



Developments in the Court's Case Law

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VIII. Developments in the Court's Case Law 2022

This section highlights the aspects on which the Inter-American Court has developed new standards during 2022, as well as relevant criteria from the Case Law already established by the Court. These Case Law standards are very important for national authorities to be able to apply an adequate control of conventionality within their respective spheres of competence.

In this regard, The Court has established that all State authorities are obliged to exercise a "control of conventionality" *ex officio* to ensure conformity between domestic law and the American Convention, evidently within their respective spheres of competence and the corresponding procedural regulations. This relates to the analysis that the State's organs and agents must make (in particular, judges and other agents of justice) of the compatibility of domestic norms and practices with the American Convention. In their specific decisions and actions, these organs and agents must comply with the general obligation to safeguard the rights and freedoms protected by the American Convention, ensuring that they do not apply domestic legal provisions that violate this treaty, and also that they apply the treaty correctly, together with the Case Law standards developed by the Inter-American Court, ultimate interpreter of the American Convention.

This section is divided into the substantive rights established in the American Convention on Human Rights that incorporate these standards and that develop their meaning and scope. In addition, subtitles have been included that highlight the issues presented, and the content includes references to specific judgments from which the Case Law was extracted.

ARTICLE 1 (OBLIGATION TO RESPECT AND TO ENSURE RIGHTS)

- **The attribution of responsibility to the State**

In the Case of Members and Militants of the Patriotic Union v. Colombia, the Court reiterated that the international responsibility of the State may be based on acts or omissions of any power or organ of the State that violate the American Convention, and is generated immediately with the international wrong attributed. In turn, the Court has indicated that an internationally wrongful act exists when a conduct consisting of an act or omission (a) is attributable to the State under international law, and (b) constitutes a breach of an international obligation of the State.¹⁰⁹

A violation of the human rights protected by the Convention may engage the international responsibility of a State Party for a breach of the duty to respect rights contained in Article 1(1) of the Convention either because the violation is perpetrated by its own agents or - even if at first they are not directly attributable to the State because they were committed by a private individual - when the unlawful act was committed with the participation, support or tolerance of State agents.¹¹⁰

¹⁰⁹ Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 256.

¹¹⁰ Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 260.

Regarding the content of the obligation to guarantee rights under Article 1(1) of the Convention, in the Case of Members and Militants of the Patriotic Union v. Colombia, the Court pointed out that it implies the duty of States Parties to organize the entire governmental apparatus and, in general, all the structures through which the exercise of public power is manifested, in such a way that they are capable of ensuring by law the free and full exercise of human rights. As a result of this obligation, States must prevent, investigate and punish any violation of the rights recognized by the Convention and also seek the reestablishment, if possible, of the violated right and, if appropriate, the reparation of the harm caused by the violation of human rights.¹¹¹

These obligations are also applicable to acts of non-State actors. Specifically, the Court has indicated that the State's international responsibility may arise from the attribution to it of acts that violate human rights committed by third parties or individuals. The *erga omnes* obligations of States to respect and guarantee the norms of protection, and to ensure the effectiveness of rights, project their effects beyond the relationship between their agents and the persons subject to their jurisdiction, since these are manifested by the positive obligation of the State to adopt the necessary measures to ensure the effective protection of human rights in relations between individuals.¹¹²

In addition, in the Case of Members and Militants of the Patriotic Union v. Colombia, the Court emphasized that investigating cases involving violations of the right to life is a central element when determining the international responsibility of the State and that this obligation arises from the guarantee of Article 1(1) of the Convention. If, in contexts of gross human rights violations, important flaws in the investigation of facts are proved that are perpetuated by impunity, this will mean that the obligation to protect the right to life has not been met. Similarly, in certain contexts and circumstances, the absence of effective mechanisms for investigating violations of the right to life and the weakness of justice systems to address such violations can lead to generalized situations or serious patterns of impunity, thus encouraging and perpetuating the repetition of violations.¹¹³

In the Case of Members and Militants of the Patriotic Union v. Colombia, the Court underscored the relationship between the duty to guarantee the rights contained in the Convention and the duty to investigate. In effect, a fundamental part of the State's lack of response was a consequence of its sustained ineffectiveness in seriously and diligently investigating the repeated acts of violence and the situation of impunity in which these acts of violence took place. This situation resulted in the State's failure to clarify promptly the reasons for the growing phenomenon of harassment, unravel the criminal structures involved and the different perpetrators, and effectively identify the sources of risk in order to set in motion its entire state apparatus to dismantle them and prevent the continuation of the extermination that was occurring under its jurisdiction.¹¹⁴

The Court added that, in this case, these failures in the duty to prevent or to investigate had effects that extended beyond an omission constituting indirect responsibility on the part of the State and operated as a form of generalized and structural tolerance of the acts of violence against the members of the Patriotic Union, which encouraged their persistence. Thus, in the particular circumstances of the case, they formed part of the general context that enabled the violation of the duty to respect rights. Likewise, taking into account the systematicity and seriousness of these breaches of the duty to investigate and to prevent,

111 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 261.

112 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 262.

113 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 265.

114 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 286.

it could be considered that they reached such a level that they implied a state conduct that favored impunity, to the point of constituting a form of systematized tolerance of the acts of violence against the members and militants of the Patriotic Union.¹¹⁵

ARTICLE 1 (OBLIGATION TO RESPECT AND TO ENSURE RIGHTS) AND ARTICLE 24 (EQUALITY BEFORE THE LAW)

• The social model of disability and the prohibition of discriminating against persons with disabilities

In the Case of Guevara Díaz v. Costa Rica, the Court reiterated that while the general obligation set forth in Article 1(1) addresses the State's duty to respect and guarantee, "without discrimination," the rights set forth in the American Convention, Article 24 protects the right to "equal protection of the law." That is, Article 24 of the American Convention prohibits discrimination not only as regards the rights enshrined in the treaty but also with respect to all laws enacted by the State and their application. In other words, if a State discriminates in respecting or guaranteeing a right set forth in the Convention, it fails to comply with the obligation set forth in Article 1(1) and the substantive right in question. On the other hand, if the discrimination involves unequal protection under a domestic law or its application, the facts should be reviewed pursuant to Article 24 of the American Convention, read in conjunction with the categories protected by Article 1(1). Additionally, the Court has indicated that a mandate aimed at guaranteeing material equality stems from Article 24 of the Convention.¹¹⁶

In this way, in the Case of Guevara Díaz v. Costa Rica, the Court reiterated that the right to equality and non-discrimination incorporates two concepts: one related to the prohibition of arbitrary differentiation of treatment, and another to the obligation of States parties to create real equal conditions for groups that have been historically excluded or that are exposed to a greater risk of being discriminated against. The Court has also found that a difference in treatment is discriminatory when it has no objective or reasonable justification; in other words, when it does not pursue a legitimate purpose and there is no proportionality between the means used and the objective pursued. This Court has thus established that since the prohibition of discrimination is based on one of the protected categories set forth in Article 1(1) of the Convention, any restriction of a right must be rigorously justified, which implies that the state's grounds for the difference in treatment must be particularly serious and supported by exhaustive arguments.¹¹⁷

In this regard, the Court recalls that persons with disabilities are bearers of the rights established in the American Convention, rights that must be guaranteed in accordance with the principles of the right to equality and the prohibition on discrimination. In addition, the Court has established that disability is a protected category in the terms of Article 1(1) of the American Convention, and therefore, any discriminatory legal provision, act, or practice based on a person's real or perceived disability is prohibited. Consequently, no legal practice, decision, or provision of domestic law by either State authorities or private individuals may reduce or restrict in a discriminatory way the rights of an individual based on their disability. In addition, since disability is a protected category under Article 1(1) of the American Convention, the burden of proof to demonstrate that the different treatment of a person with a disability is justified falls on the State, and it cannot justify its decision based on stereotypes.¹¹⁸

115 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 288.

116 Case of Guevara Díaz v. Costa Rica. Merits, Reparations and Costs. Judgment of June 22, 2022. Series C No. 453, para. 48.

117 Case of Guevara Díaz v. Costa Rica. Merits, Reparations and Costs. Judgment of June 22, 2022. Series C No. 453, para. 49.

118 Case of Guevara Díaz v. Costa Rica. Merits, Reparations and Costs. Judgment of June 22, 2022. Series C No. 453, para. 50.

The Court underscored that the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities was adopted in 1999, and ratified by Costa Rica on August 12, 1999. This Convention uses a social model in its approach to disability, meaning that disability is not defined exclusively by the presence of a physical, mental, intellectual, or sensory impairment, but rather is interrelated with the social barriers or limitations that prevent individuals from exercising their rights effectively. The type of limitations or barriers commonly encountered by functionally diverse persons in society include are, among other things, physical or architectural barriers, as well as communication, attitudinal, or socioeconomic barriers.¹¹⁹

This Court also emphasized that, in compliance its special protection duties regarding any person in a situation of vulnerability, the State must adopt positive measures to protect rights, determined according to the particular needs for protection of the bearer of the right, whether due to their personal condition or the specific situation they face, such as disability. In this sense, States have an obligation to strive for the inclusion of persons with disabilities by offering equal conditions, opportunities, and participation at all levels of society in order to ensure that any legal or de facto limitations are dismantled. States must therefore promote social inclusion practices and establish affirmative action measures to remove such barriers. In this regard, as indicated by expert witness Sylvia Quan, attitudinal barriers are a particularly significant obstacle to the exercise of rights by persons with disabilities “due to prejudices, stigmas, and discrimination in multiple forms.”¹²⁰

Based on the same logic, in the Case of Guevara Díaz v. Costa Rica, the Court noted that persons with disabilities are often subject to discrimination based on their status, and therefore States must take every legislative, social, educational, workplace, or other measure necessary to ensure that discrimination based on disability is eliminated and to promote full social integration of persons with disabilities. In this regard, the Committee on Economic, Social and Cultural Rights has underscored the obligation of States to take special measures “to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability.”¹²¹

ARTICLES 3 (RIGHT TO RECOGNITION OF JURIDICAL PERSONALITY), 4 (RIGHT TO LIFE) 5 (RIGHT TO PERSONAL INTEGRITY), AND 7 (RIGHT TO PERSONAL LIBERTY) – FORCED DISAPPEARANCE OF PERSONS

- **Differentiated impacts based on gender in forced disappearances**

In the Case of Movilla Galarcio et al. v. Colombia, the Court established that, following the disappearance of their close relatives, women may experience stigmatization, violence and discrimination associated with gender roles, and when the disappeared person is a male head of household, the victimization of his family members may be even greater.

