/158, adopted on 18 December 1990, entry into force on 1 July 2003. The following 17 Member States of the OAS are party to this treaty: Argentina, Belize, Bolivia, Chile, Colombia, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Paraguay, Peru, Saint Vincent and the Grenadines, and Uruguay.

162. *Cf. Case of Vélez Loor v. Panama,* para. 153.

163. Thus, the foreign detainee has the right to be informed of his right: (1) that the receiving State inform the competent consular post of his situation, and (2) that the receiving State transmit without delay "any communication addressed to the consular post" by the detainee. *Cf.* Article 36(1)(b) of the Vienna Convention on Consular Relations. This notification must be made before "he makes his first statement." In addition to the other rights of the person deprived of liberty, this "constitutes a mechanism to avoid illegal or arbitrary detentions from the very moment of the deprivation of liberty and, in turn, guarantees the right of defense of the individual." *The Right to Information on Consular Assistance within the framework of the Guarantees of Due Process of Law*, para. 106, and *Case of Vélez Loor v. Panama,* footnote 157.

Right to legal assistance by a legal representative, and in the case of unaccompanied or separated children, the right to the appointment of a guardian

204. States are also bound to guarantee to all children whose liberty is restricted owing to immigration matters, the right to defend themselves by offering State legal representation services.[164] Specifically, States must provide children deprived of liberty with prompt and free access to a legal representative who can give them legal assistance. The Court considers that legal assistance must be provided by a legal professional in order to satisfy the requirements of a technical defense that can advise the person subject to proceedings, *inter alia,* about the possibility of filing remedies against decisions that affect her or his rights.[165]

205. Also, in the case of children who are unaccompanied or separated from their family, it is extremely important, in order to ensure the right to personal liberty, to appoint a guardian for them in order to defend their interests and to ensure their well-being.[166]

Right to have recourse to a competent judge or court for a decision to be taken, without delay, on the lawfulness of the arrest or detention

206. The guarantee contained in Article 7(6) of the American Convention is also applicable. This article indicates that "[a]nyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful."[167] This Court has already indicated that, "given the provisions of Article 27(2) of the American Convention […] the legal remedies guaranteed in Articles 7(6) and 25(1) of the Convention may not be suspended because they are essential judicial guarantees for the protection of the rights and freedoms whose suspension Article 27(2) prohibits."[168] The Court has ruled on these principles and has determined that Article 7(6) has its own legal

164. See Article 37(d) of the Convention on the Rights of the Child. *Cf.* Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development,* UN Doc. A/HRC/20/24, 2 April 2012, para. 38.

165. *Cf. Case of Vélez Loor v. Panama,* para. 132.

166. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 33.

167. See also, Working Group on Arbitrary Detention, Report of the Working Group, *Civil and political rights, including questions of Torture and Detention*, UN Doc. E/CN.4/1999/63, 18 December 1998, para. 69, Guarantee 3.

168. *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights).* Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 44. See also, *Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights),*

content, because it specifically recognizes the right of everyone deprived of liberty to have recourse to a competent judge or panel of judges for a decision to be taken on the lawfulness of the arrest or detention, also known as *habeas corpus*, which consists in the direct protection of physical and personal liberty by means of a judicial order addressed to the corresponding authorities requiring them to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered.[169] Article 7(6) of the Convention clearly establishes that the authority that must determine the lawfulness of the "arrest or detention" must be an independent and impartial "judge or court."[170] In this regard, the Court's case law has already indicated that these remedies should not only exist formally in law, but must be effective, i.e. they must comply with the objective of obtaining a decision on the lawfulness of the arrest or detention without delay.[171] In the case of migrant children, this procedure should be of a priority nature in order to obtain a prompt decision on the action filed.[172]

XIII. PRINCIPLE OF *NON-REFOULEMENT*

[…]

214. Article 22(8) of the American Convention establishes the prohibition to deport or return any "alien" to "a country, whether or not it is his country of origin" – in other words, to her or his country of nationality

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para. 30, and *Case of Neira Alegría et al. v. Peru. Merits.* Judgment of January 19, 1995. Series C No. 20, paras. 82 to 84.

169. *Cf. Habeas Corpus in Emergency Situations (Arts. 27.2, 25.1 and 7.6 American Convention on Human Rights)*, para. 33, and *Case of Vélez Loor v. Panama,* para. 124. See also, Article 37(d) of the International Convention on the Protection of the Rights of Migrant Workers and Members of their Families.

170. *Cf. Case of Vélez Loor v. Panama,* para. 126.

171. *Cf. Case of Vélez Loor v. Panama,* para. 129, and *Case of Nadege Dorzema et al. v. Dominican Republic,* para. 141. In this regard, the observations of the Special Rapporteur on Migrants are instructive: "Some national laws do not provide for judicial review of administrative detention of migrants. In other instances, the judicial review of administrative detention is initiated only upon request of the migrant. In these cases, lack of awareness of the right to appeal, lack of awareness of the grounds for detention, difficult access to relevant files, lack of access to free legal counsel, lack of interpreters and translation services, and a general absence of information in a language detainees can understand on the right to instruct and retain counsel and the situation of the facilities where they are being held can prevent migrants from exercising their rights in practice. In the absence of lawyers and/or interpreters, migrants can often feel intimidated and obliged to sign papers without understanding their content," Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development,* UN Doc. A/HRC/7/12, 25 February 2008, para. 46.

172. *Cf.* Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development,* UN Doc. A/HRC/20/24, 2 April 2012, para. 38.

or, in the case of a stateless person, the country of habitual residence, or to a third State – in which "his right to life or personal freedom" are "in danger of being violated because of his race, nationality, religion, social status or political opinions."[173]

[…]

217. In summary, under the American Convention, the principle of *non-refoulement* established in Article 22(8) takes on a particular meaning, even though this provision was included in the paragraph following the recognition of the individual right to seek and receive asylum, and is a broader right in its meaning and scope than the one included in international refugee law. Thus, the prohibition of *refouler* established in Article 22(8) of the Convention offers complementary protection to aliens who are not asylum seekers or refugees in cases in which their right to life or freedom is threatened for the above-mentioned reasons. A reading of the *travaux préparatoires* of the Convention confirms the interpretation made in accordance with the ordinary meaning to be given to the terms of Article 22(8) of the Convention, in the context of the treaty and in the light of its object and purpose.

218. Following a more thorough examination of the components of the prohibition of *refoulement* codified in Article 22(8) of the Convention, the Court considers that, based on the interpretation of Article 22 as a whole, the term "alien" included in paragraph 8 should be understood as any person[174] who is not a national of the State in question or who is not considered its national by the State based on its laws. This covers those persons who are not considered nationals by the State based on its laws, either because they have lost *ex lege* their nationality or because a decision has deprived them of this nationality, provided that this automatic loss or State decision does not violate its international human rights obligations. In keeping with the foregoing, the Court considers that if a dispute exists with regard to the conformity of such decision or loss with the obligations derived from the American Convention and, in particular with the prohibition against arbitrary deprivation of nationality or other applicable norms, the consideration that the person is a national should prevail until a final decision has been issued in this regard and, consequently, that person cannot be expelled.[175] In this regard, it should also be recalled that the provision of human rights treaties, such as Article 22(5) of the Convention, expressly prohibit the expulsion of nationals.

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173. *Case of the Pacheco Tineo Family v. Bolivia,* para. 134.

174. That is, every human being, in the terms of Article 1(2) of the American Convention.

175. See, similarly, United Nations, Report of the Secretary-General, UN, *Human rights and arbitrary deprivation of nationality*, UN Doc. A/HRC/25/28, 19 December 2013, para. 26.

219. Regarding this point, the terms of Article 1(1) of the Convention should also be taken into account. Evidently, the fact that a person is subject to the jurisdiction of the State is not the same as being in its territory.[176] Consequently, the principle of *non-refoulement* can be invoked by any alien over whom the State in question is exercising authority or who is under its control,[177] regardless of whether she or he is on the land, rivers, or sea or in the air space of the State.

[…]

222. Concerning the risk of the violation of the rights of the child, the Court considers that these should be understood and analyzed focusing on age and gender, as well as under the logic established by the Convention on the Rights of the Child, which recognizes the effective and interdependent guarantee of civil and political rights and the progressive full effectiveness of economic, social and cultural rights,[178] within the framework of which

176. Similarly, Article 1 of the European Convention establishes that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms,* adopted on 4 November 1950, entry into force on 3 September 1953, Article 1. The European Court of Human Rights has indicated that the duty to ensure human rights contained in the European Convention to all persons under the jurisdiction of the State is not limited to the territory of the State Party, but extends to all the persons under its authority and responsibility, both if that authority is exercised within the territory, or outside it. *Cf.* ECHR, *Loizidou* c. *Turkey (preliminary objections)*, No. 15318/89. Judgment of 23 March 1995, para. 62. See also ECHR, *Case of Medvedyez v. France*, No. 3394/03. Judgment of 29 March 2010, para. 62 to 67. Although Article 2(1) of the International Covenant on Civil and Political Rights establishes that "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant," it has been interpreted that this is applicable with regard to the acts of a State in exercise of its jurisdiction outside its own territory ("… the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory)." *Cf.* International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.* Advisory Opinion of 9 July 2004, p. 136, paras. 108 to 110. See also, Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10, stating that "[t]his means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party."

177. Likewise, the decision of the Inter-American Commission: "The Commission does not believe, however, that the term 'jurisdiction' in the sense of Article 1(1) is limited to or merely coextensive with national territory. Rather, the Commission is of the view that a State party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that State's own territory […]," and that "This understanding of jurisdiction – and therefore responsibility for compliance with international obligations – as a notion linked to authority and effective control, and not merely to territorial boundaries, has been confirmed and elaborated on in other cases decided by the European Commission and Court." IACHR, Admissibility Report No. 38/99, *Víctor Saldaño v. Argentina*, March 11, 1999, paras. 17 and 19.

178. In this regard, the Committee on the Rights of the Child has stressed that "enjoyment of economic, social and cultural rights is inextricably intertwined with enjoyment of civil and political rights." Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of*

the right to life also incorporates the component of adequate development and survival. In this regard, 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 Committee on the Rights of the Child has interpreted the word "development" in a broad and holistic manner, to include the physical, mental, spiritual, moral, and social development.[179] These measures acquire fundamental importance because children are at a crucial stage of their physical, mental, spiritual, moral, psychological and social development that will have an impact on the rest of their lives in one way or another.[180] In this regard, the Committee listed a series of circumstances to be evaluated, which include:[181] (a) personal and public safety and other conditions, particularly of a socio-economic character, awaiting the child upon return including, where appropriate, a home study conducted by social network organizations; (b) availability of care arrangements for that particular child; (c) views of the child expressed in exercise of her or his right to do so under article 12 and those of the caretakers; (d) the child's level of integration in the host country and the duration of absence from the home country; (e) the child's right "to preserve his or her identity, including nationality, name and family relations" (art. 8); (f) the "desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background" (art. 20); and (g) in the absence of the availability of care provided by parents or members of the extended family, return to the country of origin should, in principle, not take place without advance secure and concrete arrangements of care and custodial responsibilities upon return.

[…]

229. In this regard, this Court has already emphasized the direct and immediate connection that exists between the rights to life and to personal integrity in the area of human health care.[182] Thus, it could be considered that the expulsion or return of a person violates international obligations, depending on the particular circumstances of the specific person, such

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the Convention on the Rights of the Child (Articles 4, 42 and paragraph 6 of Article 44), para. 6. See also, *Juridical Status and Human Rights of the Child*. OC-17/02, p. 86, eight operative paragraph; Article 26 of the American Convention, and Article 4 Convention on the Rights of the Child.

179. *Cf.* Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (Articles 4, 42 and paragraph 6 of Article 44),* para. 12.

180. *Cf. Case of the Children's Rehabilitation Institute v. Paraguay,* para. 172.

181. *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* paras. 84 and 85.

182. *Cf. Case of Vera Vera et al. v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of May 19, 2011. Series C No. 226, para. 43.

as in cases in which this measures would result in harming or a serious deterioration in the person´s health or, even, when it could lead to her or his death. In order to evaluate a possible violation of the Convention or the Declaration, the status of the health or the type of ailment that the person suffers would have to be taken into account, as well as the health care available in the country of origin and the physical and financial accessibility to this, among other aspects. The European Court of Human Rights,[183] the Human Rights Committee,[184] and the Inter-American Commission on Human Rights[185] have all understood this to be so.

230. This Court has also had the occasion to rule under its contentious jurisdiction on the basic guarantees of due process that must be ensured to aliens in administrative proceedings related to an irregular migratory status,[186] in expulsion or deportation proceedings, either for persons who have entered or remained in a country without complying with the requirements of the immigration laws, or those who are in the country legally,[187] and in proceedings to determine refugee status.[188] The Court considers that a flagrant violation of the basic guarantees of due process may result in the violation of the principle of *non-refoulement.*[189]

183. See, under the European system, ECHR, *Case of D. v. the United Kingdom*, No. 30240/96. Judgment of 2 May 1997, para. 53 ("In view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent State in violation of Article 3 (Art. 3). […] Although it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3 (Art. 3), his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment").

184. See Human Rights Committee, *C. v. Australia*, UN Doc. CCPR/C/76/D/990/1999, decision adopted on 28 October 2002, para. 8(5) ("[…] In circumstances where the State party has recognized a protection obligation towards the author, the Committee considers that deportation of the author to a country where it is unlikely that he would receive the treatment necessary for the illness caused, in whole or in part, because of the State party's violation of the author's rights would amount to a violation of Article 7 of the Covenant").

185. See IACHR, *Case of Andrea Mortlock v. the United States,* Report on admissibility and merits No. 63/08, July 25, 2008, para. 94 ("Under these circumstances, the Commission finds that knowingly sending Ms. Mortlock to Jamaica with the knowledge of her current health care regime and the country's sub-standard access to similar health for those with HIV/AIDS would violate Ms. Mortlock's rights, and would constitute a *de facto* sentence to protracted suffering and unnecessarily premature death").

186. *Cf. Case of Vélez Loor v. Panama*.

187. *Cf. Case of Nadege Dorzema et al. v. Dominican Republic*.

188. *Cf. Case of the Pacheco Tineo Family v. Bolivia*.

189. See within the European system, ECHR, *Case of Chahal v. the United Kingdom* [GC], No. 22414/93. Judgment of 15 November 1996, para. 79; ECHR, *Case of Al-Moayad v. Germany,* No. 35865/03. Decision of 20 February 2007, paras. 100-102; ECHR, *Saadi v. Italy* [GC], No. 37201/06. Judgment of 28 February 2008, para. 127; ECHR, *Case of Z and T v. the United Kingdom*, No. 27034/05. Decision of 28 February 2006; ECHR, *Case of Bader and Kanbor v. Sweden*, No. 13284/04. Decision of 26 October 2004, para. 48; ECHR, *Case of Ahmed v. Austria*, No. 25964/94. Decision of 2 March 1995, and ECHR, *Case of Páez v. Sweden,* No. 29482/95. Decision of 18 April 1996.

231. Moreover, with regard to children, the Committee on the Rights of the Child has concluded that the obligation not to return them is not limited to the real danger that may exist for the child of irreparable harm to her or his rights, contemplated in Articles 6 and 37 of the Convention on the Rights of the Child, but also applies to other serious violations of the rights guaranteed by this instrument, such as "the insufficient provisions of food or health services,"[190] "whether […] they originate from non-State actors or such violations are directly intended or are the indirect consequence of action or inaction."[191] The Court agrees with the Committee on the Rights of the Child that "[r]eturn to the country of origin shall in principle only be arranged if such return is in the best interest of the child" so that it is prohibited "if it would lead to a 'reasonable risk' that such return would result in the violation of fundamental human rights of the child, and in particular, if the principle of *non-refoulement* applies."[192]

232. Consequently, considering the general rule that when an alien alleges before a State that she or he will be at risk if she or he is returned, the competent authorities of that State must, at least, interview the person, giving her or him the opportunity to explain her or his reasons for not being returned,[193] and make a prior or preliminary assessment in order to determine whether this risk exists. If the risk is verified, she or he should not be returned to her or his country of origin or where the risk exists.[194] Moreover, in the case of children it is also essential to determine their best interests as indicated previously.

233. Thus, the prohibition to return, expel, deport, repatriate, reject at the border, or not to admit or in any way transfer or remove a child to a State when the child's life, security and/or liberty is at risk of being jeopardized because of persecution or threat, generalized violence or massive violations of human rights, among others, nor where the child is in danger of being subjected to torture or other cruel, inhuman or degrading treatment, or to a third State from which she or he may be sent to one in which these risks may be encountered, receives additional protection in other human rights norms. This is a protection that extends to another type of gross human rights violations, understood and analyzed from a perspective of age and

190. Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* paras. 26 and 27.
191. Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* paras. 26 and 27.
192. Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* para. 84.
193. *Cf. Case of the Pacheco Tineo Family v. Bolivia,* para. 136.
194. *Cf. Case of the Pacheco Tineo Family v. Bolivia,* para. 136.

gender, as well as under the rationale established by the Convention on the Rights of the Child itself, which makes the determination of the best interest surrounded by the due guarantees a central aspect when adopting any decision that concerns the child and, especially, if the principle of *non-refoulement* is involved.

[…]

236. In situations in which the individual faces a risk of torture, the principle of *non-refoulement* is absolute. However, situations may exist in which there are substantial reasons to consider that an alien represents a threat to national security or public order, but cannot be returned to the country of origin and there is no safe third country where the person can be returned.[195] The Court recognizes that, in cases where neither recognition of a refugee status nor regular immigration status is granted, and faced with the impossibility of return, the State must clarify whether the person in this situation only has the right not to be returned or whether, in addition, she or he is entitled to other rights that would make it compulsory for the State to act.

237. The Court considers that some type of standardized protection should exist for persons who have not been recognized as regular migrants nor qualifying under refugee status, but whose return would, however, be contrary to the general obligations of *non-refoulement* under international human rights law. In the case of *M.S.S. v. Belgium and Greece,* the European Court of Human Rights considered that the fact that an asylum seeker who is left in a precarious situation, with no access to certain minimum basic living conditions, may constitute a violation of the prohibition of inhuman or degrading treatment.[196]

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195. The Commission has indicated that "[f]or persons who have been subject to certain forms of persecution, such as torture, return to their home country would place them at a risk which is impermissible under international law. As noted above, the prohibition of torture as a norm of *ius cogens* – as codified in the American Declaration generally, and Article 3 of the UN Convention against Torture in the context of expulsion – applies beyond the terms of the 1951 Convention. The fact that a person is suspected of or deemed to have some relation to terrorism does not modify the obligation of the State to refrain from return where substantial grounds of a real risk of inhuman treatment are at issue. Return is also highly problematic as a practical matter in the case of stateless persons, or persons with respect to whom it is not possible to obtain travel documents. The information before the Commission is unclear in indicating what other effective options are available to such persons, or that there are adequate safeguards in place to ensure that expulsion does not place their lives or physical integrity at risk." IACHR, *Report on the situation of human rights of asylum seekers within the Canadian refugee determination system,* OEA/Ser.L/V/II.106. Doc. 40. Rev. 1, February 28, 2000, para. 154.

196. *Cf.* ECHR, *Case of M.S.S. v. Belgium and Greece* [GC], No. 30696/09. Judgment of 21 January 2011, paras. 249 to 264.

238. The Court has noted that some countries of the region[197] have established a mechanism that contemplates a type of protection similar to that granted to asylum seekers and refugees that would prevent a person from being placed in a situation in which her or his life, liberty, safety or integrity would be endangered. This mechanism, known as complementary protection, may be defined as the protection that the authorized entity in the receiving country accords to the alien who is an irregular migrant and who does not meet the conditions under the traditional or broadened definition of a refugee. This protection consists, mainly, in not returning her or him to the territory of another country where her or his life, liberty, safety or integrity would be threatened. The Court considers that complementary protection is a way in which the State acknowledges the person's situation, identifies his risks, and ascertains his needs.[198]

[…]

240. Based on the foregoing, the Court considers that complementary protection constitutes a normative development that is consistent with the principle of *non-refoulement*, by means of which States safeguard the rights of those who do not qualify as refugee or under any other migratory status but who cannot be returned. This complementary protection should recognize the basic rights of the persons protected. The State may limit the exercise of certain rights when granting this protection, provided that this is based on sound and objective reasons and does not violate the principle of non-discrimination.

[…]

242. In conclusion, an interpretation of the provisions relating to the principle of *non-refoulement*, based on the special protection derived from Articles 19 of the Convention and VII of the Declaration, and considering the regime established by the Convention on the Rights of the Child, leads this Court to affirm the validity of the extremely well established principle of *non-refoulement* in the case of children. It follows that any decision about their return to their country of origin or to a safe third country may only be based on their best interests, bearing in mind that the risk of their rights being violated may be manifested in specific and particular ways given their age.

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197. See, *Ley sobre Refugiados y Protección Complementaria*, 27 January 2011, Article 2(IV) (Mexico); *Ley No. 761 – Ley General de Migración y Extranjería,* 7 July 2011, Article 220 (Nicaragua), and *Ley General de Migración y Extranjería N° 8764,* 1º September 2009, Articles 6(6) and 94(12) (Costa Rica).

198. In some countries humanitarian visas are granted when persons do not otherwise receive formal recognition by the State because they do not qualify as refugees and cannot be returned. The same practice in different variations, is used in: Argentina, Brazil, Costa Rica, Honduras, Jamaica, Mexico, Nicaragua, Panama, Uruguay, Venezuela.

XIV. PROCEEDINGS TO ENSURE THE RIGHT OF CHILDREN TO SEEK AND RECEIVE ASYLUM

[…]

244. In order to ensure the practical effects of the right to seek and receive asylum established in Articles 22(7) of the Convention and XXVII of the American Declaration and to guarantee its exercise in conditions of equality and without discrimination, the Court has emphasized the overriding requirement that States must design and implement fair and efficient proceedings to determine whether the applicant meets the criteria to exercise this right and to request refugee status, taking into account that the definitions contain subjective and objective elements, which can only be ascertained by means of individualized proceedings that permit a proper examination of the asylum request and that prevent returns that are contrary to international law.[199]

[…]

246. Owing to the special protection derived from Articles 19 of the Convention and VII of the Declaration, the Court understands that the State's obligation to institute and follow fair and efficient proceedings so as to be able to identify potential asylum seekers, and to determine the refugee status of those who meet the requirements to obtain international protection, should also incorporate the components and the specific guarantees developed in light of the comprehensive protection due to all children. In this way, the principles contained in the Convention on the

199. *Cf. Case of the Pacheco Tineo Family v. Bolivia,* paras. 147 and 159. The UNHCR Executive Committee has indicated "the importance of establishing and ensuring access consistent with the 1951 Convention and the 1967 Protocol for all asylum-seekers to fair and efficient procedures for the determination of refugee status in order to ensure that refugees and other persons eligible for protection under international or national law are identified and granted protection". *Cf.* UNHCR, Executive Committee, *General Conclusion on International Protection*, published on 8 October 1993, UN Doc. 71 (XLIV)-1993, para. (i). See also, UNHCR, *Global consultations on international protection: Ministerial Meeting of the States Parties to the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees (12-13 December 2001)- Declaration of the States Parties to the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees,* UN Doc. HCR/MMSP/2001/9, adopted on 13 December 2001, operative paragraph 6. Also, United Nations, General Assembly *Resolution 52/132 Human rights and mass exoduses*, adopted and published on 27 February 1998, UN Doc. A/RES/52/132; United Nations, *General Assembly Resolution 49/169 Office of the United Nations High Commissioner for Refugees,* adopted and published on 24 February 1995, UN Doc. A/RES/49/169; United Nations, *General Assembly Resolution 45/140 Office of the United Nations High Commissioner for Refugees,* UN Doc. A/RES/45/140, adopted and published on 14 December 1990. The Committee against Torture has indicated the importance of "regulating procedures for dealing with and deciding on applications for asylum and refugee status which envisage the opportunity for the applicant to attend a formal hearing and to make such submissions as may be relevant to the right which he invokes, including pertinent evidence, with protection of the characteristics of due process of law." Committee against Torture, *Recommendations of the Committee against Torture:* Venezuela, UN Doc. A/54/44, 5 May 1999, para. 148.

Rights of the Child must "inform both the substantive and procedural aspects of the determination of a child's request for refugee status."[200] Thus, when children are the applicants, they must enjoy, in addition to the general guarantees provided by Articles 8 and 25 of the American Convention, specific procedural and probative guarantees to ensure their access to these proceedings and that just decisions are taken to decide their requests for refugee status,[201] which requires the establishment and implementation of proceedings that are appropriate and safe for children in an environment that creates trust at all stages of the asylum procedure.[202]

[…]

249. Thus, it is possible to consider that Articles 19, 22(7) and 22(8) of the American Convention, VII and XXVII of the American Declaration, 22 of the Convention on the Rights of the Child, as well as the 1951 Convention, its 1967 Protocol and the regional definition of the Cartagena Declaration, constitute the international *corpus iuris* for the protection of human rights of children that are asylum seekers and refugees in the American continent. In this context, the Court will now describe the essential components derived from the State obligation to establish and implement fair and efficient procedures to be able to identify potential asylum seekers and, as appropriate, determine refugee status to those who meet the requirements to obtain this type of international protection, taking into account the particular manifestations of the persecution of children, as well as those specifically required to ensure procedures that are accessible and appropriate for children.

[…]

261. In brief, in order to ensure effectively the right recognized in Articles 22(7) of the American Convention and XXVII of the American Declaration, States must adapt the proceedings on asylum or on the determination of refugee status in order to provide children with a real access to these procedures, allowing their specific situation to be considered. The Court finds that this obligation entails:[203] not impeding entry to the country; if risk and needs are identified, the person should be given access to the State entity

200. *Cf.* UNHCR, *Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees,* UN Doc. HCR/GIP/09/08, 22 December 2009, para. 5.

201. *Cf.* UNHCR, *Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees,* UN Doc. HCR/GIP/09/08, 22 December 2009, para. 65.

202. *Cf. Case of the Pacheco Tineo Family v. Bolivia,* para. 224.

203. *Cf.* UNHCR, *Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees,* UN Doc. HCR/GIP/09/08, 22 December 2009, paras. 65 to 77.

responsible for granting asylum or recognition of refugee status or other procedures that are suitable for the protection and specific attention to the circumstances of each case; priority processing of requests for asylum made by children as the main applicant; the availability of reception personnel in the entity, who can examine the child to determine her or his state of health; conducting an examination and interview endeavoring not to cause further trauma or re-victimization; having available a place of accommodations for the applicant, if they do not have one; issuing an identity document to avoid return; studying the case, with sufficient flexibility with regards to the evidence; assigning an independent and trained guardian in the case of unaccompanied or separated children; if refugee status is granted, proceed to carry out family reunification procedures, if necessary in view of the best interest of the child; and lastly, seeking a durable solution, such as voluntary repatriation, resettlement or social integration, in accordance with the determination of the best interest of the child.[204]

262. It is true that States generally determine cases on an individual basis when granting refugee status. However, in situations of a mass influx of persons,[205] in which individual determination of refugee status is generally impractical, but there is a pressing need to provide protection and assistance, particularly when children are involved, States should guarantee access to "protection from *refoulement*, and basic humanitarian treatment,"[206] by being able to resort to the group, collective or *prima facie* recognition. Under this provision, it is necessary to recognize the concept of shared responsibility that implies, first, that the host country is obliged to admit asylum seekers

204. *Cf.* UNHCR, *UNHCR Guidelines on determining the best interests of the child*, May 2008.

205. The UNHCR has indicated that it is not possible to define what constitutes a "mass or large-scale influx" in absolute terms, but this must be defined in function of the resources available to the receiving country. In this regard, it has indicated that "[t]he expression should be understood as referring to a significant number of arrivals in a country, over a short time period, of persons from the same home country who have been displaced under circumstances indicating that members of the group would qualify for international protection, and for whom, due to their numbers, individual refugee status determination is procedurally impractical." UNHCR, *Commentary on the Draft Directive on Temporary Protection in the Event of a Mass Influx*, 15 September 2000, para. 3(a) citing UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,* UN Doc. HCR/1P/4/ENG/REV.3, December 2011, para. 44. Furthermore, the UNHCR Executive Committee has observed that mass influx is a phenomenon that has not been defined, but that this situation is characterized by aspects such as the following: (i) considerable numbers of people arriving over an international border; (ii) a rapid rate of arrival; (iii) inadequate absorption or response capacity in host States, particularly during the emergency; (iv) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers. *Cf.* UNHCR, Executive Committee, *Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations*, UN Doc. A/AC.96/1003, No.100 (XLV), published on 12 October 2004.

206. UNHCR, *Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, UN Doc. EC/GC/01/4, 19 February 2001, para. 6.

within the territory, without discrimination, and to respect the principles of *non-refoulement* and non-rejection at borders, and to grant appropriate international protection. Accordingly, the country of origin must endeavor to resolve and eliminate the causes of displacement, in order to ensure a durable solution, in particular, voluntary repatriation.

XV. RIGHT TO FAMILY LIFE OF CHILDREN IN THE CONTEXT OF PROCEDURES FOR THE EXPULSION OR DEPORTATION OF THEIR PARENTS FOR MIGRATORY REASONS

[…]

272. It is also pertinent to recall that the family to which every child has a right is, above all, her or his biological family, including extended family, and which should protect the child and also be the priority object of the measures of protection provided by the State.[207] Nevertheless, the Court recalls that there is no single model for a family.[208] Accordingly, the definition of family should not be restricted by the traditional notion of a couple and their children, because other relatives may also be entitled to the

207. *Cf. Case of Fornerón and daughter v. Argentina,* para. 119.

208. *Cf.* Committee for the Elimination of Discrimination against Women, *General recommendation No. 21: Equality in marriage and family relations,* 1994, para. 13 ("The form and concept of the family can vary from State to State, and even between regions within a State. Whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people, as Article 2 of the Convention requires."); Committee on the Rights of the Child, General *Comment No. 7. Implementing child rights in early childhood,* paras. 15 and 19 ("The Committee recognizes that "family" here refers to a variety of arrangements that can provide for young children's care, nurturance and development, including the nuclear family, the extended family, and other traditional and modern community-based arrangements, provided these are consistent with children's rights and best interests. […] The Committee notes that in practice family patterns are variable and changing in many regions, as is the availability of informal networks of support for parents, with an overall trend towards greater diversity in family size, parental roles and arrangements for bringing up children."); Committee on Human Rights, *General Comment No. 19: The family (Article 23)*, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 27 May 2008, para. 2 ("The Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition"), and Committee on Human Rights*, General Comment No. 16: Right to privacy (Article 17),* UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 8 April 1998, para. 5 ("Regarding the term "family", the objectives of the Covenant require that for purposes of Article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned"); and, ECHR *X, Y, and Z, v. the United Kingdom,* No. 21830/93. Judgment of 22 April 1997, para. 36 ("When deciding whether a relationship can be said to amount to "family life", a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means."). See also, ECHR, *Case of Marckx v. Belgium*, No. 6833/74. Judgment of 13 June 1979, para. 31; ECHR, *Case of Keegan v. Ireland*, No. 16969/90. Judgment of 26 May 1994, para. 44, and ECHR, *Case of Kroon and others v. the Netherlands,* No. 18535/91. Judgment of 27 October 1994, para. 30.

right to family life, such as uncles and aunts, cousins, and grandparents, to name but a few of the possible members of the extended family, provided they have close personal ties. In addition, in many families the person or persons in charge of the legal or habitual maintenance, care and development of a child are not the biological parents. Furthermore, in the migratory context, "family ties" may have been established between individuals who are not necessarily family members in a legal sense, especially when, as regards children, they have not been accompanied by their parents in these processes. This is why the State has the obligation to determine, in each case, the composition of the child's family unit.[209] Consequently, in drawing up this opinion and in the context of the situation of migrants, the Court will apply the term "parents" of the child used in the question asked to the Court in a broad sense, including in it those who really constitute part of the child's family and, therefore, are entitled to the protection of the family granted in Articles 17 of the Convention and VI of the American Declaration. In this regard, the Committee on the Rights of the Child has stated that "[t]he term 'family' must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom,"[210] in accordance with Article 5 of the Convention on the Rights of the Child. Furthermore, the provisions of Article 9 concerning the separation of children from their parents also extends "to any person holding custody rights, legal or customary primary caregivers, foster parents and persons with whom the child has a strong personal relationship."[211]

[…]

274. Based on the preceding considerations, the child's right to the protection of the family and, in particular, to enjoy family life preserving family unity insofar as possible should always be givenpriority, except in those cases in which the separation of the child from one or both parents would be necessary owing to the best interest of the child. However, the child's right to family life *per se* does not override the authority of the States to implement their own immigration policies in keeping with human rights, in the context of proceedings relating to the expulsion of one or both parents. The Convention on the Rights of the Child also contemplates the possibility of family separation owing to the deportation of one or both parents.

209. *Cf. Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs,* para. 177.

210. Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (Article 3, paragraph 1),* para. 59.

211. Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (Article 3, paragraph 1),* para. 60.

275. Consequently, it is possible to observe that two conflicting interests arise in cases in which a decision must be taken on the eventual expulsion of one or both parents: (a) the authority of the State concerned to implement its own immigration policy to achieve legitimate purposes that ensure general welfare and observance of human rights, and (b) the right of the child to the protection of the family and, in particular, to enjoy family life by preserving family unit insofar as possible. However, the just demands of general welfare should in no way be construed so as to enable any hint of arbitrariness to the detriment of rights. In order to weigh the interests in conflict, an assessment must be made of whether the measure: is established by law,[212] and complies with the requirements of (a) suitability; (b) necessity, and (c) proportionality; in other words, it must be necessary in a democratic society.[213]

276. Concerning the requirement of suitability, the measure must have a legitimate purpose, i.e. a purpose in keeping with the American Convention.[214] Nevertheless, owing to the nature of the rights that may be affected, this cannot be any kind of purpose, but one that fulfills an essential public interest.

277. The measure must be necessary in the sense that, within the universe of possible measures, there is no other measure that would be equally effective and would be less harmful as regards the right of the child

212. The first step to assess whether a restriction of a right established in the American Convention is permitted in light of Article 30 of this instrument consists in examining whether the restrictive measure complies with the requirement of legality. This means that the general circumstances and conditions authorizing a restriction to the exercise of a specific human right must be clearly established by law. The norm that establishes the restriction must be a law in the formal and material sense. *Cf. Case of Castañeda Gutman v. United Mexican States. Preliminary objections, merits, reparations and costs.* Judgment of August 6, 2008. Series C No. 184, para. 176, and *The Word "Laws" in Article 30 of the American Convention on Human Rights,* Advisory Opinion OC-6/86 of May 9, 1986. Series A. No. 6, paras. 27 and 32.

213. The Inter-American Court has maintained that in order for a restriction to be permitted in light of the Convention it must be *necessary in a democratic society.* This requirement, which the American Convention establishes explicitly for certain rights (Right of Assembly, Article 15; Freedom of Association, Article 16, and Freedom of Movement and Residence, Article 22), has been incorporated by the Court as a standard of interpretation and as a requirements that qualifies any restriction of the rights recognized in the Convention. *Cf. Case of Castañeda Gutman v. United Mexican States,* para. 185.

214. The second limit to any restriction is related to the purpose of the restrictive measures; in other words, the reasons invoked to justify the restriction must be one of those permitted by the American Convention that are established in specific provisions included in certain rights (for example, the purpose of protecting public order or public health, in Articles 12(3), 13(2)(b) and 15), or else in norms that establish legitimate general purposes (for example, "the rights and freedoms of others," or "the just demands of the general welfare, in a democratic society," both in Article 32). *Cf. Case of Castañeda Gutman v. United Mexican States,* para. 180. See also, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 67.

to the protection of the family and, in particular, to maintaining the family unit. To this end, evidently, States must envisage alternatives to expulsion that promote the family unit and regularization of the immigration situation.[215]

278. Lastly, the measure must be strictly proportionate; thus, it must be the one that least restricts the protected right and is closely adapted to the achievement of the legitimate purpose.[216] Indeed, in order to assess the conflicting interests, it must be taken into account that a measure of expulsion may prejudice the life, well-being, and development of the child, and, therefore, her or his best interest must be a primary consideration.[217] Thus, in view of the fact that the expulsion of one or both parents would, in almost no circumstance, be in the best interests of the child, but rather would harm them, the State concerned has the obligation to weigh, adequately and strictly, the protection of the family unit against the legitimate interests of the State and must determine, in the context of each specific case, that the expulsion of one or both parents does not lead to an abusive or arbitrary interference in the family life of the child.[218]

279. To this end, the State will subsequently have to evaluate the specific circumstances of the persons concerned, including in particular: (a) the immigration history, the duration of the stay, and the extent of the ties of the parent and/or the family to the host country; (b) consideration of the nationality,[219] custody and residence of the children of the person to be expelled; (c) the scope of the harm caused by the rupture of the family owing to the expulsion, including the persons with whom the child lives, as well as the time that the child has been living in this family unit, and (d) the scope of the disruption of the daily life of the child if her or his family situation changes owing to a measure of expulsion of a person in charge of the child, so as to weigh all these circumstances rigorously in light of the best interest of the child in relation to the essential public interest that should be protected.