The Court also indicated that States Parties to the American Convention on Human Rights have the obligation to take steps to recognize and guarantee the work of women searching for their loved ones to prevent and investigate forced disappearance. States must also guarantee that this work can be performed without obstruction, intimidation or threat, ensuring the personal integrity of women seeking their loved ones and their rights to political participation recognized in the Convention, addressing the cultural and

119 Case of Guevara Díaz v. Costa Rica. Merits, Reparations and Costs. Judgment of June 22, 2022. Series C No. 453, para. 51.

120 Case of Guevara Díaz v. Costa Rica. Merits, Reparations and Costs. Judgment of June 22, 2022. Series C No. 453, para. 53.

121 Case of Guevara Díaz v. Costa Rica. Merits, Reparations and Costs. Judgment of June 22, 2022. Series C No. 453, para. 54.

historical obstacles that limit their search, and guaranteeing the permanency of the life project of these women and their dependents under dignified conditions. This should extend to reparations, which should be established in a manner that does not reproduce gender stereotypes, but rather reflects the way in which the women searching for their loved ones wish to be represented.

ARTICLE 4 (RIGHT TO LIFE)

• The death row phenomenon in cases involving the death penalty

In the Case of Dial et al. v. Trinidad and Tobago, the Court reiterated that the waiting time between the moment someone is sentenced to death and the moment when this sentence is executed produces mental anguish, extreme tension and psychological trauma owing to the situation experienced by the person which includes the way in which the sentence was imposed from the perspective of due process, and also the characteristics of the condemned man.¹²²

To the above are added the detention conditions usually experienced by those held on death row, where the inhuman treatment they receive is due to conditions of physical deprivation that include insufficient food, water and health care, as well as prolonged solitary confinement that could extend over many years, and the absence of opportunities to leave their cells and take any exercise, as in this case. Indeed, in recent decades, both international human rights law and comparative law have addressed the issue of prolonged confinement on death row, known as the “death row phenomenon,” in light of the prohibition of cruel, inhuman or degrading treatment, indicating that this phenomenon “consists of a combination of circumstances that produce severe mental trauma and physical deterioration in prisoners under sentence of death”; these “include the lengthy and anxiety-ridden wait for uncertain outcomes, isolation, drastically reduced human contact and even the physical conditions in which some inmates are held.” Also, “[d]eath row conditions are often worse than those for the rest of the prison population, and prisoners on death row are denied many basic human necessities.”¹²³

In the Case of Dial et al. v. Trinidad and Tobago the Court recalled that, since it is responsible for detention centers, the State must guarantee that inmates have living conditions that safeguard their rights. On other occasions, the Court has indicated that keeping an individual confined in overcrowded conditions, with little ventilation and natural light, without a bed to rest on, or adequate conditions of hygiene, in isolation or solitary confinement, or with undue restrictions on visiting conditions, constitutes a violation of personal integrity. The Court also considered it relevant to take into account the standards recommended by international bodies for the minimum acceptable space required for a dignified life in prison. It has also indicated that the absence of minimum conditions that ensure the supply of drinking water within a prison constitutes a serious failure of the State to comply with its duty to guarantee the rights of those held in its custody given that, due to the particular circumstances of any deprivation of liberty, detainees cannot satisfy by themselves a series of basic necessities that are essential for a decent life, such as access to sufficient clean water.¹²⁴

¹²² Case of Dial et al. v. Trinidad and Tobago. Merits and reparations. Judgment of November 21, 2022. Series C No. 476, para. 71.

¹²³ Case of Dial et al. v. Trinidad and Tobago. Merits and reparations. Judgment of November 21, 2022. Series C No. 476, para. 72.

¹²⁴ Case of Dial et al. v. Trinidad and Tobago. Merits and reparations. Judgment of November 21, 2022. Series C No. 476, para. 73.

ARTICLE 4 (RIGHT TO LIFE), ARTICLE 5 (RIGHT TO PERSONAL INTEGRITY) AND ARTICLE 26 (RIGHT TO HEALTH)

• Provision of health services during pregnancy, birth and postpartum and obstetric violence

In the Case of *Brítez Arce et al. v. Argentina*, the Court recognized that the civil and political rights, and the economic, social, cultural and environmental rights, are indivisible and, therefore, their recognition and enjoyment are invariably guided by the principles of universality, indivisibility, interdependence and interrelationship. This signifies that both categories of rights should be understood integrally and globally as human rights, without any hierarchy between them, and can be required in all cases before the competent authorities.¹²⁵ The Court also considered that the rights to life and to integrity are directly and immediately related to health care, and that the lack of adequate medical care may result in the violation of Articles 4(1) and 5(1) of the Convention.¹²⁶

The Court also indicated that, when a State fails to take adequate measures to prevent maternal mortality, this evidently compromises the right to life of women who are pregnant or postpartum.¹²⁷ The Court recalled that the right to health during pregnancy, birth and postpartum, forms an integral part of the right to enjoy the highest attainable standard of physical and mental health, and thus must comply with the elements of availability, acceptability, quality and accessibility.¹²⁸ In this regard, among the minimum international obligations that should guide health care, women who are pregnant, postpartum and breastfeeding should be fully informed of their medical condition and be ensured access to precise and timely information on reproductive and maternal health at all stages of their pregnancy. Such information must be based on scientific evidence, and be unbiased, and free of stereotypes and discrimination, including the birth plan in the health center in which the birth will take place, and the right to mother-child contact.¹²⁹

In addition, in the Case of *Brítez Arce et al. v. Argentina*, the Court considered that the lack of adequate medical care or problems of accessibility to certain procedures could entail the violation of Article 5(1) of the Convention and that, during pregnancy, women may be subjected to prejudicial practices and specific forms of violence, ill-treatment and even torture.¹³⁰

In this regard, in the Case of *Brítez Arce et al. v. Argentina* the Court reiterated that a form of gender-based violence exists known as obstetric violence, which refers to harm inflicted in relation to pregnancy, birth and postpartum with regard to access to health services, and which constitutes a human rights violation. It encompasses all situations of disrespectful, abusive or neglectful treatment or the denial thereof during pregnancy, childbirth or postpartum, in private or public health facilities.¹³¹

In this regard, based on Article 7 of the Convention of Belém do Pará, the Court recalled that States have the duty to prevent, punish and eradicate violence against women and, to this end, must refrain from committing acts that constitute gender-based violence, including acts that take place during access to reproductive health services. In addition, according to that Convention, “[e]very woman has the right to be free from violence in both the public and private spheres,” and States should pay special attention to the vulnerable situation of women who are victims of violence when they are pregnant.

¹²⁵ Case of *Brítez Arce et al. v. Argentina*. Merits, Reparations and Costs. Judgment of November 16, 2022. Series C No. 474, para. 59.

¹²⁶ Case of *Brítez Arce et al. v. Argentina*. Merits, Reparations and Costs. Judgment of November 16, 2022. Series C No. 474, para. 59.

¹²⁷ Case of *Brítez Arce et al. v. Argentina*. Merits, Reparations and Costs. Judgment of November 16, 2022. Series C No. 474, para. 70.

¹²⁸ Case of *Brítez Arce et al. v. Argentina*. Merits, Reparations and Costs. Judgment of November 16, 2022. Series C No. 474, para. 72.

¹²⁹ Case of *Brítez Arce et al. v. Argentina*. Merits, Reparations and Costs. Judgment of November 16, 2022. Series C No. 474, para. 73.

¹³⁰ Case of *Brítez Arce et al. v. Argentina*. Merits, Reparations and Costs. Judgment of November 16, 2022. Series C No. 474, para. 74.

¹³¹ Case of *Brítez Arce et al. v. Argentina*. Merits, Reparations and Costs. Judgment of November 16, 2022. Series C No. 474, para. 75.

In this regard, in light of the Convention of Belém do Pará, women have the right to be free of obstetric violence, and States have the obligation to prevent and punish this and to refrain from inflicting it, as well as to ensure that its agents act in consequence, taking into consideration the special vulnerability of those who are pregnant or postpartum.¹³² The Court also indicated that obstetric violence has been examined by various international bodies. Thus, the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has recognized that “[m]istreatment and violence against women experienced during pregnancy, facility-based childbirth and the postpartum period by medical practitioners, midwives, nurses and hospital staff, also called obstetric violence, is widespread.” While the Special Rapporteur on violence against women, its causes and consequences, has identified obstetric violence as that “experienced by women during facility-based childbirth,” and underlined that it is revealed by “a lack of autonomy and decision-making.”¹³³

The Court recognized that some countries of the region have included references to obstetric violence in their laws. Among these, Argentina defines this type of violence as “that exercised by health personnel on the body and the reproductive processes of women, expressed by a dehumanizing treatment, and abuse by the medicalization and pathologization of natural processes.”¹³⁴

In light of the foregoing, the Court found that obstetric violence was a form of gender-based violence “prohibited by the Inter-American Human Rights treaties, including the Convention of Belém do Pará,” inflicted by those responsible for providing health care to women during pregnancy, birth and postpartum health services, which are revealed mostly, but not exclusively, by the dehumanizing, disrespectful, abusive or neglectful treatment of the pregnant women; by the denial of treatment and complete information on her health situation and the applicable treatment; by forced or coerced medical interventions, and by the tendency to pathologize the natural reproductive processes, among other intimidating actions in the context of health care during pregnancy, birth and the postpartum period.¹³⁵

ARTICLE 5 (RIGHT TO PERSONAL INTEGRITY)

• Sexual violence and torture suffered by women

In the Case of Valencia Campos et al. v. Bolivia, the Court understood that a gender perspective should be incorporated into the examination of facts that could constitute ill-treatment, because this allows their nature, gravity and implications to be analyzed more precisely and also, as applicable, their roots in patterns of discrimination. Thus, acts of sexual violence may have a distinctive character in relation to women and girls.¹³⁶ Regarding sexual violence and rape, this Court’s Case Law has recognized that these forms of sexual violence may constitute cruel, inhuman or degrading treatment, and even acts of torture, if they meet the relevant definition.¹³⁷

In the Case of Valencia Campos et al. v. Bolivia, the Court recognized that, in certain circumstances, the threats and the real danger of person being subjected to severe physical injury produces such a degree of moral anguish that it may be considered “psychological torture.” In this regard, the Court has established that an act of torture may be perpetrated by acts of physical violence and also by acts that cause the

132 Case of Brítez Arce et al. v. Argentina. Merits, Reparations and Costs. Judgment of November 16, 2022. Series C No. 474, para. 77.

133 Case of Brítez Arce et al. v. Argentina. Merits, Reparations and Costs. Judgment of November 16, 2022. Series C No. 474, para. 78.

134 Case of Brítez Arce et al. v. Argentina. Merits, Reparations and Costs. Judgment of November 16, 2022. Series C No. 474, para. 8.

135 Case of Brítez Arce et al. v. Argentina. Merits, Reparations and Costs. Judgment of November 16, 2022. Series C No. 474, para. 81.

136 Case of Valencia Campos et al. v. Bolivia. Preliminary objection, Merits, Reparations and Costs. Judgment of October 18, 2022. Series C No. 469, para. 185.

137 Case of Valencia Campos et al. v. Bolivia. Preliminary objection, Merits, Reparations and Costs. Judgment of October 18, 2022. Series C No. 469, para. 186.

victim mental or moral suffering. Moreover, if they are motivated by gender stereotypes, this is contrary to Article 7 of the Convention of Belém do Pará.¹³⁸

In the Case of Valencia Campos et al. v. Bolivia, the Court also reiterated that sexual violence constitutes a paradigmatic form of violence against women, the consequences of which even transcend the person of the victim. In addition, regarding the severity of the suffering, the Court has recognized that sexual violence may have severe psychological consequences for the victims, taking into account that, in the Case of sexual violence, sexual assault corresponds to a type of crime that is not generally reported by the victim owing to the stigma usually attached to such reports. Consequently, in many cases, the victims decide to remain silent and, therefore, recourse may be had to presumptions and indications.¹³⁹

ARTICLE 7 (RIGHT TO PERSONAL LIBERTY)

• General considerations on the need to adopt differentiated measures or approaches with respect to certain groups of persons deprived of liberty

In the Advisory Opinion on differentiated approaches with respect to certain groups of persons deprived of liberty, the Court reiterated that respect for human dignity constituted the general principle for the proper treatment of persons deprived of liberty and determined that it would provide content to this principle, together with the principle of equality and non-discrimination, identifying the specific obligations concerning the decent treatment that should be given to the groups of persons deprived of liberty who were the subject of the request, namely: (A) women who are pregnant, in labor, postpartum and breastfeeding, as well as primary caregivers; (B) children who live in detention centers with their mothers or primary caregivers; (C) LGBTI persons; (D) members of indigenous peoples, and (E) older persons.¹⁴⁰

Thus, in this Advisory Opinion, the Court included general considerations on: (A) respect for human dignity as a general principle of the adequate treatment of persons deprived of liberty and of detention conditions; (B) the prohibition and prevention of torture and other cruel, inhuman or degrading treatment; (c) the purpose of oversight of sentences in the American Convention; (D) judicial control of oversight of sentences; (E) the right to equality and non-discrimination, a differentiated approach, and intersectionality; (F) access to basic services for a life with dignity in prison, identifying the international obligations concerning the rights to health, adequate food and drinking water during detention; (G) generalized overpopulation and overcrowding; (H) prison management, and (I) context caused by the COVID-19 pandemic and the particular harm to certain groups in the prison system.¹⁴¹

the Court determined that States should apply a differentiated approach when responding to the special needs of the different population groups deprived of liberty to ensure that their sentences are executed respecting human dignity.¹⁴²

138 Case of Valencia Campos et al. v. Bolivia. Preliminary objection, Merits, Reparations and Costs. Judgment of October 18, 2022. Series C No. 469, para. 188.

139 Case of Valencia Campos et al. v. Bolivia. Preliminary objection, Merits, Reparations and Costs. Judgment of October 18, 2022. Series C No. 469, para. 190.

140 Differentiated approaches with respect to certain groups of persons deprived of liberty (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments. Advisory Opinion OC-29/22 of May 30, 2022. Series A No. 29.

141 Differentiated approaches with respect to certain groups of persons deprived of liberty (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments. Advisory Opinion OC-29/22 of May 30, 2022. Series A No. 29.

142 Differentiated approaches with respect to certain groups of persons deprived of liberty (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments. Advisory Opinion OC-29/22 of May 30, 2022. Series A No. 29.

The Court considered that the application of a differentiated approach to prison policies enabled identifying how the characteristics of the group and the prison environment affect the guarantee of the rights of certain groups of persons deprived of liberty who are minorities and marginalized in prison and determined the specific risks of the infringement of rights, based on their particular characteristics and needs, in order to define and implement a series of specific measures addressed at overcoming the discrimination (structural and intersectional) that affected them. In not doing so, States would be in violation of Article 5(2) of the Convention and other specific treaties and this could result in treatment that was contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.¹⁴³

- **Differentiated approaches applicable to women who are pregnant, in labor, postpartum and breastfeeding, as well as primary caregivers, deprived of liberty**

In the Advisory Opinion on differentiated approaches with respect to certain groups of persons deprived of liberty, the Court considered that since, historically, women represented only a small proportion of the imprisoned population, prison as an institution of social control had traditionally been conceived, designed and structured from an androcentric perspective directed toward a young and marginalized male population deprived of liberty for violent crimes. In this situation, and from a gender perspective, the Court considered that the principle of equality and non-discrimination required States, through their systems of criminal justice and prison administration, to employ a differentiated approach for women prisoners so as not to replicate the treatment given to the male population. In summary, the differentiated approach requires the adoption of differentiated criminal and prison policies that respond to the profile and vulnerabilities of women deprived of liberty or under house arrest, such as social conditions and care responsibilities, with the goal of their satisfactory reintegration into society. The Court identified the specific vulnerabilities faced by women during pregnancy, labor, postpartum and breastfeeding, as well as when they are primary caregivers deprived of liberty, and developed the specific obligations that arise for the States under the Convention.¹⁴⁴

In the Advisory Opinion, the Court addressed the following issues: (A) the need to adopt special measures to make effective the rights of women who are pregnant, postpartum or breastfeeding, or primary caregivers, deprived of liberty; (B) priority in the use of alternative and substitute measures in the execution and oversight of sentences in the Case of women who are pregnant, in labor, postpartum or breastfeeding, or when they are primary caregivers; (C) principle of separation between women and men and appropriate installations for women who are pregnant, postpartum or breastfeeding, and when they are primary caregivers; (D) prohibition of measures of solitary confinement and physical coercion; (E) access to sexual and reproductive health without discrimination; (F) adequate nutrition and specialized physical and psychological health care during pregnancy, childbirth and postpartum; (G) prevention, investigation and eradication of obstetric violence in prisons; (H) access to hygiene and adequate clothing, and (I) guarantee that ties can be developed between mothers or primary caregivers deprived of liberty and their children who are outside the prison in an adequate environment.¹⁴⁵

143 Differentiated approaches with respect to certain groups of persons deprived of liberty (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments. Advisory Opinion OC-29/22 of May 30, 2022. Series A No. 29.

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145 Differentiated approaches with respect to certain groups of persons deprived of liberty (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments. Advisory Opinion OC-29/22 of May 30, 2022. Series A No. 29.

- **Differentiated approaches applicable to children living in detention centers with their mothers or primary caregivers**

In the Advisory Opinion on differentiated approaches with respect to certain groups of persons deprived of liberty, the Court stressed that, generally, there was a lack of reliable and official statistics on children living in prisons with their parent or adult of reference and, thus, this group is one of the most invisible in the prison context. The Court considered that, to ensure the right to equality and non-discrimination, States must identify children living in prison with a parent as an especially vulnerable group and must produce statistics to monitor their situation and their needs and have up-to-date records of the number in each prison, as well as develop and reinforce the required policies and norms for the comprehensive protection of their rights.¹⁴⁶

In the Advisory Opinion, the Court addressed the following aspects: (A) general considerations regarding the applicable guiding principles and the right to equality and non-discrimination; (B) right to family life of children with their parents and/or adults of reference deprived of liberty; (C) access to the rights to health and to nutrition of children who reside in detention centers, and (D) the adequate and integral development of children, with special attention to community integration, socialization, education and recreation.¹⁴⁷

- **Differentiated approaches applicable to LGBTI persons deprived of liberty**

In the Advisory Opinion on differentiated approaches with respect to certain groups of persons deprived of liberty, when referring to LGBTI persons, the Court indicated that, despite their heterogeneity, this is a population with common experiences of prison violence and discrimination arising from prejudices based on sexual orientation and gender identity and expression. It stressed that prisons were originally conceived not only from an androcentric perspective, but also based on the dominant logic of sexual binarity, cisnormativity, and heteronormativity, and this presents special challenges for the respect and guarantee of the rights of transgender persons, as well as persons with non-binary gender identities.¹⁴⁸

In view of the history of violence and discrimination against LGBTI persons, which is reproduced and exacerbated in the prison environment, as well as their specific needs during deprivation of liberty, in the Advisory Opinion on differentiated approaches with respect to certain groups of persons deprived of liberty, the Court responded to the questions raised by the Inter-American Commission as follows: (A) general considerations on the right to equality and non-discrimination and the situation of LGBTI persons deprived of liberty; (B) the principle of separation and the determination of where to locate an LGBTI person in prison; (C) the prevention, investigation and recording of violence against LGBTI persons deprived of liberty; (D) the right to health of transgender persons deprived of liberty in relation to the initiation or continuation of the transition process, and (E) intimate visits for LGBTI persons deprived of liberty.¹⁴⁹

¹⁴⁶ Differentiated approaches with respect to certain groups of persons deprived of liberty (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments. Advisory Opinion OC-29/22 of May 30, 2022. Series A No. 29.