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215. *Cf.* Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion on the rights of all children in the context of international migration*, 28 September 2012, recommendation in para. 84.

216. *Cf. Case of Castañeda Gutman v. United Mexican States,* para. 186.

217. *Cf.* Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (Article 3, paragraph 1)*.

218. *Cf. Juridical Status and Human Rights of the Child.* OC-17/02, para. 72.

219. The Court recalls that "[t]he migratory status of a person is not transmitted to the children", and "[t]he fact that a person has been born on the territory of a State is the only fact that needs to be proved for the acquisition of nationality, in the case of those persons who would not have the right to another nationality if they did not acquire that of the State where they were born." *Juridical Status and Rights of Undocumented Migrants.* OC-18/03, para. 134, and *Case of the Yean and Bosico Girls v. Dominican Republic,* para. 156.

280. In those situations in which the child has a right to nationality – original,[220] by naturalization, or for any other reason established in domestic law – of the country from which one or both of the parents may be expelled owing to their irregular migratory situation, or in which the child complies with the legal conditions to reside there on a permanent basis, it is axiomatic that the child must conserve the right to continue enjoying her or his family life in said country and, as a component of this, mutual enjoyment of the cohabitation of parents and children. The Court finds, in application of the criteria described above, that the rupture of the family unit by the expulsion of one or both parents due to a breach of immigration laws related to entry or permanence is disproportionate in these situations, because the sacrifice inherent in the restriction of the right to family life, which may have repercussions on the life and development of the child, appears unreasonable or excessive in relation to the advantages obtained by forcing the parent to leave the territory because of an administrative offense.

281. In short, in the Court's opinion any administrative or judicial organ that must decide on family separation owing to expulsion based on the migratory status of one or both parents must, when weighing all the factors, consider the particular circumstances of the specific case, and guarantee an individual decision[221] – in keeping with the parameters described in the paragraphs above – evaluating and determining the child's best interest.[222]

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220. In most countries in the region *ius soli* applies, which determines that the person acquires the nationality of the State in whose territory she or he was born. Article 20(2) of the American Convention establishes the right to the nationality of the State in whose territory the person was born, if this person "does not have the right to any other nationality." On this point, the Court underscores that it is necessary, as a guarantee of the right to identity and to the exercise of other rights, that State ensure that all births in their territory are duly registered. See Article 7.1 of the Convention on the Rights of the Child, Article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. *Cf.* Inter-American Juridical Committee, *Advisory Opinion "on the scope of the right to identity*," 71st regular session, Río de Janeiro, Brazil, Document CJI/doc. 276/07 rev. 1, of August 10, 2007, para. 18(3)(6), approved during the same session by Resolution CJI/RES.137 (LXXI-O/07), of August 10, 2007, second operative paragraph.

221. Article 22(9) of the American Convention establishes that: "[t]he collective expulsion of aliens is prohibited." Under the inter-American system for the protection of human rights, the Court has considered that the "collective" character of an expulsion implies a decision that has not made an objective analysis of the individual circumstances of each alien and, consequently, is based on arbitrariness. Also, proceedings that may result in the expulsion or deportation of an alien must, in addition to being individual, respect certain basic guarantees of due process. *Cf. Case of Nadege Dorzema et al. v. Dominican Republic*, paras. 171 and 175.

222. *Cf.* Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (Article 3, paragraph 1),* para. 58.

282. In this regard, the Court finds it essential that, when making this assessment, States ensure the right of children to have the opportunity to be heard based on their age and maturity[223] and that their views are duly taken into account in those administrative or judicial proceedings in which a decision may be adopted that entails the expulsion of their parents.[224] If the child is a national of the receiving country, but one or neither of her or his parents is, it is necessary to hear the child in order to understad the impact that the expulsion of the parent(s) may have on her or him. Also, granting the child the right to be heard is fundamental in order to determine whether there is an alternative that is more appropriate to her or his best interest.

[…]

223. See Article 12 on the Convention of the Rights of the Child. *Cf.* Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development,* UN Doc. A/HRC/11/7, May 14, 2009, para. 59, and Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion on the rights of all children in the context of international migration*, 28 September 2012, para. 84.

224. *Cf. Case of the Pacheco Tineo Family v. Bolivia,* para. 227.

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF EXPELLED DOMINICANS AND HAITIANS v. DOMINICAN REPUBLIC

Series C No. 282

JUDGMENT OF 28 AUGUST 2014

(Preliminary objections, merits, reparations and costs)

[Extracts][1]

1. This is an excerpt from the judgment on the preliminary objections, merits, reparations and costs in the case of *Expelled Dominicans and Haitians v. Dominican Republic*. It contains a summary of the facts, and only the paragraphs relevant to this publication. The number and length of the footnotes has been reduced. The paragraph numbers correspond to those in the original judgment, but the footnotes have been renumbered. The full text of the judgment is available at: http://corteidh.or.cr/docs/casos/articulos/seriec_282_ing.pdf.

JUDGMENT

In the case of *Expelled Dominicans and Haitians*,

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

Humberto Antonio Sierra Porto, President
Roberto F. Caldas, Vice President
Manuel E. Ventura Robles, Judge
Eduardo Vio Grossi, Judge, and
Eduardo Ferrer Mac-Gregor Poisot, Judge;

also present,

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

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter also "the American Convention" or "the Convention") and Articles 31, 32, 65 and 67 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), delivers this Judgment […]:

[…]

VII. FACTS

[The case concerns the illegal and arbitrary deprivation of liberty and subsequent summary expulsions of Haitian and Dominican persons from the Dominican Republic to Haiti, including children, which occurred between 1999 and 2000 without due process and without access to effective recourse for ensuring their rights. In this context, the official identification documents of some of the victims were destroyed or ignored by State authorities at the time of the expulsions, or in other cases some of the victims born in Dominican Republic were not registered as such or did not have documentation proving their nationality.

This Court found that the facts of this case occurred within a context where, in the Dominican Republic, Haitian people and Dominican-born people of Haitian descent commonly lived in poverty and frequently suffered derogatory or discriminatory treatment, including by the authorities, aggravating their situation of vulnerability. This context is connected to the difficulty those who make up said population has obtaining personal identification documents. Furthermore, the Court observed that at least at the time of the facts of this case, for a period of about a decade beginning in

1990, there was a systematic pattern of expulsions of Haitians and persons of Haitian descent from the Dominican Republic, including through collective actions and/or proceedings that lacked an individualized, case-by-case analysis and reflected a discriminatory conception.

Summarized below are the relevant facts regarding the members of each of the victim families in this case:

a) The Medina family, comprised of: Willian Medina, born in the Dominican Republic and carrying his Dominican identification; his partner, Lilia Jean Pierre, born in Haiti, and their children: Awilda, Luis Ney and Carolina Isabel (deceased in 2004), all three of whom with their birth certificates and the first also carrying her Dominican identification card. In November 1999 or January 2000 state officials arrived at the family home and, without verifying their documentation, took all of the family members to the "Oviedo prison." Then, after several hours, they were transferred along with other people to Haitian territory. Moreover, after the public hearing held on October 8 and 9, 2013, the State reported that: starting from actions initiated in September 2013, on October 18 of the same year the Central Electoral Board decided to authorize the provisional suspension of the issuing of the birth registry records of Willian Medina Ferreras and his children Awilda, Luis Ney and Carol Isabel; that it would request before competent courts the nullification of their birth certificates; and they recommended the cancelation of the identification cards as well as the voter identification cards of Willian Median Ferreras and Awilda Medina Ferreras. Finally, the State requested to prosecute "Winet" (an individual who, according to the Central Electoral Board, had presumably identified himself as Willian Medina Ferreras) for allegedly obtaining a "falsified" identity. As of the date of the issuance of this judgment of the Inter-American Court no information about the conclusion of the processes mentioned has been received.

b) The Fils-Aime family, comprised of: Jeanty Fils-Aime (deceased in 2009); his partner Janise Midi, born in Haiti and possessing a Haitian identification card; and their children: Antonion, Diane, and Endry, for whom, as in the case of Jeanty Fils-Aime, it was not possible to determine their place of birth or nationality. On November 2, 1999, State agents detained Mr. Jeanty Fils-Aime by the Market, and later that day arrived at the family home and arrested Janise Midi along with their three children. They were forcibly loaded into a "truck" and taken to the "Fortress of Pedernales, next to Customs," and then together with other persons they were expelled from the Dominican Republic to Haiti.

c) The Gelin family: comprised of: Bersson Gelin, whose place of birth and nationality could not be determined, and his son William Gelin.

According to Bersson Gelin, on December 5, 1999, while he was on his way to work, he was stopped and loaded into a "bus" and then taken to Haiti. This act meant being separated from his son.

d) The Sensión family: comprised of: Antonio Sensión, born in the Dominican Republic and a Dominican identification card holder; his partner Ana Virginia Nolasco, a Haitian national and Dominican identification card holder; and their daughters: Ana Lidia and Reyita Antonia, born in the Dominican Republic and possessing Dominican identification cards. In 1994 Mrs. Nolasco and her daughters were detained by immigration officials and transferred in a "truck" to the Haitian border. Mr. Sensión learned that his family had been forcibly expelled in that same year, and after eight years he found them in the year 2002.

e) The Jean family: comprised of Víctor Jean, who was born in the Dominican Republic; his partner Marlene Mesidor, born in Haiti; and their children: Markenson, born in Haiti and possessing a Haitian passport; and Miguel, Natalie and Victoria (who died on April 20, 2014). According to the evidence presented to the Court, it was determined that Jean Victor and Miguel, Natalie and Victoria were born in the Dominican Republic, but none possessed official documentation. In December of 2000, State agents arrived at the home of the Jean family banging on the door, then entered the house and ordered all the family members to leave and get into a "bus." They then transported them to the border of Jimaní and left them in Haitian territory.

f) Rafaelito Pérez Charles: born in the Dominican Republic and in possession of a Dominican identification card. On July 24, 1999 Mr. Pérez Charles was arrested by several immigration agents while he returned from work. The officers put him into a "bus," then took him to a detention center and later, transported him to Jimaní, from where he was expelled to Haiti.]

VIII. THE RIGHT TO JURIDICAL PERSONALITY, TO A NAME, TO NATIONALITY AND TO IDENTITY, IN RELATION TO THE RIGHTS OF THE CHILD, THE RIGHT TO EQUAL PROTECTION BEFORE THE LAW AND THE OBLIGATIONS TO RESPECT RIGHTS WITHOUT DISCRIMINATION AND TO ADOPT DOMESTIC LEGAL PROVISIONS

[…]

C. Considerations of the Court

[…]

C.1. The right to nationality and to equality before the law

253. Regarding the right to nationality recognized in Article 20 of the American Convention, the Court has indicated that nationality, "as a legal and political bond that links a person to a particular State, allows the individual to acquire and to exercise the rights and responsibilities inherent in membership in a political community. As such, nationality is a prerequisite for the exercise of certain rights,"[2] and it is also a non-derogable right according to Article 27 of the Convention.[3] In this regard, it is pertinent to mention that nationality is a fundamental right of the human person that is established in other international instruments.[4]

254. Furthermore, it should be noted that the American Convention includes two aspects of the right to nationality: the right to a nationality from the perspective of endowing the individual with certain basic minimum legal protections within a set of relationships that establish his or her connection to a particular State, and the right to the protection of the individual against the arbitrary deprivation of his or her nationality, because doing so would deprive the individual of all of his or her political rights and of those civil rights that are based on a person's nationality.[5]

255. This Court has established that:

> Nationality, as it is mostly accepted, should be considered a natural condition of the human being. This condition is not only the very basis of his political status but also part of his civil status. Consequently, even though it has traditionally been accepted that the determination and regulation of nationality fall within the competence of

2. *Cf. Case of the Girls Yean and Bosico v. Dominican Republic,* para. 137.

3. *Cf. Case of the Girls Yean and Bosico v. Dominican Republic*, para. 136. On this issue, the Court has recognized the rights that cannot be suspended as a non-derogable nucleus of rights; in this respect, *cf. Case of the Pueblo Bello Massacre v. Colombia. Merits, reparations and costs*. Judgment of January 31, 2006. Series C No. 140, para. 119, and *Case of González et al. ("Cotton Field")*, para. 244. The Court recalls that the right to nationality cannot be suspended according to Article 27 of the Convention. In this regard, *cf. Habeas Corpus in Emergency Situations (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*. Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 23.

4. *Cf.* Among others, the American Declaration of the Rights and Duties of Man, Article XIX; the Universal Declaration of Human Rights, Article 15; the International Covenant on Civil and Political Rights, Article 24(3) (rights of the child); the Convention on the Rights of the Child, Article 7; the International Convention on the Elimination of All Forms of Racial Discrimination, Article 5 (d) (iii); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 29; the Convention on the Reduction of Statelessness, Article 1(1); the European Convention on Nationality, Article 4; the African Charter on the Rights and Welfare of the Child, Article 6.

5. *Cf. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica.* Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 34, and *Case of Gelman v. Uruguay. Merits and reparations.* Judgment of February 24, 2011. Series C No. 221, para. 128.

each State, developments in this area reveal that international law has imposed certain limits on the State's margin of discretion.[6]

256. In this regard, the Court considers that the determination of nationality continues to be within the jurisdiction of the States. Nevertheless, this attribute of Statehood must be exercised in conformity with the parameters that emanate from the binding norms of international law which States, in the exercise of their sovereignty, have undertaken to abide by. Thus, in accordance with the current development of international human rights law, it is necessary that when regulating the granting of nationality, States must take into account: (a) their obligation to prevent, avoid and reduce statelessness, and (b) their obligation to provide every individual with the equal and effective protection of the law without discrimination.[7]

257. Regarding its obligation to prevent, avoid and reduce statelessness, States have the obligation to refrain from adopting practices or laws on the granting of nationality whose application would contribute to an increase in the number of stateless persons. Statelessness makes it impossible for individuals to enjoy their civil and political rights, and places them in a situation of extreme vulnerability.[8]

C.1.1. Nationality and the obligation to prevent, avoid and reduce statelessness

258. Pursuant to the relevant international legal framework, a State's obligation to respect the right to nationality and to prevent statelessness commences at the time of an individual's birth. In this regard, the International Covenant on Civil and Political Rights[9] establishes that children automatically acquire the nationality of the State in whose territory they are born as otherwise they would be stateless at birth. With respect to the above and Article 24 of the Covenant (rights of the child),[10] the Human Rights Committee stated that "States are required to adopt every appropriate measure, both internally and in cooperation with other States,

6. *Cf. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*. OC-4/84, para. 32.
7. *Case of the Girls Yean and Bosico v. Dominican Republic*, para. 140.
8. *Case of the Girls Yean and Bosico v. Dominican Republic,* para. 142.
9. In force since March 23, 1976. Ratified by the Dominican Republic on January 4, 1978.
10. Article 24 establishes: "1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality."

to ensure that every child has a nationality when he is born."[11] Moreover, Article 7 of the Convention on the Rights of the Child[12] stipulates that:

> 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality [...]
>
> 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

259. Article 20(2) of the American Convention indicates that "every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality." This principle must be interpreted in light of the obligation to ensurethe exercise of the rights of all persons subject to the State's jurisdiction, as established in Article 1(1) of the Convention. Therefore, a State must have certainty that a child born in its territory will acquire the nationality of another State immediately after birth,[13] if he or she is not to acquire the nationality of the State in whose territory he or she was born.

260. Taking into account the above, the Court considers that Article 20(2) of the American Convention should be interpreted in the same way as established in Article 7 of the Convention on the Rights of the Child.[14]

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11. General Comment 17, Article 24 International Covenant on Civil and Political Rights, para. 8. This was also the interpretation followed by the African Committee of Experts on the Rights and Welfare of the Child, Institute for Human Rights and Development in *Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v. Kenya*, of March 22, 2011, para. 42: "a purposive reading and interpretation of the relevant provision strongly suggests that, as much as possible, children should have a nationality beginning from birth." In addition, Article 6(4) of the African Charter on the Rights and Welfare of the Child establishes that: "States Parties to the present Charter shall undertake to ensure that their constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws."
12. In force since September 2, 1990. Ratified by the Dominican Republic on June 11, 1991.
13. Similarly, see United Nations, Human Rights Committee, General Comment 1, Article 24 of the International Covenant on Civil and Political Rights, para. 8*;* African Committee of Experts on the Rights and Welfare of the Child, *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v. Kenya*, of March 22, 2011, para. 51 (the Committee observed that the Government of Kenya had made no efforts to ensure that children of Nubian descent acquired the nationality of another State, in this case Sudan); UNHCR Executive Committee, *Guidelines on Statelessness No. 4* of 21 December, 2012, para. 25. The UNHCR Executive Committee only considered it acceptable that States do "not grant nationality to children born in their territory if the child concerned can acquire the nationality of a parent immediately after birth and the State of nationality of the parent does not have discretion to refuse the grant of nationality." It is recommended to "States that do not grant nationality in such circumstances" that they "assist parents in initiating the relevant procedure with the authorities of their State or States of nationality."
14. Article 1 of the Convention on the Reduction of Statelessness, which the Dominican Republic adhered to on December 5, 1961, stipulates that States must grant their nationality to a person born in their territory who would otherwise be stateless. In addition, it establishes that the nationality must be granted "at birth, by operation of law, or upon an application being lodged with the appropriate

In the *Case of the Girls Yean and Bosico,* the Court noted that "[t]he fact that a person has been born on the territory of a State is the only fact that needs to be proved for the acquisition of nationality, in the case of those persons who would not have the right to another nationality if they did not acquire that of the State where they were born."[15]

261. Moreover, if a State cannot be certain that a child born in its territory can obtain the nationality of another State, for example, by obtaining the nationality of a parent by *ius sanguinis*, the former has the obligation to grant the child nationality (*ex lege,* automatically) to avoid a situation of statelessness at birth, pursuant to Article 20(2) of the American Convention. This obligation also applies in the hypothesis that the parents cannot (owing to the existence of *facto* obstacles*)* register their child in the State of which they themselves are nationals.[16]

C.1.2. Nationality and the principle of equality and non-discrimination

262. The Court has held that Article 1(1) of the American Convention, which establishes the obligation of States to respect and ensure the free and full exercise of the rights and freedoms recognized therein "without any discrimination," is a general norm, the content of which extends to all the provisions of this instrument. In other words, regardless of its origin or form, any treatment is incompatible *per se* with the Convention if it can be considered discriminatory in relation to the exercise of any of the rights that it guarantees.[17] In addition, Article 24 recognizes the right to equal protection of the law, and is applicable if the discrimination relates to unequal protection by domestic law or through its application.[18]

263. The Court also reiterates that "international human rights law not only prohibits policies and practices that are deliberately discriminatory,

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authority […] in the manner prescribed by the national law." In any case, based on the foregoing, the Court understands that the State, on ratifying the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child, undertook to observe a regime that obliges States to guarantee, both internally and in cooperation with other States, that a person has a nationality from the moment of his birth.

15. *Cf. Case of the Girls Yean and Bosico v. Dominican Republic,* para. 156.

16. UNHCR Executive Committee*, Guidelines on Statelessness No. 4* of 21 December 2012, para. 26. This must also be determined based on whether it can reasonably be expected that a person takes measures to acquire nationality in the circumstances of his or her specific case. For example, the children of refugees, see para. 27.

17. *Cf. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, OC-4/84,* para. 53*; Case of the Afrodescendant Communities of the Cacarica River Basin (Operation Genesis) v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2013. Series C No. 270, para. 332, and *Case of Veliz Franco et al. v. Guatemala*, para. 204.

18. *Cf. Case of Apitz Barbera et al. v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 209, and *Case of Veliz Franco et al. v. Guatemala*, para. 214.

but also those whose impact could be discriminatory with regard to certain categories of individuals, even when it is not possible to prove a discriminatory intention."[19] In this regard:

> [A] violation of the right to equality and non-discrimination also occurs in situations and cases of indirect discrimination reflected in the disproportionate impact of norms, actions, policies or other measures that, even when their formulation is or appears to be neutral, or their scope is general and undifferentiated, have negative effects on certain vulnerable groups. [20]

Accordingly, the Court has also stipulated that, "States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of *de jure* or *de facto* discrimination."[21] They are also obliged to "take positive steps to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons."[22]

264. Regarding the right to nationality, the Court reiterates that the *jus cogens* principle of equal and effective protection before the law and non-discrimination[23] requires that States, when regulating the mechanisms for granting nationality, abstain from establishing discriminatory regulations or regulations that have a discriminatory impact on different groups of a population when they exercise their rights.[24] In addition, States must

19. *Case of Nadege Dorzema et al. v. Dominican Republic,* para. 234*, and* ECHR, *Case of D.H. and others v. the Czech Republic*, No. 57325/00. Judgment of 13 November 2007, paras. 184 and 194.

20. *Case of Nadege Dorzema et al. v. Dominican Republic,* para. 235. On that occasion, the Court referred to the comments of the Committee on Economic, Social and Cultural Rights, in its *General Comment No. 20 (Non-discrimination in economic, social and cultural rights*, para. 10(b)). In this judgment, the Court also recalled that the European Court has considered "that where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be regarded as discriminatory notwithstanding that it is not specifically aimed or directed at that group," in the following decision: ECHR, *Hoogendijk v. the Netherlands*, No. 58641/00. Decision on admissibility of 6 January 2005, p. 21.

21. *Juridical Status and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 103, and *Case of Veliz Franco et al. v. Guatemala*, para. 206.

22. *Juridical Status and Rights of Undocumented Migrants.* OC-18/03, para. 104, and *Case of Veliz Franco et al. v. Guatemala*, para. 206.

23. *Cf. Juridical Status and Rights of Undocumented Migrants.* OC-18/03, para. 101.

24. *Cf. Case of the Girls Yean and Bosico v. Dominican Republic,* para. 141. See also: *Case of Yatama*. Judgment of June 23, 2005. Series C No. 127, para. 135; *Juridical Status and Rights of Undocumented Migrants.* OC-18/03, para. 88*, and Juridical Status and Human Rights of the Child. Advisory Opinion* OC-17/02 of August 28, 2002. Series A No. 17, para. 44. See also, with regard to the principle of non-discrimination in the granting or denying of nationality, other international systems and instruments: ECHR, *Case of Genovese v. Malta*, No. 53124/09. Judgment of 11 October 2011 (Discrimination between legitimate and illegitimate children in relation to the acquisition of nationality by *jus sanguinis*); European Commission on Human Rights, *Slepcik v. The Netherlands and Czech Republic*, No. 30913/96. Decision of September 2, 1996 (Discrimination based on race or ethnic group); 1997 European Convention on Nationality, article 5; Convention on the Reduction of Statelessness, Article 9; Convention on the Rights of the Child, articles 2(2), 7 and 8; Committee on the Rights of the Child, General Comment No. 6 (Treatment of unaccompanied or separated children), 2005, para. 12, International Convention on the Elimination of All Forms of Racial Discrimination, article 5(d)(iii); International Convention

combat discriminatory practices at all levels, especially in public entities and, lastly, they adopt positive measures when necessary to ensure that every person is effectively equal before the law.[25] The Court has also established that States have the obligation to guarantee the principle of equality before the law and non-discrimination irrespective of a person's migratory status, and this obligation extends to the sphere of the right to nationality.[26] In this regard, the Court has established, when examining a case with regard to the Dominican Republic, that the migratory status of the parents cannot be transmitted to their children.[27]

C.2. The right to the recognition of juridical personality, to a name, and to an identity

265. With regard to the right to juridical personality protected in Article 3 of the American Convention, the Court has stated that juridical personality "implies the capacity to be the holder of rights (capacity of exercise) and obligations."[28] Consequently, the State must respect and seek the means and legal conditions to ensure the right to the recognition of juridical personality can be exercised freely and fully by the rights holders.[29] This recognition establishes the effective existence of this right before society and the State, permitting the individual to be a holder of rights and obligations, to exercise them and to be able to act on them, constituting an inherent right of the human person from which, pursuant to the American Convention, the State may not derogate.[30] The Court has also asserted that "[a] stateless person, *ex definitione*, does not have recognized juridical personality, because he has not established a juridical and political connection with any State."[31]

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on the Protection of the Rights of All Migrant Workers and Members of their Families, article 29; African Commission on Human and Peoples' Rights, 54/91-61/91-96/93-98/93-164/07-196/97-210/98, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricane des droits de l'homme and RADDHO, Collectif des Veuves et ayant-droit, et Association mauritanienne des droits de l'homme v. Mauritania,* paras. 129 and 131 (denationalization of black Mauritanians).

25. *Cf. Case of the Girls Yean and Bosico v. Dominican Republic*, para. 141.

26. *Cf. Case of the Girls Yean and Bosico v. Dominican Republic*, paras. 155 and 156.

27. *Case of the Girls Yean and Bosico v. Dominican Republic*, para. 156.

28. *Case of Bámaca Velásquez v. Guatemala. Merits*. Judgment of November 25, 2000. Series C No. 70, para. 179, and *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of September 4, 2012. Series C No. 250, para. 119.

29. *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146, para. 189, and *Case of Chitay Nech et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of May 25, 2010. Series C No. 212, para. 101.

30. *Cf.* Article 27 (Suspension of Guarantees) of the American Convention, and *Case of Chitay Nech et al. v. Guatemala,* para. 101.

31. *Case of the Girls Yean and Bosico v. Dominican Republic*, para. 178.

266. Furthermore, the Court has determined that the right to nationality forms part of what has been called the right to identity, defined by this Court as "the collection of attributes and characteristics that allow for the individualization of the person in a society, and, in that sense, encompasses a number of other rights according to the subject it treats and the circumstances of the case."[32]

267. In this regard, the General Assembly of the Organization of American States (hereinafter "the OAS General Assembly" has indicated "that recognition of the identity of persons is one of the means through which observance of the rights to legal personhood, a name, nationality, civil registration, and family relationships is facilitated, among other rights recognized in international instruments, such as the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights."[33] It has also determined that "that failure to recognize one's identity can mean that a person has no legal proof of his or her existence, which makes it difficult to fully exercise his or her civil, political, economic, social, and cultural rights."[34] Similarly, the Inter-American Juridical Committee has stated that the "right to identity is consubstantial to the human attributes and dignity." Consequently, "it is a fundamental human right opposable *erga omnes* as an expression of a collective interest of the international community as a whole, which allows neither annulment nor suspension in the cases established in the American Convention."[35]

268. As revealed by the foregoing, the right to a name is also connected to identity. As recognized in Article 18 of the Convention, the Court has determined that the right to a name "constitutes a basic and essential element of the identity of each individual, without which he cannot be recognized by society or registered before the State. [Thus,]States are obliged not only to protect the right to a name, but also to provide the necessary measures

32. *Case of Gelman v. Uruguay*, para. 122. paragraph]."

33. *Cf.* OAS, "Inter-American Program for a Universal Civil Registry and 'the Right to Identity,'" resolution AG/RES. 2286 (XXXVII-O/07) of June 5, 2007; Resolution AG/RES. 2362 (XXXVIII-O/08) of June 3, 2008, and Resolution AG/RES. 2602 (XL-O/10) of June 8, 2010. On this aspect, the Inter-American Juridical Committee considered that the American Convention on Human Rights, although it does not recognize the right to identity under this specific name, does include, as mentioned, the right to a name, the right to nationality, and the right to protection of the family. In this regard, *cf.* Opinion adopted by the Inter-American Juridical Committee on the scope of the right to identity, on August 10, 2007, paras. 11(2), 12 and 18(3)(3). This was cited in the Court's judgment in the case of *Gelman v. Uruguay* (para. 123).

34. *Cf. Case of Gelman v. Uruguay*, para. 123.

35. *Cf. Case of Contreras et al. v. El Salvador. Merits, reparations and costs*. Judgment of August 31, 2011. Series C No.232, para. 112.

to facilitate the registration of an individual immediately after birth."[36] The Court has indicated that:

> States must also ensure that the individual is registered under the name that he or his parents have chosen, according to the moment when registration occurs, without any type of restriction to the right or interference in the decision of choosing the name. Once an individual is registered, the possibility of preserving and re-establishing the given name and surname must be ensured. The given name and surname are essential to formally establish the connection that exists between the different members of the family[37]

C.3. Rights of the child

269. The Court has emphasized that cases in which the victims of human rights violations are children are particularly serious,[38] as they are not only holders of the rights established in the American Convention, but also protected by the special measures established in Article 19 of the same, as defined according to the particular circumstances of each specific case.[39] The Court has affirmed that any State, social or family decision that entails any constraint on the exercise of any right of a child must take into account the principle of the best interests of the child and be rigorously adapted to the relevant legal provisions.[40] In this regard, the Committee on the Rights of the Child had indicated that the failure to register a child "can have a negative impact on a child's sense of personal identity, and children may be denied entitlements to basic health, education and social welfare."[41]

C.4. Obligation to adopt domestic legal provisions

270. With regard to the obligation to adopt domestic legal provisions established in Article 2 of the Convention, the Court has indicated that this provision imposes on the States Parties the general obligation to adapt their domestic law to the provisions of the Convention in order to ensure and make effective the exercise of the rights and freedoms recognized there-

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36. *Cf. Case of the Girls Yean and Bosico v. Dominican Republic*, paras. 182 and 183, and *Case of Contreras et al. v. El Salvador*, para. 110.

37. *Case of the Girls Yean and Bosico v. Dominican Republic*, para. 184, and *Case of the Las Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of November 24, 2009. Series C No. 211, para. 192.

38. *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, paras. 146 and 191, and *Case of Veliz Franco et al. v. Guatemala*, para. 133.

39. *Cf. Case of Fornerón and daughter v. Argentina. Merits, reparations and costs.* Judgment of April 27, 2012. Series C No. 242, para. 44, and *Case of the Pacheco Tineo Family v. Bolivia*, para. 217.

40. *Cf. Juridical Status and Human Rights of the Child.* OC-17/02, para. 65*, and Case of the Pacheco Tineo Family v. Bolivia*, para. 218.

41. United Nations, Committee on the Rights of the Child, General Comment No. 7 (2005) "Implementing child rights in early childhood," CRC/C/GC/7/Rev.1, 20 September 2006, para. 25.

in.[42] The Court has stated that this entails the adoption of two types of measures, namely: (a) the enactment of laws and the implementation of practices leading to the effective observance of these guarantees, and (b) the elimination of laws and practices of any kind that result in a violation of the guarantees established in the Convention,[43] because they fail to recognize those rights and freedoms or they prevent their exercise.[44]

271. As the Court has noted on other occasions, the provisions of domestic law that are adopted to this end must be effective (the principle of *effet utile*), which means that States are obliged to enshrine and adopt in their domestic laws all measures required to ensure that the provisions of the Convention are truly complied with and implemented.[45]

C.5. Application to this case

C.5.1. Regarding the individuals whose identification documents were repudiated by the authorities at the time of their expulsion

[...]

273. According to the facts of the case, the personal documents of Willian Medina Ferreras were destroyed by Dominican officials during his expulsion. Awilda Medina, Luis Ney Medina and Carolina Isabel Medina, moreover, were not given the opportunity to show their documents to the officials because they were expelled without proper verification of their documents and their nationality. Meanwhile, Rafaelito Pérez Charles was detained and expelled by several agents who did not allow him to present his identification documents, even though Mr. Pérez Charles had informed them that these documents were at his home.

274. The actions of the State agents amounted to a failure to acknowledge the identity of the victims by either not allowing them to identify themselves or not properly verifying the documentation they presented. This situation affected other rights, such as the right to a name, the right to recognition of juridical personality, and the right to nationality that, taken as a whole, prejudiced the right to identity. Additionally, the Court considered that, in this case the State, by ignoring the documentation of Awilda Medina, Luis

42. *Cf. Case of Albán Cornejo et al.. v. Ecuador. Merits reparations and costs.* Judgment of November 22, 2007. Series C No. 171, para. 118, *and Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile,* para. 175.

43. *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs*. Judgment of May 30, 1999. Series C No. 52, para. 207, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile,* para. 175.

44. *Cf. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, para. 113.

45. *Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.)*. Judgment of February 5, 2001. Series C No. 73, para. 87, and *Case of Osorio Rivera and family members v. Peru,* footnote 332.

Ney Medina and Carolina Isabel Medina, who were children at the time of the events, did not take into consideration the best interests of the children.

275. In consideration of the context in which the facts of the case occurred, furthermore, the Court found that, in violation of the obligation not to discriminate, the aforementioned violations were the result of pejorative treatment based on the personal characteristics of Willian Medina Ferreras, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina and Rafaelito Pérez Charles whose Haitian origin was noted by the authorities who intervened.

276. Based on the above, the Court considers that the repudiation by State agents of the documentation of Willian Medina Ferreras, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina and Rafaelito Pérez Charles at the time of their expulsion constituted a violation of their right to the recognition of juridical personhood, to a name and to a nationality, as well as, owing to all these violations taken as a whole, a violation of the right to an identity, thereby amounting to, a violation of Articles 3, 18 and 20, respectively, of the American Convention. These violations occurred within the context of non-compliance with the obligation to respect rights without discrimination, as established in Article 1(1) of this instrument and, likewise, with regard to the rights of the child recognized in Article 19 of the Convention, to the detriment of Awilda Medina, Luis Ney Medina and Carolina Isabel Medina (deceased).

C.5.2. Regarding those born in Dominican territory who were not registered and did not have documentation

277. It should be explained that, as revealed by the foregoing, the Commission, contrary to the representatives, affirmed that Victoria, Natalie and Miguel, all surnamed Jean, who were children at the time of the facts, were Dominican nationals and possessed the pertinent documentation to prove this. However, the facts of the case and the State's assertions reveal that, although the State acknowledged that these persons were born in Dominican territory, they did not have documentation that proved their Dominican nationality. To the contrary, the State affirmed that they have the right to Haitian nationality and that as such, it understood that they would not be left stateless if they were not granted Dominican nationality. With regard to Victor Jean, based on the facts of the case, it is observed that he was born in the Dominican Republic,[46] but he also did not have the documentation to prove his nationality. The Court notes that although some of the aforementioned individuals were born before the recognition

46. According to the criteria for the assessment of the evidence, based on the evidence available, the Court understands that Victor Jean was born in Dominican territory in 1958.

of the Court's temporal competence, the lack of documentation continued following the acceptance of the Court's jurisdiction and therefore the Court is competent to examine that circumstance.

278. As pertains to the individuals mentioned above, what is to be reviewed is the omission that began on March 25, 1999, consisting in the lack of documentation proving their identity and nationality. In response, the State has argued that this does not constitute a violation of the American Convention as the claim is unfounded on legal grounds, and that, therefore, these individuals are not entitled to such documentation. The Court must therefore consider the State's arguments to determine whether State responsibility is invoked as a result of the omission.

279. The Court notes that the State has argued that, based on its domestic laws, the presumed victims were not entitled to Dominican nationality by the application of *ius soli*, and that the State has no obligation to grant it to them because, in its opinion, they would not be made stateless. In consideration of the State's assertion that, for legal reasons, the presumed victims were not Dominican, the Court finds that it is not necessary to verify the factual aspects relating to the alleged obstacles for obtaining the documents or the alleged "refusal" by the authorities to grant them them.

[...]