¹⁴⁷ Differentiated approaches with respect to certain groups of persons deprived of liberty (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments. Advisory Opinion OC-29/22 of May 30, 2022. Series A No. 29.

¹⁴⁸ Differentiated approaches with respect to certain groups of persons deprived of liberty (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments). Advisory Opinion OC-29/22 of May 30, 2022. Series A No. 29.

¹⁴⁹ Differentiated approaches with respect to certain groups of persons deprived of liberty (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments. Advisory Opinion OC-29/22 of May 30, 2022. Series A No. 29.

- **Differentiated approaches applicable to members of indigenous peoples deprived of liberty**

The Court interpreted the provisions of the American Convention taking into consideration the inherent characteristics that differentiate members of indigenous peoples from the general population and that constitute their cultural identity. The Court emphasized the need for the representatives and authorities of the indigenous peoples to play an active role in the formulation, implementation and evaluation of the States' criminal policies and that dialogue and cooperation relations be established between these authorities and ordinary justice.

When providing an answer to the questions raised by the Commission, the Court referred to the following aspects: (A) general consideration on the right to equality and non-discrimination, and the situation of indigenous persons deprived of liberty; (B) the preference for punishment other than imprisonment for indigenous persons deprived of liberty; (C) preservation of the cultural identity of indigenous persons deprived of liberty; (D) the use of indigenous languages during deprivation of liberty, and the adoption of culturally appropriate measures for rehabilitation and reintegration, and (E) prevention of violence against indigenous persons deprived of liberty.¹⁵⁰

- **Differentiated approaches applicable to older persons deprived of liberty**

In the Advisory Opinion on differentiated approaches with respect to certain groups of persons deprived of liberty and in relation to the specific Case of older persons deprived of liberty, the Court indicated that the special needs resulting from the aging process were exacerbated by the inherent vulnerability of the prison population. In addition, the Court noted that the process of aging may lead to situations of disability and, therefore, found it pertinent to include considerations in that regard.¹⁵¹

In the Advisory Opinion on differentiated approaches with respect to certain groups of persons deprived of liberty, the Court determined the specific obligations of States in order to ensure the rights of older persons deprived of liberty, addressing the following issues: (A) the need to adopt special measures to make effective the rights of older persons deprived of liberty; (B) the appropriateness of substitute or alternative measures to the execution of prison sentences for older persons; (C) the rights to accessibility and mobility of older persons deprived of liberty; (D) the right to health of older persons deprived of liberty; (E) the right of older persons deprived of liberty to outside contact with their families, and (F) the rehabilitation and social reinsertion of older persons deprived of liberty.¹⁵²

- **The obligation of State to maintain public order within their territory and respect for human rights**

In the Case of Tzompaxtle Tecpile et al. v. Mexico, the Court recalled that States have the obligation to guarantee security and maintain public order within their territory and that, consequently, they must take the necessary measures to fight organized crime, including measures that entail restrictions to, or even deprivation of, personal liberty. Despite this, the State does not have unlimited powers to achieve this end, regardless of the severity of certain actions and the guilt of the presumed perpetrators. In particular,

150 Differentiated approaches with respect to certain groups of persons deprived of liberty (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments. Advisory Opinion OC-29/22 of May 30, 2022. Series A No. 29.

151 Differentiated approaches with respect to certain groups of persons deprived of liberty (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments. Advisory Opinion OC-29/22 of May 30, 2022. Series A No. 29.

152 Differentiated approaches with respect to certain groups of persons deprived of liberty (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments. Advisory Opinion OC-29/22 of May 30, 2022. Series A No. 29.

the authorities may not violate the rights recognized in the American Convention, such as the rights to presumption of innocence, personal liberty, and due process, and they may not execute unlawful or arbitrary detentions.¹⁵³

- **Precautionary Measures that restrict liberty, the right not to be deprived of liberty arbitrarily, and the right to presumption of innocence**

In the Case of Tzompaxtle Tecpile et al. v. Mexico, the Court reiterated that, to comply with the requirements for restricting the right to personal liberty by means of a precautionary measure, such as pre-trial detention, sufficient evidence must exist to allow the reasonable suspicion that a wrongful act occurred and that the person subject to the procedure may have taken part in that wrongful act.¹⁵⁴ This presumption does not constitute, of itself, a legitimate purpose for applying a Precautionary Measures that restricts freedom, nor should it impair the right to the presumption of innocence contained in Article 8(2) of the Convention.¹⁵⁵ This should be understood taking into account that, in principle and in general terms, this decision should not have any impact on the responsibility of the accused, because it should be taken by a judge or authority other than the one who ultimately decides on the merits of the case.¹⁵⁶

The Court has considered that the suspicion or sufficient indications that permit a reasonable supposition that the person subject to the proceedings could have taken part in the wrongful act investigated should be based on specific facts; that is, not on mere conjectures or abstract intuition. Consequently, the State should not detain someone and then investigate him.¹⁵⁷

The Court reiterated that the judicial authority is responsible for imposing measures of this nature solely when it has verified that: (a) the purpose of the measures that deprive or restrict liberty is compatible with the Convention; (b) the measures adopted are appropriate to achieve the purpose sought; (c) they are necessary, in the sense that they are absolutely essential to achieve the purpose sought and that, among all possible measures, there is no less burdensome measure in relation to the right involved, that would be equally suitable to achieve the proposed objective, and (d) they are strictly proportionate, so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or excessive compared to the advantages obtained from this restriction and the achievement of the purpose sought.¹⁵⁸ The Court also recalled that the deprivation of the liberty of a person who is accused of, or being prosecuted for, an offense cannot be based on general or special preventive objectives attributable to the punishment.¹⁵⁹

The Court recalled that, pursuant to its consistent Case Law, a precautionary measure should only be imposed when it is necessary to meet a legitimate purpose, namely: that the accused will not impede the development of the proceedings or evade the action of justice. It has also underscored that procedural risk cannot be presumed, but must be verified in each case, based on the true and objective circumstances of each specific case.¹⁶⁰ Nor can the elements that prove the existence of the legitimate purposes be

153 Case of Tzompaxtle Tecpile et al. v. Mexico. Preliminary objection, Merits, Reparations and Costs. Judgment of November 7, 2022. Series C No. 470, para. 95.

154 Case of Tzompaxtle Tecpile et al. v. Mexico. Preliminary objection, Merits, Reparations and Costs. Judgment of November 7, 2022. Series C No. 470, para. 100.

155 Case of Tzompaxtle Tecpile et al. v. Mexico. Preliminary objection, Merits, Reparations and Costs. Judgment of November 7, 2022. Series C No. 470, para. 101.

156 Case of Tzompaxtle Tecpile et al. v. Mexico. Preliminary objection, Merits, Reparations and Costs. Judgment of November 7, 2022. Series C No. 470, para. 102.

157 Case of Tzompaxtle Tecpile et al. v. Mexico. Preliminary objection, Merits, Reparations and Costs. Judgment of November 7, 2022. Series C No. 470, para. 103.

158 Case of Tzompaxtle Tecpile et al. v. Mexico. Preliminary objection, Merits, Reparations and Costs. Judgment of November 7, 2022. Series C No. 470, para. 105.

159 Case of Tzompaxtle Tecpile et al. v. Mexico. Preliminary objection, Merits, Reparations and Costs. Judgment of November 7, 2022. Series C No. 470, para. 104.

160 Case of Tzompaxtle Tecpile et al. v. Mexico. Preliminary objection, Merits, Reparations and Costs. Judgment of November 7, 2022. Series C No. 470, para. 106.

presumed, but must also be based on the true and objective circumstances of each specific case, which must be verified by the prosecution and not the accused, who also must be able to exercise the right of defense, and be duly assisted by a lawyer. Furthermore, the Court has indicated that the seriousness of the offense with which the accused is charged is not, of itself, sufficient justification for pre-trial detention.¹⁶¹

Additionally, the Court indicated that, since deprivation of liberty is a measure that involves a restriction of the sphere of individual action, the judicial authority who imposes this measure must be required to do so only when he considers that the other mechanisms established by law, which entail less interference in individual rights, are insufficient to meet the procedural purpose.¹⁶² Moreover, alternative measures must be available and a measure that restricts liberty may only be imposed when it is not possible to use alternative measures to mitigate its effects. In addition, the Court has indicated that the authorities must consider alternative measures to guarantee appearance at the trial.¹⁶³

The Court has also indicated—in cases in which measures involving deprivation of liberty have been imposed—that Article 5 of the American Convention establishes temporal limits to its duration. Consequently, when the length of pre-trial detention exceeds a reasonable time, the liberty of the accused should be restricted by other less harmful measures that ensure his/her presence at the trial.¹⁶⁴

- **Pre-trial mechanisms that restrict the liberty of a person for investigation purposes**

In the Case of Tzompaxtle Tecpile et al. v. Mexico, the Court indicated that any pre-trial mechanism that seeks to restrict a person's liberty in order to investigate offenses that they may have committed, is intrinsically contrary to the provisions of the American Convention and expressly violates the rights to personal liberty and the presumption of innocence.¹⁶⁵ In this regard, the Court recalled that anyone who, by means of an investigation or a trial, is suspected of being the perpetrator or participant in a wrongful act, is entitled to the guarantees of due process.¹⁶⁶ Consequently, and in relation to the mechanism of custody (arraigo) as a pre-trial restrictive measure for investigation purposes, the Court understood that this is incompatible with the American Convention, because the premises that define its inherent characteristics fail to harmonize with the rights to personal liberty and the presumption of innocence.¹⁶⁷

- **House searches**

In the Case of Tzompaxtle Tecpile et al. v. Mexico, the Court recalled the right to personal privacy and indicated that the sphere of personal and family privacy is characterized by being exempt from arbitrary or abusive interference or attack by third parties or public authorities. In light of this, the Court recalled that the belongings that a person carries with them when outside his/her home, even when that person is inside a vehicle, are possessions that, similarly to those that are inside his/her home, are included in the

161 Case of Tzompaxtle Tecpile et al. v. Mexico. Preliminary objection, Merits, Reparations and Costs. Judgment of November 7, 2022. Series C No. 470, para. 108.

162 Case of Tzompaxtle Tecpile et al. v. Mexico. Preliminary objection, Merits, Reparations and Costs. Judgment of November 7, 2022. Series C No. 470, para. 110.

163 Case of Tzompaxtle Tecpile et al. v. Mexico. Preliminary objection, Merits, Reparations and Costs. Judgment of November 7, 2022. Series C No. 470, para. 111.

164 Case of Tzompaxtle Tecpile et al. v. Mexico. Preliminary objection, Merits, Reparations and Costs. Judgment of November 7, 2022. Series C No. 470, para. 112.

165 Case of Tzompaxtle Tecpile et al. v. Mexico. Preliminary objection, Merits, Reparations and Costs. Judgment of November 7, 2022. Series C No. 470, para. 171.

166 Case of Tzompaxtle Tecpile et al. v. Mexico. Preliminary objection, Merits, Reparations and Costs. Judgment of November 7, 2022. Series C No. 470, para. 125.

167 Case of Tzompaxtle Tecpile et al. v. Mexico. Preliminary objection, Merits, Reparations and Costs. Judgment of November 7, 2022. Series C No. 470, para. 216.

sphere of protection of the right to private life and privacy. Therefore, they cannot be subject to arbitrary interference by third parties or authorities.¹⁶⁸

In the Case of Tzompaxtle et al. v. México, the Court examined whether the domestic authorities had the authority, conferred by a ley or regulations, to carry out vehicle searches. On this point, the Court noted that the State had not mentioned any norm that authorized the authorities to conduct vehicle searches, and had merely alluded to the authorization of the driver of the vehicle and to “discharge of functions.”¹⁶⁹

In addition, the Court referred to what constitutes “the reasonable suspicion” that an offense has been committed to execute this type of search and recalled, as indicated by the European Court of Human Rights, that this presupposes the existence of “some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence.”¹⁷⁰

ARTICLES 8 AND 25 (JUDICIAL GUARANTEES)

- **Judicial independence and its applicability to prosecutors owing to the nature of their functions**

In the Case of Nissen Pessolani v. Paraguay, the Court reiterated that its Case Law has established that the guarantee of tenure and irremovability of Judges, aimed at safeguarding their independence, is also applicable to prosecutors owing to the nature of their functions. Thus, regarding the specific function of prosecutors, on different occasions, the Court has referred to the need – in relation to human rights violations and, in general, in criminal matters – for States to guarantee an independent and objective investigation. The Court has emphasized that the authorities in charge of the investigation must enjoy independence, *de iure* and *de facto*, and this requires “not only hierarchical or institutional independence, but also real independence.”¹⁷¹

The Court has underscored that prosecutors execute functions of agents of justice and, in this capacity, need to enjoy, *inter alia*, guarantees of employment stability as an essential condition of their independence in order to comply satisfactorily with their procedural functions. Therefore, they are protected by the guarantees of a proper appointment, irremovability from office, and to be protected against external pressures. Otherwise, the independence and objectivity are jeopardized that are required of their function as principles aimed at ensuring that the investigations conducted and the claims made before the Courts are addressed exclusively at achieving justice in each specific case, in keeping with the provision of Article 8 of the Convention. It should be added that the Court has specified that the absence of a guarantee of irremovability for prosecutors – which makes them vulnerable to reprisals for the decisions they take – results in a violation of the independence that is guaranteed by Article 8(1) of the Convention. In this regard, in the Judgments in the Case of Martínez Esquivia v. Colombia and Casa Nina v. Peru, the Court established that the independence recognized to prosecutors constitutes the guarantee that they will not be subject to political pressures or undue interferences in their actions, or to reprisals for the decisions that they have objectively taken, and this requires, precisely, the guarantee of stability in office and irremovability.

168 Case of Tzompaxtle Tecpile et al. v. Mexico. Preliminary objection, Merits, Reparations and Costs. Judgment of November 7, 2022. Series C No. 470, para. 189.

169 Case of Tzompaxtle Tecpile et al. v. Mexico. Preliminary objection, Merits, Reparations and Costs. Judgment of November 7, 2022. Series C No. 470, para. 191.

170 Case of Tzompaxtle Tecpile et al. v. Mexico. Preliminary objection, Merits, Reparations and Costs. Judgment of November 7, 2022. Series C No. 470, para. 191.

171 Case of Nissen Pessolani v. Paraguay. Merits, Reparations and Costs. Judgment of November 21, 2022. Series C No. 477, para. 57.

Based on the foregoing considerations, the Court reiterated that, for prosecutors, the guarantee of stability in office and irremovability meant: (i) that removal from office should be based exclusively on the permitted causes, either by a procedure that complies with judicial guarantees or because the mandate has ended; (ii) that prosecutors may only be dismissed due to serious disciplinary offenses or incompetence, and (iii) that any procedure must be decided pursuant to the norms established for judicial conduct and by just proceedings that ensure objectivity and impartiality pursuant to the Constitution or the law.¹⁷²

- **Right to a competent and independent Judge**

In the Case of Nissen Pessolani v. Paraguay, the Court reiterated that it had already examined cases related to the removal of judicial authorities by joint bodies, with the participation of parliamentarians, and had analyzed the possible interferences with the principle of judicial independence that they could engender. In this regard, the Court indicated that the guarantees of due process established in the American Convention are applicable to the substantiation of this type of procedure. Thus, Article 8 of the Convention establishes guidelines for due process of law, which refers to the series of requirements that should be observed by the procedural instances to ensure that individuals are able to defend their rights adequately against any act of the State that could affect them. In this regard, in its consistent Case Law, the Court has indicated that any public authority, whether administrative, legislative or judicial, whose decisions could have an impact on a person's rights, is required to take such decisions with full respect for the guarantees of due process of law.¹⁷³

- **The alleged violation of the guarantee of an impartial Judge**

In the Case of Nissen Pessolani v. Paraguay, the Court recalled that it had established that impartiality requires the judicial authority who intervenes in any specific dispute to approach the facts of the case subjectively free of all prejudice and also to offer sufficient objective guarantees to exclude any doubt the parties or the community might entertain as to his or her lack of impartiality. This guarantee means that the members of the Court, and the judge in charge of the proceedings, do not have a direct interest, a pre-conceived position, or a preference for any of the parties and are not involved in the dispute, but rather act only and exclusively in accordance with the law.¹⁷⁴

Personal or subjective impartiality is to be presumed unless there is evidence to the contrary and this consists, for example, in the demonstration that any member of the Court, or the competent authority, has prejudices or biases of a personal nature against the litigants. In turn, the so-called objective approach test consists in determining whether the judge in question has offered sufficient elements of conviction to exclude any legitimate misgivings or well-grounded suspicion of partiality regarding a person. The Court has also indicated that disqualification is a procedural instrument that protects the right to be tried by an impartial judge or court, while seeking to grant credibility to Jurisdictional functions.¹⁷⁵

In proceedings instituted against judicial authorities, which could eventually lead to their removal, the guarantee of irremovability that protects them, to safeguard their independence, requires that such proceedings are processed and decided objectively and impartially; in other words, as required by the guarantees of due process.¹⁷⁶

172 Case of Nissen Pessolani v. Paraguay. Merits, Reparations and Costs. Judgment of November 21, 2022. Series C No. 477, para. 59.

173 Case of Nissen Pessolani v. Paraguay. Merits, Reparations and Costs. Judgment of November 21, 2022. Series C No. 477, para. 61.

174 Case of Nissen Pessolani v. Paraguay. Merits, Reparations and Costs. Judgment of November 21, 2022. Series C No. 477, para. 64.

175 Case of Nissen Pessolani v. Paraguay. Merits, Reparations and Costs. Judgment of November 21, 2022. Series C No. 477, para. 65.

176 Case of Nissen Pessolani v. Paraguay. Merits, Reparations and Costs. Judgment of November 21, 2022. Series C No. 477, para. 66.

• Due diligence in the investigation of violence against human rights defenders

In the Case of Sales Pimenta v. Brazil, the Court recalled that, in Cases of attacks against human rights defenders, States have the obligation to investigate the violations committed against them seriously and effectively, combat impunity, and ensure impartial, prompt and diligent justice. This entails an exhaustive search for all the information in order to prepare and execute an investigation that leads to the proper analysis of all the hypotheses regarding the authorship, by act or omission at different levels, exploring all pertinent lines of investigation to identify the perpetrators. Consequently, in the presence of indications or allegations that the specific motive for a particular act against a human rights defender could be his work of the defense and promotion of human rights, the investigating authorities should take into account the context of the facts and his activities to identify the interests that could have been affected, in order to establish and exhaust the lines of investigation that take this into account, determine the reason for the crime, and identify the perpetrators.¹⁷⁷

Due to the essential role that human rights defenders play during the daily exercise of their activities to promote and protect human rights, the Court reiterated the existence of an enhanced obligation of due diligence with regard to the investigation into the death of defenders.¹⁷⁸

In the Case of Sales Pimenta v. Brazil, the Court also underscored that compliance with the State duty to create the necessary conditions for the effective enjoyment and exercise of the rights established in the Convention was intrinsically linked to the recognition and protection of the important role that human rights defenders play, since their work is fundamental for the strengthening of democracy and the Rule of Law. The Court also recalled that their monitoring, reporting and educational activities make an essential contribution to respect for human rights, because they act as guarantors against impunity. Thus, they supplement the role, not only of the States, but also of the Inter-American human rights system as a whole. In this regard, the Court emphasized the need to eradicate the impunity surrounding acts of violence against human rights defenders, because this is essential to guarantee that they are able to carry out their work freely and safely.¹⁷⁹

The Court underlined that violence against human rights defenders has a chilling effect, especially when offenses remain unpunished. Thus, it reiterated that threats and attacks on the integrity and life of human rights defenders and the impunity of those responsible for such acts are particularly serious, because the impact is not only individual, but also collective, insofar as society is prevented from knowing the truth about the situation of, respect for, or violation of, the rights of people subject to the jurisdiction of a specific State.¹⁸⁰

• Environmental defenders

In the Case of Baraona Bray v. Chile, the Court reiterated that the condition of human rights defender derives from their work in this area, irrespective of whether the person who does this work is a private individual or a public official, or whether the defense is exercised in relation to the civil and political rights, or to the economic, social, cultural and environmental rights. The Court also noted that the activities of promotion and protection of human rights can be executed intermittently or occasionally, so that the condition of human rights defender is not necessarily a permanent situation.¹⁸¹

177 Case of Sales Pimenta v. Brazil. Preliminary objection, Merits, Reparations and Costs. Judgment of June 30, 2022. Series C No. 454, para. 86.