289. First, it is observed that the Constitutions of 1955 and 1994, as well as that of 1966, did not explicitly state that those born in Dominican territory, who were the children of aliens in an irregular situation, could not acquire Dominican nationality based on this fact, nor that, with regard to the acquisition of Dominican nationality, a parallel could be drawn between migratory irregularity and the concept of a person who "is in transit in the [Dominican territory]." In addition, judicial interpretations existed prior to the enactment of the General Migration Law of August 27, 2004, stating that the concept of "transit" was not the same as the "illegal status of the alien".

290. Second, it is also observed that in 2005 and 2013, in other words, following the birth of the presumed victims and, the facts of this case, in general the Supreme Court of Justice and the Constitutional Court, respectively, interpreted article 11(1) of the Constitutions of 1994 and 1966, as well as the similar provision included in "all the Dominican Constitutions since [...] 1929". Despite the fact that the constitutional texts do not include an explicit statement to this effect[47], according to the interpretation of the

47. The 2004 Migration Law had established that "[n]on-residents are considered to be persons in transit for the purposes of the application of article 11 of the Constitution."

constitutions by the judiciary, individuals whose parents are aliens residing irregularly in Dominican territory cannot acquire Dominican nationality. Thus, in the words of the Constitutional Court cited above, "these persons may not claim that their children born in the country have a right to obtain Dominican nationality under article 11(1) of the 1966 Constitution", the wording of which is almost identical to that of the Constitutions of 1955 and 1994.

291. Third, it should be underscored that the express inclusion in the Dominican constitutional provisions of the "illegal residence" of the ascendants of persons born in Dominican territory as grounds for denying the latter Dominican nationality was included only recently,in 2010. Thus, article 18(3) of the Constitution, resulting from the constitutional amendment published on January 26, 2010, indicates that persons born on national territory who are "children [...] of aliens in transit or residing illegally in Dominican territory" shall not be Dominicans.

292. Regarding the above, it should be noted that the Dominican Republic's assertion is correct that the inclusion of requirements for the acquisition of nationality by birth in the State's territory is not *per se* discriminatory Nevertheless, as the State has indicated, the State's "authority" concerning the regulation of nationality is limited by the respect for human rights; in particular, by the obligation to avoid the risk of statelessness. Expert witness Harrington made a similar observation.

293. The State alleged, however, that, in its opinion, the presumed victims referred to above, "were not born Dominicans based on the application of the principle of *ius soli* [...], because neither they nor their parents have proved that [...] their migratory status was regular at the time of their birth." Furthermore, the State asserted that these persons would not be stateless because Haiti recognized *ius sanguinis* and that it is not discriminatory to establish requirements for the acquisition of nationality. Consequently, the State claimed that no evidence of "institutional discrimination" against "Haitians seeking to obtain Dominican nationality" existed. The State's argument is consistent with the affirmations of the Supreme Court of Justice and the Constitutional Court in 2005 and 2013, respectively, in the sense that despite the absence of an explicit reference in the constitutional texts prior to the constitutional amendment published on January 26, 2010, based on the domestic constitutional and juridical regime in force prior to that year, those individuals whose parents were aliens in an irregular situation do not have a right to acquire Dominican nationality.

294. In this regard, the Court finds it desirable to indicate that, irrespective of the legal terms of State laws and regulations, or their interpretation by the competent State organs, as indicated by this Court in

the *Case of the Girls Yean and Bosico v. Dominican Republic*, basic standards of reasonableness must be followed in matters relating to the rights and obligations established in the American Convention. Thus, as the Inter-American Court indicated in that case "to consider that a person is in transit, irrespective of the classification used, the State must respect a reasonable temporal limit and understand that a foreigner who develops connections in a State cannot be equated to a person in transit."[48]

295. Moreover, the Court notes that, prior to the entry into force of the 2010 constitutional amendment or, at least before the enactment of the 2004 Migration Law, there was no consistent State practice or uniform judicial interpretation that denied nationality to the children of aliens in an irregular situation. Thus, it is illustrative to note the previously cited domestic judicial decision of October 16, 2003, that "the illegal status of the alien cannot be compared to the concept of 'in transit,'". Expert witness Rodríguez Gómez, in his expert testimony by affidavit on October 1, 2013, stated that, until the enactment of the Migration Law, "national case law [...] was consistent and categorical on this issue" in the same sense as the above-cited judicial decision. Furthermore, the "*Consideranda*" of Law No. 169-14 are also illustrative of the fact that from 1929 on, based on findings of the Constitutional Court in judgment TC/0168/13, documentation had been granted that "presumed" the Dominican nationality of persons who, according to the legal interpretations made in that judgment, were not Dominicans. Consequently, these "*Consideranda*", in referring to the above-mentioned judgment, indicated that "the Constitutional Court referred [...] to what it called 'the unanticipated legal issues of the Dominican immigration policy and the institutional and bureaucratic shortcomings of the Civil Registry,' indicating that these unanticipated issues 'go back to the time immediately after the proclamation of the Constitution of [...] June 20, 1929,' resulting in a number of persons receiving documentation as though they were Dominican nationals, having been born in Dominican territory, and consequently had concrete certainties and expectations in their life as citizens based on the acquired nationality." In addition, Cristóbal Rodríguez Gómez, in his expert opinion, stated that "over six years ago, the Central Electoral Board began revoking the nationality of [...] [persons] who had been born 15, 20, 30 and 40 years before the new General Migration Law 285-04 was enacted." The statement of the expert witness reveals that, prior to 2004, Dominican nationality had been granted to persons who, eventually and only as a result of legal criteria that were subsequently defined, did not comply with the requirements for its possession.

48. *Case of the Girls Yean and Bosico v. Dominican Republic*, para. 157.

296. In addition, as the State has acknowledged, it is not possible to enact regulations that result in the risk of persons born in their territory as stateless. In this regard, the Court has indicated that "[t]he fact that a person has been born in the territory of a State is the only fact that needs to be proved for the acquisition of nationality, in the case of those persons who would not have the right to another nationality if they did not acquire that of the State where they were born."[49] Accordingly, it is relevant to examine the State's argument that the presumed victims would be able to acquire Haitian nationality because Haiti allegedly applies the system of *ius sanguinis* to grant nationality.

297. On this point, the Court notes that the State's argument relevant to this case is insufficient, consisting solely in the assertion that, in Haiti, nationality is regulated by *ius sanguinis*. This is because the State has not proved that the presumed victims who never obtained Dominican nationality are, in fact, able to obtain Haitian nationality. Hence, to reveal the insufficiency of the State's arguments, it is enough to weigh them against certain well-known public information, such as the fact that the 1987 Haitian Constitution was in force on the date of the birth of the presumed victims who were children on March 25, 1999. Article 11, the 1987 Constitution established that any individual born of a Haitian father or mother who had been born Haitian and had never renounced that nationality could acquire nationality by birth. However, Articles 7 and 8 of the Decree-Law on nationality of November 6, 1984, established that children born abroad of a Haitian mother and a foreign father, as in the case of these presumed victims, could not acquire Haitian nationality until they came of age, at which time, they could choose between the foreign nationality and the Haitian nationality, provided that they were going to settle, or were already settled in Haiti. Regarding Victor Jean, the Haitian Constitution in force at the time of his birth, in 1958, was the 1957 Constitution, which, in its article 4(a) established that any child of a Haitian father may acquire nationality by birth.[50] In this regard, it should be clarified that this does not mean that the Court, in the context of this case, is reviewing the laws of Haiti; it is merely demonstrating that, based on certain public information, the State's argument that the presumed victims could acquire Haitian nationality would have required greater substantiation to support it. Thus,

49. *Cf. Case of the Girls Yean and Bosico v. Dominican Republic*, para. 156.c.

50. Despite the general indication, with which the parties agree, that the presumed victims are of Haitian descent, the information with regard to Victor Jean's filiation has not been authenticated, so that it has not been proved whether his parents were both Haitians, or whether only his mother or only his father were. This gives rise to uncertainty about whether Victor Jean's situation is adapted to the hypothesis established in the said Haitian constitutional text.

the information presented by the State in this regard does provide the Court with certainty as to whether the State has taken measures to verify that the presumed victims in question could really obtain Haitian nationality.

298. Given the above, it follows that the presumed victims never obtained documentation proving their nationality. In this regard, the State's assertion that the presumed victims are not Dominicans relates to the interpretation of constitutional provisions in force prior to January 26, 2010, based on judicial decisions issued in 2005 and 2013, following the birth of the individuals in question and, in general, the facts of this case. Thus, the applicable legal regime would mean, in practical terms, a retroactive application of norms affecting the legal certainty of the enjoyment of the right to nationality. In addition, within the context of the case, this would entail the risk of statelessness for the presumed victims, because the State has not provided sufficient proof that these persons would obtain another nationality. Consequently, the State has not sufficiently proven that there are valid legal arguments to justify the assertion that its omission, that of failing to provide documentation to the presumed victims, did not result in the deprivation of their access to a nationality. Hence, the State's denial of the right of the presumed victims to the Dominican nationality resulted in an arbitrary violation of that right.

299. As indicated above, it must, therefore, be established that the denial of nationality to the presumed victims also gave rise to a violation of the right to recognition of juridical personality. Similarly, the failure to obtain personal identification documentations led to a violation of the right to a name. Moreover, as has already been observed, the close relationship between these three rights that were violated and the right to an identity resulted in the violation of the latter.[51]

300. The Court also considers that, in this case, the State's actions did not take into consideration the best interests of the child by failing to grant documentation to Miguel Jean, Victoria Jean and Natalie Jean, who were children at the time that the events occurred and after March 25, 1999.

301. Based on the above, the Court considers that the State violated the right to the recognition of juridical personality, to a name, and to a nationality recognized in Articles 3, 18 and 20 of the American Convention, as well as, owing to this series of violations, – the right to an identity, in

51. Regarding the arguments of the Commission and the representatives in relation to the alleged discriminatory "impact" or "application" of "the law" or its "interpretation or application", this Court refers to its analysis below. In addition, as already mentioned, the representatives indicated a connection between the right to identity and "the right to a family," without presenting specific arguments in this regard. This failure to present specific arguments on the "right to a family" prevents the Court from examining the supposed violation of that right. This is without prejudice to the analysis of Article 17 of the Convention that, based on other grounds, will be made in Chapter X.

relation to the non-compliance with the obligations established in Article 1(1) of the Convention, to the detriment of Victor Jean, Miguel Jean, Victoria Jean and Natalie Jean, and also in relation to the rights of the child recognized in Article 19 of this instrument, to the detriment of the latter three of these persons.

C.5.3. Regarding the alleged violation of Article 2 of the American Convention in relation to Articles 1(1), 3, 18, 20 and 24

[...]

304. The representatives, however only allege non-compliance with Article 2 of the Convention in relation to the right to nationality. Neither in its submission filing the case, nor in the Merits Report, did the Inter-American Commission include arguments with regard to the non-compliance with the right to the recognition of juridical personality and to a name. The representatives, furthermore, in their Brief containing Pleadings, Motions, and Evidence also refrained from arguing non-compliance with those rights. This, however, does not prevent the Court from reviewing whether non-compliance with the obligation to adopt domestic legal provisions in relation to such rights existed. It is relevant to examine this in the case *sub-judice* because the Court has declared the violation of those rights as a result of the repudiation by State authorities of the personal documentation of the presumed victims or, in the case of some of the presumed victims, the impossibility in obtaining such documentation. The Court will also undertake this review with regard to the right to equality before the law, the violation of which was alleged by both the Commission and the representatives.

305. On this point, the Court reiterates that the principle of *iura novit curia*, which is strongly supported by international jurisprudence, allows it to review the possible violation of provisions of the Convention that have not been alleged in the briefs presented by the parties, provided that the latter have been able to state their respective positions in relation to the facts that support them.[52] In this regard, the Court has applied this principle on several occasions since handing down its first judgment, in order to find the violation of rights that had not been alleged to directly by the parties, but that emerged through the analysis of the facts in dispute. This is because the principle of *iura novit curia* authorizes the Court to consider the legal situation or statement in conflict differently from the way in which the

52. *Cf. Case of Velásquez Rodríguez v. Honduras. Merits,* para. 163*, and Case of Furlan and family members v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012. Series C No. 246, para. 55.

parties had classified it, provided that it respects the factual framework of the case.[53]

306. Accordingly, in consideration of the facts of the case and through the application of the *iura novit curia* principle, the Court notes that the possible failure to comply with Article 2, due to the abovementioned norms and decisions, could impact the aforementioned rights. Consequently, in this section, the Court will examine the arguments presented by the representatives on the right to nationality, extending its analysis to the other rights that have been mentioned, insofar as the Court has already examined them and has found them to have been violated.

307. The Court notes that there is no evidence that General Migration Law No. 285-04 enacted in 2004, and Resolution 02-07 of the Central Electoral Board which created and brought into effect the Birth Registry for the children of a foreign mother in the Dominican Republic, and in accordance with the norms referenced by the representatives, were applied to the victims in this case or affected the enjoyment of their rights in any other way. Hence, the Court is unable to rule on their alleged incompatibility with the American Convention.

308. Nevertheless, the Court finds it necessary to decide on judgment TC/0168/13 of the Constitutional Court of September 23, 2013, and on Law No. 169-14, owing to its close relationship with that judgment. Also, for the reasons outlined below, it is pertinent that the Court examine Circular No. 017 of March 29, 2007, of the President of the Administrative Chamber of the Central Electoral Board, and Resolution 12-2007 of December 10, 2007, of the plenary session of the Central Electoral Board.

309. Regarding judgment TC/0168/13, the representatives presented this as a "supervening fact," which was contested by the State. In the case of the abovementioned Circular and Resolution, it should be noted that these documents were included by the representatives in their Brief containing Pleadings, Motions, and Evidence as documentary evidence.

310. The Court considers that, although judgment TC/0168/13 was not the result of proceedings to which the presumed victims were party, and that it has not been argued that it applied directly to them, the judgment not only establishes the interpretation of norms that are relevant to the situation of the presumed victims because it refers to "all the Dominican Constitutions as of 1929," and because it ordered a policy for general review, as of 1929, to detect "aliens who are irregularly registered," which may affect the enjoyment of the right to nationality of the victims considered in this

53. *Cf. Case of Bueno Alves v. Argentina. Merits, reparations and costs.* Judgment of May 11, 2007. Series C No. 164, para. 70, and *Case of Furlan and family members v. Argentina*, para. 55.

chapter.[54] Consequently, it is pertinent to consider judgment TC/0168/13 as a supervening fact and to therefore examine its juridical implications on the case *sub examine*.[55]

311. Regarding judgment TC/0168/13, it should be recalled that, in its case law, the Inter-American Court has established that it is aware that domestic authorities are subject to the rule of law and, therefore, are obliged to apply the laws that are in force.[56] However, when a state is party to an international treaty, such as the American Convention, all of its organs, including its judges, are also subject to that treaty. This obliges states 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 levels are obliged to exercise *ex officio* a "conventionality control" between domestic laws and the American Convention. Evidently such a control must be undertaken within the framework of their respective jurisdictions and the corresponding procedural regulations. As such, they must not only take into account the treaty, but also its interpretation by the Inter-American Court, the highest authority for the interpretation of the American Convention.[57]

54. In this regard, even though judgment TC/0168/13 is not a law, the text reveals that the decisions made in it have general implications that go beyond the parties involved in the respective proceedings. Not only was this not contested by the State (or by the representatives or the Commission), but was also revealed by the Dominican Republic because it advised that it is "binding for all the public powers and organs of the State," and its words reveal that it affects those born in Dominican territory of foreign parents who do not have at least one parent who is a "legal resident". According to the Court's case law, the possibility of the Court examining a general law or norm, also including Resolution No. 12-07, Circular No. 017 and Law No. 169-14, is not narrowly restricted to their having been applied to the victims in a case because, depending on the case, it may also be in order for the Court to rule on norms or measures of a general nature when, even in the absence of a specific and actual action applying them to the presumed victims, their impact or effects on the validity, exercise and enjoyment of the treaty-based rights of these persons is verified, or they represent an obstacle or an impediment to the due observance of the corresponding State obligations. (This is revealed by the analysis made by the Court in the *Case of García Lucero et al. v. Chile*, paras. 156, 157 and 160).

55. In addition, as already indicated, on June 9, 2014, the State presented as "supervening facts" norms relating to judgment TC/0168/13. These are "Decree No. 327-13 of November 29, 2013," and "Law No. 169-14 of May 23, 2014". First, it should be noted that the State's presentation of these facts to the Court means that the State considers them relevant to the case *sub examine*, even though it did not present arguments on how they impact it. The Court notes that the said norms consider judgment TC/0168/13 to be one of their justifications, and Law No. 169-14 accords it an important place in its "*Consideranda.*" This reaffirms that, even though, at one time the State was opposed to the Court examining this Constitutional Court judgment, it is relevant to this case.

56. *Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs.* Judgment of September 26, 2006. Series C No. 154, para. 124, and *Case of García Cruz and Sánchez Silvestre v. Mexico. Merits, reparations and costs*. Judgment of November 26, 2013. Series C No. 273, footnote 76.

57. *Cf. Case of Liakat Alibux v. Suriname,* para. 87.

312. In judgment TC/0168/13, the Constitutional Court indicated that it was legal, according to the text of article 11(1) of the 1966 Constitution, and of Dominican constitutional law as of 1929, in general, to apply the fact that the parents of the persons born in Dominican territory were aliens living irregularly in the country as an exception to the acquisition of Dominican nationality by *ius soli*.[58] Based on this understanding, the Constitutional Court held the following in the fifth operative paragraph of judgment TC/0168/13:

> Fifth: To establish, also, that the Central Electoral Board implement the following measures:*(i) Conduct a thorough audit of the birth records of the Civil Registry of the Dominican Republic from (June 21, 1929,) to date*, within one year of notification of this judgment (renewable for a further year at the discretion of the Central Electoral Board), to identify and to incorporate into a written and/or digital list, all the aliens registered in the birth recordsof the Civil Registry of the Dominican Republic; *(ii) Make a second list of the aliens who are registered irregularly because they lack or do not meet the requirements set out in the Constitution of the Republic for attribution of Dominican nationality through ius soli*, *which shall be called the List of aliens irregularly registered in the Civil Registry of the Dominican Republic*. (iii) Create special annual birth records for aliens from June 21, 1929, to April 18, 2007, date on which the Central Electoral Board brought into effect the *Birth Registry of a child to a foreign non-resident mother in the Dominican Republic* by Resolution 02-2007; and, then, *to transfer the births that appear on the list of aliens irregularly registered in the Civil Registry of the Dominican Republic to the new birth record of aliens,* in accordance with the respective year. (iv) *Notify the Ministry of Foreign Affairs of all births transferred* in accordance with the preceding paragraph *so that the latter may notify accordingly* the person who the said birth concerns, and to the consulates and/or embassies or diplomatic delegations, as applicable, *for the relevant legal ends*[59] (emphasis added).

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58. With regard to Dominican constitutional law, it should be placed on record that the representatives indicated that the criterion for interpretation of the term "in transit" in article 11 of the 1994 Constitution, which, in their opinion, created an unjustified distinction in treatment, was incorporated textually in the 2010 Constitution, which excludes the children of those who "reside illegally in Dominican territory" from the right to nationality. Despite this, they did not argue that the Constitution has been applied to or has had any impact on the enjoyment of the rights of the presumed victims, and they have not alleged the possible violation of Article 2 of the American Convention, or of other provisions of this treaty, based on the 2010 Constitution. Moreover, the facts of the case do not reveal that a direct application of the 2010 Constitution to the presumed victims has been proved, or any other type of direct impact of this Constitution on their situation.

59. In judgment TC/0168/13, the Constitutional Court noted: "Regarding the measures that must be adopted, the Constitutional Court finds the following: […] Migration Act No. 285 (of 2004) […and] Migration Regulations No. 631 (of 2011) […] replaced Immigration Law No. 95 of […] 1939, and its implementing Regulations No. 279, of the same year, that were in force for almost 70 years; which is an overlong period during which the absence of legal provisions encouraged the creation of conditions that have had a negative impact on the Dominican Civil Registry. However, fortunately, today the country has these two important legal instruments, whose provisions contain the solutions to the current migratory problem and restore the reliability of our registration system." After referring in detail to the contents of these (and other) new sources of law, the Constitutional Court proceeded to consider: "In this regard, it should be pointed out that the elements of this case oblige the Constitutional

313. The Court considers this excerpt from the judgment to be an order for the retroactive application of a general policy for all those persons born in the Dominican Republic since June 21, 1929, including the victims in this case, as mandated by the Constitutional Court. In addition, the State has advised that this order is binding upon all public public authorities and organs of the State, and that the State had "begun implementing different measures" to ensure compliance.

314. The Court concludes, therefore, that the judgment TC/0168/13 includes a general measure that would affect the presumed victims' enjoyment of their rights. Thus, such a measure would deprive of legal certainty of the enjoyment of their right to nationality those who possess Dominican nationality and who, at the time that they were removed from Dominican Republic, were in possession of official documentation certifying this status: Willian Medina Ferreras, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina and Rafaelito Pérez Charles. This is because their birth certificates or their registration in the birth registry will be subject to review by the Central Electoral Board and, as a result, they may be found to have been "registered irregularly." This also infringes on the right to recognition of juridical personality and to a name, as well as the right to an identity when the violations are considered together.

315. Nevertheless, Judgment TC/0168/13 has established a retroactive policy based on the understanding that, prior to 2010, domestic law envisaged the impossibility for those born in Dominican territory of parents who were aliens residing irregularly in the country of acquiring Dominican nationality based on *ius soli*. Given the resulting distinction between such persons and others also born in Dominican territory, it is therefore necessary to verify whether the right of the presumed victims to equality before the law was violated.

316. The Court considers that, in view of the stated difference in treatment among persons born in the territory of the Dominican Republic based on normative regulations (or on practices or decisions that determined their application or interpretation), the State must prove that this differentiated treatment does not entail a violation of the right to equal protection of the law with regard to the group of persons who, having been born in

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Court to adopt measures that go beyond the particular situation of Juliana Dequis (or Deguis) Pierre; conferring on this judgment effects *inter comunia*, because it tends to protect the fundamental rights of a very large group of individuals who are in situations that, from a factual and legal perspective, are the same or similar to that of the appellant. Thus, the [Constitutional] Court finds that, in cases such as this, the application for *amparo* goes beyond the sphere of the specific violation claimed by the appellant, and that its protective mechanism should have an expanded and binding authority that permits the protection of fundamental rights to be extended to other persons outside these proceedings who are in similar situations" (*cf.* Constitutional Court, judgment TC/0168/13, pp. 91 to 97).

Dominican territory, are unable to acquire the nationality of this country. In this regard, the Court has established that a difference in treatment is discriminatory when it is not reasonably and objectivelyjustified;[60] in other words, when it does not seek a legitimate purpose and there is no reasonable proportional relationship between the means used and the end sought.[61]

317. In this regard, the Court notes that, as already mentioned, in judgment TC/0168/13 the Constitutional Court indicated that, contrary to the children of aliens who "obtain a legal residence permit," "[a]liens who [...] are in an irregular migratory situation [...] cannot claim that their children born in the country have the right to obtain Dominican nationality [...] because it is legally inadmissible to found the inception of a right on a *de facto* illegal situation." The Inter-American Court notes that the argument concerning the "illegal situation" of the alien who "is in an irregular migratory situation," refers to aliens in an irregular situation, and not to their children. In other words, the difference between those born in Dominican territory who are children of aliens is not made based on a situation related to them, but, rather, is based on the whether their parents are regular or irregular migrants. Thus, the distinction made based on the migratory status of the parents does not, in itself, justify or explain the purpose differential treatment of persons born in Dominican territory. Consequently, the Court finds that the arguments set forth in judgment TC/0168/13 are insufficient, because they do not explain the objective sought by such a distinction and, therefore, they prevent an assessment of whether the distinction is reasonable and proportionate.

318. As already mentioned, the obligation to provide every individual with the equal and effective protection of the law without discrimination imposes a limit on the State's authority in determining those who are its nationals. The Court finds no reason to differ from its opinion in its judgment in the *Case of the Girls Yean and Bosico v. Dominican Republic*, that "The migratory status of a person is not transmitted to the children."[62] Thus, the introduction in the Dominican Republic of the standard of the irregular permanence of the parents as an exception to the acquisition of nationality by *ius solis* was discriminatory when applied in a context that has previously

60. *Cf. Juridical Status and Human Rights of the Child.* OC-17/02, para. 46; *Juridical Status and Rights of Undocumented Migrants.* OC-18/03, para. 84, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 200.

61. *Cf. Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 200. (This judgment cites the following case law: ECHR, *Case of D.H. and others v. the Czech Republic,* para. 196, and ECHR, *Case of Sejdić and Finci v. Bosnia and Herzegovina*, Nos. 27996/06 and 34836/06. Judgment of 22 December 2009, para. 42.)

62. *Case of the Girls Yean and Bosico v. Dominican Republic*, para. 156.

been described as discriminatory towards Dominicans of Haitian origin. In addition, this group was disproportionately affected by the introduction of the differentiated criteria.[63] Consequently, the right to equality before the law recognized in Article 24 of the Convention was violated.

319. Furthermore, as indicated, on June 9, 2014, the State presented "Law No. 169-14 of May 23, 2014," as a "supervening fact",[64] which is regulated by Decree No. 250-14. In view of the close relationship between these norms and judgment TC/0168/13, the Court finds it necessary to refer to them.

320. The *consideranda* of Law No. 169-14 indicate that the law is based on the provisions of judgment TC/0168/13 and that, in this regard, "regularizing civil status records does not involve a denial or questioning of the interpretation provided by the Constitutional Court." The articles of the law distinguish between the situation of certain persons registered in the Civil Registry and others who are not registered.

321. Regarding the former, Article 2 of Law No. 169-14 orders the "regulariza[tion of] [...] the records of the persons who" as indicated in paragraph (a) of the preceding Article, are "children born in national territory during the period between June 16, 1929, and April 18, 2007, of foreign non-resident fathers and mothers, who were registered in the records of the Dominican Civil Registry based on documents that were not recognized by the relevant norms in force at the time of the registration." The Court has not been provided with sufficient evidence to verify that the presumed victims are in this situation, so that the analysis of articles 2 to 5

63. In this regard, added to the reference made to the context of this case, it should be indicated that, in its judgment TC/1068/13 the Constitutional Court indicated not only that Haitian immigration in the Dominican Republic is greater than that from other countries, but also that a very high percentage of this Haitian immigration is irregular. Thus, it stated in this judgment that "[t]here are 100,638 foreigners from countries other than Haiti, while those of Haitian origin amount to 668,145. […] Haitian immigrants and their descendants […] represent 6.87% of the population living in national territory. According to information published by the Dominican press, the General Directorate of Immigration of the Dominican Republic has only legally registered 11,000 Haitian immigrants, which represents a very small percentage, 0.16%, of the total." In the Dominican Republic, the population of Haitians and those of Haitian descent is greater that the population of aliens or those of foreign descent from other countries and, also, a percentage of Haitian migrants are not "legally registered." In addition, contextual references have been made to the difficulties encountered to obtain personal documentation and the vulnerability of Haitians and those of Haitian descent in the Dominican Republic.

64. On the same occasion, the State also submitted as a supervening fact Decree No. 327-13, which indicates that it has been issued by order of the Constitutional Court in the said judgment. The Decree establishes the "terms and conditions" for aliens who are living irregularly in Dominican territory to acquire a "documented legal status under […] General Migration Law No. 285-04." Its provisions with regard to "aliens" and the conditions for regularizing their permanence in Dominican territory are not related to the question of the right to nationality and, therefore, cannot have an impact on the presumed victims in this regard. Consequently, it is not relevant for the Court to examine the norm in question.

of Law No. 169-14 in relation to the persons mentioned in paragraph (a) of its Article 1 is not relevant.[65]

322. With regard to the children "of foreign parents in an irregular migratory situation who, having been born in national territory do not appear registered in the Dominican Civil Registry," Law No. 169-14 establishes in its sixth article (Article 6, in conformity with Article 1(b)) that they "may register in the registry for aliens established by General Migration Law No. 285-04." According to Article 6 of Law No. 169-14 and Article 3 of its implementing regulations (Decree No. 250-14), those interested in submitting an application in order to "benefit from the registration of aliens" have 90 days from the entry into force of these regulations. Once they have complied with certain conditions, and following registration, these persons may "take advantage of the provisions of Decree No. 327-13," which regulates the "National Plan for the regularization of aliens in an irregular migratory situation." Article 8 of the law also establishes the "[n]aturalization" of "children of aliens born in the Dominican Republic, regularized pursuant to the provisions of Decree No. 327-13. Lastly, article 11 establishes that the provisions relating to the said persons who are not registered in the Dominican Civil Registry and to "naturalization" will be valid "during the execution of the National Plan for the regularization of aliens in an irregular migratory situation. Furthermore, article 3 of Decree No. 327-13 indicates that "[t]he alien who wishes to avail himself of the Plan must file his application within 18 months of the date that it comes into force."[66]

65. Thus, on June 17, 2014, when presenting their respective observations, the representatives only indicated that "some of the [presumed] victims in this case [were in the situation described], and even if at one time they had an identity document, they were unable to register their children owing to the situation of discrimination and arbitrariness that existed. One of Antonio Sensión's daughters was in that situation." Although they referred to "some" of the presumed victims, the representatives did not clarify who they were referring to. Furthermore, the reference to one of Antonio Sensión's daughters is confusing; not only does it not indicate which daughter is referred to, but it is also unclear whether she is in the "situation" of "being unable" "to register her children," or whether it is she herself who could not be "registered." The indications provided by the representatives are insufficient to allow the Court to examine the matter.

66. Other provisions of Law No. 169-14, such as articles 9 and 10, establish, respectively, "sanctions" for "false information" when filing an application to the aliens registry, or "false information in an official document or any other criminal offense committed by Civil Registry officials." Article 12 indicates that "[t]he Executive shall issue the regulations to implement the provisions of chapters II and III of this law [regarding "registration of children of aliens born in the Dominican Republic," (articles 6 and 7), and "naturalization" (article 8)], within 60 days at most of the date of its promulgation; regulations that, among other provisions, shall include the mechanism for authenticating the birth, as well as the necessary amendments to the National Plan for the regularization of aliens in an irregular migratory situation for these persons." Lastly, article 13 of Law No. 169-14 establishes that "[t]he provisions of this law shall not result in any cost or charge for the beneficiaries."

323. The Court notes that Law No. 169-14, in the same way as judgment TC/0168/13, on which it is based, is founded on considering that those born in Dominican territory, who are the children of aliens in an irregular situation, are aliens. In practice, this understanding, applied to persons who were born before the 2010 constitutional reform, entails a retroactive deprivation of nationality; and, in relation to some presumed victims in this case, it has already been determined that this is contrary to the Convention. Accordingly, the Court must review the provisions of Law No. 169-14 in relation to the possible violation of the rights of Victor Jean, Miguel Jean, Victoria Jean (deceased) and Natalie Jean, who were never included in the registry as established in the law.

324. The Court notes that Law No. 169-14 created an impediment to the full exercise of the victims' right to nationality. Thus, the law considered them aliens not only conceptually, but also established the possibility that, if they presented the corresponding request within 90 days, they could benefit from a plan to "regularize aliens" established by the said Decree No. 327-13. This could lead to a "naturalization" process that, by definition, is contrary to the automatic acquisition of nationality based on having been born on the State's territory. Even though such a mechanism could result in the "acquisition" of Dominican nationality for the individuals in question, the means by which they would acquire the Dominican nationality would be the result of treating them as aliens, which is contrary to full respect for the right to nationality to which they should have had access since birth. Consequently, providing the individuals, for a limited time only, with the possibility of acceding to a process that could eventually result in the "acquisition" of a nationality that, in fact, they should already have, has established an impediment to the enjoyment of their right to nationality. Therefore, in this respect, Articles 6, 8 and 11 of Law No. 169-14 violated treaty-based obligations, including the duty to adopt domestic legal provisions for the right to recognition of juridical personality, to a name, and to nationality, as well as, in relation to these rights, the right to an identity. Such violations are to the detriment of Victor Jean, Miguel Jean, Victoria Jean and Natalie Jean. Also, for similar reasons to those stated above, these provisions violate the right to equal protection of the law.

325. In conclusion, given its general scope, judgment TC/0168/13 constitutes a measure that fails to comply with the obligation to adopt domestic legal provisions, codified in Article 2 of the American Convention, in relation to the right to recognition of juridical personality, to a name, and to nationality recognized in Articles 3, 18 and 20 of this instrument, respectively, and in relation to these rights, the right to an identity, as well as the right to equal protection of the law recognized in Article 24 of the

American Convention. All of the above-mentioned violations are considered in relation to the failure to comply with the obligations established in Article 1(1) of this instrument. This non-compliance violated the said rights of Willian Medina Ferreras, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina (deceased) and Rafaelito Pérez Charles. In addition, as indicated,the State violated these same articles of the Convention to the detriment of the rights of Victor Jean, Miguel Jean, Victoria Jean (deceased) and Natalie Jean owing to Articles 6, 8 and 11 of Law No. 169-14.

[...]

IX. THE RIGHT TO PERSONAL LIBERTY, TO A FAIR TRIAL, TO FREEDOM OF MOVEMENT AND RESIDENCE, AND TO JUDICIAL PROTECTION, IN RELATION TO THE RIGHTS OF THE CHILD AND THE OBLIGATION TO RESPECT RIGHTS WITHOUT DISCRIMINATION

[...]

B. Considerations of the Court

[...]

344. But first, bearing in mind the characteristics of this case, the Court underlines that ten of the presumed victims who were deprived of liberty and then expelled were children at the time of the events, namely: Luis Ney Medina, Awilda Medina, Carolina Isabel Medina, Antonio Fils-Aimé, Endry Fils-Aimé, Diane Fils-Aimé, Markenson Jean, Miguel Jean, Victoria Jean and Natalie Jean. In this regard, the facts of the case do not reveal that the State took special measures of protection in favor of the children concerned based on the principle of the best interests of the child. These children were treated the same as the adults during the deprivation of liberty and subsequent expulsion, without any consideration for their special condition.

345. In addition, regarding the presumed victims Bersson Gelin, Jeanty Fils-Aimé, Nené Fils-Aimé, Diane Fils-Aimé, Antonio Fils-Aimé and Endry Fils-Aimé, the Court is unable to determine with certainty where they were born and, therefore, in their case, it is unable to review the alleged violation of any of the paragraphs of Article 22 of the Convention. Nevertheless, with the exception of Nené Fils-Aimé, the Court has already established that these presumed victims were effectively deprived of their liberty and expelled from Dominican territory to Haiti, and thus in their case it will examine the presumed violation of Articles 7, 8 and 25 of the Conventionm. In the case of Nené Fils-Aimé, insufficient factual evidence has been provided to analyze the presumed violation of these articles to his detriment.

B.1. Basic guarantees in immigration proceedings that may involve the deprivation of liberty and expulsion or deportation

B.1.1. General considerations

346. It should be recalled that the Court has affirmed that Article 7 of the American Convention contains a general rule, established in its first paragraph, according to which: "[e]very person has the right to personal liberty and security," and also another rule, of a specific nature, that consists of guarantees that protect the right not to be deprived of liberty illegally (Art. 7(2)) or arbitrarily (Art. 7(3)), to be informed of the reasons for the detention and of the charges (Art. 7(4)), to judicial control of the deprivation of liberty (Art. 7(5)), and to contest the lawfulness of the detention (Art. 7(6)).[67] Regarding the general obligation, the Court has reiterated that "any violation of subparagraphs 2 to 7 of Article 7 of the Convention necessarily entails the violation of Article 7(1) thereof."[68]

347. The Court has also indicated that any restriction of the right to personal liberty must only be for the reasons and in the conditions previously established by the Constitution or the laws enacted in accordance with it (material aspect), and also strictly subject to proceedings objectively defined in it (formal aspect).[69] In addition, the Court has reiterated that any detention, regardless of the reasons or duration, must be duly recorded in the pertinent document, at minimum indicating clearly the reasons for the detention, the person who made the arrest, the time of the arrest and the time of the release, as well as a record that the competent judge was advised of the detention to protect against any illegal or arbitrary interference with physical liberty.[70] Where such a record of detention is not made, the rights recognized in Articles 7(1) and 7(2) of the American Convention, in relation to Article 1(1) of this instrument, are deemed to have been violated.[71]

348. Furthermore, the Court has indicated that scheduled collective detentions and roundups, which are not based on an individualized review of wrongful actions, and that lack judicial control, are incompatible with the respect for fundamental rights. Among others, they are contrary to the

67. *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 51, and *Case of J. v. Peru*, para. 125.
68. *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 54, and *Case of J. v. Peru*, para. 125.
69. *Cf. Case of Gangaram Panday v. Suriname. Merits, reparations and costs*. Judgment of January 21, 1994. Series C No. 16, para. 47, and *Case of García and family members v. Guatemala. Merits, reparations and costs*. Judgment of October 24, 2012. Series C No. 258, para. 100.
70. *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 53, *and Case of García and family members v. Guatemala,* para. 100.
71. *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 54, *and Case of García and family members v. Guatemala*, para. 100.

presumption of innocence, they unduly curtail personal liberty, and they transform preventive detention into a discriminatory mechanism; consequently, the State may not implement such detentions under any circumstance.[72]

349. In addition, the Court has indicated that the right to a fair trial, recognized in Article 8 of the American Convention, refers to the series of requirements that must be observed at the different procedural stages to ensure that the individual is able to defend his or her rights adequately vis-à-vis any act of the State taken by any public authority, whether administrative, legislative or judicial, that may affect him or her.[73] Thus, in its consistent case law, the Court has reiterated that "although Article 8 of the American Convention is entitled "Right to a Fair Trial" [Note: Right to judicial guarantees in the Spanish version], its application is not limited strictly to judicial remedies."[74] Rather, the "series of basic guarantees of due process of law" are applicable in the determination of rights and obligations of a "civil, labor, fiscal or any other nature."[75] In other words, "any act or omission of the State's organs in the course of proceedings, whether these are administrative, punitive, or jurisdictional, must respect due process of law."[76]

B.1.2. Standards for expulsion proceedings

350. In relation to immigration matters, the Court has indicated that, in the exercise of their authority to establish immigration policies,[77] States may establish mechanisms to control the entry into and departure from its territory of non-nationals, provided that these policies are compatible with the norms for the protection of the human rights established in the American Convention. In other words, although States have a margin of

72. *Cf. Case of Bulacio v. Argentina. Merits, reparations and costs.* Judgment of September 21, 2006. Series C No. 152, paras. 93 and 96.

73. *Cf. Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, para. 69*, and Case of the Pacheco Tineo Family v. Bolivia,* para. 130.

74. *Cf. Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87* of October 6, 1987. Series A No. 9, para. 27, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2013. Series C No. 268, para. 166.

75. *Cf. Case of the Constitutional Court v. Peru. Merits, reparations and costs*, para. 70*, and Case of the Pacheco Tineo Family v. Bolivia*, para. 130.

76. *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No. 72, para. 124, and *Case of the Pacheco Tineo Family v. Bolivia,* para. 130.

77. A State's immigration policy is composed of any institutional act, measure or omission (laws, decrees, resolutions, directives, administrative acts, etc.) that relates to the entry into, departure from, or permanence in its territory of the national or foreign population. *Cf. Juridical Status and Rights of Undocumented Migrants.* OC-18/03, para. 163, and *Case of Vélez Loor v. Panama*, para. 97.

discretion when determining their immigration policies, the objectives of such policies must respect the human rights of migrants.[78]

351. In this regard, the Court has affirmed that "due process must be guaranteed to everyone, regardless of their migratory status," because "the broad scope of the intangible nature of due process applies not only *ratione materiae* but also *ratione personae* without any discrimination,"[79] and in order that "migrants may assert their rights and defend their interests effectively and in conditions of procedural equality with others who are justiciable."[80]

352. The Court considers it desirable to stress that the international organs and norms for the protection of human rights all coincide in establishing basic guarantees applicable to such proceedings.[81]

353. Thus, for example, in the universal system for the protection of human rights, Article 13 of the International Covenant on Civil and Political Rights[82] indicates that:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

354. he Human Rights Committee, interpreting this article, determined that "[t]he particular rights of [the aforementioned] Article 13 only protect those aliens who are lawfully in the territory of a State party. [...] However, if

78. *Cf. Juridical Status and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 168; *Case of Vélez Loor v. Panama*, para. 97, and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection.* OC-21/14, para. 39. See also: Expert opinion of Pablo Ceriani Cernadas provided before the Court, in which, among other matters, he stated that "[r]egardless of the different immigration categories that a State devises (wherein, in principle, there is a margin of discretion to grant a residence permit when implementing these categories), this definition of categories and the way in which they are implemented differs significantly from the *de facto* reality of migratory flows, which results in – and this is the experience not only of the countries of the region, not only of Latin America, but it is the situation in the United States, in many countries of the European Union, and of Asia – a significant number of people in an irregular migratory situation, which, without doubt, will have a negative impact as regards the human rights of these persons, in addition to the impact that it may have for policies, for example, of human development and other kinds of social integration policies that a country wishes to implement" (expert opinion of Pablo Ceriani Cernadas before the Court during the public hearing held on October 7 and 8, 2013).

79. *Cf. Juridical Status and Rights of Undocumented Migrants.* OC-18/03, para. 122, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 159.

80. *Cf. The Right to Information on Consular Assistance within the Framework of the Due Guarantees of Process of Law.* Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, paras. 117 and 119; *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 159, and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection.* OC-21/14, para. 113.

81. *Mutatis mutandis*, *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 160.

82. Dominican Republic ratified the International Covenant on Civil and Political Rights on January 4, 1978.

the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with Article 13."[83]

355. Lastly, the International Law Commission, in its draft articles on the protection of the human rights of persons expelled or in the process of being expelled, has stated that such persons must receive the following procedural

83. Human Rights Committee, General Comment 15: The position of aliens under the International Covenant on Civil and Political Rights; adopted at the twenty-seventh session, 1986, para. 9. Regarding the regional systems for the protection of human rights, the African Commission on Human and Peoples' Rights has considered that: "it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the Charter [African Charter on Human and Peoples' Rights] and international law." (African Commission on Human and Peoples' Rights, Communication No. 159/96, 22nd Ordinary Session, 11 November 1997, para. 20.). Consequently, in expulsion proceedings during which the basic guarantees of due process of law are not observed, the African Commission has frequently decided a violation of the rights protected in Article 7(1)(a) of the African Charter on Human and Peoples' Rights ("Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force") and, in some cases, Article 12(4) of this treaty ("A non-national legally admitted in a territory of a State Party to the present Charter may only be expelled from it by virtue of a decision taken in accordance with the law.") (See, for example: African Commission on Human and Peoples' Rights, Communication No. 313/05, 47th Ordinary Session of 12 to 26 May 2010, para. 205; African Commission on Human and Peoples' Rights, Communications 27/89, 46/91, 49/91, 99/93, 20th Ordinary Session, 31 October 1996, para. 34: "By expelling these refugees from Rwanda, without giving them the opportunity to be heard by the national judicial authorities, the Government of Rwanda has violated Article 7(1) of the Charter." African Commission on Human and Peoples' Rights, Communication No. 71/92, 20th Ordinary Session, 31 October 1996, para. 30: "The Commission has already established that none of the deportees had the opportunity to seize the Zambian courts to challenge their detention or deportation. This constitutes a violation of their rights under Article 7 of the Charter and under Zambian national law"; African Commission on Human and Peoples' Rights, Communication No. 212/98, 25th Ordinary Session, May 5, 1999, para. 61: "The Zambian government by denying Mr. Chinula the opportunity to appeal his deportation order has deprived him of a right to fair hearing which contravenes all Zambian domestic laws and international human rights laws."). Under the European system for the protection of human rights, Article 1(1) of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms establishes a series of specific procedural safeguards relating to expulsion of aliens lawfully resident in the territory of a State Member. Thus, the alien must be allowed: (a) to submit reasons against his expulsion; (b) to have his case reviewed, and (c) to be represented for these purposes before the competent authority. The European Court of Human Rights, in its consistent case law, has considered that: the right to an effective remedy (Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity"), and the possible violation of other rights protected by the Convention owing to expulsion, such as the right to life (Article 2), to personal integrity (Article 3) and to respect for private and family life (Article 8), require States to "make available to the individual [subject to an expulsion decision] the "effective" possibility of challenging the deportation or refusalof-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality" (See, ECHR, *Case of Al-Nashif v. Bulgaria,* No. 50963/99. Judgment of 20 September 2002, para. 133).

guarantees: (a) basic detention conditions during the proceedings; (b) the right to receive notice of the expulsion decision; (c) the right to challenge the expulsion decision; (d) the right to be heard by a competent authority; (e) the right to be represented before the competent authority; (f) the right to have the free assistance of an interpreter, and (g) the right to consular assistance.[84]

356. Based on these standards and the obligations associated with the right to judicial guarantees, the Court has considered that proceedings that may result in the expulsion of an alien must be individualized, in order to evaluate the personal circumstances of each individual and to comply with the prohibition of collective expulsions. Also, these proceedings must not discriminate for reasons of nationality, color, race, sex, language, religion, political opinion, social origin, or other condition, and the persons subject to them must have the following basic guarantees:[85] (a) to be informed expressly and formally of the charges against them and the reasons for the expulsion or deportation. This notice must include information on their rights, such as: (i) the possibility of explaining their reasons and contesting the charges against them, and (ii) the possibility of requesting and receiving consular assistance,[86] legal advice and, if appropriate, translation or interpretation services; (b) if an unfavorable decision is taken, the right to request a review of their case before the competent authority and to appear before this authority in that regard, and (c) to receive formal legal notice of the eventual decision to expel, which must be duly reasoned pursuant to the law.

357. The Court finds it necessary to reiterate that, in expulsion proceedings involving children, the State must also observe the guarantees indicated above, as well as other guarantees the purpose of which is to protect the best interests of the child, in the understanding that these interests are

84. International Law Commission. Expulsion of aliens. Text of draft articles 1-32 provisionally adopted on first Reading by the Drafting Committee at the sixty-fourth session, A/CN.4/L.797, May 24, 2012, articles 19 and 26; *cf. Case of Nadege Dorzema et al. v. Dominican Republic,* para. 163, and *Case of the Pacheco Tineo Family v. Bolivia,* footnote 157.

85. *Cf. Case of Nadege Dorzema et al. v. Dominican Republic*, para. 175, and *Case of the Pacheco Tineo Family v.* Bolivia*,* para. 133. See also, expert opinion of Pablo Ceriani Cernadas, in which he referred to the different guarantees of due process that must be ensured in the context of expulsion proceedings. Specifically, he indicated that "[t]he nature of an expulsion is evidently punitive and thus the need to ensure all the procedural guarantees in order to respect and guarantee the rights that may be at risk in each case. In addition, based on the principle of legality, which makes it obligatory to regulate the proceedings to be followed in such cases by law, a key element is the adoption of the mechanisms to be applied in each individual case in order to examine in detail the offense attributed to the person, the evidence and other elements of the case and, evidently, to ensure the person's right of defense." Expert opinion of Pablo Ceriani Cernadas provided during the public hearing.

86. *Cf.* Vienna Convention on Consular Relations, Article 36.1.b, and *The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law.* OC-16/99, para. 103.

directly related to the child's right to the protection of the family and, in particular, to the enjoyment of family life by maintaining family unity insofar as possible.[87] Any ruling of an administrative or judicial organ that must decide on family separation owing to the migratory status of one or both parents must therefore take into consideration the particular circumstances of the specific case, thereby ensuring an individualized decision,[88] it must seek to achieve a legitimate purpose pursuant to the Convention, and it must be suitable, necessary and proportionate.[89] To achieve this, the State must analyze the particular circumstances of each case as regards: (a) the immigration history, the duration of the stay, and the extent of the ties of the parent and/or the family to the host country; (b) consideration of the nationality,[90] custody and residence of the children of the person to be deported; (c) scope of the harm caused by the rupture of the family owing to the expulsion, including the persons with whom the child lives, as well as the time that the child has been living in this family unit, and (d) scope of the disruption of the daily life of the child if her or his family situation changes owing to a measure of expulsion of a person in charge of the child, so as to weigh all these circumstances rigorously in light of the best interest of the child in relation to the essential public interest that should be protected.[91]

358. Regarding proceedings or measures that affect fundamental rights, such as personal liberty, and that may result in expulsion or deportation, the Court has considered that "the State cannot decide punitive administrative or judicial decisions without respecting certain minimum guarantees, the content of which is substantially the same as those established in paragraph 2 of Article 8 of the Convention."[92]

B.1.3. Standards related to the deprivation of liberty, including that of children, in immigration proceedings

359. The Court has established the incompatibility with the American Convention of the punitive deprivation of liberty in order to control migratory

87. *Cf. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection.* OC-21/14, para. 275.
88. *Cf. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection.* OC-21/14, para. 281.
89. *Cf. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection.* OC-21/14, para. 153.
90. *Cf. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection.* OC-21/14, para. 279.
91. *Cf. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection.* OC-21/14, para. 279.
92. *Case of the Pacheco Tineo Family v. Bolivia*, para. 132. See also, *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 157, and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection.* OC-21/14, para. 112.

flows, in particular those of an irregular nature.[93] Thus, it has determined that the detention of persons for non-compliance with the immigration laws should never be for punitive reasons, so that the deprivation of liberty should only be used when necessary and proportionate in the specific case in order to ensure the appearance of the person in the immigration proceedings or to ensure the application of a deportation order, and only for the least amount of time possible.[94] Consequently, "migratory policies based on the mandatory detention of irregular migrants, without ordering the competent authorities to verify, in each particular case and by means of an individualized evaluation, the possibility of using less restrictive measures to achieve the same ends, are arbitrary."[95] In this regard, the Working Group on Arbitrary Detention has stated that:

> If there has to be administrative detention, the principle of proportionality requires it to be the last resort. Strict legal limitations must be observed and judicial safeguards be provided for. The reasons put forward by States to justify detention [...] must be clearly defined and exhaustively enumerated in legislation. [...] The detention of minors [...] requires even further justification.[96]

360. Furthermore, in the Court's opinion, States may not use the deprivation of liberty of children who are with their parents, or those who are unaccompanied or separated from their parents as a precautionary measure for the purposes of immigration proceedings; nor may they base this measure concerning non-compliance with the requirements to enter or remain in a country on the fact that the child is alone or separated from his or her family, or on the purpose of ensuring family unity, because States can and should order less harmful alternatives and, at the same time, they should prioritize the protection of the rights of the child comprehensively.[97]

B.1.4. The prohibition of collective expulsions

361. In addition, the inadmissibility of collective expulsions stems from the considerations on due process of law in immigration proceedings, and is established in Article 22(9) of the Convention, by which they are expressly prohibited.[98] This Court has found that the fundamental factor

93. *Cf. Case of Vélez Loor v. Panama*, para. 167, and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection.* OC-21/14, para. 151.
94. *Cf. Case of Vélez Loor v. Panama,* para. 171, and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. OC-21/14, para. 151.
95. *Case of Vélez Loor v. Panama*, para. 171*, and Case of the Pacheco Tineo Family v. Bolivia*, para. 131.
96. United Nations, Report of the Working Group on Arbitrary Detention, A/HRC/13/30, 18 January 2010, paras. 59 and 60.
97. *Cf. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection.* OC-21/14, para. 160.
98. In this regard, different international human rights treaties are consistent in prohibiting collective expulsions in terms similar to the American Convention, *Cf.* Protocol 4 to the European Convention,

to determine the "collective" nature of an expulsion is not the number of aliens included in the expulsion order, but whether the order is based on an objective analysis of the individual circumstances of each alien.[99] The Court, referring to the observations of the European Court of Human Rights, has determined that a collective expulsion of aliens is "[a]ny [decision] of the competent authority compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group."[100]

362. Similarly, in its General Recommendation No. 30, the United Nations Committee on the Elimination of Racial Discrimination indicated that the States parties to the International Convention on the Elimination of All Forms of Racial Discrimination[101] must "[e]nsure that non-citizens are not subject to collective expulsion in particular in situations where there are insufficient guarantees that the personal circumstances of each of the persons concerned have been taken into account."[102]

363. Furthermore, the Office of the United Nations High Commissioner for Human Rights, in its report on "The Rights of Non-citizens," underlined that "the procedure for the expulsion of a group of non-citizens must afford sufficient guarantees demonstrating that the personal circumstances of each of those non-citizens concerned has been genuinely and individually taken into account."[103]

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article 4: "The collective expulsion of aliens is prohibited"; the African Charter on Human and Peoples' Rights, article 12(5): "The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups," and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 22(1): "Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually."

99. *Case of Nadege Dorzema et al. v. Dominican Republic*, paras. 171 and 172.

100. *Cf. Case of Nadege Dorzema et al. v. Dominican Republic,* para. 171. *Cf.* ECHR, *Case of Andric v. Sweden,* No. 45917/99. Decision of 23 February 1999, para. 1, and ECHR, *Case of Conka v. Belgium,* No. 51564/99. Judgment of 5 February 2002, para. 59. See also, Committee of Ministers of the Council of Europe, "*Twenty Guidelines on Forced Return*." Guideline No. 3 establishes the prohibition of collective expulsion. It indicates that "A removal order shall only be issued on the basis of a reasonable and objective examination of the particular case of each individual person concerned."

101. Dominican Republic ratified the International Convention on the Elimination of All Forms of Racial Discrimination on May 25, 1983.

102. *Cf.* Committee on the Elimination of Racial Discrimination, General recommendation No. 30, para. 26.

103. Office of the United Nations High Commissioner for Human Rights. "The Rights of Non-citizens," 2006, p. 18

B.2. Legal qualification of the facts of this case

B.2.1. Right to personal liberty

B.2.1.1. Alleged illegal and arbitrary nature of the deprivations of liberty (Article 7(2) and 7(3))

364. With regard to Article 7(2) of the Convention, the Court has emphasized that the restriction of physical liberty, "even for a short period, including limitations merely for identification purposes,"[104] must "adhere strictly to the relevant provisions of the American Convention and domestic law, provided that the latter is compatible with the Convention."[105] Consequently, the alleged violation of Article 7(2) must be examined in light of the previously mentioned domestic legal and constitutional provisions, and "any requirement established in domestic law that is not complied with when depriving a person of his liberty will cause this deprivation to be unlawful and contrary to the American Convention."[106] As for the arbitrary nature of the detention, Article 7(3) of the Convention establishes that "[n]o one shall be subject to arbitrary arrest or imprisonment." Regarding this provision, on other occasions the Court has considered that no one may be subject to arrest or imprisonment for reasons or by methods that – although classified as lawful – may be deemed incompatible with respect for the fundamental rights of the individual because they are, among other matters, unreasonable, unpredictable, or disproportionate.[107]

[...]

368. Nevertheless, the Court notes that the facts do not reveal that the deprivation of liberty of the members of the Jean,[108] Fils-Aimé[109] and

104. *Cf. Case of Nadege Dorzema et al. v. Dominican Republic*, para. 126.

105. *Case of Torres Millacura et al. v. Argentina, Merits, reparations and costs.* Judgment of August 26, 2011. Series C No. 229, para. 76, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 126.

106. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 57, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 126.

107. *Cf. Case of Gangaram Panday v. Suriname*, para. 47, and *Case of J. v. Peru*, para. 127.

108. The Jean family consisting, at the time of the events, of Victor Jean, Marlene Mesidor, the girls Victoria Jean (deceased) and Natalie Jean, and the boys Miguel Jean and Markenson, who, in December 2000, at around 7.30 a.m., were arrested by State agents in their home, made to get into a bus and taken to Haitian territory, where they arrived at around 5 p.m.

109. First Jeanty Fils-Aimé, and then the rest of the family, Janise Midi and their daughter Diane Fils-Aimé and their sons Antonio Fils-Aimé and Endry Fils-Aimé, were detained and taken to the "Pedernales garrison," and then expelled to Haiti at around 8 p.m.

Medina[110] families, as well as of Rafaelito Pérez Charles[111] and Bersson Gelin,[112] prior to their expulsion from Dominican territory to Haiti, were carried out in accordance with the procedure established by domestic law. Thus, the detentions were illegal and violated Article 7(2) of the Convention. Furthermore, they were not carried out in order to implement formal immigration proceedings. It is obvious that the way in which the presumed victims were deprived of their liberty by the State agents indicates that this was due to racial profiling related to the fact that they apparently belonged to the group of Haitians or Dominicans of Haitian origin or descent, which is manifestly unreasonable and therefore arbitrary, thereby violating Article 7(3) of the Convention. Consequently, the Court finds that the deprivations of liberty were illegal and arbitrary and that the State violated paragraphs 2 and 3 of Article 7 of the Convention.

B.2.1.2. Notice of the reasons for the deprivation of liberty (Article 7(4))

369. With regard to Article 7(4) of the American Convention, the Court has stated that "the facts must be examined in relation to domestic law and the provisions of the Convention, because the information regarding the 'reasons' for the detention must be provided 'promptly' at the time of the detention, and because the right contained in that paragraph entails two obligations: (a) the need for written or oral information on the reasons for the detention, and (b) notice, in writing, of the charges."[113]

370. In the case *sub judice*, both Immigration Law No. 95 and Immigration Regulations No. 279 require that aliens detained for deportation purposes be informed of the specific reasons why they must be deported. According to the Immigration Regulations, the specific charges against them needed to have been included in the arrest warrant issued by the Director General of Immigration. However, as indicated above, the established facts do not reveal that the members of the Medina, Fils-Aimé and Jean families, Rafaelito Pérez Charles and Bersson Gelin were ever informed of the reasons for the deprivation of their liberty, either orally

110. The Medina family, consisting of Willian Medina Ferreras, the boy Luis Ney Medina, and the girls Awilda Medina and Carolina Isabel Medina (deceased), Dominican nationals with official documentation, and Lilia Jean Pierre, a Haitian national, were arrested in November 1999 or January 2000 in their home and taken to a prison in Oviedo, where they remained until they were expelled to Haiti.

111. Mr. Pérez Charles was arrested on July 24, 1999, by immigration agents and taken to a detention center where he remained for a short time. He was then taken to Jimaní, from where he was expelled to Haitian territory.

112. Mr. Gelin was arrested on December 5, 1999, and then expelled to Haiti.

113. *Cf. Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of November 26, 2010. Series C No. 220, para. 106, and *Case of J. v. Peru*, para. 149.

or in writing. Moreover, there is no document proving that they were advised in writing about the existence of any kind of charge against them, as required by the domestic laws in force at the time of the facts. This leads to the conclusion that the State failed to observe the guarantee established in Article 7(4) of the Convention.

B.2.1.3. Right to be brought before a competent authority (Article 7(5))

371. With regard to Article 7(5) of the Convention, which establishes that any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power, the Court has underlined that "the judge must guarantee the rights of the detainee, to authorize taking precautionary or coercive measures, when strictly necessary, and and to ensure, in general, that the detainee is treated in a manner consistent with the presumption of innocence," as a "guarantee to avoid arbitrary or illegal detention,[114] as well as to ensure the right to life and to personal integrity."[115]

372. In contrast to the European Convention for the Protection of Human Rights and Fundamental Freedoms[116] (hereinafter also "the European Convention"), the American Convention does not establish a limitation to the exercise of the guarantee established in Article 7(5) of the Convention based on the reasons or circumstances for which the person has been arrested or detained.[117] Consequently, "based on the *pro persona* principle, this guarantee must be observed, whenever anyone is arrested or detained due to his migratory situation, in keeping with the principles of judicial control and procedural immediacy."[118] This Court has considered that, in order to constitute a mechanism that truly counters illegal or arbitrary detentions, "the judicial review must be conducted promptly and in a way that guarantees compliance with the law and the detainee's effective

114. *Case of Bulacio v. Argentina*, para. 129, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 135.

115. *Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114, para. 118, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 135.

116. In the European Convention, the right to be brought promptly before a judge or other officer established in Article 5(3) is related exclusively to the category of detainee mentioned in paragraph 1(c) of this Article; that is, the person who is detained for the purpose of "bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offense or fleeing after having done so." *Cf. Case of Vélez Loor v. Panama,* footnote 106.

117. *Cf. Case of Vélez Loor v. Panama,* para. 107, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 136.

118. *Cf. Case of Tibi v. Ecuador,* para. 118, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 136.

enjoyment of his rights, taking into account his particular vulnerability."[119] In this regard, the United Nations Working Group on Arbitrary Detention has stated that "[a]ny [...] immigrant placed in custody must be brought promptly before a judicial or other authority."[120]

373. In this regard, Article 8.2.d) of the 1994 Constitution, in force at the time of the detentions, established that "[a]nyone deprived of his liberty shall be brought before a competent judicial authority within forty-eight hours of his detention or shall be released."

374. The deprivation of liberty of the members of the Jean, Fils-Aimé and Medina families, and of Bersson Gelin and Rafaelito Pérez Charles, were a few hours long and, therefore, lasted less than the 48 hours established by the Constitution requiring the detainee to be brought before a competent judicial authority, the conclusion of the deprivation of liberty of the presumed victims was not brought about by their release in Dominican territory. Rather, it occurred through their expulsion from Dominican territory by State agents and without having been brought before a competent authority who could decide, as appropriate, on the eventual admissibility of their release. In this case, consequently, Article 7(5) of the Convention was violated to the detriment of the members of the Jean, Fils-Aimé and Medina families, and of Bersson Gelin and Rafaelito Pérez Charles.

B.2.1.4. Judicial review of the lawfulness of the deprivation of liberty (Article 7(6))

375. Lastly, Article 7(6) of the Convention enshrines the right of anyone who is arrested or detained to have recourse to a competent judge or court so that the judge or court may decide, without delay, on the lawfulness of his or her arrest or detention and may therefore order his or her release if the arrest or detention is unlawful.

376. In this regard, the Court has indicated that "the authority which decides on the legality of an "arrest or detention" must be "a judge or court." The Convention is therefore ensuring that there is judicial control over the deprivation of liberty."[121] In addition, in relation to the nature of such remedies at the domestic level, the Court has underscored that these "must not only exist formally in the legislation, but they must also be effective,

119. *Case of Bayarri v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of October 30, 2008. Series C No. 187, para. 67, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 136.

120. United Nations, Working Group on Arbitrary Detention, Report of the Group, Annex II, Deliberation No. 5: Situation regarding immigrants and asylum-seekers, 1999, E/CN.4/2000/4, Principle 3. *Cf. Case of Vélez Loor v. Panama*, para. 107.

121. *Case of Vélez Loor v. Panama*, para. 126, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 140.

that is, they must fulfill the objective of obtaining, without delay, a decision on the legality of the arrest or detention."[122]

[...]

379. Regarding the arguments on the alleged violation of Articles 8 and 25 of the Convention, the State referred to Law No. 5353 on *Habeas Corpus* arguing that the law established the "effective domestic remedy" of *habeas corpus*, that would have allowed any of the presumed victims to question the lawfulness of their detention. However, as indicated previously, the Court reiterates that remedies must not only exist formally in law, but they must also be effective. In this regard, the Court has held that Article 7(6) of the Convention "implies that the person detained effectively exercises this right, in the assumption that he can do so, and that the State effectively provides this recourse and rules on it."[123] Nevertheless, bearing in mind the circumstances in which the deprivations of liberty occurred, especially owing to the expedited expulsion, the presumed victims who were detained had no opportunity to file for an effective remedy that would examine the lawfulness of their detention. Therefore, the Court finds that the State violated Article 7(6) of the Convention, to the detriment of the members of the Jean, Medina and Fils-Aimé families and Rafaelito Pérez Charles and Bersson Gelin.

B.2.1.5. Conclusion

380. As indicated in the preceding paragraphs, the State violated the right to personal liberty, as established in paragraphs 1, 2, 3, 4, 5 and 6 of Article 7 of the American Convention, in relation to non-compliance with the obligation to respect rights established in Article 1(1) of this instrument, to the detriment of Willian Medina Ferreras, Lilia Jean Pierre, Luis Ney Medina, Awilda Medina, Carolina Isabel Medina (deceased), Jeanty Fils-Aimé (deceased), Janise Midi, Antonio Fils-Aimé, Diane Fils-Aimé, Endry Fils-Aimé, Rafaelito Pérez Charles, Bersson Gelin, Victor Jean, Marlene Mesidor, Markenson Jean, Victoria Jean (deceased), Miguel Jean and Natalie Jean, and also in relation to the rights of the child recognized in Article 19 of the Convention, with regard to those victims who were children at the time of the expulsion.

122. *Case of Vélez Loor v. Panama*, para. 129, and *Case of J. v. Peru*, para. 170.

123. *Case of Yvon Neptune v. Haiti. Merits, reparations and costs.* Judgment of May 6, 2008. Series C No. 180, para. 114, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 143.

B.2.2. The Right to freedom of movement and residence, to judicial guarantees and to judicial protection

B.2.2.1. Collective expulsions of Haitian nationals (Article 22(9))

381. As indicated above, the Court has held that, to comply with the prohibition of collective expulsions, proceedings that may result in the expulsion or deportation of an alien must be individualized in order to assess the personal circumstances of each person, and this requires, at minimum, the identification of the person and a clarification of the particular circumstances of his or her migratory situation. In addition, such proceedings must not discriminate for reasons of nationality, color, race, sex, language, religion, political opinion, social origin or any other condition, and must observe the basic guarantees previously mentioned.[124]

382. However, the facts of the case *sub judice* reveal that, together with their family members and other persons, Lilia Jean Pierre, Janise Midi, Marlene Mesidor and Markenson Jean, all of Haitian nationality, were detained and expelled in less than 48 hours. There is no evidence that, prior to their expulsion, they had been submitted to an individualized evaluation of the kind mentioned above, nor has the State provided evidence that it had instituted formal proceedings to identify these individuals and evaluate the particular circumstances of their migratory situation.

383. Furthermore, the statements of the presumed victims reveal that the expulsions were carried out in a summary manner and as a group. Thus, the Court recalls that the members of the Medina family, including Lilia Jean Pierre, were taken to the Haitian border together with other persons Also, the bus that Marlene Mesidor and the other members of the Jean family were forced to board in order to be expelled to Haitian territory was already "full of people". Even though these facts, *per se*, do not prove a collective expulsion of persons, they reinforce the belief that the facts relating to the victims formed part of procedures involving collective deprivation of liberty that were not supported by the prior assessment of the situation of each person who was deprived of liberty.

384. Consequently, the Court concludes that the expulsions of Lilia Jean Pierre, Janise Midi, Marlene Mesidor and Markenson Jean were not carried out on the basis of individual evaluations of the particular circumstances of each of them, for the effects of Article 22(9) of the American Convention, so that their expulsions are considered to be collective expulsions of aliens in violation of this article.

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124. *Cf. Case of Nadege Dorzema et al. v. Dominican Republic*, para. 175, and *Case of the Pacheco Tineo Family v. Bolivia*, para. 133.

B.2.2.2. Regarding the expulsions and the alleged violation of the freedom of movement and residence of the Dominican nationals (Articles 22(1) and 22(5))

385. The Court has indicated that the right to freedom of movement and residence of every person who is lawfully protected by Article 22(1) of the American Convention, "is an essential condition for the free development of the individual, and includes, *inter alia*, the right of those who are lawfully in a State to move about it freely and to choose their place of residence."[125] The Court has also held that "[t]his right may be violated formally or by de facto restrictions, when the State has not established the conditions or provided the means that allow it to be exercised."[126]

386. In addition, Article 22(5) of the American Convention establishes the prohibition to expel a person from the territory of the State of which he or she is a national, as well as the prohibition to deprive anyone of the right to enter it. In this regard, it should be noted that several international instruments establish the prohibition to expel nationals.[127] Similarly, the European Court of Human Rights has affirmed that it is possible to consider such a situation as amounting to the expulsion of nationals when a person is obliged to abandon the territory of which he or she is a national, without being able to return.[128] The European Court of Human Rights has found violations of the norm equivalent to that of Article 22(5) of the American Convention in the European system, Article 3(1) of Protocol 4 to the European Convention, in cases of the expulsion of nationals.[129]

387. The Court notes that Rafaelito Pérez Charles, Willian Medina Ferreras and the children at the time, Awilda Medina, Carolina Isabel Medina and Luis Ney Medina, were Dominican nationals who had official identity documents at the time of the facts, and as has already been determined, it was precisely the repudiation of these documents that violated their right

125. *Cf. Case of Ricardo Canese v. Paraguay. Merits, reparations and costs*. Judgment of August 31, 2004. Series C No. 111, para. 115, and *Case of Nadege Dorzema et al. v. Dominican Republic,* para. 169.

126. *Case of the Moiwana Community v. Suriname*, paras. 119 and 120, and *Case of Vélez Restrepo and family members v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of September 3, 2012. Series C No. 248, para. 220.

127. Protocol 4 to the European Convention, Article 3(1), which states that "[n]o one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national"; Arab Charter on Human Rights Carta, Article 27(b), which indicates that "[n]o one may be exiled from his country or prohibited from returning thereto," and International Covenant on Civil and Political Rights, Article 12(4): "No one shall be arbitrarily deprived of the right to enter his own country." *Cf.* In her expert opinion provided by affidavit, Julia Harrington mentioned Article 12(4) of the International Covenant on Civil and Political Rights, Article 22(5) of the American Convention, and Article 3 of Protocol 4 of the European Convention (expert opinion of Julia Harrington provided by affidavit).

128. ECHR, *Case of A.B. v. Poland*, No. 33878/96. Decision on admissibility of 13 March 2003, para. 4.

129. ECHR, *Case of Slivenko v. Latvia,* No. 48321/99. Judgment of 9 October 2003, para. 120.

to nationality. In addition, the children, Victoria Jean, Natalie Jean and Miguel Jean, as well as Victor Jean were born in the Dominican Republic, but at the time the events took place did not have official identification documents. With regard to these individuals, the Court has also determined that the absence of this documentation was related to a violation of the right to nationality. Therefore, all these persons must be considered Dominican nationals for the purpose of the application of Article 22 of the Convention.

388. The State asserted that it had never repatriated a Dominican national who could prove his or her nationality. The evidence provided by the State, however, does not prove that it took measures to identify and verify formally the nationality of the presumed victims.

389. The Court considers that, although some of the presumed victims could, in fact, return to Dominican territory,[130] owing to the way in which the events occurred, the destruction or repudiation of the documents of the Dominican nationals who had documentation as well as the expulsion of Dominicans who lacked official documentation, prevented the victims from being able to lawfully return to Dominican territory and to move around and reside freely and lawfully in the Dominican Republic. Consequently, the Court considers that the State violated the rights to enter the country of which they are nationals and to move around and live in it as recognized in Articles 22(5) and 22(1) of the American Convention, in relation to failure to comply with the obligation to respect rights established in Article 1(1) of the Convention, to the detriment of Willian Medina Ferreras, Luis Ney Medina, Awilda Medina, Carolina Isabel Medina (deceased), Rafaelito Pérez Charles, Victor Jean, Miguel Jean, Victoria Jean (deceased) and Natalie Jean.

B.2.2.3. Respect for the basic procedural guarantees (Article 8(1))

390. The Court notes that in proceedings that may result in expulsion or deportation, respect for the right to judicial guarantees established in Article 8 of the American Convention is relevant, and includes the observance of a series of basic guarantees of due process.

[...]

393. In this case, it is not necessary for the Court to rule on the conformity of the domestic norms with the State's international obligations. It is sufficient to note, however, thatwith specific regard to the expulsions that are the subject of this case, the Dominican Republic has not presented any evidence that it applied the procedure established by the aforementioned internal regulations, or took any other measures to ensure that the victims

130. According to the facts, Rafaelito Pérez Charles, and the Jean family returned to the Dominican Republic permanently in 2002. Furthermore, some members of the Medina family made several trips to the Dominican Republic for medical reasons related to the accident suffered by Awilda Medina.

hadthe basic guarantees of due process, in order to comply with its obligations under international standards and the American Convention,[131] notwithstanding the prohibition to expel nationals established in Article 22(5) of the Convention.

394. Based on the above, the Court finds that the expulsion of said persons did not respect the relevant international standards nor the procedures established in domestic law. Consequently, the victims were not granted the basic guarantees that corresponded to them as persons subject to expulsion or deportation, violating Article 8(1) of the American Convention, in relation to non-compliance with the obligation to respect rights established in Article 1(1), to the detriment of Willian Medina Ferreras, Lilia Jean Pierre, Luis Ney Medina, Awilda Medina, Carolina Isabel Medina (deceased), Jeanty Fils-Aimé (deceased), Janise Midi, Diane Fils-Aimé, Antonio Fils-Aimé, Endry Fils-Aimé, Victor Jean, Marlene Mesidor, Markenson Jean, Miguel Jean, Victoria Jean (deceased), Natalie Jean, Rafaelito Pérez Charles and Bersson Gelin, and also, in relation to the rights of the child, protected by Article 19 of the Convention, with regard to those victims who were children at the time of the expulsion.