178 Case of Sales Pimenta v. Brazil. Preliminary objection, Merits, Reparations and Costs. Judgment of June 30, 2022. Series C No. 454, para. 87.

179 Case of Sales Pimenta v. Brazil. Preliminary objection, Merits, Reparations and Costs. Judgment of June 30, 2022. Series C No. 454, para. 88.

180 Case of Sales Pimenta v. Brazil. Preliminary objection, Merits, Reparations and Costs. Judgment of June 30, 2022. Series C No. 454, para. 89.

181 Case of Baraona Bray v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2022, para. 71.

The definition of a human rights defender is broad and flexible owing to the very nature of the activity. Therefore, any person who carries out an activity to promote and defend any human right and refers to himself or herself in this way or who is recognized as such by society, should be considered a human rights defender. This category evidently includes environmental defenders, also known as environmental human rights defenders or human rights defenders in environmental matters.¹⁸²

The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) is the first international instrument to refer expressly to these defenders. The Agreement contains a general definition of environmental defenders based on their work. Thus, it defines them as “persons, groups and organizations that promote and defend human rights in environmental matters.”¹⁸³

Similarly, in his report on the situation of human rights defenders, a former United Nations Special Rapporteur indicated that “[t]he term ‘environmental human rights defenders’ refers to individuals and groups who, in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights relating to the environment, including water, air, land, flora and fauna.” According to the report, regardless of the work they do, defenders are defined, above all, by their actions to protect environmental and land rights.¹⁸⁴

In addition, the Court noted that numerous international instruments have referred to the importance of the work done by human rights and environmental defenders; the situation of vulnerability in which they may find themselves, and the need to provide them with special protection. At the regional level, the General Assembly of the Organization of American States has recognized and supported the work of human rights defenders and their valuable contribution to the promotion, respect for, and protection of fundamental rights and freedoms in the Americas. Thus, the Assembly has urged States “to persist in their efforts to provide [them] with the necessary guarantees and facilities to continue freely carrying out their task.” In addition, the former United Nations Special Rapporteur on the situation of human rights defenders considered that States should “vigilantly protect defenders from intimidation, criminalization and violence, diligently investigate, prosecute and punish the perpetrators of these crimes [...]” and “establish a safe and encouraging climate for defenders to act without threats, harassment, intimidation or violence.” All this in the understanding that defenders are unable to defend rights related to the environment adequately, if they are unable to exercise their own rights of access to information, and freedom of expression, peaceful Assembly and association, with guarantees of non-discrimination and participation in decision-making.¹⁸⁵

Meanwhile, the United Nations Human Rights Council has recognized the important role of human rights defenders, including environmental human rights defenders “in supporting States to fulfil their obligations under the Paris Agreement and to realize the 2030 Agenda for Sustainable Development” and, therefore, emphasized that they “must be ensured a safe and enabling environment to undertake their work free from hindrance and insecurity.”¹⁸⁶

In this regard, article 9 of the Escazú Agreement establishes the obligation of States parties to “guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity.” It also establishes that States must “take adequate and effective measures to recognize, protect and promote” all their rights, “including their right to life, personal integrity, and freedom of opinion and

182 Case of Baraona Bray v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2022, para. 72.

183 Case of Baraona Bray v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2022, para. 73.

184 Case of Baraona Bray v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2022, para. 74.

185 Case of Baraona Bray v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2022, para. 75.

186 Case of Baraona Bray v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2022, para. 76.

expression.” Among the general provisions, it also establishes that each State party must ensure that the rights recognized in the Agreement are freely exercised (2) and guarantee an enabling environment for the work of persons, associations, organizations or groups that promote environmental protection, by recognizing and protecting them (6). In particular, the Escazu Agreement takes into consideration the Agenda 2030 for Sustainable Development and the Sustainable Development Goals (SDGs), and recalls the commitment to achieving sustainable development in its three dimensions – economic, social and environmental – in a balanced and integrated manner. Furthermore, it recalls that the outcome document of the 2012 United Nations Conference on Sustainable Development, entitled “The future we want” acknowledged that democracy, good governance and the Rule of Law are essential for sustainable development.¹⁸⁷

The Court considered that respect for and guarantee of the rights of human rights defenders in environmental matters, in addition to being a commitment acquired by the States parties to the American Convention – since such defenders are persons subject to their jurisdiction – is of special importance, because they play a fundamental role “for strengthening democracy and the Rule of Law.”¹⁸⁸

In the Case of *Baraona Bray v. Chile*, the Court considered that, given the importance of their work, the free and full exercise of the said rights imposes on States the duty to create legal and factual conditions in which they are able to perform their task freely. This is particularly relevant if the interdependence and indivisibility of human rights and the protection of the environment is taken into account and also the difficulties associated with the defense of the environment in the countries of the region, in which a growing number of reports can be observed of threats, acts of violence, and the murder of environmentalists due to their work.¹⁸⁹

• The duty of enhanced due diligence in Cases of violence against girls

In the Case of *Angulo Losada v. Bolivia*, the Court recalled that, in Cases of violence against women, the general obligations established in Articles 8 and 25 of the American Convention are supplemented and reinforced by the obligations resulting from the Convention of Belém do Pará. Article 7(b) of the Convention specifically obliges the States parties to “apply due diligence to prevent, investigate and impose penalties for violence against women.” In turn, Article 7(f) indicates that States must “establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures.” Thus, when an act of violence is committed 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 ensure that victims have confidence in the state institutions created to protect them.¹⁹⁰

In the Case of *Angulo Losada v. Bolivia*, the Court considered that, with regard to the guarantees established in Articles 8 and 25 of the Convention, these are recognized to everyone equally, and should be correlated with the specific rights established in the Convention, and with Article 19, so that they are reflected in any administrative or judicial proceedings in which the rights of the child are examined. In this regard, in compliance with Article 19 of the American Convention, States should adopt special and specific measures in cases in which the victim is a child or adolescent, especially when an act of sexual violence has occurred and, especially, in Cases of rape, without prejudice to the standards established for Cases of

187 Case of *Baraona Bray v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2022, para. 77.

188 Case of *Baraona Bray v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2022, para. 78.

189 Case of *Baraona Bray v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2022, para. 79.

190 Case of *Angulo Losada v. Bolivia*. Preliminary Objections, merits and reparations. Judgment of November 18, 2022. Series C No. 475, para. 94.

sexual violence and rape involving adult women. Consequently, the violations of a girl child's rights must be examined based not only on international instruments concerning violence against women, but also in light of the international corpus juris for the protection of children, which should define the content and scope of the obligations that the State must assume when analyzing the rights of persons under 18 years of age and, in this specific case, the enhanced state obligation of due diligence.¹⁹¹

Thus, the Court underscored that the special measures of protection that the State must adopt are based on the fact that children and adolescents are considered to be more vulnerable to human rights violations. This is also determined by different factors, such as the age, specific situation, and level of development and maturity of each child or adolescent. As expert witness Cillero stated, age is a potential factor of discrimination because "owing to their age, children and adolescents do not have social and legal legitimacy to take important decisions on matters relating to education, health, and their sexual and reproductive rights." In addition, as the Court has already pointed out, in the Case of girl children, this vulnerability to human rights violations may be inserted in and increased by historical discrimination factors which have contributed to the fact that women and girls suffer higher rates of sexual violence, especially within the family.¹⁹² As the Court has indicated, the duty to guarantee rights acquires special emphasis when girls are victims of a crime of sexual violence and participate in the investigations and criminal proceedings, as in the instant case.¹⁹³

In the Case of Angulo Losada v. Bolivia, the Court indicated that, although the right to due process and its correlative guarantees are applicable to everyone, in the Case of children and adolescents, due to the special protection derived from Article 19 of the Convention, the exercise of those rights supposes – owing to their special situation – the adoption of certain specific measures in order to ensure access to justice in conditions of equality, guarantee effective due process, and ensure that the best interests of the child are the primary consideration in all the administrative or judicial decisions adopted.¹⁹⁴ As the Court has already indicated, the participation in criminal proceedings of children and adolescents, victims of crime, may be necessary to contribute to the effective development of the proceedings; however, from the very start and throughout the proceedings, they must be provided with information on the proceedings, and on the services of legal aid, physical and mental health care and other measures of protection available.¹⁹⁵

In the Case of Angulo Losada v. Bolivia, the Court recalled that it had already indicated that child and adolescent victims, particularly of sexual violence, may suffer serious physical, psychological and emotional consequences as a result of the act that violated their rights, and also revictimization at the hands of the State's organs due to their participation in criminal proceedings, the function of which is precisely the protection of their rights. In this regard, if it is considered that the participation of the child or adolescent is necessary and can contribute to the gathering of probative material, revictimization must be avoided at all times, and the procedures and actions in which their participation is considered to be strictly necessary must be limited; moreover, their presence and interaction with their aggressor must be avoided during the procedures ordered. Thus, all the officials and authorities who intervene in the investigations and the criminal proceedings related to sexual violence must pay particular attention to

191 Case of Angulo Losada v. Bolivia. Preliminary Objections, merits and reparations. Judgment of November 18, 2022. Series C No. 475, para. 99.