B.2.2.4. The existence of an effective recourse to contest the detention and expulsion (Article 25(1))

395. The Court recalls that the State had reiterated that, at the time of the facts, three remedies existed in domestic law: the application for the remedy of *amparo*, the *habeas corpus* recourse (Law No. 5353 of *Habeas Corpus* of October 22, 1914), and the remedies available in the contentious-administrative justice system (Law No. 1494 of August 9, 1947), and that the presumed victims had the "real and effective opportunity" to institute proceedings that would have allowed them to question the lawfulness of

131. To the contrary, the Court notes that the facts and evidence provided reveal that none of the said presumed victims were the subject of a complete investigation of their particular individual circumstances based on well-founded indications of a possible infringement of the Immigration Law. In addition, no arrest warrant was issued for any of them, and no formal proceedings were instituted to grant the presumed victims the possibility of being heard and contesting the decision to expel them and defending themselves from any charges against them. No final decision on deportation was taken by the Secretary of State for Internal Affairs and Police and communicated to the presumed victims, or any other type of official decision ordering the expulsions. Furthermore, the victims were not informed of the reasons for their expulsion or the specific charges against them, or of possible judicial remedies to contest the decision to expel them, and they were not provided with legal assistance. In addition, in the case of the presumed victims of Haitian nationality, Lilia Jean Pierre, Janise Midi, Marlene Mesidor and Markenson Jean, they were not provided with consular assistance, and did not receive a copy of their repatriation order (which did not exist) and the Haitian diplomatic or consular authorities were not informed of their expulsion.

their detention and the decision of the Dominican authorities to deport or expel them.

396. The sudden deprivation of liberty and expulsions of the victims were carried out in less than 48 hours without prior notice. Consequently, in this case, it is not necessary for the Court to examine whether, in general terms, the remedies indicated by the State might be appropriate and effective in similar circumstances to those experienced by the presumed victims. Indeed, it is sufficient to note that, in view of the particular circumstances of this case, specifically the way in which the expulsions were implemented, the presumed victims were unable to institute the proceedings mentioned by the Dominican Republicnor were effective procedures made available to them.

397. In light of the above, the Court concludes that, owing to the particular circumstances of this case, the victims did not have real and effective access to the right to appeal, which violated the right to judicial protection recognized in Article 25(1) of the American Convention, in relation to failure to comply with the obligation to respect rights established in Article 1(1) of the Convention, to the detriment of Willian Medina Ferreras, Lilia Jean Pierre, Luis Ney Medina, Awilda Medina, Carolina Isabel Medina (deceased), Jeanty Fils-Aimé (deceased), Janise Midi, Diane Fils-Aimé, Antonio Fils-Aimé, Endry Fils-Aimé, Victor Jean, Marlene Mesidor, Markenson Jean, Miguel Jean, Victoria Jean (deceased), Natalie Jean, Rafaelito Pérez Charles and Bersson Gelin, and also in relation to the rights of the child recognized in Article 19 of the Convention, to the detriment of those previously indicated who were children at the time the facts of the case took place.

B.2.3. The discriminatory nature of the expulsions (Article 1(1))

398. As already indicated, the Court has determined that Article 1(1) of the Convention, "a rule general in scope which applies to all the provisions of the treaty, imposes on the States Parties the obligation to respect and guarantee the free and full exercise of the rights and freedoms recognized therein without any discrimination." In other words, whatever the origin or form that it takes, any treatment that may be considered discriminatory in relation to the exercise of any of the rights ensured in the Convention is incompatible *per se* with this instrument.[132] Consequently, the State's failure to comply with the general obligation to respect and ensurerights by way

132. *Cf. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*. OC-4/84, para. 53, and *Case of Veliz Franco et al. v. Guatemala*, para. 204.

of discriminatory treatment gives rise to its international responsibility.[133] This is why the Court has affirmed that there is an inseparable link between the obligation to respect and to ensure human rights and the principle of equality and non-discrimination.[134] Article 24 of the Convention also recognizes a right that entails the State's obligation to respect and ensure the principle of equality and non-discrimination in safeguarding other rights and inall the domestic laws that it enacts.[135] This protects the right to "equal protection of the law,"[136] so that discrimination resulting from an inequality that stems from domestic law or from its application is also prohibited.[137]

399. In this case, the representatives and the Commission argued that the deprivation of liberty and the expulsions were racially driven, that is to say discriminatory acts or a discriminatory practice by State agents.

400. In this regard, the State argued that it would not have carried out the deprivation of liberty and subsequent expulsion of the presumed victims. The Court reiterates that it has already established that at the time of the events there existed a context of expulsions, including collective expulsions, of Haitians and Dominicans of Haitian origin or descent in the Dominican Republic. The facts related to the presumed victims conform to this context and the *modus operandi* applied in those practices.

401. Regarding racial discrimination,[138] the Court has recognized "the difficulty for those who are the object of discrimination to prove cases of racial prejudice" and concurs with the European Court that, in certain cases of human rights violations motivated by discrimination, the burden of

133. *Cf. Juridical Status and Rights of Undocumented Migrants.* OC-18/03*,* para. 85, and *Case of Veliz Franco et al. v. Guatemala*, para. 204.

134. *Cf. Juridical Status and Rights of Undocumented Migrants*. OC-18/03*,* para. 53, and *Case of Veliz Franco et al. v. Guatemala*, para. 204.

135. *Cf. Case of Yatama v. Nicaragua*, para. 186, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 199.

136. *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*. OC-4/84, para. 54*, and Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile,* para. 199.

137. *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, para. 209, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile,* para. 199.

138. In this regard, the Article 1(1) of the American Convention establishes respect for and guarantee of the rights recognized therein, "without any discrimination for reasons of race, color, […] national or social origin, economic status, […] or any other social condition." In addition, the International Convention on the Elimination of All Forms of Racial Discrimination defines discrimination as: "[…] any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." International Convention on the Elimination of All Forms of Racial Discrimination of January 4, 1969, Article 1. *Cf. Case of Nadege Dorzema et al. v. Dominican Republic,* para. 231.

proof falls on the State, which controls the means to clarify the events that occurred in its territory.[139]

402. In addition, with regard to the rights of migrants, the Court has established that it is permissible for the State to treat documented migrants differently from undocumented ones, as well as to treat immigrants differently from nationals, "provided that this treatment is reasonable, objective and proportionate, and does not harm human rights."[140] However, "the obligation to respect and to ensure the principle of equality before the law and non-discrimination is independent of the migratory status of a person in a State." In other words, States have the obligation to guarantee this fundamental principle to their citizens and to any alien in their territory, without discrimination of any kind based on his or her regular or irregular presence, nationality, race, gender or any othercondition.[141]

403. Furthermore, the Court has already established that the deprivations of liberty were not implemented in order to conduct a formal immigration proceeding, and the way in which the presumed victims were detained while they were out and about or in their home indicates a presumption by the State agents that, based on their physical characteristics, the presumed victims must have belonged to the specific group, that of Haitians or individuals of Haitian origin.

404. In light of the above, the Court considers that the established facts and the context in which the facts of this case occurred reveal that the victims were not deprived of liberty in order to conduct formal immigration proceedings, but rather were detained and expelled mainly owing to their physical characteristics and the fact that they belonged to a specific group; that is, because they were Haitians or of Haitian origin. This constitutes adiscriminatory and prejudicial action towards the victims due to their Haitian origin or descent. Such behavior jeopardizes the enjoyment of the rights that the Court found to have been violated. Consequently, the Court concludes that, with respect to the rights found to have been violated, the State failed to comply with the obligation established in Article 1(1) of the American Convention to respect the rights without discrimination.

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139. *Cf. Case of González Medina and family members v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgment of February 27, 2012. Series C No. 240, para. 132, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 229.

140. *Cf. Juridical Status and Rights of Undocumented Migrants*. OC-17/02, para. 119; *Case of Nadege Dorzema et al. v. Dominican Republic,* para. 233, and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. OC-21/14, footnote 74.

141. *Cf. Juridical Status and Rights of Undocumented Migrants*. OC-18/03, para. 118, and *Case of the Girls Yean and Bosico v. Dominican Republic*, para. 155.

B.3. Conclusion

405. As established above, the State violated the right to personal liberty, established in paragraphs 1, 2, 3, 4, 5 and 6 of Article 7 of the American Convention, in relation to its failure to comply with the obligation to respect rights without discrimination, as established in Article 1(1) of this instrument, to the detriment of the persons who were deprived of liberty: Willian Medina Ferreras, Lilia Jean Pierre, Luis Ney Medina, Awilda Medina, Carolina Isabel Medina (deceased), Jeanty Fils-Aimé (deceased), Janise Midi, Antonio Fils-Aimé, Diane Fils-Aimé, Endry Fils-Aimé, Rafaelito Pérez Charles, Bersson Gelin, Victor Jean, Marlene Mesidor, Markenson Jean, Victoria Jean (deceased), Miguel Jean and Natalie Jean, and also in relation to the rights of the child recognized in Article 19 of the Convention, to the detriment of the victims who were children at the time of the events.

406. For the reasons stated above, the Court also concludes that the State violated the prohibition of the collective expulsion of aliens, as recognized in Article 22(9) of the American Convention, in relation to failure to comply with the obligation to respect rights without discrimination established in Article 1(1) of the Convention, to the detriment of the victims of Haitian nationality: Lilia Jean Pierre, Janise Midi, Marlene Mesidor and Markenson Jean, and also, in relation to the rights of the child recognized in Article 19 of the Convention, to the detriment of Markenson Jean, who was a child at the time of the events. Likewise, the Court considers that the State violated the right to freedom of movement and residence recognized in Article 22(1) and 22(5) of the American Convention, in relation to the failure to comply with the obligation to respect rights without discrimination established in Article 1(1) of the Convention, to the detriment of the victims of Dominican nationality: Willian Medina Ferreras, Luis Ney Medina, Awilda Medina, Carolina Isabel Medina (deceased), Rafaelito Pérez Charles, Victor Jean, Victoria Jean (deceased), Miguel Jean and Natalie Jean, and also in relation to the rights of the child recognized in Article 19 of the Convention, to the detriment of the victims who were children at the time of the events.

407. Lastly, based on the foregoing considerations, the Court concludes that the State violated the right to a fair trialand to judicial protection, recognized in Articles 8(1) and 25(1) of the American Convention, in relation to failure to comply with the obligation to respect the rights of the Convention without discrimination established in Article 1(1) of the Convention, to the detriment of Willian Medina Ferreras, Lilia Jean Pierre, Luis Ney Medina, Awilda Medina, Carolina Isabel Medina (deceased), Jeanty Fils-Aimé (deceased), Janise Midi, Diane Fils-Aimé, Antonio Fils-

Aimé, Endry Fils-Aimé, Victor Jean, Marlene Mesidor, Markenson Jean, Miguel Jean, Victoria Jean (deceased), Natalie Jean, Rafaelito Pérez Charles and Bersson Gelin, as well as its obligations arising from the rights of the child, protected in Article 19 of the Convention, to the detriment of the victims who were children at the time of the events.

[...]

XIII. REPARATIONS (APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION)

[...]

B.1. Measures of restitution

B.1.1. Recognition of nationality for the Dominican persons and residence permits for the Haitian persons

B.1.1.1. Willian Medina Ferreras and his family members

[...]

452. The Court has determined that the authorities' repudiation of the personal documentation of Willian Medina Ferreras, Awilda Medina, Luis Ney Medina and Carolina Isabel Medina (deceased), resulted in the violation, *inter alia*, of their right to nationality. The Court also recalls that, in its submission, the State´s answer underscored that it had "indicate[d] opportunely that 'Willia[n] Medina Ferreras, [A]wilda Medina [and] Luis Ney Medina [...] are Dominican citizens [...] so that there is no objection to replacing the corresponding documentation, either the birth certificate or the identity card, as appropriate." Therefore, the Court considers that, within six months, the Dominican Republic must adopt the measures required to ensure that Willian Medina Ferreras, Awilda Medina and Luis Ney Medina have the necessary documentation to prove their identity and their Dominican nationality, and must, if necessary, proceed to replace or restore documentation, as well as to take any other measure required in order to comply with this decision, free of charge.

453. The Court notes that Law No. 169-14 institutes a procedure to regularize documentation, and the Court has determined that, while the law as a whole does not contravene the Convention, Articles 6, 8 and 11 of this law are in contravention of the instrument. Accordingly, it should be noted that it is not pertinent for the Inter-American Court to decide on whether or not the articles of this law that have not been found to be in the Convention, are an appropriate mechanism through which to fulfill

the measure ordered in the preceding paragraph. It is pertinent, however, to indicate that Law No. 169-14, as well as any other procedure, must be implemented in keeping with the holding of this Judgment and, in particular, with the provisions of the preceding paragraph.

454. The Court also underlines that article 3 of Law No. 169-14 excludes the possibility of regularizing "records based on false information, identity theft, or any other act that constitutes the falsification of a public deed, provided that the act can be attributed directly to the beneficiary." The Court has been informed of administrative and judicial proceedings to decide on the annulment of records and documentation of Willian Medina Ferreras, Awilda Medina, Luis Ney Medina, and Carolina Isabel Medina (deceased), as well as on the criminal sanction of presumed wrongful acts in this regard. These proceedings originated from an administrative investigation arising from the fact that Willian Medina Ferreras was a plaintiff, under the inter-American system, seeking a declaration by the Court on the international responsibility of the Dominican Republic. Thus, the facts reveal that the actions and interviews on September 26 and 27, 2013, that resulted in other proceedings, including those of a judicial nature, were conducted "because this person is suing the Dominican State before the Inter-American Commission on Human Rights".

455. Consequently, it should be recalled that Article 53 of the Court's Rules of Procedure establishes that "States may not institute proceedings against [...] alleged victims, nor exert pressure on them [...] on account of [their] statements [...] or [their] legal defenses before the Court."

456. It should be recalled that States have the authority to institute proceedings to penalize or annul acts contrary to their laws. However, Article 53 of the Rules of Procedure prohibits, in general, the "prosecut[ion]" or the implementation of "reprisals" on account of "statements or [the] legal defense" before the Court. The purpose of this norm is to ensure that those who intervene in the proceedings before the Court may do so freely with the certainty that they will not be prejudiced as a result. Regardless, therefore, of whether or not the documentation relating to Willian Medina Ferreras and the members of his family is null and void, or whether or not an offense was committed (matters that the State may investigate), in this case the explicit reason behind certain administrative investigations relating to some victims, which resulted in judicial proceedings, was the fact that the State was being sued in the international sphere, In these circumstances, the Court notes that the State's conduct has impaired the safety of the procedural activity that Article 53 seeks to protect. Thus, the Court cannot consider that legal proceedings arising from a violation of Article 53 of the Rules of Procedure are valid, because this provision could not achieve its

purpose if proceedings instituted in violation of the provision were found to be legitimate. Therefore, notwithstanding the State's power to take measures under its domestic laws and its international undertakings to punish acts that are contrary to domestic law, the above-mentioned administrative and judicial proceedings cannot represent an obstacle to compliance with any of the measures of reparation ordered in this Judgment, including that related to the adoption of measures aimed at providing Willian Medina Ferreras, Awilda Medina and Luis Ney Medina with the documentation required to prove their identity and Dominican nationality.

457. Based on the above, the Dominican Republic must also adopt, within six months, the necessary measures to nullify the aforementioned administrative investigations, as well as the civil and criminal proceedings that are underway, relating to records and documentation of Willian Medina Ferreras, Awilda Medina, Luis Ney Medina and Carolina Isabel Medina. The eventual continuation, and possible results, shall have no effect with regard to said victims as regards compliance with this Judgment.

B.1.1.2. Victor Jean, Miguel Jean, Victoria Jean and Natalie Jean

458. The Court has also determined that the absence of records and documentation of Victor Jean, Miguel Jean, Victoria Jean (deceased) and Natalie Jean, violated, *inter alia*, the right to recognition of juridical personality, a name, and nationality of these persons, as well as the right to identity, in consideration of the violations as a whole. Therefore, the State must adopt, within six months, the measures required to ensure that Victor Jean, Miguel Jean, Victoria Jean and Natalie Jean are, as appropriate, duly registered and have the necessary documentation to prove their identity and Dominican nationality; that is, their birth certificate and, accordingly, also their identity card. The State may not make compliance with this decision dependent on the commencement or continuation of any process or proceedings by the victims or their representatives, nor can it recover payment from them.

B.1.1.3. Marlene Mesidor

459. The Court notes that Marlene Mesidor has children who are Dominicans, including a daughter who is still a child and a victim in this case: Natalie Jean. Therefore, taking into account the rights of the family, and also the rights of the child, the Court finds that the State must adopt within six months the necessary measures to ensure that Marlene Mesidor may reside or remain lawfully in the territory of the Dominican Republic, together with her children, some of whom are still minors, in order to keep the family unit together in light of the protection of the rights of the family.

[...]

B.3. Guarantees of non-repetition

[...]

B.3.1. Human rights training for State agents

[...]

465. Based on the facts and the violations declared in the case *sub judice*, the Court considers it relevant to enhance respect for and ensure the rights of the Dominican population of Haitian descent and the Haitian population by training those involved in immigration matters, such as members of the Armed Forces, border control agents, and agents responsible for immigration and judicial proceedings, so that events such as those of this case are not repeated. To this end, the Court finds that the State must implement, within a reasonable time, continuous and permanent training programs on topics that concern this population in order to ensure: (a) that racial profiling never constitutes a reason for detention or expulsion; (b) the strict observance of the guarantees of due process during any proceedings related to the expulsion or deportation of aliens; (c) that Dominican nationals are never, in any circumstance, expelled, and (d) that collective expulsions of aliens are never executed.

B.3.2. Adoption of domestic legal measures

[...]

468. The Court has established that judgment TC/0168/13 and Articles 6, 8 and 11 of Law No. 169-14 violate the American Convention. Consequently, the Dominican Republic must, within a reasonable time, take the necessary measures to ensure that these laws no longer continue to have legal effect.

469. The Court has established that, in the Dominican Republic, the consideration of the irregular migratory status of parents who are aliens as grounds for an exception to the acquisition of nationality based on *ius soli* is discriminatory and, therefore, violates Article 24 of the Convention. In this respect, the Court "has found no reason [...] to differ from its opinion in its judgment in the *Case of the Girls Yean and Bosico v. Dominican Republic*, that an individual's immigration status is not transmitted to his or her children". In addition, the Court has indicated that the application of this criterion deprives an individual of legal certainty in the enjoyment of the right to nationality, which violates Articles 3, 18 and 20 of the Convention, and, in consideration of these violations as a whole, the right to an identity. Therefore, in accordance with the obligation established in Article 2 of the American Convention, the State must adopt, within a reasonable time, the necessary measures to nullify any type of norm, whether administrative, regulatory,

legal or constitutional, as well as any practice, decision or interpretation that establishes or has the effect that the irregular status of parents who are aliens constitutes grounds for denying Dominican nationality to those born on the territory of the Dominican Republic, as such norms, practices, decisions or interpretations are contrary to the American Convention.

470. In addition to the above, in order to avoid a repetition of facts similar to those of this case, the Court finds it pertinent to establish that the State must adopt, within a reasonable time, the legislative and, if necessary, constitutional, administrative or any other type of measures required to regulate a simple and accessible birth registry procedure to ensure that all those born on its territory can be registered immediately after birth, regardless of their descent, origin or the migratory situation of their parents.[142]

471. Lastly, the Court finds it pertinent to recall, without prejudice to the measures that it has established, that, within the ambit of their jurisdiction, "all the authorities and organs of a State Party to the Convention have the obligation to exercise a "conventionality control.'"[143]

[…]

142. *Case of the Girls Yean and Bosico v. Dominican Republic,* para. 239 to 241. In this regard, paragraph 240 establishes that "[t]his Court considers that the State, when establishing the requirements for the late registration of births, should take into account the particularly vulnerable situation of Dominican children of Haitian descent. The requirements should not represent an obstacle to obtain Dominican nationality and should be only those that are essential to establish that the birth took place in the Dominican Republic. In this regard, the identification of the father or the mother of the child should not be restricted to the presentation of the identity and electoral card, but, to this end, the State should accept any other appropriate public document, because the said identity card is exclusive to Dominican citizens. Also, the requirements must be standard and clearly established, so that the application is not subject to the discretion of State officials, thus ensuring the legal certainty of those who use this procedure, and in order to effectively ensure the rights established in the American Convention, pursuant to Article 1(1) of the Convention."

143. *Cf. Case of the Santo Domingo Massacre v. Colombia. Preliminary objections, merits and reparations.* Judgment of November 30, 2012. Series C No. 259, para. 142, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 436.

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF ESPINOZA GONZÁLES v. PERU
Series C No. 289

JUDGMENT OF 20 NOVEMBER 2014

(Preliminary objections, merits, reparations and costs)

[Extracts][1]

1. This is an excerpt from the judgment on the preliminary objections, merits, reparations and costs in the case of *Espinoza Gonzáles v. Peru*. It contains a summary of the facts, and only the paragraphs relevant to this publication. The number and length of the footnotes has been reduced. The paragraph numbers correspond to those in the original judgment, but the footnotes have been renumbered. The full text of the judgment is available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_289_ing.doc.

JUDGMENT

In the case of *Espinoza Gonzáles v. Peru*,

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

Humberto Antonio Sierra Porto, President
Roberto F. Caldas, Vice President
Manuel E. Ventura Robles, Judge
Eduardo Vio Grossi, Judge, and
Eduardo Ferrer Mac-Gregor Poisot, Judge;

also present,

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

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter also "the American Convention" or "the Convention") and Articles 31, 32, 42, 65 and 67 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), delivers this Judgment […]:

[…]

VI. FACTS

[During the internal conflict that took place in Peru between 1980 and 2000 between armed groups and military and police forces, torture and other cruel, inhuman or degrading treatment were part of a systematic and generalized practice. These practices were used as instruments of counterinsurgency within the framework of criminal investigations of treason and terrorism. In particular, there were numerous acts that shaped a widespread and abhorrent practice of rape and other forms of sexual violence affecting mainly women, and formed part of a wider context of discrimination against women. Such practices were facilitated by the permanent use of states of emergency and antiterrorism legislation, which remain effective to date, and were characterized by the absence of minimum guarantees for detainees, in addition to the State having, among other things, the power to hold detainees incommunicado and in solitary confinement.

In this context, on April 17, 1993, Gladys Carol Espinoza Gonzáles was intercepted, along with her romantic partner Rafael Salgado, in Lima by members of the Division of Kidnapping Investigations (DIVISE) of the National Police of Peru (PNP) who had mounted an operation

entitled "Oriente" in order to find those responsible for the abduction of a businessman. Both were taken to DIVISE premises, and the next day Gladys Espinoza was transferred to the facilities of the National Directorate Against Terrorism (DINCOTE). At those facilities it was denied to Teodora Gonzáles, Gladys Espinoza's mother, that her daughter was detained there and she was not permitted to see her until about three weeks later. On April 26, 1993 Teodora Gonzáles filed a brief with the 14th Special Prosecutor for Terrorism, in which she requested the intervention of a medical examiner to verify the life and state of health of her daughter. Two days later the then-General Coordinator of the Association for Human Rights (APRODEH) reported to the Special Prosecutor of the Ombudsman and Human Rights, as well as to the State Prosecutor's office and the Public Ministry, that Gladys Espinoza had been subjected to sexual and physical abuse, among other abuses, continuously since the day of her arrest. During her detention at DINCOTE Gladys Espinoza was the recipient of medical attention and treatment. With respect to this treatment at least five tests, reports and medical certificates were issued in which the presence of lesions and bruises on various parts of her body was noted.

On June 25, 1993 the Special Military Court convicted Gladys Espinoza for the crime of treason. On February 17, 2003, the Superior Criminal Chamber of the Supreme Court nullified all of the prior proceedings before the military court for the crime of Treason. On March 1, 2004 the National Chamber of Terrorism delivered a judgment convicting Gladys Espinoza for committing the crime of Terrorism in violation of Public Tranquility. On November 24, 2004 the Permanent Criminal Chamber of the Supreme Court of Justice sentenced Gladys Espinoza to 25 years imprisonment, terminating on April 17, 2018. Gladys Espinoza has been held in various prisons in Peru and currently remains imprisoned. Between 1996 and 2001 she was held in the Yanamayo Prison.

Within the context of the abovementioned criminal proceedings, and on several other occasions, Gladys Espinoza reported to Peruvian authorities that she was a victim of violent acts throughout her detention, including torture, rape, and other forms of sexual violence, including while she was imprisoned in the DIVISE and DINCOTE facilities. As a result, in 2004, a "Protocol of Forensic Examination for Detection of Injuries Resulting from Torture in Living Persons" was conducted on Gladys Espinoza.

Despite numerous complaints from 1993 onwards, and medical reports on her state of health, there was no investigation into the alleged acts of violence, and in particular sexual violence, perpetrated against Gladys Espinoza. It was only on June 8, 2011, when the Inter-American Commission notified Peru of the Report on Admissibility and Merits

No. 67/11 regarding the instant case, that the process began that led to the opening of the investigation by the Third Criminal Regional Prosecutor of Lima, which officially started on April 16, 2012. Following the appropriate investigative procedure, a "Protocol of Investigation of Torture or Cruel, Inhuman or Degrading Treatment," conducted on Gladys Espinoza by the Institute of Forensic Medicine on January 7, 2014, the Prosecutor formalized the criminal complaint with the National Criminal Court of Lima on April 30, 2014. On May 20, 2014, the First National Criminal Court issued an indictment charging several people with the crimes of kidnapping, rape, and torture.]

VIII. MERITS

[…]

B. Considerations of the Court

106. The Court has established in its case law that Article 7 of the American Convention includes two types of very different regulations, one general and the other specific. The general regulation can be found in the first paragraph: "[e]very person has the right to personal liberty and security." While the specific regulation is composed of a series of guarantees that protect the right not to be deprived of liberty unlawfully (Article 7(2)) or arbitrarily (Article 7(3)), to be informed of the reasons for the detention and the charges that have been brought (Article 7(4)), to judicial control of the deprivation of liberty (Article 7(5)), and to a decision by the court on the lawfulness of the detention (Article 7(6)).[2] Any violation of paragraphs 2 to 7 of Article 7 of the Convention necessarily entails the violation of Article 7(1) thereof.[3] On this point, it should be indicated that the Commission argued that the arrest of Gladys Espinoza was arbitrary, because the State authorities had used insults, blows and threats when making it, and without the State providing an explanation on the strict necessity and proportionality for this in light of the standards that regulate the use of force. In reply, the State argued that resistance to arrest and, consequently, a skirmish between the agents and the persons arrested, cannot lead to the conclusion that an act of violence entailing an arbitrary detention had occurred. Since the Court has examined the use of force against persons arrested under Article 5 of

2. *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 51, and *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2014. Series C No. 282, para. 346.

3. *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador,* and *Case of Expelled Dominicans and Haitians v. Dominican Republic*, para. 346.

the American Convention, it will make the corresponding factual and legal determinations in Chapter VIII.2, which analyzes the alleged violations of the personal integrity of Gladys Espinoza.

[…]

B.1. Article 7(2) of the American Convention (right not to be deprived of liberty unlawfully) in relation to Article 1(1) of this instrument

108. Article 7(2) of the American Convention establishes that "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the Constitution of the State Party concerned or by a law established pursuant thereto." The Commission and the representatives affirmed that the arrest of Gladys Espinoza was unlawful because it was made without a court order and without grounds for *flagrante delicto*, thus violating the relevant domestic norms. The State affirmed that these requirements were not necessary because there was a state of emergency and suspension of guarantees; it also indicated that, during the presumed victim's arrest sufficient evidence existed to constitute a situation of *flagrante delicto* in relation to an offense of continuing execution, terrorism. However, in its final arguments, the State withdrew its arguments concerning the presumed *flagrante delicto*, affirming that, at the time of the events surrounding the presumed victim's arrest, a state of emergency and suspension of guarantees was in force that enabled the State to deprive a person of liberty without a court order or grounds for *flagrante delicto*, provided that the principles of reasonableness and proportionality were respected and that "there should be no discussion as to whether or not *flagrante delicto* existed," because "the terrorist group carried out abductions," and this fact was related to the purpose of the suspension of guarantees. Considering that Peru has withdrawn this argument, the Court need only rule on the arguments relating to the suspension of guarantees.

109. The Court has indicated that, since Article 7(2) of the Convention refers to the Constitution and laws established "pursuant thereto," the analysis of its observance entails the examination of compliance with the requirements established as specifically as possible and "beforehand" in those laws with regard to the "grounds" and "conditions" for the deprivation of physical liberty. If the formal and substantial aspects of domestic law are not respected when depriving a person of their liberty, the detention will be unlawful and contrary to the American Convention[4] in light of Article 7(2).

110. However, first, it is necessary to examine the Commission's objection that a situation of estoppel had been constituted because the State

4. *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador,* para. 57, and *Case of J. v. Peru,* para. 126.

had not submitted its argument concerning the suspension of guarantees during the procedure before the Commission, but only recently during the proceedings before the Court, and because it was not mentioned in the Commission's report. In this regard, although the Commission did not refer directly to a suspension of guarantees, it is clear that the elements which it established did raise this issue, which is part of the factual framework of the case. Paragraphs 76, 77 and 106 of said report reveal that the State had described and recognized the existence of "emergency legislation against terrorism" in force at the time of the facts of the case. Furthermore, the Commission referred to the establishment of the so-called "Emergency and National Reconstruction Government" and to the existence of the "anti-terrorist laws adopted in 1992." Therefore, the Court determines that a situation of estoppel has not been constituted, and will take into account the arguments on the suspension of guarantees.

111. On previous occasions, the Court has heard cases against Peru in which the existence of a suspension of guarantees or the application of Supreme Decrees 25,475, 25,744 and 25,659 has been alleged. In those cases, no general question was raised on the alleged suspension of guarantees in relation to the scope of the alleged violation of the right to be arrested only by order of the court or in flagrante delicto.[5] However, this question has been raised in the instant case. The Commission and the representatives have argued that it is not sufficient to allege "the generic existence of a state of emergency," because the detention of Gladys Espinoza was not compatible with the requirements of lawfulness, exceptionality and necessity, and the temporal nature of a suspension of guarantees. Consequently, the Court must analyze this matter.

[…]

B.1.2. The suspension of guarantees and its limits

116. The Commission and the representatives argued that it was not sufficient to allege "the generic existence of a state of emergency," because the detention of Gladys Espinoza had not been compatible with the legal, exceptional, necessary and temporal requirements of a suspension of guarantees.

117. Article 27(1) of the Convention refers to several situations. The measures adopted in any of these emergencies should be adapted to "the exigencies of the situation," and it is clear that what is permissible in one of them may not be permissible in the others. The lawfulness of the measures

5. *Cf. Case of Osorio Rivera and family members v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 26, 2013. Series C No. 274, and *Case of J. v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of November 27, 2013. Series C No. 275.

adopted to deal with each of the special situations referred to in Article 27(1) will thus depend on the nature, intensity, complexity and particular context of the emergency, as well as on the proportionality and reasonableness of the measures adopted to deal with it.[6] In this regard, although the Court has indicated that the State has the right and the obligation to ensure its security and to maintain public order, its powers are not unlimited, because it has the duty, at all times, to apply measures that are in keeping with the law and respectful of the fundamental rights of all those subject to its jurisdiction.[7] Consequently, Article 27(1)[8] of the Convention permits the suspension of the obligations that it establishes, "to the extent and for the period of time strictly required by the exigencies of the situation" in question. The measures adopted should not violate other international obligations of the State Party, and should "not involve any discrimination on grounds of race, color, sex, language, religion or social origin."[9] This means that the prerogative must also be exercised and interpreted in keeping with the provisions of Article 29(a) of the Convention,[10] exceptionally and in restrictive terms. In addition, Article 27(3) establishes the duty of States to "immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of

6. *Cf. Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*. Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 22, and *Case of J. v. Peru,* para. 139.

7. *Cf. Case of Bámaca Velásquez v. Guatemala. Merits*. Judgment of November 25, 2000. Series C No. 70**,** para. 174, and *Case of J. v. Peru,* para. 124.

8. Article 27 of the Convention on suspension of guarantees establishes that: "1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin. 2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from *Ex Post Facto* Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights. 3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension."

9. *Cf. Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)***,** para. 19, and *Case of J. v. Peru,* para. 139.

10. The relevant part of Article 29 of the Convention establishes that: "[n]o provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein."

which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension."

118. First, the Court notes that the body of evidence in this case reveals that in a note of July 12, 1993, the Permanent Representative of Peru before the Organization of American States (OAS) had forwarded only to the Executive Secretariat of the Inter-American Commission a "copy of the Supreme Decrees promulgated by the Government of Peru between January 19 and June 19 [1993]." Consequently, the Court has no evidence to analyze whether the State complied with said duty to advise that it had suspended guarantees, through the OAS Secretary General.

119. In addition, as already indicated, the detention of Gladys Espinoza took place in the context of a conflict between armed groups and agents of the Police and Military Forces, and the implementation in Peru of a decree, applicable to the geographical area, which extended the state of emergency that had been decreed and suspended certain constitutional guarantees, including the right to be arrested only by court order or in flagrante delicto (Article 2, paragraph 20.g). The Court notes that the Convention permits the suspension of guarantees only in case of war, public danger, or other emergency that threatens the independence or security of a State Party,[11] and that the Convention does not prohibit suspending this right temporarily while complying with certain safeguards.[12]

120. Despite the foregoing, the Court has pointed out that the suspension of guarantees should not exceed what is strictly necessary and that any action by the public authorities that exceeds those limits, which must by precisely set out in the provisions that decree a state of emergency, is unlawful.[13] Thus, the limitations imposed on the actions taken by the State respond to the generic need that, in any state of emergency, appropriate measures subsist to control the measures ordered, so as to ensure that they are reasonably adapted to the needs of the situation and do not exceed the strict limits imposed by, or derived from, the Convention.[14] Indeed, the suspension of guarantees constitutes an exceptional situation, under which it is lawful for the Government to apply certain measures that restrict rights and freedoms, which, under normal conditions, are prohibited or subject to more rigorous requirements. This does not mean, however, that the sus-

11. *Cf. Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, para. 19, and *Case of J. v. Per,* para. 138.

12. *Cf. Case of J. v. Peru*, para. 140, and *Case of Osorio Rivera and family members v. Peru*, para. 120.

13. *Cf. Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, para. 38, and *Case of J. v. Peru,* para. 139.

14. *Cf. Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*. Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9**,** para. 21, and *Case of J. v. Peru,* para. 139.

pension of guarantees entails the temporary suspension of the rule of law or that it authorizes the Government to act in a way that is contrary to the lawfulness that it must always observe. When guarantees have been suspended, some of the legal limits to the actions of the public authorities may differ from those in force under normal conditions, but should not be considered inexistent, nor should it be understood, consequently, that the Government is invested with absolute powers that exceed the conditions under which this exceptional legality is authorized.[15]

121. The case file reveals that, at the time of Gladys Espinoza's arrest, the state of emergency had been extended, and it suspended, among other matters, the right to be arrested only by court order or in flagrante delicto. Also, the procedural norms applicable to the police investigation, the preliminary proceedings, and the trial of crimes of terrorism and treason decreed on May 5 and September 21, 1992, were in force. On this point, the representatives and the Commission did not argue that at the time of the facts of this case the situation in Peru did not require the suspension of said rights. Nevertheless, the Court observes that although the right to be detained only by court order or in flagrante delicto was suspended, said procedural norms allowed a person presumably implicated in the crime of terrorism to be kept in preventive detention for no more than 15 calendar days, which could be extended for a similar period, without the person being brought before a judicial authority. Also, "the remedy of habeas corpus [was inadmissible] in the case of detainees implicated in or being prosecuted for the crime of terrorism covered by Decree Law No. 25,475." The Court considers that the possible effects on Gladys Espinoza, owing to the application of the said norms, must be analyzed in light of the guarantees established in Article 7(3), 7(5) and 7(6) of the Convention, and will therefore analyze them in the following sub-sections.

B.1.3. Absence of an appropriate record of the detention

122. The Commission and the representatives argued the absence of an appropriate record of the detention of Gladys Espinoza. The Court has considered that any detention, regardless of the reason for it or its duration, must be duly recorded in the pertinent document, clearly indicating, at least, the reasons for the arrest, who made it, the time of the arrest, and the time of the release, as well as a record that the competent judge was advised, in order to protect against any unlawful or arbitrary interference

15. *Cf. Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights),* para. 24, and *Case of J. v. Peru,* para. 137.

with physical liberty.[16] The Court has established that this obligation also exists in police detention centers.[17] The Court notes that this obligation is included in a domestic norm that was not suspended (article 2, paragraph 20(i)).

123. The body of evidence reveals that the entry of Gladys Carol Espinoza Gonzáles is recorded on page 90 of the Detainee Register of the Peruvian National Police attached to the Ministry of the Interior, covering the period from August 27, 1992, to December 9, 1996. This document shows that her entry was only registered at 1.10 a.m. on April 19, 1993. In other words, although the arrest was made on April 17, 1993, the entry was only registered two days later, and without the reasons for the arrest being clearly indicated, or who made the arrest, or the time of the arrest. Therefore, the Court finds that the failure to record the detention of Gladys Carol Espinoza Gonzáles appropriately constitutes a violation of the right recognized in Article 7(2) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Gladys Carol Espinoza Gonzáles.

B.2. Article 7(4) of the American Convention (right to be informed of the reasons for the detention), in relation to Article 1(1) of this instrument

124. The Commission and the representatives argued that Gladys Espinoza was not informed promptly of the reasons for her arrest and detention or the charge against her. Article 7(4) of the American Convention refers to two guarantees for the person who is being arrested: (i) oral or written information on the reasons for the detention, and (ii) notification, which must be in writing, of the charges.[18] The information on the "reasons" for the detention must be provided "promptly," and this constitutes a mechanism to avoid unlawful and arbitrary detentions from the very moment of the deprivation of liberty and, also, ensures the individual's right of defense.[19] The Court has indicated that the agent who makes the arrest must advise the person detained, in a simple language free

16. *Cf. Case of Torres Millacura et al. v. Argentina. Merits, reparations and costs*. Judgment of August 26, 2011. Series C No. 229, para. 76, and *Case of Expelled Dominicans and Haitians v. Dominican Republic,* para. 347.

17. *Cf. Case of Bulacio v. Argentina. Merits, reparations and costs.* Judgment of September 18, 2003. Series C No. 100, para. 132, and *Case of J. v. Peru,* para. 152.

18. *Cf. Case of Cabrera García and Montiel Flores v. Mexico*, para. 106, and *Case of Expelled Dominicans and Haitians v. Dominican Republic,* para. 369.

19. *Cf. Case of Juan Humberto Sánchez v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of June 7, 2003. Series C No. 99, para. 82, and *Case of the Landaeta Mejías Brothers et al. v. Venezuela,* para. 165.

of technicalities, of the essential facts and legal grounds on which the arrest is based, and that Article 7(4) of the Convention is not satisfied by merely a mention of the legal grounds.[20] If the person is not informed appropriately of the reasons for the detention, including the facts and their legal grounds, they do not know the charges against which they must defend themselves and, at the same time, judicial control becomes illusory.[21] The Court notes that this obligation is included in a domestic norm that was not suspended.

[…]

128. In view of the fact that she was not informed of the reasons for the detention or notified of the charges against her, pursuant to the provisions of the Convention, the Court finds that the State violated Article 7(4) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Gladys Carol Espinoza Gonzáles.

B.3. Article 7(5) and 7(3) of the American Convention (right to judicial control of the detention and right not to be deprived of liberty arbitrarily), in relation to Article 1(1) of this instrument

[…]

132. In sum, the Court has insufficient evidence to establish how long Gladys Espinoza's detention lasted without judicial control. Therefore, for the purposes of this judgment, the Court will consider that Gladys Espinoza remained at least 30 days without being brought before a judge. In the cases of *Castillo Petruzzi et al.* and *Cantoral Benavides*, the Court found that the laws of Peru, according to which a person presumably implicated in the crime of treason could be kept in preventive detention for a period of 15 days, extendible for a similar term, without being brought before a judge, was contrary to Article 7(5) of the Convention, and considered that the period of approximately 36 days that elapsed between the arrest and the date on which the victims were brought before the courts was excessive and contrary to the Convention.[22] In addition, in the case of *J. v. Peru*, the Court considered that, even in a context of suspension of guarantees, it was not proportionate that the victim, who had been arrested without a court order, remained detained at least 15 days without any form of judicial control because she was presumably implicated in the crime of terrorism.[23]

20. *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador,* para. 71, and *Case of J. v. Peru,* para. 149.
21. *Cf. Case of Yvon Neptune v. Haiti. Merits, reparations and costs*. Judgment of May 6, 2008. Series C No. 180**,** para. 109, and *Case of J. v. Peru,* para. 149.
22. *Cf. Case of Castillo Petruzzi et al. v. Peru***,** paras. 110 and 111, and *Case of Cantoral Benavides v. Peru,* para. 73.
23. *Cf. Case of J. v. Peru*, para. 144.

133. In view of the fact that, in this case, it has been proved that Gladys Espinoza, who was accused of being implicated in the crime of treason and who was subjected to the norms in force at the time of the facts, was not brought before a judge for at least 30 days, it is appropriate to apply the conclusions reached in the cases indicated in the preceding paragraph. Moreover, although neither of the parties questioned whether the supervisory judge offered the necessary guarantees of competence, independence and impartiality, the Court has indicated that the fact that the victim was brought before a military criminal judge, does not meet the requirements of Article 7(5) of the Convention.[24] Consequently, the Court finds that this detention, without judicial control pursuant to the standards of the Convention, was contrary to Article 7(5) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Gladys Carol Espinoza Gonzáles.

134. In other cases, the Court has indicated that prolonging detention without the person being brought before the competent authority makes it arbitrary.[25] Consequently, the Court considers that once the period of detention had been extended, given the failure to bring the detainee before a supervisory judge promptly and, subsequently, owing to the continuation of the deprivation of liberty by order of the military judge, it became an arbitrary detention. Therefore, the Court declares the violation of Article 7(3), in relation to Article 1(1) of the American Convention, to the detriment of Gladys Carol Espinoza Gonzáles.

B.4. Article 7(6) of the American Convention (right to recourse to a competent judge or court for a decision on the lawfulness of the arrest or detention), in relation to Article 1(1) of this instrument

135. The Commission and the representatives argued the violation of Article 7(6) of the Convention to the detriment of Gladys Espinoza because it was prohibited to present an application for habeas corpus in favor of individuals involved in proceedings for terrorism or treason. Article 7(6) of the Convention protects the right of anyone deprived of liberty to recourse to a competent judge or court for a decision on the lawfulness of the arrest or detention, so that the latter can decide, promptly, on the lawfulness of the deprivation of liberty and, if appropriate, order their release.[26] The Court has emphasized that the authority who must decide on the lawfulness of the arrest or detention must be a judge or a court. The Convention is thereby

24. *Cf. Case of Cantoral Benavides v. Peru,* para. 75.
25. *Cf. Case of Cabrera García and Montiel Flores v. Mexico*, para. 102, and *Case of J. v. Peru,* para. 144.
26. *Cf. Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, para. 33, and *Case of Expelled Dominicans and Haitians v. Dominican Republic,* para. 375.

ensuring that the control of the deprivation of liberty must be judicial.[27] In addition, it has stated that this control "must not only exist formally by law, but must be effective; in other words, comply with the purpose of obtaining a prompt decision on the lawfulness of the arrest or detention."[28]

136. As the State has acknowledged, following the entry into force of Decree Law 25,659 in August 1992, "applications for habeas corpus were inadmissible for detainees accused of, or being prosecuted for, the crime of terrorism established in Decree Law No. 25,475."[29] The Court notes that the right to contest the lawfulness of the detention before a judge must be guaranteed for the whole time that an individual is deprived of liberty. Gladys Carol Espinoza Gonzáles was unable to benefit from the remedy of habeas corpus if she had wished, because the said legal provision contrary to the Convention was in force throughout her detention. Therefore, as it has in other cases,[30] the Court finds that, following the entry into force of Decree Law No. 25,659, the State violated Article 7(6) of the Convention, in relation to Articles 1(1) and 2 thereof, to the detriment of Gladys Carol Espinoza Gonzáles.

B.5. Conclusion

137. Based on the above, the Court finds that the State is internationally responsible for the violation, to the detriment of Gladys Carol Espinoza Gonzáles, of the following paragraphs of Article 7, in relation to Article 1(1) of the American Convention: (a) Articles 7(1) and 7(2) of the Convention, owing to the failure to record the detention of Gladys Carol Espinoza Gonzáles appropriately; (b) Articles 7(1) and 7(4) of the Convention, because she was not advised of the reasons for her arrest and detention or notified of the charges against her in accordance with the standards established in the Convention; (c) Articles 7(1), 7(3) and 7(5) of the Convention, owing to the absence of judicial control of the detention for at least 30 days, which meant that the detention became arbitrary, and (d) Articles 7(1) and 7(6) of the Convention, in relation to Article 2 thereof, owing to the impossibility of filing an application for habeas corpus of any other action for protection while Decree Law 25,659 was in force.

27. *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador,* para. 128, and *Case of Expelled Dominicans and Haitians v. Dominican Republic,* para. 376.

28. *Cf. Case of Acosta Calderón v. Ecuador,* para. 97, and *Case of Expelled Dominicans and Haitians v. Dominican Republic,* para. 376.

29. *Cf.* Decree Law No. 25,659 of August 7, 1992 (evidence file, folio 1971).

30. *Cf. mutatis mutandis, Case of Loayza Tamayo v. Peru. Merits*, paras. 52, 54 and 55; *Case of Castillo Petruzzi et al. v. Peru*, paras. 182 to 188; *Case of Cantoral Benavides v. Peru*, paras. 166 to 170; *Case of García Asto and Ramírez Rojas v. Peru,* paras. 114 and 115, and *Case of J. Vs Peru,* para. 171.

VIII.2. RIGHT TO HUMANE TREATMENT AND TO PRIVACY, AND OBLIGATION TO PREVENT AND PUNISH TORTURE

[…]

A. General standards relating to personal integrity and the torture of detainees

140. Article 5(1) of the Convention recognizes, in general terms, the right to personal integrity, of both a physical and mental, and also a moral nature. Meanwhile, Article 5(2) establishes, specifically, the absolute prohibition to subject someone to torture or cruel, inhuman or degrading treatment or punishment, as well as the right of all persons deprived of their liberty to be treated with respect for the inherent dignity of the human person.[31] The Court understands that any violation of Article 5(2) of the American Convention necessarily entails the violation of Article 5(1) thereof.[32]

141. The Court has established that torture and cruel, inhuman or degrading treatment or punishment are strictly prohibited by international human rights law.[33] The prohibition of torture and cruel, inhuman or degrading treatment or punishment is absolute and non-derogable, even under the most difficult circumstances, such as: war; threat of war; the fight against terrorism and any other crimes; states of emergency or internal unrest or conflict,; suspension of constitutional guarantees; internal political instability; or other public emergencies or catastrophes.[34] Nowadays, this prohibition is part of international jus cogens.[35] Both universal[36] and re-

31. *Cf. Case of Yvon Neptune v. Haiti,* para. 129, and *Case of J. v. Peru,* para. 303. The principles contained in Article 5(2) of the Convention are also included in Articles 7 and 10(1) of the International Covenant on Civil and Political Rights, which establish, respectively, that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment," and that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." The first and sixth principles of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment establish the same, respectively. For its part, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms establishes that: "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." *Cf.* International Covenant on Civil and Political Rights, Articles 7 and 10(1); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principles 1 and 6, and European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3.

32. *Cf. Case of Yvon Neptune v. Haiti,* para. 129, and *Case of J. v. Peru,* para. 303.

33. *Cf. Case of Cantoral Benavides v. Peru. Merits,* para. 95, and *Case of J. v. Peru,* para. 304.

34. *Cf. Case of Lori Berenson Mejía v. Peru,* para. 100, and *Case of J. v. Peru,* para. 304.

35. *Cf. Case of Caesar v. Trinidad and Tobago. Merits, reparations and costs.* Judgment of March 11, 2005. Series C No. 123, para. 100, and *Case of J. v. Peru,* para. 304.

36. *Cf.* International Covenant on Civil and Political Rights, Article 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 2; Convention on the Rights

gional treaties[37] establish this prohibition and the non-derogable right not to be subjected to any form of torture. Also, numerous international instruments recognize this right and reiterate the same prohibition,[38] including international humanitarian law.[39]

142. In addition, the Court has indicated that the violation of the right to physical and mental integrity has different connotations of degree, and ranges from torture to other kinds of abuse or cruel, inhuman or degrading treatment, the physical and mental aftereffects of which vary in intensity in accordance with factors that are endogenous and exogenous to the individual (such as duration of the treatment, age, sex, health, context, and vulnerability) that must be analyzed in each specific situation.[40] In other words, the personal characteristics of a presumed victim of torture or cruel, inhuman or degrading treatment must be taken into account when determining whether their personal integrity was violated, because these characteristics may change the individual's perception of the reality and, consequently, increase the suffering and the feeling of humiliation when they are subjected to certain treatments.[41]

143. In order to define what should be understood as "torture" in light of Article 5(2) of the American Convention, the Court's case law establishes that an act constitutes torture when the ill-treatment: (i) is intentional; (ii) causes severe physical or mental suffering, and (iii) is committed with an objective or purpose.[42]

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of the Child, Article 37, and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 10.

37. *Cf.* Inter-American Convention to Prevent and Punish Torture, articles 1 and 5; African Charter on Human and Peoples' Rights, Article 5; African Charter on the Rights and Welfare of the Child, Article 16; Convention of Belem do Pará, Article 4, and European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3.

38. *Cf.* Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principles 1 and 6; Code of conduct for law enforcement officials, article 5; 1974 Declaration on the Protection of Women and Children in Emergency or Armed Conflict, article 4, and Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, Guideline IV.

39. *Cf. inter alia,* Article 3 common to the four 1949 Geneva Conventions; Geneva Convention relative to the Treatment of Prisoners of War (Convention III), Articles 49, 52, 87, 89 and 97; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV), Articles 40, 51, 95, 96, 100 and 119; Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of the Victims of International Armed Conflicts (Protocol I), Article 75.2.a)ii), and Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of the Victims of Non-International Armed Conflicts (Protocol II), Article 4.2.a). See also, *Case of Fleury et al. v. Haiti*, para. 71, and *Case of J. v. Peru,* para. 304.

40. *Cf. Case of Loayza Tamayo v. Peru. Merits,* para. 57, and *Case of J. v. Peru,* para. 362.

41. *Cf. Case of Ximenes Lopes v. Brazil.* Judgment of July 4, 2006. Series C No. 149, para. 127, and *Case of J. v. Peru*, para. 362.

42. *Cf. Case of Bueno Alves v. Argentina. Merits, reparations and costs.* Judgment of May 11, 2007. Series C No. 164, para. 79, and *Case of J. v. Peru*, para. 364.

B. The detention of Gladys Espinoza and the events that took place on the premises of DIVISE and DINCOTE in April and May 1993

[…]

B.2. Considerations of the Court

148. To analyze the arguments of the Commission and of the parties, the Court will proceed, first, to establish the facts that occurred at the time of Gladys Espinoza's arrest and while she was at the DIVISE and the DINCOTE headquarters. To this end, the Court will take into account: (i) the Final Report of the "CVR"; (ii) the statements made by Gladys Espinoza between 1993 and 2014; (iii) the reports prepared by the DIVISE and the DINCOTE in 1993 on the circumstances in which Gladys Espinoza and Rafael Salgado were arrested; (iv) the medical certificates and/or psychological appraisals issued between 1993 and 2014, mostly by the State's forensic doctors, as well as the expert appraisal provided to the Court by the psychologist Ana Deutsch; (v) the testimony of Lily Cuba and Manuel Espinoza Gonzáles before the Inter-American Court, and (vi) the alleged failure to investigate the said facts. All the above, taking into consideration the context in which the facts occurred, which has already been established by the Court. Once it has established the facts that occurred, the Court will proceed to determine their legal definition and, where appropriate, to determine whether the State violated the rights recognized in the American Convention and the ICPPT.

149. In this regard, the Court finds it relevant to recall the standards it has used for assessing the evidence in this type of case. Thus, regarding the statements made by presumed victims, the Court has considered that they usually abstain from denouncing acts or torture or ill-treatment out of fear, especially if they are detained in the place where these occurred,[43] and that it is not reasonable to require the victims of torture to describe all the presumed ill-treatment they have suffered each time they make a statement.

150. In cases of alleged sexual violence, the Court has indicated that, generally, sexual assaults are characterized by occurring in the absence of anyone other than the victim and the assailant or assailants. Given the nature of this type of violence, the existence of graphic or documentary evidence cannot be expected and, consequently, the victim's statement constitutes

43. *Cf. Case of Bayarri v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of October 30, 2008. Series C No. 187, para. 92, and *Case of J. v. Peru*, para. 337.

fundamental proof of the fact.[44] Also, when examining such statements, it must be borne in mind that sexual abuse corresponds to a type of offense that the victim does not usually report,[45] owing to the stigma that frequently results from this type of complaint. The Court has also taken into account that the statements made by victims of sexual violence relate to an occasion that was very traumatic for them, and its impact may lead to a certain lack of precision when remembering it.[46] Therefore, the Court has noted that the lack of precision in statements relating to sexual violence, or the mention of some of the alleged facts in only some of them, does not mean that such statements are false or that the facts recounted are untrue.[47]

151. In addition, the Court recalls that the evidence obtained by medical examinations plays a crucial role in investigations involving detainees, and in cases in which they allege ill-treatment.[48] Thus, allegations of ill-treatment in police custody are extremely difficult to substantiate by the victim, if he or she was isolated from the external world, without access to doctors, lawyers, family or friends who could provide support and gather the necessary evidence.[49] Therefore, the judicial authorities have the duty to ensure the rights of detainees, which entails obtaining and preserving any evidence that may substantiate the acts of torture, including medical examinations.[50]

152. It is also important to underline that, in cases in which supposed torture or ill-treatment is alleged, the time that passes before the corresponding medical appraisals is significant for the reliable determination of the existence of the harm, especially when there are no witnesses other than the perpetrators and the victims themselves and, consequently, probative elements may be very limited. This reveals that, for an investigation into

44. *Cf. Case of Fernández Ortega et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 30, 2010. Series C No. 215, para. 100, and *Case of J. v. Peru*, para. 323.

45. *Cf. Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 31, 2010. Series C No. 216, para. 95, and *Case of J. v. Peru,* para. 323.

46. *Cf. Case of J. v. Peru,* para. 325. Similarly, see *Case of Fernández Ortega et al. v. Mexico,* para. 105, and *Case of Rosendo Cantú et al. v. Mexico*, para. 91.

47. *Cf. Case of Cabrera García and Montiel Flores v. Mexico*, para. 113, and *Case of J. v. Peru,* para. 325.

48. *Cf.* ECHR, *Case of Korobov v. Ukraine,* No. 39598/03. Judgment of 21 July 2011, para. 69; ECHR, *İmanoğlu and Polattaş v. Turkey*, No. 15828/03. Judgment of 7 March 2009, para. 79; and *Case of J. v. Peru,* para. 333.

49. *Cf. Case of J. v. Peru,* para. 333. Also, ECHR, *Case of Aksoy v. Turkey*, No. 21987/93. Judgment of 18 December 1996, para. 97, and ECHR, *Case of Eldar İmanov and Azhdar Imanov v. Russia*, No. 6887/02. Judgment of 16 December 2010, para. 113.

50. *Cf. Case of Bayarri v. Argentina,* para. 92, and *Case of J. v. Peru,* para. 333. See also, Office of the United Nations High Commissioner for Human Rights, *Istanbul Protocol (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment),* New York and Geneva, 2001, para. 77, and ECHR, *Case of Eldar Imanov and Azhdar Imanov v. Russia*, para. 113.

acts or torture to be effective, this must be conducted promptly.[51] Therefore, failure to perform a medical examination of a person who is in the State's custody, or performing this without meeting the applicable standards, cannot be used to question the veracity of the presumed victim's allegations of ill-treatment.[52] Also, the absence of physical signs does not mean that ill-treatment has not occurred, because such acts of violence against the individual frequently do not leave permanent marks or scars.[53]

153. Likewise, in cases in which sexual violence is alleged, the lack of medical evidence does not decrease the truth of the presumed victim's statement.[54] In such cases, a medical examination will not necessarily reveal the occurrence of violence or rape, because not all cases of violence and/or rape cause physical injuries or ailments that can be verified by such examinations.[55]

154. The Court will analyze the characteristics of the statements that should be collected and the examinations that should be performed once the State became aware that someone has been subjected to acts of torture and/or sexual violence in Chapter VIII.4 on the alleged violation of the right to judicial guarantees and judicial protection to the detriment of Gladys Espinoza. However, as mentioned, in this chapter, the Court will assess the medical and psychological testimony and appraisals in the case file in order to determine what happened to the presumed victim.

[…]

51. *Cf. Case of Bueno Alves v. Argentina. Merits, reparations and costs.* Judgment of May 11, 2007. Series C No. 164, para. 111; *Case of J. v. Peru,* para. 333, and Istanbul Protocol, para. 104.

52. *Cf. Case of J. v. Peru,* para. 333. Similarly, see ECHR, *Tekín v. Turkey*, No. 41556/98, Judgment of 9 June 1998, para. 41; ECHR, *Türkan v. Turkey*, No. 33086/04, Judgment of 18 September 2008, para. 43, and ECHR, *Korobov v. Ukraine,* para. 68.

53. *Cf. Case of J. v. Peru,* para. 329, and Istanbul Protocol, para. 161.

54. *Cf. Case of J. v. Peru*, para. 333, International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998, case No. ICTR-96-4-T, paras. 134 and 135; International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Anto Furundzija*, Judgment of 10 December 1998, case No. IT-95-17/1-T, para. 271; International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Tadić*, Appeal Judgment of 15 July 1999, case No. IT-94-1-A, para. 65; International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo ("Celebici camp")*, Appeal Judgment of 20 February 2001, case No. IT-96-21, paras. 504 and 505. Similarly, article 96 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia and of the International Criminal Tribunal for Rwanda establish that "in cases of sexual assault, no corroboration of the victim's testimony shall be required."

55. *Cf. Case of Fernández Ortega et al. v. Mexico*, para. 124, and *Case of J. v. Peru*, para. 329. See also, ECHR, *M.C. v. Bulgaria*, No. 39272/98. Judgment of 4 December 2003, para. 166.

B.2.7. Determination of the ill-treatment that occurred

179. Taking into account the context established by the Court as regards the practice of detentions, torture, cruel, inhuman and degrading treatment, as well as sexual violence and the rape of women, perpetrated by State agents as part of the counter-subversive struggle in Peru, the Court considers that, based on: (i) the final report of the CVR; (ii) the statements of Gladys Espinoza from 1993 to 2014; (iii) the above-mentioned reports prepared by the DIVISE and the DINCOTE in 1993; (iv) the aforementioned medical and/or psychological certificates and reports issued between 1993 and 2014; (v) the testimony of Manuel Espinoza Gonzáles and Lily Cuba, and (vi) the failure to investigate the facts of the case, it is sufficiently proved that, at the time of the initial arrest of Gladys Espinoza, she was on a motorcycle with Rafael Salgado, when, while shots were fired, she was physically assaulted by unknown State officials and received a blow to the back of her head, among others, in order to force her into the vehicle in which she was taken to DIVISE headquarters. At this time she received death threats against herself and her family and threats of being infected with "AIDS," and heard her companion being threatened that "the 20 men were going to take advantage of her" if he did not talk.

180. In addition, the Court finds that it has been sufficiently proved that during her time on the premises of the DIVISE and the DINCOTE in April and May 1993, Gladys Espinoza was blindfolded; interrogated concerning the abduction of a businessman; forcibly undressed; threatened that she and her family would be killed; threatened that she would be disappeared and that she would be infected with "AIDS;" and physically abused on repeated occasions and in different ways, including by beating her whole body, including the soles of her feet, her back and head. In addition, she was tied up and suspended, and her head was submerged in fetid water. She also heard the cries of her partner, Rafael Salgado. Likewise, the Court finds it proved that Ms. Espinoza Gonzáles was subjected to inappropriate touching, vaginal and anal penetration with hands and, in the latter case, also with an object. Also her breasts and her pubic hair were pulled and one of her attackers tried to put his penis in her mouth.

181. The State has not contested that Ms. Espinoza Gonzáles remained incommunicado for some time in the DIVISE and the DINCOTE. In this regard, it is a proven fact that Teodora Gonzáles went to the DINCOTE for the first time because, on April 23, 1993, a police agent had told her that her daughter was there in a serious state of health. The Court also recalls that, initially, the DINCOTE authorities denied that she was there, allowing them access to her two weeks later and only for a few minutes.

On May 7, 1993, Ms. Espinoza gave a statement in the presence of the Investigating Officer of one of the DINCOTE offices and of her lawyer. It is also pertinent to point out that the CVR Final Report refers to the use of the practice of holding detainees incommunicado during the armed conflict. In fact, the CVR, citing the National Human Rights Coordinator in her 1993-1994 Report on Torture indicated that "in application of the special anti-terrorist laws, almost all detainees had been kept incommunicado, restricting their right of defense and subject to the decision of the police themselves as regards the establishment of their legal situation; in other words, to which jurisdiction they should be subject (military or civil)." Thus, the Court recalls that Article 12.d of Decree Law No. 25,475, in force at the time of the facts in question, authorized the National Police to order the absolute holding incommunicado of detainees. Consequently, the Court finds it proved that Gladys Carol Espinoza Gonzáles was unable to communicate with her family until approximately three weeks after her detention.

182. In addition, the Court recalls that Gladys Espinoza was arrested and detained without a court order and without judicial control for at least 30 days. The conditions in which her arrest and detention were carried out lead to the conclusion that the facts that she alleges truly occurred. As it has on other occasions,[56] the Court observes that to reach a different conclusion would mean allowing the State to shield itself behind the negligence and ineffectiveness of the investigation, and the situation of impunity in which the facts of this case remain, in order to exempt itself from responsibility.

B.2.8. Legal definition of the facts

183. Having established the facts, the Court will proceed to provide a legal definition for what happened during the initial detention of Gladys Espinoza on April 17, 1993, and during the time she spent on the premises of the DIVISE and the DINCOTE in April and May 1993.

184. First, the Court has indicated that any use of force that is not strictly necessary owing to the behavior of the person detained constitutes an affront to human dignity, in violation of Article 5 of the American Convention.[57] In this case, the State has not proved that the force used when arresting Ms. Espinoza Gonzáles was necessary; therefore the Court finds that the State violated her right to personal integrity recognized in Article 5(1) of the American Convention, in relation to Article 1(1) of this instrument.

56. *Cf. Case of Kawas Fernández v. Honduras. Merits, reparations and costs.* Judgment of April 3, 2009. Series C No. 196, para. 97, and *Case of J. v. Peru*, para. 356.
57. *Cf. Case of Loayza Tamayo v. Peru. Merits*, para. 57, and *Case of J. v. Peru*, para. 363.

185. Second, the Court recalls that an international legal regime has been developed concerning the absolute prohibition of all forms of torture, both physical and psychological, and, with regard to the latter, it has been recognized that the threat and real danger that a person will be subjected to severe physical injuries causes, in certain circumstances, a moral anguish of such a degree that it may be considered "psychological torture."[58] The Court finds it evident that, given the context of violence at the time by both the subversive groups and State agents, the fact that unknown men arrested Ms. Espinoza while firing their weapons and that they beat her on the head, among other actions, in order to force her into a vehicle together with her partner, who was bleeding, and where she received death threats against herself and her family, and that she would be "infected with AIDS," and heard that 20 men were going to "take advantage of her," necessarily caused her feelings of intense anguish, fear and vulnerability. Thus, these facts also constitute, a violation of her physical integrity, a form of psychological torture, in violation of Article 5(1) and 5(2) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Gladys Espinoza.

186. Third, regarding the events that took place on the premises of the DIVISE and the DINCOTE, international human right law has established that holding detainees incommunicado must be exceptional and that its use during detention may constitute an act that is contrary to human dignity,[59] because it may result in a situation of extreme psychological and moral suffering for the detainee.[60] Thus, starting with its first judgments, the Inter-American Court has considered that prolonged isolation and incommunicado represent, in themselves, forms of cruel and inhuman treatment, that are harmful to the mental and moral integrity of the individual and of the right of every detainee to the respect dye to the dignity inherent in the human being.[61] The State must also ensure that those deprived of liberty may contact the members of their family.[62] The Court recalls that holding incommunicado is an exceptional measure to ensure the results of an investigation, and that that it can only be applied if it is ordered in keeping with conditions that have been established previously by law.[63]

187. The Court considers that the fact that Ms. Espinoza had no access to her family for approximately three weeks constituted a prolonged period of incommunicado. In addition, the Court has already established that

58. *Cf. Case of Cantoral Benavides v. Peru,* para. 102, and *Case of J. v. Peru,* para. 364.
59. *Cf. Case of Cantoral Benavides v. Peru. Merits,* para. 82, and *Case of J. v. Peru*, para. 376.
60. *Cf. Case of Suárez Rosero v. Ecuador. Merits,* para. 90, and *Case of J. v. Peru*, para. 376.
61. *Cf. Case of Maritza Urrutia v. Guatemala*, para. 87, and *Case of J. v. Peru,* para. 376.
62. *Cf. Case of J. v. Peru,* para. 376. See also, African Commission on Human and Peoples' Rights, *Law Office of Ghazi Suleiman v. Sudan,* Communications Nos. 222/98 and 229/99 (2003), para. 44.
63. *Cf. Case of Suárez Rosero v. Ecuador. Merits,* para. 89, and *Case of J. v. Peru,* para. 378.

the detention of Ms. Espinoza Gonzáles was unlawful. In this regard, the Court has indicated that even if an unlawful detention has only lasted for a short time, this is sufficient for it to constitute a violation of mental and moral integrity, in accordance with the standards of international human rights law and, in these circumstances, it is possible to infer, even when there is no other evidence in this regard, that the treatment that the victim received during her time of incommunicado was inhuman and degrading.[64] Therefore, this time of incommunicado constituted a violation of Articles 5(2) and 5(1) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Gladys Espinoza.

188. Lastly, in order to establish whether the above-mentioned acts inflicted on Gladys Espinoza on the premises of the DIVISE and of the DINCOTE in April and May 1993, constituted acts of torture, the Court will determine whether these acts: (i) were intentional; (ii) caused severe physical or mental suffering, and (ii) were committed with an objective or purpose.

189. In view of its nature, repetition and duration over time, the Court finds it evident that the physical and psychological abuse suffered by Gladys Espinoza, including being beaten on all parts of her body, suspended by her hands and immersed in fetid water, and receiving death threats against herself and her family, was intentional. Regarding the severity of her suffering, the Court recalls that, in her statements, Ms. Espinoza indicated that she heard her partner crying out in pain, that she fainted on several occasions, that she felt that she was abandoning her body because she had "gone beyond the limits of pain," and that she asked her captors to kill her. In this regard, the Court notes that the psychologist Carmen Wurst identified the loss of consciousness and the depersonalization as protective systems deployed in the face of such acts. Lastly, with regard to the objective, the said acts were perpetrated against Ms. Espinoza in the context of a situation in which the agents of the DIVISE and the DINCOTE interrogated her repeatedly concerning the whereabouts of Mr. Furukawa following his abduction. Without rejecting the possible existence of other objectives, the Court finds that, in this case, it has been proved that the physical and psychological violence inflicted had the specific objective of obtaining information on the MRTA and the presumed abduction mentioned above, as well as to punish her for not providing the information requested.

190. With regard to the acts of a sexual nature perpetrated against Ms. Espinoza while on the premises of the DIVISE and the DINCOTE, the

64. *Cf. Case of Juan Humberto Sánchez v. Honduras*, para. 98, and *Case of Maritza Urrutia v. Guatemala,* para. 87.

Court recalls, as the Convention of Belém do Pará indicates, that violence against women not only constitutes a violation of human rights, but is "an offense against human dignity and a manifestation of the historically unequal power relations between women and men," that "pervades every sector of society regardless of class, race or ethnic group, income, culture, level of education, age or religion and strikes at its very foundations."[65]

191. In keeping with international case law and taking into account the provisions of the Convention of Belém do Pará, the Court has considered that sexual violence is constituted by acts of a sexual nature that, in addition to encompassing the physical invasion of the human body, may include acts that do not involve penetration or even any physical contact.[66] Thus, in another case, the Court established that subjecting women to forced nudity while they were constantly observed by armed men who were apparently members of the State's security forces, constituted sexual violence.[67]

192. Also, pursuant to the jurisprudential and normative standards of both international criminal law and comparative criminal law, the Court has considered that rape does not necessarily entail vaginal sexual intercourse as considered traditionally. Rape should also be understood to include acts of vaginal or anal penetration using other parts of the perpetrator's body or objects, as well as oral penetration by the male organ.[68] In this regard, the Court clarifies that, for an act to be considered rape, it is sufficient that penetration occurs, however slight this may be, in the terms described above.[69] Furthermore, it should be understood that vaginal penetration

65. Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, Preamble.

66. *Cf. Case of the Miguel Castro Castro Prison v. Peru,* para. 306, and *Case of J. v. Peru*, para. 358. See also, International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, para. 688.

67. *Cf. Case of the Miguel Castro Castro Prison v. Peru*, para. 306.

68. *Cf. Case of the Miguel Castro Castro Prison v. Peru,* para. 310, and *Case of J. v. Peru,* para. 359.

69. This is confirmed by the normative and case law of the International Criminal Court and of the *ad hoc* international criminal tribunals. The first element of the crime against humanity of rape (Rome Statute, Article 7(1) (g)) and of the war crime of rape (Rome Statute, Articles 8(2)(b)(xxii) and 8(2)(e)(vi)) is "The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body." *Elements of Crimes,* available on the website of the ICC: http://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf. The case law of the *ad hoc* international criminal tribunals is consistent with this. *Cf.* International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Anto Furundzija*, para. 185; International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Kunarac and others*, Judgment of 22 February 2001, case No. IT-96-23-T and IT-96-23/1-T, paras. 437 and 438; International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Kunarac and others,* Appeal judgment of 12 June 2002, case No. IT-96-23-T and IT-96-23/1-T, para. 127. *Cf.* Special Court for Sierra Leone, *The Prosecutor v. Issa Hassan Sesay and others,* Judgment of 2 March 2009, case No. SCSL-04-15-T, paras. 145 and 146. This interpretation was also used by the CVR in its report that "understands rape to be a form of sexual violence that occurs when the perpetrator has invaded the body

refers to penetration with any part of the perpetrator's body or any object, of any genital opening, including the labia majora or minora, as well as the vaginal orifice. This interpretation is in keeping with the concept that any type of penetration, however slight, is sufficient for an act to be considered rape. The Court understands that rape is a form of sexual violence.[70]

193. The Court has also recognized that rape is an extremely traumatic experience that has severe consequences and causes great physical and psychological damage, leaving the victim "physically and emotionally humiliated," a situation that it is difficult to overcome with the passage of time, contrary to what happens in the case of other traumatic experiences.[71] This reveals that rape inherently produces severe suffering for the victim, even when there is no evidence of physical injury or affliction. Indeed, the consequences of rape will not be bodily injuries or ailments in all cases. Women who are victims of rape also experience severe psychological, and even social, harm and aftereffects.