192 Case of Angulo Losada v. Bolivia. Preliminary Objections, merits and reparations. Judgment of November 18, 2022. Series C No. 475, para. 100.

193 Case of Angulo Losada v. Bolivia. Preliminary Objections, merits and reparations. Judgment of November 18, 2022. Series C No. 475, para. 101.

194 Case of Angulo Losada v. Bolivia. Preliminary Objections, merits and reparations. Judgment of November 18, 2022. Series C No. 475, para. 102.

195 Case of Angulo Losada v. Bolivia. Preliminary Objections, merits and reparations. Judgment of November 18, 2022. Series C No. 475, para. 103.

preventing the victims from suffering further harm during such proceedings. During the investigation and the judicial proceedings, child and adolescent victims should not only be treated in a way that is adapted to them, but also with sensitivity, “taking into account their personal situation, their needs, their age, their sex, their disability, and their level of maturity, and fully respecting their physical, mental and moral integrity.” In this regard, the Court agreed with the opinion expressed by expert witness Cillero during the hearing that “women victims of sexual crimes, and child and adolescent victims of sexual crimes, are at a huge disadvantage in criminal proceedings, as a result of the traumas they have suffered”; therefore, it is necessary that “empathetic neutrality” should exist in the relations between the officials of the system of justice and the victims of sexual violence.¹⁹⁶

In the Case of Angulo Losada v. Bolivia, the Court reiterated that sexual violence is an extremely traumatic experience that may have severe consequences and cause great physical and mental harm. It leaves the victim “physically and emotionally humiliated,” a situation that it is difficult to overcome with the passage of time, contrary to other traumatic experiences. In the Case of child and adolescent victims of sexual violence, this impact could be severely aggravated, so that they may suffer a differentiated emotional trauma to that of adults, and an extremely profound impact, in particular when a bond of trust and authority exists between the aggressor and the victim, such as in the Case of a parent or other adult in the family who has a caregiving or supervising relationship with the victim. Therefore, the Court recalls the importance of adopting a care protocol addressed at reducing the consequences on the victim’s bio-psychosocial well-being. In this regard, the Court has indicated that, in Cases of sexual violence, the State must, on being informed of the facts, provide, immediately and free of charge, professional assistance, both medical and psychological and/or psychiatric by a professional with specific training on attending victims of this type of crime and with a child- and gender-based approach. The support must be maintained throughout the criminal proceedings, endeavoring to ensure that it is the same professional who accompanies the child or adolescent. It is extremely important that, in the course of the proceedings and the support services, the age, level of maturity and understanding, gender, sexual orientation, socio-economic level, and aptitudes and capacities of the child or adolescent are taken into account, as well as any other special factor or need.¹⁹⁷

Consequently, in the Case of Angulo Losada v. Bolivia, the Court established that States should guarantee: (i) that any proceedings take place in an environment that is not intimidating, hostile, insensitive or inappropriate to the age of the child or adolescent; (ii) that the personnel responsible for receiving the narrative of the facts (including administrative, judicial and prosecutorial authorities, and health personnel) are fully qualified, so that the children or adolescents feel respected and safe when giving their account of what happened and expressing their opinion, and also in an appropriate physical, mental and emotional environment that allows them to recount the events that occurred or their experiences in the manner of their choice, without the personnel using an offensive, discriminatory or stigmatizing language; (iii) that, throughout the proceedings, the children or adolescents are treated with tact and sensitivity, explaining to them the reasons for and utility of the procedures that will be conducted or the nature of the expert appraisals to which they will be subjected, always based on their age, level of maturity and development, and in keeping with their right to information; (iv) that, if appropriate, the privacy and the confidentiality of the information provided by children and adolescents who are victims of sexual violence will be respected, always avoiding their participation in an excessive number of interventions or their exposure to the public, adopting the necessary measures to avoid causing them suffering during the proceedings and subjecting

196 Case of Angulo Losada v. Bolivia. Preliminary Objections, merits and reparations. Judgment of November 18, 2022. Series C No. 475, para. 104.

197 Case of Angulo Losada v. Bolivia. Preliminary Objections, merits and reparations. Judgment of November 18, 2022. Series C No. 475, para. 105.

them to further harm; (v) that the interview with the child or adolescent victim of sexual violence, which should be videotaped, is conducted by a qualified psychologist or a professional in a similar field duly qualified to take this type of statement, and that they cannot be questioned directly by the Court or the parties; (vi) that the interview rooms provide an environment that is safe and not intimidating, hostile or inappropriate, and that offers privacy and inspires confidence in the victims, and (vii) that children and adolescents are not interviewed more than strictly necessary, based on their best interests, to avoid revictimization or a traumatic impact.¹⁹⁸

Regarding the physical examination, in the Case of Angulo Losada v. Bolivia, the Court recalled that it had already ruled that authorities must avoid, insofar as possible, subjecting victims to more than one physical evaluation, which could be revictimizing. In these cases, the medical examination must be performed by a professional with extensive knowledge and experience in Cases of sexual violence against children and adolescents, who will try and minimize or avoid causing them additional trauma or revictimizing them. It is recommendable that the victim or, if appropriate their legal representative, is able to choose the sex of the examiner, and that the examination is performed by a specialist in pediatric and adolescent gynecology with specific training in forensic medical examinations in Cases of sexual abuse and rape. In addition, the medical examination must only be performed following the informed consent of the victim, or their legal representative, in accordance with their level of maturity, taking into account the right of the child to be heard, in an appropriate place, respecting intimacy and privacy, and permitting the victim to be accompanied by a person of their confidence. Likewise, a record of the examination must be drawn up which includes the information provided by the victim prior to the examination and during this, and also a record of the victim's informed consent to each stage of the examination. This record should be signed by the specialist who performs the examination, the victim or their legal representative, and the person of confidence who accompanies the victim. The need for a gynecological examination should be considered on a case-by-case basis, taking into account the time that has passed since the moment at which it is alleged that the sexual violence occurred. Consequently, the Court considered that the request for a gynecological examination should be justified in detail and, if it is not required or it is not possible to obtain the victim's informed consent, the examination should be omitted; however, this can never serve as an excuse to discredit and/or prevent an investigation.¹⁹⁹

• Consent in crimes of sexual violence, and access to justice

In the Case of Angulo Losada v. Bolivia, the Court endorsed the position of diverse international bodies and considered that the criminal laws on sexual violence should include the need for consent as the central element. In other words, for rape to have been committed, evidence of threats, use of force or physical violence should not be required; rather it should be sufficient that it is shown, with any appropriate type of evidence, that the victim did not consent to the sexual act. The definition of crimes relating to sexual violence should focus on consent, as an essential element in access to justice by women victims of sexual violence. Therefore, it is not necessary to prove resistance to the physical assault, but rather the absence of consent, based on Article 7 of the Convention of Belém do Pará. It should be underscored that it can only be understood that consent has been given when this has been freely indicated by acts that, in keeping with the circumstances of the case, clearly express the person's willingness – either by verbal consent, or because this consent can be inferred from a conduct plainly identifiable as voluntary participation.²⁰⁰

198 Case of Angulo Losada v. Bolivia. Preliminary Objections, merits and reparations. Judgment of November 18, 2022. Series C No. 475, para. 106.

199 Case of Angulo Losada v. Bolivia. Preliminary Objections, merits and reparations. Judgment of November 18, 2022. Series C No. 475, para. 107.

200 Case of Angulo Losada v. Bolivia. Preliminary Objections, merits and reparations. Judgment of November 18, 2022. Series C No. 475, para. 145.

In the Case of Angulo Losada v. Bolivia, the Court indicated that the importance of the role of consent in situations of sexual violence is also justified by the high number of cases in which the sexual abuse occurs when the relations between victim and aggressor are marked by asymmetrical power. Such power is used by the dominant partner to subdue the victim through acts committed, for example, in institutional surroundings – the workplace or an educational setting – and through economic deprivation. Often, in these situations, it is likely that there is no physical violence and that the victim does not expressly reject the sexual act, “but the violation occurs because consent is assumed in situations of unequal power.”²⁰¹

Also, in the Case of Angulo Losada v. Bolivia, the Court indicated that there are situations in which there are flaws in the consent, and recognized that the absence of a legal definition of psychological violence, for example, hinders the possibility of investigating rape. In this regard, in keeping with MESCEVI General Recommendation No. 3, the Court considered it essential that States include in their criminal law criteria that makes it possible to determine the absence of consent in a sexual act, such as: (a) use of or threat to use force; (b) coercion or fear of violence or of the consequences; (c) intimidation; (d) arrest and/or deprivation of liberty; (e) psychological oppression; (f) abuse of power, and (g) inability to understand sexual violence.²⁰²

The Court also found it necessary that criminal laws also establish that consent may not be inferred: (i) when force, threat of force, coercion or exploitation of a coercive environment have diminished the victim’s ability to give voluntary and free consent; (ii) when the victim is unable to give free consent; (iii) based on the victim’s silence or lack of resistance to sexual violence, and (iv) when there is a power relationship that forces the victim to act out of fear of the consequences, and that exploits a coercive environment.²⁰³

In the Case of Angulo Losada v. Bolivia, the Court considered that it was essential that laws on crimes of sexual violence establish that consent cannot be inferred, but must always be given expressly and freely prior to the act, and that it is reversible. Based on this premise, as the Court has already indicated, in the presence of “any type of coercive situation there is no longer any need to invoke the mechanism of consent because that situation evidently eliminates consent.”²⁰⁴

In this regard, in the Case of Angulo Losada v. Bolivia, the Court reiterated its findings in other cases to the effect that no reference to the victim’s consent to sexual relations should be made when the aggressor represents a figure of authority for the victim because there is an imbalance of power that is aggravated by the difference of age between the victim and the aggressor. In such cases, what might appear to be the victim’s consent may not be valid due precisely to the imbalance of power in the relationship which is revealed by the victim’s submission.²⁰⁵

• Intervention and limits to the military criminal jurisdiction

In the Case of Casierra Quiñonez et al. v. Ecuador, the Court recalled its consistent Case Law regarding the restriction of the military jurisdiction from examining facts that constitute human rights violations, to the effect that, under the democratic Rule of Law, the military criminal jurisdiction must have a restrictive and exceptional scope, and be directed at the protection of special legal interests relating to the functions

201 Case of Angulo Losada v. Bolivia. Preliminary Objections, merits and reparations. Judgment of November 18, 2022. Series C No. 475, para. 146.