194. In the instant case, the Court has established that, during her detention in the DIVISE and the DINCOTE in April and May 1993, Gladys Espinoza was subjected to forced nudity and inappropriate touching, her breasts and pubic hair were pulled, and one of her assailants tried to put his penis in her mouth. It is clear that, since they involved the presumed victim's breasts and genital area, these acts constituted sexual violence. Regarding the "inappropriate touching" and the attempt to force her to have oral sex, the Court considers that these acts entailed the physical invasion of Gladys Espinoza's body,[72] taking into account that the victims of sexual violence tend to use unspecific terms when making their statements and not to provide graphic explanations of the anatomical characteristics of what

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of a person by a conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. This invasion should occur by force, or by the threat of force or by coercion caused, for example, by the fear of violence, intimidation, detention, psychological oppression or abuse of power, against this or another person or taking advantage of a climate of coercion, or that has been carried out against a person who is unable to give their free consent." *Cf. Informe Final de la Comisión de la Verdad y Reconciliación*, Volume VI, Chapter 1.5, p. 265.

70. *Cf. Case of J. v. Peru,* para. 359. See, in this regard, Article 2 of the Convention of Belém do Pará, and International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, para. 688. The Rome Statute of the International Criminal Court enumerates rape and other specific crimes and adds, in general, in the case of crimes against humanity, "any other form of sexual violence of comparable gravity" and, in the case of war crimes, "any other form of sexual violence also constituting a grave breach of the Geneva Conventions." *Elements of Crimes* describes rape as a crime against humanity of rape and a war crime.

71. *Cf. Case of the Miguel Castro Castro Prison v. Peru*, para. 311, and *Case of Rosendo Cantú et al. v. Mexico,* para. 114. Similarly, ECHR, *Case of Aydin v. Turkey*, No 23178/94. Judgment of 25 September, 1997, para. 83.

72. In this regard, see, *Case of J. v. Peru,* para. 347.

happened.[73] In this regard, the CVR indicated that "[t]he statements usually use unclear or 'personal' terms when describing the acts of sexual violence to which victims were subjected" and referred specifically to the use of the term "inappropriate touching" as one of the ways in which the victims described acts of sexual violence.[74] The Court has also established that, during the said period, Ms. Espinoza experienced vaginal and anal penetration by hand and, in the latter case, also by an object, which constituted acts of rape.

195. Lastly, the Court considers it pertinent to recall, as already established in this case, that one of the forms of the generalized practice of torture was the generalized practice of sexual violence against women, in particular by State agents, and against women who were presumably involved in the armed conflict. The Court also recalls that special mention was made of the DINCOTE as a place where rape was perpetrated frequently. In this regard, the Court finds that what happed to Ms. Espinoza is consistent with this generalized practice. Since they took place in this context, the Court considers that the acts of sexual violence against Gladys Espinoza also constituted acts of torture the absolute prohibition of which, it reiterates, belongs nowadays to the domain of international jus cogens.

196. Based on all the above, the Court decides that the acts perpetrated against Gladys Carol Espinoza Gonzáles on the premises of the DIVISE and the DINCOTE constituted acts of torture, in violation of the obligations contained in Article 5(2) and 5(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, and failure to comply with the obligations established in Articles 1 and 6 of the Inter-American Convention to Prevent and Punish Torture.

197. Furthermore, the Court has stipulated that although Article 11 of the American Convention is entitled "Right to Privacy" [Note: Protection of Honor and Dignity in the Spanish version], its contents include the protection of private life.[75] The concept of private life includes sexual life among other protected areas.[76] The Court finds that the rape and other forms of sexual violence perpetrated against Gladys Espinoza violated essential aspects and values of her private life, signified interference in her sexual life, and annulled her right to take decisions freely regarding who to have sexual relations with, losing control completely of her most personal and intimate decisions, and with regard to basic bodily functions.[77] Consequently, owing

73. *Cf. Case of J. v. Peru,* para. 360.
74. *Cf. Informe Final de la Comisión de la Verdad y Reconciliación*, Volume VI, Chapter 1.5, p. 364, and *Case of J. v. Peru,* para. 347.
75. *Cf. Case of the Ituango Massacres v. Colombia.* Judgment of July 1, 2006. Series C No. 148, para. 193, and *Case of J. v. Peru,* para. 367.
76. *Cf. Case of Fernández Ortega et al. v. Mexico,* para. 129, and *Case of J. v. Peru,* para. 367.
77. *Cf. Case of J. v. Peru,* para. 367.

to the sexual violence and rape that Gladys Espinoza suffered, the Court finds that the State also violated Article 11(1) and 11(2) of the American Convention, in relation to Article 1(1) of this instrument, to her detriment.

C. Detention conditions of Gladys Carol Espinoza Gonzáles in the Yanamayo Maximum Security Prison of Puno and the incident that occurred on August 5, 1999

[…]

C.2. Considerations of the Court

[…]

C.2.1. Detention conditions of Gladys Carol Espinoza Gonzáles in the Yanamayo Maximum Security Prison of Puno

[…]

205. The Court has established that, under Article 5(1) and 5(2) of the Convention, all those deprived of liberty have the right to live in detention conditions that are compatible with their personal dignity. In addition, the State must ensure the rights to life and to personal integrity of those deprived of liberty because it occupies a special position of guarantor with regard to such persons, since the prison authorities have total control over them.[78] Likewise, the Court has indicated that prolonged isolation and incommunicado are, in themselves, forms of cruel and inhuman treatment.

206. The Court has also indicated that the State has the obligation to safeguard the health and well-being of prisoners, providing them, inter alia, with any medical care they require, and to ensure that the manner and method of deprivation of liberty do not exceed the inevitable level of suffering inherent in detention.[79] Thus, the State has the duty to provide detainees with regular medical checkups and adequate care and treatment when this is required.[80] Thus, the absence of appropriate medical care for a person who is deprived of liberty and in the State's custody may be considered a violation of Article 5(1) and 5(2) of the Convention depending on the particular circumstances of the specific person, such as their state of health or type of ailment they suffer from, the time that passes without such

78. *Cf. Case of Neira Alegría et al. v. Peru. Merits,* para. 60, and *Case of Vera Vera et al. v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of May 19, 2011. Series C No. 226, para. 42.
79. *Cf. Case of the "Juvenile Re-education Institute" v. Paraguay. Preliminary objections, merits, reparations and costs.* Judgment of September 2, 2004. Series C No. 112, para. 159, and *Case of Vélez Loor v. Panama,* para. 198.
80. *Cf. Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114, para. 156, and *Case of Vélez Loor v. Panama,* para. 220.

care, the accumulative physical and mental effects[81] and, in some cases, the sex and age of the detainee.[82]

207. In the cases of *Lori Berenson Mejía*,[83] *García Asto and Ramírez Rojas*[84] and *Castillo Petruzzi et al.*,[85] all against Peru, the Court established that the application of articles 20 of Decree Law No. 25,475 and 3 of Decree Law No. 25,744 to the victims by the military courts constituted cruel, inhuman and degrading treatment in violation of Article 5 of the American Convention, since they were kept in detention conditions under a regime of incommunicado, solitary confinement and restriction of family visits. It should be noted that the victims in these cases were at the Yanamayo Maximum Security Prison from January 17, 1996, to October 7, 1998, July 20, 1999, to September 21, 2001, and October 14 and 15, 1993, to May 30, 1999, respectively.

208. The Court notes that the period during which Gladys Espinoza remained at the Yanamayo Prison – that is, from January 17, 1996, to May 10, 2001 – overlaps the periods indicated in the said cases. Furthermore, it notes that Articles 20 of Decree Law No. 25,475 and 3 of Decree Law No. 25,744 were applied to Gladys Espinoza, and that she was kept under the detention conditions described previously. Likewise, the Court has verified that, during the time Gladys Espinoza was at the Yanamayo Prison, she had at least two medical examinations. The reports reveal a progressive deterioration in her health and that, despite the fact that it was recommended that she be evaluated by a neurologist, there is no record that this was done. Based on all the above, the Court finds that Gladys Espinoza was subjected to cruel, inhuman and degrading treatment and, therefore, the State is responsible for the violation of Article 5(2) and 5(1) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Gladys Carol Espinoza Gonzáles.

C.2.2. The incident during the inspection of August 5, 1999, in the Yanamayo Maximum Security Prison of Puno

[…]

213. First, the Court finds that sexual violence is never a permissible measure in the use of force by the security forces. Second, the facts of this

81. *Cf. Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela,* para. 103, and *Case of Vélez Loor v. Panama*, para. 220.

82. *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, para. 74, and *Case of Vera Vera et al. v. Ecuador,* para. 44.

83. *Cf. Case of Lori Berenson Mejía v. Peru*, para. 101.

84. *Cf. Case of García Asto and Ramírez Rojas v. Peru,* para. 223.

85. *Cf. Case of Castillo Petruzzi et al. v. Peru***,** para. 198.

case do not reveal the existence of a situation that would have justified the degree of force used against Ms. Espinoza. Indeed, it has not been verified that a situation of disorder existed in the prison and the State has not proved the existence of behavior by Ms. Espinoza that differs from that described, nor can it be understood that less harmful measures of control were used and failed. All this, added to the prison context in which the facts of this case are inserted, allows the Court to conclude that the scale of the force used entailed a violation of Article 5(1) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Gladys Espinoza.

214. Thus, based on the description of the acts of violence suffered by Gladys Espinoza during the incident of August 5, 1999, in the context of this case, there can be no doubt that they were committed intentionally, that they caused severe suffering and physical repercussions, and that they were aimed at humiliating her and punishing her. In these circumstances, these acts were forms of torture. Consequently, the Court decides that the State is responsible for the violation of the right to personal integrity, recognized in Article 5(2) and 5(1) of the American Convention, to the detriment of Gladys Carol Espinoza Gonzáles.

VIII.3. SEXUAL VIOLENCE AND THE OBLIGATION NOT TO DISCRIMINATE AGAINST WOMEN, IN RELATION TO THE OBLIGATION TO RESPECT RIGHTS

[…]

B. Considerations of the Court

216. Regarding the principles of equality before the law and non-discrimination, the Court has indicated that the concept of equality can be inferred directly from the unity of the nature of humankind and is inseparable from the essential dignity of the individual; thus, any situation that, considering a specific group to be superior, treats it in a privileged way or, inversely, considering it inferior, treats it with hostility or, in any way, discriminates against it so that it cannot enjoy rights that are recognized to those who it does not consider included in that situation is incompatible with this concept.[86] At the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of jus cogens. The whole juridical structure of national

86. *Cf. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica***.** Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 55, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile. Merits, reparations and costs.* Judgment of May 29, 2014. Series C No. 279, para. 197.

and international public order rests on it and it permeates the whole legal system.[87]

217. In this regard, the Court has pointed out that, while the general obligation under Article 1(1) of the American Convention refers to the obligation of the State to respect and to ensure "without discrimination" the rights contained in this treaty, Article 24 protects the right to "equal protection of the law."[88] Article 24 of the American Convention prohibits legal or factual discrimination, not only with regard to the rights established therein, but with regard to all the laws that the State enacts and their application.[89] In other words, it is not limited to reiterating the provisions of Article 1(1) of the Convention regarding the State's obligation to respect and to ensure, without discrimination, the rights recognized in this treaty, but establishes a right that also results in obligations of the State to respect and to ensure the principle of equality and non-discrimination in the safeguard of other rights and in any internal laws that it enacts.[90]

218. The Court has established that Article 1(1) of the Convention "is a norm of a general nature the content of which extends to all the provisions of the treaty, and establishes the obligation of the States Parties to respect and to ensure the full and free exercise of the rights and freedoms recognized therein without any discrimination." In other words, whatever the origin or the form it takes, any treatment that may be considered discriminatory in relation to the exercise of any of the rights ensured in the Convention is per se incompatible with this instrument.[91] Consequently, the State's failure to comply with the general obligation to respect and to ensure human rights, by means of any type of discriminatory treatment, results in its international responsibility.[92] Thus, the Court has affirmed that there is an inseparable connection between the obligations to respect and to ensure human rights

87. *Cf. Juridical Status and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2013. Series A No. 18, para. 101, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile,* para. 197.

88. *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 209, and *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2014. Series C No. 282, para. 262.

89. *Cf. Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs.* Judgment of June 23, 2005. Series C No. 127, para. 186, and *Case of Expelled Dominicans and Haitians v. Dominican Republic,* para. 398.

90. *Cf. Case of Yatama v. Nicaragua*, para. 186, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile,* para. 199.

91. *Cf. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica,* para. 53, *and Case of Expelled Dominicans and Haitians v. Dominican Republic,* para. 398.

92. *Cf. Juridical Status and Rights of Undocumented Migrants,* para. 85, and *Case of Expelled Dominicans and Haitians v. Dominican Republic,* para. 398.

and the principle of equality and non-discrimination.[93] Article 24 of the Convention establishes a right that also results in the State's obligations to respect and to ensure the principle of equality and non-discrimination in the safeguard of other rights and in all the domestic laws that it enacts,[94] because it protects the right to "equal protection of the law,"[95] so that it also prohibits the discrimination derived from any inequality resulting from domestic laws or their application.[96]

219. In this regard, the Court has determined that a difference in treatment is discriminatory when it does not have an objective and reasonable justification;[97] that is, when it does not seek a legitimate objective, and when there is no reasonable proportional relationship between the means used and the objective sought.[98]

220. The Court has also established that States must abstain from taking measures that, in any way, are directly or indirectly aimed at creating situations of discrimination de jure or de facto. States are obliged to adopt positive measures to reverse or change any discriminatory situations that exist in their societies which affect a specific group of persons. This entails the special duty of protection that the State must exercise with regard to the acts and practices of third parties that, with its tolerance or acquiescence, create, maintain or encourage discriminatory situations.[99]

221. From a general point of view, the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter, "CEDAW") defines discrimination against women as "[a]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic,

93. *Cf. Juridical Status and Rights of Undocumented Migrants,* para. 53, and *Case of Expelled Dominicans and Haitians v. Dominican Republic,* para. 398.

94. *Cf. Case of Yatama v. Nicaragua*, para. 186, and *Case of Expelled Dominicans and Haitians v. Dominican Republic,* para. 398.

95. *Cf. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, para. 54, *and Case of Expelled Dominicans and Haitians v. Dominican Republic,* para. 398.

96. *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela,* para. 209, and *Case of Expelled Dominicans and Haitians v. Dominican Republic*, para. 398.

97. *Cf. Juridical Status and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 46, and *Case of Norín Catrimán (Leaders, members and activist of the Mapuche Indigenous People) et al. v. Chile*, para. 200.

98. *Cf. Case of Norín Catrimán (Leaders, members and activist of the Mapuche Indigenous People) et al. v. Chile***,** para. 200, and *Case of Expelled Dominicans and Haitians v. Dominican Republic*, para. 316.

99. *Cf. Juridical Status and Rights of Undocumented Migrants*, paras. 103 and 104, and *Case of Norín Catrimán (Leaders, members and activist of the Mapuche Indigenous People) et al. v. Chile,* para. 201.

social, cultural, civil or any other field."[100] In this regard, the United Nations Committee on the Elimination of Discrimination against Women (hereinafter, "the CEDAW Committee") has stated that the definition of discrimination against women "includes gender-based violence, that is, violence that it directed against a woman because she is a woman or that affects women disproportionately." It has also stated that "[g]ender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men."[101]

222. In the inter-American sphere, the preamble of the Convention of Belém do Pará indicates that violence against women is "a manifestation of the historically unequal power relations between women and men" and recognizes that the right of all women to a life free from violence includes the right to be free from any kind of discrimination. The Court has indicated that, when it has been shown that the application of a rule leads to a differentiated impact on women and on men, the State must prove that this is due to objective factors, unrelated to discrimination.[102]

223. Lastly, the Court has established that women who have been arrested or detained "must not suffer discrimination, and must be protected from all forms of violence or exploitation." This discrimination includes "violence against a woman because she is a woman or that affects women disproportionately," and includes "acts that inflict physical, mental or sexual harm or suffering, threats to commit such acts, coercion and other forms of deprivation of liberty."[103]

224. Since the representatives' arguments in this case refer to a supposed discrimination in relation to the obligation to respect and to ensure the right to personal integrity to the detriment of Gladys Espinoza, the Court will now determine whether the State failed to comply with the obligation contained in Article 1(1) of the American Convention owing to the alleged application to Gladys Espinoza of a discriminatory practice of violence and rape during her detention on the premises of the DIVISE and the DINCOTE in 1993.

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100. Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979, Article 1.

101. *Cf.* Committee on the Elimination of Discrimination against Women, General Recommendation 19: Violence against women, eleventh session, 1992, UN Doc. HRI\GEN\1\Rev.1 at 84 (1994), paras. 1 and 6.

102. *Cf. Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 16, 2009. Series C No. 205, para. 396, citing ECHR, *Opuz v. Turkey*, No. 33401/02. Judgment of 9 June 2009, paras. 180, 191 and 200.

103. *Cf. Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs*. Judgment of November 25, 2006. Series C No. 160, para. 303, and *Case of González et al. ("Cotton Field") v. Mexico,* para. 397.

B.1. The discriminatory practice of sexual violence and rape

225. In the instant case, the Court has already established that, during the conflict that occurred between 1980 and 2000, sexual violence was a generalized practice within the security forces and its main victims were women. The Court considers that this practice constituted gender-based violence because it affected women simply because they were women and that, as revealed by the evidence, it was encouraged by the anti-terrorism laws in force during that period, which were characterized by the absence of basic guarantees for detainees, in addition to establishing, among other matters, the power to keep detainees in solitary confinement and incommunicado.

226. In this regard, several international organizations have recognized that, during armed conflicts, women and children face specific situations that affect their human rights, such as acts of sexual violence, which is frequently used as a symbolic means of humiliating the opposing party or as a means of punishment and repression.[104] The use of the State's power to violate the rights of women during an internal conflict, in addition to affecting them directly, may be aimed at having an effect on society through such violations and providing a message or a lesson.[105] In particular, rape is a paradigmatic form of violence against women which has consequences that even transcend the person of the victim.[106]

[…]

229. The Court has already established that the acts of violence and rape perpetrated against Gladys Espinoza during her detention in the DIVISE and the DINCOTE were consistent with the generalized practice of sexual violence that existed in Peru at the time of the facts. In this regard, the Court recalls that a significant number of women detainees were subjected to gender-based sexual violence owing to their real or presumed personal involvement in the armed conflict, as well as those whose partners were real or supposed members of the subversive groups. In the instant case, the Court has already established that the torture to which Gladys Espinoza was subjected, which included rape and other forms of sexual violence, took

104. *Cf. Case of the Miguel Castro Castro Prison v. Peru*, paras. 223 and 224, and *Case of the Massacres of El Mozote and nearby places v. El Salvador*, para. 165. See also, Committee for the Elimination of Discrimination against Women, General Recommendation 19: Violence against women, para. 16, and Commission on Human Rights, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2000/45, "Violence against women perpetrated and/or condoned by the State during times of armed conflict (1997-2000)", UN Doc. E/CN.4/2001/73, 23 January 2001.

105. *Cf. Case of the Miguel Castro Castro Prison v. Peru,* para. 224, and *Case of the Massacres of El Mozote and nearby places v. El Salvador,* para. 165.

106. *Cf. Case of Fernández Ortega et al. v. Mexico*, para. 119, and *Case of the Massacres of El Mozote and nearby places v. El Salvador,* para. 165.

place in the context of a detention and was aimed at obtaining information on the abduction of a businessman by the MRTA. The Court also recalls that the State agents who arrested her together with Rafael Salgado threatened him that unless he provided information on the whereabouts of this businessman, "20 [men would] have their way with her." In other words, the body of Gladys Espinoza, as a woman, was used in order to obtain information from her partner and to humiliate and intimidate both of them. These acts confirm that the State agents used sexual violence and the threat of sexual violence against Gladys Carol Espinoza Gonzáles as a strategy in the fight against the said subversive group. Consequently, the Court decides that subjecting Ms. Espinoza to this generalized practice constituted discrimination owing to her condition as a woman, in violation of Article 1(1) of the American Convention to her detriment, in relation to the rights to personal integrity and to honor and dignity established in Articles 5(1), 5(2) and 11 of this instrument, and to the obligations established in Articles 1 and 6 of the Inter-American Convention to Prevent and Punish Torture.

VIII.4. THE RIGHT TO A FAIR TRIAL AND TO JUDICIAL PROTECTION

[…]

B. Considerations of the Court

[…]

238. The Court has indicated in its consistent case law that the obligation to investigate is an obligation of means and not of results, which must be assumed by the State as an inherent legal duty and not simply as a formality, preordained to be fruitless, or merely as a measure taken by private individuals,[107] which depends on the procedural initiative of the victims or of their family members or on the contribution of evidence by private individuals.[108] The investigation must be serious, impartial and effective, and be aimed at determining the truth and the pursuit, capture, prosecution and eventual punishment of the perpetrators of the facts.[109] The said obligation remains "whosoever the agent to whom the violation may eventually be attributed, even private individuals, because if their acts

107. *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 177, and *Case of the Human Rights Defender et al. v. Guatemala,* para. 200.
108. *Cf. Case of Velásquez Rodríguez v. Honduras*, para. 177, and *Case of the Human Rights Defender et al. v. Guatemala,* para. 200.
109. *Cf. Case of Juan Humberto Sánchez v. Honduras*, para. 127, and *Case of the Human Rights Defender et al. v. Guatemala,* para. 200.

are not investigated correctly, they would, to a certain extent, be aided by the public authorities, which would engage the international responsibility of the State."[110] Moreover, due diligence requires that the body conducting the investigation take all the actions and make all the inquiries required to achieve the result sought. To the contrary, the investigation is not effective in the terms of the Convention.[111]

239. In particular, under Article 1(1) of the American Convention, the obligation to ensure the rights recognized in Article 5(1) and 5(2) of the American Convention entails the State's duty to investigate possible acts of torture or other cruel, inhuman or degrading treatment.[112] This obligation to investigate is enhanced by the provisions of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture that oblige the States "to take effective measures to prevent and punish torture within their jurisdiction," as well as "to prevent and punish other cruel, inhuman or degrading treatment or punishment." In addition, pursuant to Article 8 of that Convention, States Parties "shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case. In addition, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal proceedings."

240. In this regard, it is essential that States act diligently to avoid alleged acts of torture or cruel, inhuman and degrading treatment, taking into account, moreover, that the victims usually abstain from denouncing the facts, due to fear, especially when they are deprived of liberty in the custody of the State. In addition, the judicial authorities have the obligation to ensure the rights of all those deprived of liberty, which entails obtaining and preserving any evidence that may substantiate alleged acts of torture.[113]

241. The Court also recalls that, in cases of violence against women, the general obligations established in Articles 8 and 25 of the American Convention are complemented and enhanced by the obligations derived

110. *Case of Velásquez Rodríguez v. Honduras*, para. 177, and *Case of the Human Rights Defender et al. v. Guatemala,* para. 200.

111. *Cf. Case of the Serrano Cruz Sisters v. El Salvador. Merits, reparations and costs.* Judgment of March 1, 2005. Series C No. 120*,* para. 83, and *Case of the Human Rights Defender et al. v. Guatemala,* para. 200.

112. *Cf. Case of Ximenes Lopes v. Brazil.* Judgment of July 4, 2006. Series C No. 149, para. 147, and *Case of J. v. Peru,* para. 341.

113. *Cf. Case of Cabrera García and Montiel Flores v. Mexico*, para. 135, and *Case of Mendoza et al. v. Argentina. Preliminary objections, merits and reparations.* Judgment of May 14, 2013. Series C No. 260, para. 234.

from the specific inter-American treaty, the Convention of Belém do Pará, for those States that are party to it. Article 7(b) of that Convention specifically obliges the States Parties to apply due diligence to prevent, investigate, punish and eradicate violence against women.[114] In such cases, the State authorities must open ex officio and immediately, a serious, impartial and effective investigation as soon as they become aware of the facts that constitute violence against women, including sexual violence.[115] Thus, when an act of violence has been perpetrated against a woman, it is particularly important that the authorities in charge of the investigation conduct this with determination and effectiveness, bearing in mind the duty of society to reject violence against women, and the State's obligation to eradicate this and to inspire confidence in the victims in the States institutions created to protect them.[116]

242. The Court has specified the guiding principles that must be observed in criminal investigations involving human rights violations.[117] The Court has also indicated that the obligation to conduct an effective investigation has added implications when a woman has died or suffered ill-treatment or restriction of her personal liberty in the context of generalized violence against women.[118] In cases of violence against women, various international instruments are useful for specifying and providing content to the enhanced State obligation to investigate them with due diligence.[119] Among other matters, a criminal investigation into sexual violence must: (i) document and coordinate the investigation procedures and process the evidence diligently, taking sufficient specimens, performing tests to determine the possible perpetrator of the act, preserving other evidence such

114. *Cf. Case of Fernández Ortega et al. v. Mexico,* para. 193, and *Case of Veliz Franco et al. v. Guatemala,* para. 185.

115. *Cf. Case of the Miguel Castro Castro Prison v. Peru,* para. 378, and *Case of Veliz Franco et al. v. Guatemala,* para. 185.

116. *Cf. Case of Fernández Ortega et al. v. Mexico,* para. 193, and *Case of Veliz Franco et al. v. Guatemala,* para. 185.

117. These may include, *inter alia*: to gather and preserve the evidence in order to contribute to any potential criminal investigation of those responsible; to identify possible witnesses and to obtain their statements, and to determine the cause, form, place and time of the fact investigated. In addition, it is necessary to conduct a thorough investigation of the scene of the crime, and ensure that a rigorous analysis is made by competent professionals, using the most appropriate procedures. *Cf. Case of Juan Humberto Sánchez v. Honduras,* para. 128, and *Case of J. v. Peru,* para. 344.

118. *Cf. Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 16, 2009. Series C No.205*,* para. 293, and *Case of Veliz Franco et al. v. Guatemala,* para. 186.

119. *Cf. Case of Fernández Ortega et al. v. Mexico,* para. 194, and *Case of J. v. Peru,* para. 344. Istanbul Protocol, 2001, paras. 67, 77, 89, 99, 101 to 105, 154, 161 to 163, 170, 171, 224, 225, 260, 269 and 290, and World Health Organization, *Guidelines for medico-legal care for victims of sexual violence*, Geneva, 2003, *inter alia,* pp. 17, 30-1, 34, 39 to 44 and 57 to 74.

as the victim's clothes, inspecting the scene of the incident immediately, and ensuring the proper chain of custody; (ii) provide free legal assistance to the victim during all stages of the proceedings, and (iii) provide both emergency and, if necessary, continuing medical, prophylactic and psychological care to the victim, using a treatment protocol aimed at lessening the consequences of the offense.[120] Also, in cases of alleged acts of violence against women, the criminal investigation should include a gender perspective and be conducted by officials with experience in similar cases and in providing attention to victims of discrimination and gender-based violence.[121] The Court has also referred to the essential characteristics of the medical examinations of the presumed victim and of the statements taken from her in this type of case.

243. Nevertheless, the Court has already established that no investigation whatsoever was conducted before the State was notified of the Report on Admissibility and Merits of the Inter-American Commission, and that it was only on April 16, 2012, that the Third Supranational Criminal Prosecutor opened a criminal investigation into the acts perpetrated against Gladys Espinoza following her arrest on April 17, 1993, and until June 24 that year on the premises of the DIVISE and the DINCOTE, as well as for the incident that took place on August 5, 1999, in the Yanamayo Maximum Security Prison, among others. The Court has verified that the proceedings are currently at the trial stage. Based on the foregoing, the Court will now examine, first, the failure to investigate the facts of this case until 2012, and then analyze the alleged failure to comply with the obligation in the investigation opened in 2012.

120. *Cf. Case of Fernández Ortega et al. v. Mexico,* para. 194, and *Case of J. v. Peru,* para. 344. In this regard, the State is obliged to provide, with the consent of the victims, treatment for the consequences to their health of the sexual violence, including the possibility of access to prophylactic treatment and treatment to prevent pregnancy. In this regard, see:: World Health Organization, Guidelines for medico-legal care for victims of sexual violence, Geneva, 2003, *inter alia,* p. 63, available at: http://whqlibdoc.who.int/publications/2004/924154628X.pdf?ua=1; See also: *Instrumento de Trabajo y Consulta, Protocolo Interinstitucional de Atención Integral a Víctimas de Violación Sexual* (Costa Rica), available at: http://ministeriopublico.poder-judicial.go.cr/biblioteca/protocolos/10.pdf; *Modelo Integrado para la Prevención y Atención de la Violencia Familiar y Sexual,* 2010 (Mexico), available at: http://www.inm.gob.mx/static/Autorizacion_Protocolos/SSA/ModeloIntregrado_para_Prevencion_Atn_Violencia_familiar_y_se.pdf; Federación Latinoamericana de Sociedades de Obstetricia and Ginecología, *Propuesta de Estándares Regionales para la Elaboración de Protocolos de Atención Integral Temprana a Víctimas de Violencia Sexual* (2011), available at: http://www.flasog.org/wp-content/uploads/2014/01/Propuestas-Estandares-Protocolos-Atencion-Victimas-Violencia-FLASOG-2011.pdf; *Modelo de Atención Integral en Salud para Víctimas de Violencia Sexual,* 2011 (Colombia), available at: http://www.minsalud.gov.co/Documentos%20y%20Publicaciones/MODELO%20DE%20ATENCI%C3%93N%20A%20V%C3%8DCTIMAS%20DE%20VIOLENCIA%20SEXUAL.pdf, and *Guía Técnica de Atención Integral de Personas Afectadas por la Violencia basada en Género*, 2007 (Peru), available at: http://www.sis.gob.pe/ipresspublicas/ normas/pdf/minsa/GUIASPRACTICAS/2007/RM141_2007.pdf.

121. *Cf. Case of González et al. ("Cotton Field") v. Mexico,* para. 455, and *Case of Veliz Franco et al. v. Guatemala,* para. 188.

[…]

B.1.1. The failure to investigate between 1993 and 2012 the events of torture and other abuses suffered by Espinoza Gonzáles on the premises of the DIVISE and the DINCOTE

[…]

248. Thus, first, the Court considers that, with regard to the interviews of a person who states that they have been subjected to acts of torture: (i) he or she should be allowed to describe freely what they consider relevant, so that the officials should not merely ask questions; (ii) no one should be required to speak of any form of torture if they are uncomfortable doing so; (iii) the psychosocial history prior to the arrest of the presumed victim should be documented during the interview, together with a summary of the facts narrated relating to the moment of the initial arrest, the circumstances and the place, and the conditions while in State custody, the ill-treatment or acts of torture presumably suffered, as well as the methods presumably used to this end, and (iv) the detailed statement should be recorded and transcribed.[122] In cases in which the alleged torture includes acts of violence or rape, the presumed victim must give their consent to this recording.[123]

249. In particular, the Court has indicated that, in interviews of a presumed victim of acts of violence or rape, the statement should be made in a safe and secure environment that provides privacy and instills confidence, and that the statement should be recorded in order to avoid or limit the need for its repetition.[124] This statement should contain, with the consent of the presumed victim: (i) the date, time and location of the assault, including a description of the type of surface on which it occurred; (ii) the name, identity and number of assailants; (iii) the nature of the physical contacts perpetrated; (iv) whether weapons or restraints were used; (v) use of medication, drugs, alcohol or other substances; (vi) how clothing was removed, if applicable; (vii) details of actual or attempted sexual activity against the presumed victim; (viii) whether condoms or lubricants were used; (ix) whether there were any subsequent activities by the patient that could alter evidence, and (x) details of any symptoms that the presumed victim has developed since that time.[125]

250. From the three statements taken from Gladys Espinoza in 1993, it can be observed that: (i) none of them were received in a safe and secure

122. *Cf.* Istanbul Protocol, paras. 100, 135 to 141.

123. *Cf.* World Health Organization, *Guidelines for medico-legal care for victims of sexual violence*, *inter alia,* pp. 34, 37, 96 and 97.

124. *Cf. Case of Fernández Ortega et al. v. Mexico,* para. 194, and *Case of J. v. Peru,* para. 344.

125. *Cf.* World Health Organization, *Guidelines for medico-legal care for victims of sexual violence*, *inter alia,* pp. 36 and 37.

environment; rather, to the contrary, they were received on the premises of the DINCOTE, where the acts of torture had occurred, and two of them in the presence of military officers; (ii) they were restricted to questions asked by the Investigating Officer, including questions on the existence of ill-treatment against her, and there is no record that she was allowed the describe freely the facts that she considered relevant, and (iii) no relevant information was recorded on Gladys Espinoza's background, apart from that related to her possible participation in acts of terrorism or treason. Furthermore, the Court observes that, during these statements, Gladys Espinoza was required to repeat her description of the acts of torture and sexual violence perpetrated against her.

251. Second, regarding the medical examinations performed on Gladys Espinoza on April 18, 19 and 21, and May 18, 1993, as well as the psychological appraisal made on April 26 that year while she was detained in the DIVISE and the DINCOTE, the Court considers that, in cases in which signs of torture exist, the medical examinations of the presumed victim must be performed with the latter's prior and informed consent, without the presence of security agents or other State agents, and the corresponding reports should include at least the following:

> (a) The circumstances of the interview. The name of the subject and name and affiliation of those present at the examination; the exact time and date, location, nature and address of the institution (including, where appropriate, the room) where the examination is being conducted (e.g. detention centre, clinic, house, etc.); any appropriate circumstances at the time of the examination (e.g. nature of any restraints on arrival or during the examination, presence of security forces during the examination, demeanour of those accompanying the prisoner, threatening statements to the examiner, etc.); and any other relevant factor;
>
> (b) The background. A detailed record of the subject's story as given during the interview, including alleged methods of torture or ill-treatment, the time when torture or ill-treatment was alleged to have occurred and all complaints of physical and psychological symptoms;
>
> (c) A physical and psychological examination. A record of all physical and psychological findings upon clinical examination including appropriate diagnostic tests and, where possible, color photographs of all injuries;
>
> (d) An opinion. An interpretation as to the probable relationship of physical and psychological findings and possible torture or ill-treatment. A recommendation for any necessary medical and psychological treatment or further examination should also be given [, and]
>
> (e) A record of authorship. The report should clearly identify those carrying out the examination and should be signed.[126]

126. Istanbul Protocol, para. 83.

252. The Court has also indicated that, in cases of violence against women, a complete and detailed medical and psychological appraisal should be made as soon as there is awareness of the alleged acts by suitable trained personnel, if possible of the sex indicated by the victim, advising the latter that she may be accompanied by someone she trusts if she so wishes.[127] This appraisal must be performed in keeping with protocols designed specifically for documenting evidence in cases of gender-based violence.[128]

253. The reports assessed in this chapter reveal that: (a) the forensic personnel who performed the physical examination of Gladys Espinoza on May 18, 1993, were all male, and there is no record that she had been offered the presence of a person of the sex she preferred, even though acts of sexual violence had already been reported; (b) there is no record in the reports on the appraisals made of Gladys Espinoza in April and May 1993, of any account provided by her of the acts that occurred during her arrest and following this, in particular, the acts of torture and other ill-treatment to which she was subjected; (c) there is no other documentation, in particular, photographic documentation, to substantiate the comments of the personnel who appraised her, and (d) there is no interpretation of the probable connection between the physical symptoms and the possible acts of torture to which Ms. Espinoza referred in her statements, beyond the indication in the appraisal of May 18, 1993, of "signs compatible with a recent unnatural act."

254. In addition, the case file reveals that the first physical examination that made an assessment of the sexual integrity of Gladys Espinoza was performed on May 18, 1993, even though the State had been aware of the acts of rape and other forms of sexual violence to which she had been subjected since at least April 28, 1993.

255. In this regard, when referring to the investigation in cases of torture, the Istanbul Protocol indicates that "[t]he timeliness of such medical examination is particularly important," and that it "should be undertaken regardless of the length of time since the torture."[129] Nevertheless, this Protocol notes that "[d]espite all precautions, physical and psychological examinations by their very nature may re-traumatize the patient by provoking or exacerbating symptoms of post-traumatic stress by reviving painful effects and memories."[130]

127. *Cf. Case of Fernández Ortega et al. v. Mexico,* para. 194, and *Case of J. v. Peru,* para. 344.
128. *Cf.* World Health Organization, *Guidelines for medico-legal care for victims of sexual violence*, *inter alia,* pp. 28 and 29.
129. Istanbul Protocol, para. 104.
130. Istanbul Protocol, para. 149.

256. Furthermore, in cases of sexual violence, the Court has underlined that the investigation must try, insofar as possible, to avoid the re-victimization of the presumed victim or the re-experience of the profoundly traumatic incident.[131] Regarding examinations of sexual integrity, the World Health Organization has established that, in this type of case, the gynecological examination should be made as soon as possible.[132] In this regard, the Court considers that the gynecological and anal examination should be performed, if it is considered appropriate to perform it and with the prior informed consent of the presumed victim, during the first 72 hours after the reported act, based on a specific protocol for attention to victims of sexual violence.[133] This does not preclude the gynecological examination being performed after this period, with the presumed victim's consent, because evidence can be found some time after the act of sexual violence, particularly with the development of forensic investigation technologies.[134] Consequently, the time limits established for performing an examination of this nature must be considered as guidelines, rather than as rigid policy. Thus, the appropriateness of a gynecological examination must be considered on the basis of a case-by-case analysis taking into account the time that has passed since the alleged sexual violence occurred. Accordingly, the Court considers that the authority requesting a gynecological examination must provide detailed reasons for its appropriateness and, should it not be appropriate or if the presumed victim has not given her informed consent, the examination should be omitted, although this should never serve as an excuse for doubting the presumed victim and/or avoiding an investigation.

131. *Cf. Case of Fernández Ortega et al. v. Mexico,* para. 196, and *Case of Rosendo Cantú et al. v. Mexico,* para. 180.

132. *Cf.* World Health Organization, *Guidelines for medico-legal care for victims of sexual violence*, *inter alia,* pp. 18, 43 and 58.

133. The Court observes that the following countries in the region have adopted the standard of 72 hours for the collection of forensic evidence in cases of rape: (i) Bolivia: *Atención Integral a las Mujeres Adultas y Adolescentes Víctimas de Violencia Sexual: Normas, Protocolos y Procedimientos*, 2010, *inter alia,* pp. 51 and 94, available at: http://www.justicia.gob.bo/index.php/normas/doc_download/92; (ii) Costa Rica: *Instrumento de Trabajo y Consulta, Protocolo Interinstitucional de Atención Integral a Víctimas de Violación Sexual*, *inter alia,* pp. 13 and 26; (iii) Paraguay: *Protocolo de Intervención con Víctimas/Sobrevivientes de Agresión Sexual en Facilidades de Salud*, 2006, *inter alia,* p. 26, available at: http://www.salud.gov.pr/Programas/ORCPS/ProtocolosMedicos/Protocolos/Protocolo%20de%20Intervencion%20con%20sobrevivientes%20de%20Agresion%20Sexual%2030%20oct%202006.pdf, and (iv) Peru: *Guía Técnica de Atención Integral de Personas Afectadas por la Violencia Basada en Género*, 2007, p. 34. The Court observes that in the case of: (v) United States of America, even though many jurisdictions have traditionally used 72 hours after the rape as a standard time limit for collecting evidence, many jurisdictions have established longer periods (for example, five days or one week). *Cf.* United States of America: *A National Protocol for Sexual Assault Medical Forensic Examinations Adults/Adolescents*, 2013, p. 7, available at: https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf.

134. *Cf. A National Protocol for Sexual Assault Medical Forensic Examinations Adults/Adolescents*, p. 8.

257. Bearing in mind the foregoing, the Court observes that the medical examination was performed approximately three weeks after the time at which the State became aware of the acts of sexual violence perpetrated against Gladys Espinoza. Moreover, the case file does not reveal any reason that would justify such a delay in performing this medical examination.

258. Third, the Court considers that doctors and other health personnel are obliged not to engage, actively or passively, in acts which constitute participation or complicity in, or incitement or attempts to commit torture or other cruel, inhuman or degrading treatment.[135] In particular, in their reports, forensic doctors are obliged to record the existence of evidence of ill-treatment, if this is the case.[136] Thus, forensic doctors must take steps to notify possible abuse to the corresponding authorities or, if this entails foreseeable risks to health care professionals or their patients, to authorities outside the immediate jurisdiction.[137] In addition, the State must provide the necessary guarantees to ensure that, if a medical forensic examination supports the possibility that acts of torture or other cruel, inhuman or degrading treatment have been perpetrated, the detainee is not returned to the place of detention where this occurred.[138]

259. In this regard, the Court notes that, despite the evident progressive deterioration in Gladys Espinoza's physical condition, revealed by the four physical examinations performed on her in April and May 1993, the forensic doctors who examined her did not report the existence of signs of torture to any authority and, on each of those occasions, Gladys Espinoza was returned to the same DINCOTE officials who had perpetrated the said torture and cruel, inhuman and degrading treatment against her.

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135. *Cf.* United Nations, General Assembly, *Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture, and other cruel, inhuman or degrading treatment or punishment,* Resolution 37/194 of 18 December 1982, principle 2, available at: http://www.un.org/documents/ga/res/37/a37r194.htm. See also: World Medical Association, *Tokyo Declaration*, adopted in October 1975 and revised in May 2006, art. 1, available at: http://www.wma.net/en/ 30publications/10policies/c18/.

136. *Cf.* Istanbul Protocol, para. 71.

137. *Cf.* Istanbul Protocol, para. 73. Similarly, see also: Argentine Criminal Code, article 144(2), available at: http://www.infoleg.gov.ar/infolegInternet/anexos/15000-19999/16546/texact.htm; National Mental Health Act of Argentina, art. 29, available at: http://www.msal.gov.ar/saludmental/images/stories/info-equipos/pdf/2013-09-26_ley-nacional-salud-mental.pdf; Medical Ethics Code of Bolivia, art. 52, available at: http://snis.minsalud.gob.bo/documentacion/normativas/codigodeeticaydeontologiamedica.pdf; Code of Criminal Procedure of Chile, art. 84, available at: http://www.leychile.cl/Navegar?idNorma=22960; Criminal Code of Colombia, amended by Law 1121 of 2006, art. 441, available at: http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=22647, among others Similarly, see: International Council of Nurses, *Nurses' role in the care of detainees and prisoners*, 1998, Available at: http://www.icn.ch/images/stories/documents/publications/position_statements/A13_Nurses_Role_Detainees_Prisoners.pdf.

138. *Cf.* Istanbul Protocol, para. 126.

260. The Court has established that the State must ensure the independence of medical and health care personnel responsible for examining and providing assistance to detainees so that they may perform the necessary medical examinations freely, respecting the norms established for the practice of their profession.[139] Thus, the Court considers that "professional independence requires that, at all times, health care professional act in accordance with the fundamental goal of medicine, which is to alleviate suffering and anguish, and to avoid harm to the patient, despite any circumstance that could counteract this." The obligation of independence requires that doctors should have full freedom to act in the interests of the patient, and means that doctors must use the best medical practices, whatsoever the pressure to which they may be subject, including possible instructions from those employing them, prison authorities or security forces. In this regard, the State is obliged to abstain from, in any way, obliging doctors to compromise their professional independence. Even though it is not sufficient to indicate that a doctor is a State employee to determine that he is not independent, the State must ensure that his contractual conditions grant him the necessary professional independence to issue his clinical opinions without pressure. The forensic doctor also has the obligation to be objective and impartial when assessing the person he is examining.[140]

261. The Court has indicated that, in principle, the burden of proving the facts on which his or her arguments are based corresponds to the plaintiff; however, it has emphasized that, contrary to domestic criminal law, in proceedings on human rights violations, the State's defense cannot rest on the plaintiff's impossibility of providing evidence when it is the State that controls the means to clarify acts that occurred in its territory.[141] Thus, the Court considers that the burden of proving the lack of independence of the forensic doctors attached to the State's institutions in cases of torture should not rest exclusively on the party alleging this, because it is the State that has the means to prove that this guarantee was respected.

262. In this case, of the four physical examinations and the psychological examination performed on Gladys Espinoza in 1993, two were carried out by the Institute of Forensic Medicine of the Public Prosecution Service, two

139. *Cf. Case of Bayarri v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of October 30, 2008. Series C No. 187, para. 92. See also, Istanbul Protocol, paras. 56, 60, 65 and 66, and Committee against Torture, *General Comment No. 2: Implementation of article 2 by the States Parties,* UN Doc. CAT/C/GC/2, para. 13.

140. *Cf.* Istanbul Protocol, paras. 57, 61, 67 and 71. In this regard see the *amicus curiae* presented by Women's Link Worldwide and the Legal Clinic of the Universidad de Valencia of April 15, 2014 (merits file, folio 1422).

141. *Cf. Case of Velásquez Rodríguez v. Honduras,* para. 135, and *Case of J. v. Peru,* para. 306.

by the forensic doctors and psychologists of the Criminalistics Directorate of the Peruvian National Police, and another by the Emergency Service of the Hospital of the Peruvian National Police. The State did not submit arguments to disprove the alleged lack of independence of the doctors who evaluated Gladys Espinoza on those occasions, or evidence that proves whether said doctors enjoyed guarantees for the independent exercise of their profession. Taking this into account, as well as the fact that the doctors did not identify the signs which showed that Gladys Espinoza had been tortured and subjected to rape and other forms of sexual violence, even though the examinations performed revealed the progressive deterioration in her physical condition during her detention in the DINCOTE, the Court considers that there is sufficient evidence to affirm that said forensic doctors were not independent, impartial and objective. In this regard, the Court takes note that, during the oral hearing held before the National Terrorism Chamber on February 24, 2004, one of the forensic doctors, who had signed the medical reports of April 20 and May 18, 1993, and another of them, who also signed the medical report of May 18, 1993, did not deny or affirm that Gladys Espinoza's injuries were the result of acts of torture, while the forensic doctor who signed the medical report corresponding to the examination performed on April 22, 1993, stated that "it is not possible that [her injuries] resulted from torture." The Court also takes note that, in October 2012, the prosecutor in charge of the investigation into the acts of torture and sexual violence against Gladys Espinoza asked the Institute of Forensic Medicine to provide information on the medical examinations carried out on Gladys Espinoza since 1993, and the request went unanswered.

263. The absolute absence of an investigation from 1993 to 2004 despite the indications identified in this chapter should not be assessed in isolation. The Court has noted that, during the Peruvian conflict, "the prosecutors called upon by law to determine the existence of abuse and report them to the courts ignored complaints by detainees."[142] Furthermore, the CVR, basing itself on reports of the National Human Rights Coordinator and of the International Committee of the Red Cross, confirmed in its Final Report that State officials, "concealed or even endorsed what took place," and also indicated that, "despite the complaints of some victims and of national and international human rights organizations, as well as of organizations of the Catholic Church, the agents of justice failed to prosecute any member of the Police or Armed Forces for torture […]. Consequently, this unlawful practice continued to be implemented with impunity, spreading feelings

142. *Case of J. v. Peru,* para. 319.

of helplessness and pessimism among the population." In addition, as indicated, the Final Report of the CVR established that "[m]ost of the victims state that the medical forensic examinations that were carried out by […] medical professionals were not rigorous; that is, they only performed the medical examinations as a mere formality. […] Also, the testimonies received by the [CVR] indicate [that the medical reports] did not record the evident signs of torture or the complaints of the victims who said they had been tortured." It also indicated that "[t]he professional misconduct of forensic doctors has particularly egregious consequences in the cases of sexual violence, because they condemn the crime to impunity."

264. Based on the above, the Court considers that the deficient way in which the State officials took statements about the acts of which Gladys Espinoza was a victim, the consistent refusal of the forensic doctors to identify the signs of torture and sexual violence that were evident on Gladys Espinoza, and the failure of those doctors to report them, as well as the lack of independence of the forensic doctors who evaluated Gladys Espinoza, had an adverse impact on the possible collection of evidence, contributing to the impunity that reigns in this case.

B.1.2. The allegations of torture raised during the criminal proceedings against Gladys Espinoza in 2003 and 2004 and the application of gender stereotyping by the authorities

[…]

266. As the Court has already indicated, even when the acts of torture or cruel, inhuman or degrading treatment have not been reported to the competent authorities by the victim, in any case in which there are indications that this has occurred, the State must open, ex officio and promptly, an impartial, independent and thorough investigation leading to the determination of the nature and origin of the injuries noted, together with the identification of those responsible, and their prosecution.[143] Also, the obligation to investigate gender-based violence was enhanced for Peru by the entry into force of the Convention of Belém do Pará on June 4, 2006. The Court notes that the judicial bodies mentioned above, and also the Public Prosecution Service and the Attorney General's Office, failed to file any complaint or open any investigation to clarify the facts that were alleged by Gladys Espinoza, despite being aware of the acts against her personal integrity.

[…]

143. *Cf. Case of Gutiérrez Soler v. Colombia.* Judgment of September 12, 2005. Series C No. 132, para. 54, and *Case of J. v. Peru,* para. 347.

268. In this regard, the Court considers that gender-stereotyping refers to a preconception of the attributes or characteristics, or of the respective roles that are or should be played by men and women.[144] Thus, the Court has identified gender stereotypes that are incompatible with international human rights law, and that States should take measures to eradicate.[145]

[…]

270. First, Forensic report No. 003821-V issued by the IML following the evaluations made of Gladys Espinoza on January 27 and February 9, 2004, reveals that the forensic doctors who evaluated Gladys Espinoza determined that her conduct during her statements was a "dramatization of the events" and that she "has a histrionic personality disorder, which does not prevent her from being in contact with the reality except when she disassociates herself from it." The report also concludes that Gladys Espinoza suffered from "dissociative disorder" and "histrionic personality disorder." Similarly, Psychological appraisal report No. 003737-2004-PSC, prepared by the IML after interviewing Gladys Espinoza on February 9 and 10, 2004, indicates that "[t]he individual examined is a person with a low tolerance of frustration […]; she tends to exaggerate her emotions […] when it suits her interests; she tries to be convincing when she speaks, she is careful about the image she presents, she is evasive, she does not commit herself, she finds it difficult to admit she is wrong, she is manipulative in order to obtain secondary gains […] and to seek support."

271. Furthermore, during the public hearing held on February 26, 2004, before the National Terrorism Chamber, the psychologists who prepared Psychological appraisal report No. 003737-2004-PSC mentioned in the preceding paragraph gave oral testimony. When asked how they would define a person with histrionic and dissociative characteristics, they stated that "such individuals are characterized by being immature and unsure of themselves; they change the object of their affections in order to call attention to themselves; in the case of the dissocial characteristics, they are individuals who tend to lie and to play down their defects and errors, always giving more attention to the satisfaction of their own needs." They added that "these characteristics are not definitive; as noted, they are only features of a personality [that] in this case was histrionic and dissocial." They also asserted that "a histrionic trait means that the individual tends to manipulate others, not only during an interview but also by other means; the reference to secondary gains means that there is an unspecified interest that the individual seeks to achieve through their life history." They also

144. *Cf. Case of González et al. ("Cotton Field") v. Mexico,* para. 401.

145. *Cf. Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of November 28, 2012. Series C No. 257, para. 302.

indicated that the inmate with histrionic and dissocial personality traits tends to violate norms and rules."

272. In this regard, expert witness Rebeca Cook stated before the Court that "[t]he characterization of a woman suspected of criminal activity as a 'bad girl' allows her maturity and humanity to be denied and, thereby, exempts those in charge of her custody from responsibility." She asserted that, the characteristics often attributed to women suspected of having committed offenses include: "being assertive, manipulative, lacking credibility, and with a tendency to challenge authority." The expert witness added that when "[j]udges hold similar gender stereotypes with regard to women suspects, this may result in the decision on the latter's innocence or guilt not being founded on appropriate evidence, or even that more severe punishments are imposed on them than on women suspects who submit to male authority." Hence, the Court recognizes and rejects the gender stereotype according to which women suspected of having committed an offense are considered to be intrinsically untrustworthy or manipulative, especially in the context of judicial proceedings. In this regard, the Court has stated that assessments of this nature reveal "a discretional and discriminatory opinion based on the procedural situation of the women […]."[146]

273. Meanwhile, expert witness María Jennie Dador stated before the Court that, when investigating cases of sexual violence and torture reported in Peru, the judicial authorities had "accorded too much significance to the medical forensic examinations, the integrity of the hymen or 'loss of virginity,' and evidence of physical signs of violence, without considering that, neither at that time nor today, were there or are there technical and scientific or human resources that would allow the justice system to obtain the necessary evidence to charge the assailants."

274. In its judgment of March 1, 2004, the National Terrorism Chamber assessed the psychological evaluations performed by the forensic doctors in January and February 2004 in order to evaluate the admissibility of eliminating probative elements allegedly obtained by means of "humiliating treatment and torture, and also sexual abuse by unknown individuals [because it was] prohibited evidence […]." When referring to these psychological appraisals, the Chamber asserted that they "show that the accused has histrionic and dissocial traits, and the psychological appraisals examined during the deliberations indicated that these characteristics correspond to an immature and insecure personality, that does not easily accept frustration, and that manipulates others in order to obtain advantages." Moreover, it

146. *Mutatis mutandis, Case of J. v. Peru,* para. 352.

declared the elimination requested inadmissible, because Gladys Espinoza had given a consistent version of the facts without providing "any kind of self-incriminating version, […]; consequently, there is no causal relationship between the physical ill-treatment that the accused allegedly suffered and the obtaining of inculpatory evidence; thus it can be ruled out that it is prohibited evidence." In the reasoning of this judgment, the National Terrorism Chamber did not use the content of the medical examinations performed on Gladys Espinoza to justify its decision, but rather based itself only on her failure to incriminate herself. The Court also notes that the National Terrorism Chamber did not rule on the existence or inexistence of torture; however, as indicated, it did not order an investigation into the said facts.

275. Meanwhile, the ruling issued by the Permanent Criminal Chamber of the Supreme Court on November 24, 2004, corresponding to the "application for a declaration of nullity filed by [Gladys Espinoza] against the guilty verdict [of March 1, 2004]; by the senior prosecutor with regard to the quantum of the sentence, and by the Attorney General's Office with regard to the amount of the civil reparation," asserted that "during the oral trial, the medical experts have indicated that the injuries to Gladys Carol Espinoza Gonzáles are not compatible with torture, and it should be added that the psychological appraisal concluded that the person appraised is someone who is manipulative in order to obtain advantages." Thus, the Chamber considered that "there are no grounds to declare the nullity of the judgment […] convicting Gladys Carol Espinoza […] of the crime against public peace-terrorism." In this regard, in the said judgment, the Criminal Chamber of the Supreme Court of Justice rejected the allegation of the possible existence of "torture that [Gladys Espinoza] denounced she was a victim of on police premises," based, exclusively, on the indications of the medical experts during the oral trial, and specifically stated that Gladys Espinoza is a person who is manipulative in order to obtain advantages. The Criminal Chamber did not assess any other evidence in the case file in order to reach this conclusion, and interpreted the assessments of the expert witnesses during the oral hearing in a way that was designed to invalidate her credibility as a witness. However, the Court recalls, in particular, that two of the three medical experts who testified before the National Terrorism Chamber during the said public hearing neither denied nor affirmed the existence of acts of torture and sexual violence against Gladys Espinoza. Thus, this selective way of assessing the expert opinions provided during the oral hearing invalidated the content of Gladys Espinoza's statements, and this is a matter of particular concern given the special significance of the statements of a presumed victim of sexual violence.

276. It is pertinent to take into account that, when analyzing psychological reports 003821-V and 003737-2004-PSC of February 2004, the psychologist Carmen Wurst, in the psychological appraisal made of Ms. Espinoza in 2008, stated that "[n]either of the said appraisals has taken into account that this was a case of torture and rape. The conclusions make no mention of the relationship that existed between the traumatic event and the aftereffects found […]. The conclusions emitted only corroborate and substantiate the psychological harm produced by the torture. [Moreover, these appraisals] have been used in a pejorative manner, when referring to reactions that could be expected […]. The diagnosis tries to demonstrate that, owing to her histrionic traits, the patient has invented the episode of torture, which is absolutely improbable and incorrect, because these reactions and clinical symptoms are normal and only to be expected and, to the contrary, confirm the aftereffects of torture according to the Istanbul Protocol."

277. Furthermore, the Court recalls that a pattern of torture and of sexual violence existed in Peru, implemented in a discriminatory manner against women in the context of investigations into terrorism and treason at the time of the facts. In addition, as previously indicated, at the time the Criminal Chamber's judgment was delivered, in cases of sexual violence, the Peruvian courts accorded too much significance to the medical evidence, thus making stereotyped assessments limited to verifying the integrity of the hymen, the loss of virginity, and the physical traces of violence.

278. The Court finds it pertinent to underscore that a guarantee of access to justice for women victims of sexual violence must be the establishment of rules for the assessment of the evidence that avoid stereotyped affirmations, insinuations and allusions. In this regard, the Court observes that, Plenary Decision No. 1-2011/CJ-116 of the Supreme Court of Justice of December 6, 2011, which "establishe[d] as legal doctrine" the criteria for the assessment of the evidence of sexual offenses in Peru following that date, affirmed that "some sectors of the community assume that this assessment of the evidence is governed by gender stereotypes among the police, prosecutors and judges" and recognized the need "to make an appropriate assessment and selection of the evidence in order to neutralize the possibility of producing any error that injures human dignity and is a sources of impunity." Thus, the Court considers that, in the instant case, the absence, in 2004, of norms that would regulate the special assessment of the evidence that is called for in cases of sexual violence encouraged the use of gender stereotypes in the Permanent Criminal Chamber's assessment of the evidence that Gladys Espinoza had been a victim of torture and sexual violence.

279. Based on all the foregoing, the Court considers that the statement of the Permanent Criminal Chamber of the Supreme Court that Gladys Espinoza manipulated the reality in her own interests is consistent with the opinion of expert witness Dador, in the sense that, in cases of sexual violence, the Peruvian judicial authorities used gender-based stereotypes in the assessment of the evidence, detracting from the statements of women victims of such acts. Added to this, the Court considers that the following factors reveal that this Chamber chose the evidence selectively to the detriment of Gladys Espinoza: (i) the fact that the judge rejected the allegation of the possible existence of torture by indicating that she was a person who manipulated the reality; (ii) the existence of medical expert opinions that did not deny the possibility that Gladys Espinoza had been a victim of torture, and (iii) the failure to analyze the other evidence in the judicial case file, such as the medical examinations performed on her, which reveal elements that would reasonably constitute evidence of torture. In addition, the absence of norms for the assessment of the evidence in this type of case promoted the selective choice of evidence in order to reject Gladys Espinoza's allegations of torture, which resulted in the failure to order any investigation into this. The above constituted treatment that discriminated against her by the Permanent Criminal Chamber of the Supreme Court of Justice of Peru, because it founded its judgment on a gender stereotype relating to the unreliability of the statements of women suspected of having committed an offense.

280. In this regard, the Court reiterates that judicial ineffectiveness in individual cases of violence against women encourages a climate of impunity that facilitates and promotes the repetition of the acts of violence in general, and sends a message that violence against women may be condoned and accepted, which fosters its perpetuation and social acceptance of the phenomenon, the feeling and sensation of insecurity for women, and their persistent mistrust in the system for the administration of justice.[147] This ineffectiveness or indifference represents, in itself, discrimination against women in access to justice. Accordingly, when there are indications or concrete suspicions of gender-based violence, the authorities' failure to investigate the possible discriminatory reasons for the act of violence against a woman may, of itself, constitute a form of gender-based discrimination.[148]

281. In this regard, expert witness Rebecca Cook indicated that "[a] culture of impunity […] perpetuates the idea that, by default, women considered suspects are worth less than men […]. The inadequate response

147. *Cf. Case of González et al. ("Cotton Field") v. Mexico,* paras. 388 and 400, and *Case of Veliz Franco et al. v. Guatemala,* para. 208.
148. *Cf. Case of Veliz Franco et al. v. Guatemala,* para. 208.

of States and judges to gender-based violence suffered by women when they are in police custody or in prison reflects and perpetuates the perception that this type of violence against women is not a serious crime. In sum, violence against women who are considered suspects is [hidden] and under-penalized, allowing it to continue with impunity." She also indicated that "[t]he implementation of a gender perspective [in access to justice mechanisms] requires a guarantee that the gender stereotypes held by agents or officials will not prevent or distort effective investigations or the prosecution and/or appropriate punishment of violence against women."

282. In the instant case, Félix Reátegui, principal adviser to the President of the CVR and operational coordinator of the of the Final Report Unit, indicated in relation to the number of cases of sexual violence recorded that, "contrary to other violations, there is a marked tendency for sexual violence to be reported much less frequently than it really occurs for different reasons: due to the limited importance given to it; because in a context of continuous violence against women, it tends to be seen as something normal or as a minor violation; owing to shame and the fear of stigmatization and because, traditionally, the State authorities have shown scant respect for women who report that they have suffered sexual violence." In this regard, expert witness Julissa Mantilla indicated during the public hearing before the Court, without the State contesting this, that of the 538 cases of rape recorded by the CVR, 527 were committed against women and, up until 2012, of the 538 cases of rape found by the CVR, "only 16 cases were being investigated. Of those, 13 were at the stage of preliminary investigation by the Public Prosecution Service and three were before courts." In this regard, the Court has already indicated in this Judgment that the Report of the CVR is an important reference point for the facts of this case. The foregoing allows this Court to conclude that Peru rendered invisible the egregious pattern of sexual violence of which women detained due to their presumed participation in crimes of terrorism and treason were victims, which represented an obstacle to the judicialization of these facts, promoting their impunity to date, and constituted gender-based discrimination in access to justice.

[…]

B.1.4. Conclusion on the absence of an investigation from 1993 to 2012

285. Based on the foregoing, the Court considers that the State should have opened an investigation, ex officio, immediately after April 18, 1993, into the acts of torture perpetrated against Gladys Espinoza during her arrest, and subsequently on the premises of the DIVISE and the DINCOTE. The State should also have opened an investigation into the acts of sexual

violence perpetrated against her, at least, following April 28, 1993, the date on which APRODEH filed the corresponding complaints before the Special Prosecution Unit of the Ombudsman's office. Similarly, the Court considers that the State should have opened an investigation promptly after August 25, 1999, into the acts of torture and the possible existence of sexual violence against Gladys Espinoza within the Yanamayo Prison on August 5, 1999. Nevertheless, it was not until April 16, 2012, that the Third Supranational Criminal Prosecutor opened a criminal investigation into these facts, which is currently at the trial stage.

286. The Court notes that the start of the investigation in 2012 signified an unjustified delay of approximately 19 years in relation to the facts that occurred in the DIVISE and DINCOTE in 1993, and approximately 13 years in relation to the facts that occurred in the Yanamayo Prison in 1999, and that the proceedings are still underway. In this regard, the Court recalls that the lack of diligence means that, as time passes, the possibility of obtaining and presenting pertinent evidence to clarify the facts and determine the corresponding responsibilities is adversely affected, and the State has thereby contributed to their impunity.149 Thus, it is obvious that some of the evidence that could have been collected in order to clarify the acts of violence of which Gladys Espinoza was a victim is no longer available owing to the passage of time. The Court also notes that the deficient way in which statements were taken and medical examinations performed in this case contributed to impunity, and that the application of gender stereotypes by the Permanent Criminal Chamber of the Supreme Court of Justice also resulted in the failure to investigate the facts. Lastly, the Court observes that, in this case, the State has not submitted information to confirm that it has provided Gladys Espinoza with the medical and psychological care required in cases of violence and rape.

287. Consequently, the Court determines that the State has violated the rights recognized in Articles 8(1) and 25 of the Convention, in relation to Article 1(1) of this instrument, and also the obligations established in Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture. It also finds that the State failed to comply with the obligation to investigate sexual violence contained in Article 7(b) of the Convention of Belém do Pará with regard to the incident that took place in the Yanamayo

149. *Cf. Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, reparations and costs*. Judgment of September 1, 2010 Series C No. 217, para. 172, and *Case of the Human Rights Defender et al. v. Guatemala,* para. 214. The Court has defined impunity as the total absence of investigation, pursuit, capture, prosecution and conviction of those responsible for human rights violations. *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Preliminary objections.* para. 173, and *Case of the Human Rights Defender et al. v. Guatemala,* para. 214.

Prison and, as of June 4, 1996, date on which Peru ratified this treaty, with regard to the facts that occurred in 1993 in the DIVISE and the DINCOTE.

288. Furthermore, the Court determines that the stereotyped assessment of the evidence by the Permanent Criminal Chamber of the Supreme Court of Justice, as a result of which an investigation into the reported facts was not ordered, constituted gender-based discrimination in access to justice and, therefore, constituted non-compliance by the State with the obligation contained in Article 1(1) of the Convention, in relation to Articles 8(1) and 25 and 2 thereof, and to Articles 1, 6 and 8 of the ICPPT as well as Article 7(b) of the Convention of Belém do Pará.

[…]

IX. REPARATIONS (APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION)

[…]

B. Obligation to investigate the facts that generated the violations and identify, try, and punish those responsible

[…]

308. Therefore, the Court establishes that the State must, within a reasonable time, open, advance, guide, continue and conclude, as applicable and with the greatest diligence, the pertinent criminal investigations and proceedings, in order to identify, prosecute and punish, as appropriate, those responsible for the gross violations of the personal integrity of Gladys Espinoza. The investigation and criminal proceedings must be, as applicable, for the acts of torture, sexual violence and rape of which Gladys Carol Espinoza Gonzáles was a victim on her arrest on April 17, 1993, during the time she remained on the premises of the DIVISE and the DINCOTE in April and May 1993, and also during the incident that took place on August 5, 1999, in the Yanamayo Maximum Security Prison, in Puno, based on the criteria described for investigating this type of case. Thus, the State must remove all obstacles, de facto and de jure, that maintain total impunity in this case. Due diligence in the investigation signifies that all the pertinent State authorities are obliged to collaborate in the collection of evidence and must therefore provide the judge, prosecutor or other judicial authority with all the information requested, and abstain from acts that entail the obstruction of the investigative procedure.

309. As it has established on other occasions relating to this type of case,[150] both the respective investigation and the criminal proceedings should

150. *Cf. Case of González et al. ("Cotton Field") v. Mexico,* para. 455*, and Case of Veliz Franco et al. v. Guatemala,* para. 251.

include a gender perspective, undertake specific lines of investigation with regard to the sexual violence in order to avoid omissions in the collection of evidence, and provide the victim with information on any progress in the investigation and criminal proceedings pursuant to domestic law and, as appropriate, adequate participation at all stages of the investigation and trial. In addition, the investigation must be conducted by officials with experience in similar cases and in attention to victims of gender-based discrimination and violence. Furthermore, it must be ensured that those in charge of the investigation and the criminal proceedings, as well as, when appropriate, other persons involved such as witnesses, experts, or members of the victim's family, have due guarantees for their safety. Likewise, since a gross violation of human rights is involved, because torture was a generalized practice in the context of the conflict in Peru, the State must abstain from using mechanisms such as amnesty to benefit the perpetrators, or any other similar provision, such as prescription, non-retroactivity of the criminal law, res judicata, ne bis in idem or any other similar extenuating circumstance in order to evade this obligation.[151]

C. Measures of rehabilitation and satisfaction, and guarantees of non-repetition

C.1. Rehabilitation

[…]

314. Consequently, the Court establishes that the State must provide, free of charge and immediately through its specialized health care institutions, in an adequate, comprehensive and effective manner, the medical, psychological or psychiatric treatment required by Gladys Carol Espinoza Gonzáles, following her informed consent and if she so wishes, including the provision of medicines, also free of charge. The State must also ensure that the professionals who are assigned assess the victim's psychological and physical conditions adequately and have sufficient training and experience to treat both her physical health problems and the psychological traumas resulting from the cruel, inhuman and degrading treatment, and the torture she has suffered, which included rape and other forms of sexual violence. To this end, and since Gladys Espinoza is currently incarcerated, these professionals must have access to the place where she is confined, and her transfer, as necessary, to health care institutions must be ensured.

151. *Cf. Case of Barrios Altos v. Peru. Merits.* Judgment of March 14, 2001. Series C No. 75, para. 41, and *Case of Osorio Rivera and family members v. Peru,* para. 244.

Subsequently, the treatments must be provided, insofar as possible, in the health care centers nearest to her place of residence[152] in Peru for as long as necessary. This means that Gladys Espinoza must receive a differentiated treatment in relation to the process and the procedures that have to be complied with in order to be treated in the public hospitals.[153]

315. Furthermore, the State must provide, free of charge and immediately, through its specialized health care institutions, in an adequate, comprehensive and effective manner, the psychological or psychiatric treatment required by Manuel Espinoza Gonzáles, following his informed consent and if he so wishes, including the provision of medicines, also free of charge. In addition, the treatments must be provided, insofar as possible, in the health care centers nearest to his place of residence in Peru for as long as necessary. This means that Mr. Espinoza Gonzáles must receive a differentiated treatment in relation to the process and the procedures that have to be complied with in order to be treated in the public hospitals.

316. In addition, when providing psychological or psychiatric treatment to Gladys Espinoza and Manuel Espinoza, it will be necessary to consider the particular circumstances and needs of each victim, in order to provide collective, family or individual treatment, as agreed with each of them and following an individual evaluation.[154] The victims who request this measure of reparation, or their legal representatives, have six month as of notification of this Judgment to advise the State of their intention of receiving psychological or psychiatric treatment and, in the case of Gladys Espinoza, medical treatment also.[155]

[…]

C.3. Guarantees of non-repetition

C.3.1. Measures of a normative and institutional nature

[…]

322. The Court appreciates the State's efforts to combat gender-based violence. This progress, especially in the judicial area, constitutes a structural indicator related to the adoption of norms that, in principle, are aimed at

152. *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs.* Judgment of December 3, 2001. Series C No. 88, para. 51, and *Case of the Human Rights Defender et al. v. Guatemala,* para. 258.

153. *Cf. Case of Heliodoro Portugal v. Panama. Monitoring compliance with judgment.* Order of the Inter-American Court of May 28, 2010, *considerandum* 28, and *Case of Osorio Rivera and family members v. Peru,* para. 256.

154. *Cf. Case of 19 Tradesmen v. Colombia. Merits, reparations and costs.* Judgment of July 5, 2004. Series C No. 109, para. 278, and *Case of Osorio Rivera and family members v. Peru,* para. 256.

155. *Cf. Case of Fernández Ortega et al. v. Mexico,* para. 252, and *Case of Osorio Rivera and family members v. Peru,* para. 256.

dealing with violence and discrimination against women. Nevertheless Peru did not provide the Court with information on the effectiveness of the measures adopted. Furthermore, Peruvian investigation protocols should include the standards established in this Judgment. Consequently, the Court orders the State of Peru, within a reasonable time, to draw up investigation protocols to ensure that cases of torture, rape and other forms of sexual violence are duly investigated and prosecuted pursuant to the standards indicated in paragraphs 248, 249, 251, 252, 255 and 256 of this Judgment, which relate to the collection of evidence in cases of torture and sexual violence and, in particular, to the reception of statements, and the execution of medical and psychological assessments.

C.3.2. Education and training programs

[…]

326**.** The Court assesses positively the measures adopted by the State concerning human rights training in different State institutions. However, it recalls that, considered as a system of continuing education, training should be offered for a considerable time in order to achieve its objectives.[156] Likewise, and in light of its case law,[157] the Court notes that training with a gender perspective entails not only a process of learning the norms, but must also teach all officials to recognize the existence of discrimination against women, and the impact on women of stereotyped ideas and assessments in relation to the scope and content of human rights.

327. Consequently, the Court establishes that the State, within a reasonable time, must incorporate into the permanent education and training programs and courses for those in charge of criminal investigations and judicial proceedings, the standards established in paragraphs 237 to 242, 248, 249, 251, 252, 255, 256, 258, 260, 266, 268 and 278 of this Judgment concerning: (i) a gender perspective for due diligence in conducting preliminary investigations and judicial proceedings in relation to gender-based discrimination and violence against women, in particular acts of violence and rape, and (ii) the elimination of gender stereotypes.

[…]

156. *Cf. Case of Escher et al. v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of July 6, 2009. Series C No. 200, para. 251, and *Case of González et al. ("Cotton Field") v. Mexico*, para. 540.

157. *Cf. Case of González et al. ("Cotton Field") v. Mexico*, para. 540.

C.3.4. Rehabilitation of women victims of sexual violence during the Peruvian conflict

331. In this case, the Court has established that the generalized practice of rape and other forms of sexual violence was used as a war strategy and particularly affected women in the context of the Peruvian conflict from 1980 to 2000. Consequently, the Court considers that, if it does not already have one, the State must implement a mechanism that allows all women victims of such violations who request this to have access free of charge, through the State's public institutions, to specialized medical, psychological and/or psychiatric rehabilitation to redress this type of violation.

[…]