202 Case of Angulo Losada v. Bolivia. Preliminary Objections, merits and reparations. Judgment of November 18, 2022. Series C No. 475, para. 147.

203 Case of Angulo Losada v. Bolivia. Preliminary Objections, merits and reparations. Judgment of November 18, 2022. Series C No. 475, para. 148.

204 Case of Angulo Losada v. Bolivia. Preliminary Objections, merits and reparations. Judgment of November 18, 2022. Series C No. 475, para. 149.

205 Case of Angulo Losada v. Bolivia. Preliminary Objections, merits and reparations. Judgment of November 18, 2022. Series C No. 475, para. 151.

inherent to the armed forces. Consequently, the Court has indicated that the military jurisdiction should only try military personnel on activity duty for the perpetration of crimes or misdemeanors that, by their very nature, violate the specific legal interest of the military forces. The fact that the individuals involved are members of the armed forces or that the events occurred within a military establishment does not mean, *per se*, that military justice should intervene. This is because, owing to the nature of the crime and the legal interest violated, the military criminal jurisdiction is not the competent jurisdiction to investigate and, if appropriate, prosecute and punish the perpetrators of human rights violations; to the contrary, the prosecution of those responsible always corresponds to the common or ordinary system of justice. In the Case of Grijalva Bueno v. Ecuador, the Court pointed out that officers of the military criminal jurisdiction “were hierarchically subordinate to the Executive Branch and, therefore, were not independent judges.”²⁰⁶

The Court has indicated that when the military justice assumes jurisdiction over a matter that should be heard by the ordinary justice system, the right to a natural judge is impaired and, *a fortiori*, due process, which is closely linked to the right of access to justice itself. The judge in charge of hearing a case must be competent, and also independent and impartial. In this sense, the victims of human rights violations and their families have the right that such violations are heard and decided by a competent court, in accordance with due process and access to justice, which, evidently, was not guaranteed to the alleged victims in this specific case.²⁰⁷

The Court emphasized that the State had acknowledged that both the investigation and the proceedings before the military criminal jurisdiction were not in accordance with Inter-American standards, given the lack of competence of that jurisdiction to hear facts related to human rights violations. Thus, the Court found that the ordinary judge's disqualification from hearing the case, the time during which the case was heard by the military jurisdiction, and the latter's decision to dismiss the case, subsequently confirmed – which has determined that the facts have not yet been clarified and the pertinent responsibilities have not yet been established – constituted violations of the guarantee of a natural judge and also the rights to due process and to access to justice of the alleged victims.

Given the arguments made, the Court recalls that States can establish truth commissions, which contribute to the construction and preservation of the historical memory, the clarification of facts, and the determination of institutional, social and political responsibilities during certain historical periods of a society. However, this neither completes nor replaces the obligation of the State to determine the truth through judicial proceedings.²⁰⁸

- **Rights to prior detailed notification of the charges, to adequate time and means for the preparation of the defense, and to appeal the sentence**

In the Case of Mina Cuero v. Ecuador, the Court reiterated that, even though Article 8 of the American Convention is entitled “Right to a Fair Trial,” its application is not limited to judicial proceedings *stricto sensu*, “but rather [to the] series of requirements that must be observed by procedural instances, whatsoever their nature,” to ensure that individuals are able to defend themselves adequately from any act of the State that may affect their rights. Therefore, any act or omission of the state organs in the course of proceedings, whether these are punitive administrative or jurisdictional proceedings, must respect due process of law.²⁰⁹

206 Case of Casierra Quiñonez et al. v. Ecuador. Preliminary objection, Merits, Reparations and Costs. Judgment of May 11, 2022. Series C No. 450, para. 149.

207 Case of Casierra Quiñonez et al. v. Ecuador. Preliminary objection, Merits, Reparations and Costs. Judgment of May 11, 2022. Series C No. 450, para. 151.

208 Case of Casierra Quiñonez et al. v. Ecuador. Preliminary objection, Merits, Reparations and Costs. Judgment of May 11, 2022. Series C No. 450, para. 154.

209 Case of Mina Cuero v. Ecuador. Preliminary objection, Merits, Reparations and Costs. Judgment of September 7, 2022. Series C No. 464, para. 80.

With regard to the right to be heard, established in Article 8(1) of the Convention, the Court has interpreted this in the general sense of understanding the right of everyone to have access to the state body or organ responsible for determining their rights and obligations. Regarding this right, the Court reiterated that victims must have extensive possibilities of being heard and acting in the respective proceedings, so that they are able to set out their claims and present evidence, and that these are examined fully and effectively by the authorities before a decision is taken on facts, responsibilities, penalties and reparations.²¹⁰

Meanwhile, Article 8(2) of the Convention establishes the minimum guarantees that States must ensure based on due process of law. In its Case Law, the Court has ruled law on the scope of this article and has established that it is not limited to criminal proceedings, but extends, if applicable, to administrative proceedings against state authorities and to non-criminal judicial proceedings in the labor, administrative and constitutional sphere. It has also indicated that, both in the foregoing and in other matters, “the individual also has the right, in general, to the due process of law applied in criminal matters.” This means that the guarantees of Article 8(2) of the Convention are not exclusive to criminal proceedings, but rather are applicable to any punitive procedure. In each case, it is necessary to determine the minimum guarantees that relate to a specific non-criminal punitive procedure, according to its nature and scope.²¹¹

Regarding the right to prior notification in detail of the charges, established in Article 8(2)(b) of the Convention, the Court has established that this right means that a factual description of the conduct attributed to the accused must be provided that includes the factual information in the indictment; this constitutes the essential reference for the exercise of the defense. Therefore, the accused has a right to know, by a clear, precise and detailed description, the facts that are attributed to him. The Court has pointed out that the State must inform the person concerned not only of the reasons for the charges – that is, the acts or omissions attributed to him – but also the reasons that led the State to bring charges, the evidence proving them, and the legal classification accorded to the facts.²¹²

Furthermore, according to the Court’s Case Law, the right to have adequate time and means for the preparation of the defense, established in Article 8(2)(c) of the Convention, obliges the State to allow the accused to have access to the case file against him; it also signifies that the adversarial principle must be respected that guarantees his intervention in the analysis of the evidence. In addition, adequate means for presenting the defense include all the materials and evidence required, as well as exculpatory documents.²¹³

ARTICLE 13 (RIGHT TO FREEDOM OF THOUGHT AND EXPRESSION)

• The murder of journalists as an extreme form of censorship

In the Case of Leguizamón Zaván et al. v. Paraguay, the Court underscored that the murder of those who exercise the profession of journalism constitutes the most extreme form of censorship, by preventing them from continuing to disseminate opinions, ideas and information of public relevance. Consequently, this means that their right to freedom of thought and expression is violated in its individual aspect, as well as the possibility of contributing to a pluralist public debate on matters of national importance. In addition, the murder of a journalist has an impact not only on him, but also on society and on his journalist colleagues,

210 Case of Mina Cuero v. Ecuador. Preliminary objection, Merits, Reparations and Costs. Judgment of September 7, 2022. Series C No. 464, para. 83.

211 Case of Mina Cuero v. Ecuador. Preliminary objection, Merits, Reparations and Costs. Judgment of September 7, 2022. Series C No. 464, para. 84.

212 Case of Mina Cuero v. Ecuador. Preliminary objection, Merits, Reparations and Costs. Judgment of September 7, 2022. Series C No. 464, para. 85.

213 Case of Mina Cuero v. Ecuador. Preliminary objection, Merits, Reparations and Costs. Judgment of September 7, 2022. Series C No. 464, para. 86.

for whom it can have a chilling effect. It can also involve the violation of the right to freedom of expression in its collective dimension owing to the self-censure that the professionals may impose on themselves as a strategy to safeguard their life and integrity,²¹⁴ thus creating a fertile ground for authoritarian regimes. To the contrary, “in a climate where journalists are safe, citizens find it easier to access quality information and many objective become possible as a result: democratic governance and poverty reduction; conservation of the environment; gender equality and the empowerment of women; justice and a culture of human rights, to name a few.” Consequently, the guarantee of the pluralism intrinsic to democratic societies requires the greatest possible circulation of articles and opinions on matters of public interest that guarantee the peoples’ right of access to information and ideas representing diverse positions.²¹⁵

It is also evident that an adequate fight against corruption requires transparency in the exercise of power. The role of the media is fundamental in this regard to inform the population of the degree to which the constitutional powers comply with the law, by act or by omission, fulfilling a relevant social role in the formation of public opinion. That relationship between transparency, democracy and probity is clearly reflected in the Inter-American Democratic Charter when it establishes that “[t]ransparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy.” The protection of the work of the media in its role as guardian of the general interest is not only a matter of public significance, but also a matter of the survival of the democratic system. In this regard, the preamble to the Inter-American Convention against Corruption establishes that “representative democracy, an essential condition for stability, peace and development of the region, requires, by its nature, the combating of every form of corruption in the performance of public functions, as well as acts of corruption specifically related to such performance.”²¹⁶

- **Importance of the role of the journalist in a democratic society, and protection of journalistic sources**

In the Case of Moya Chacón et al. v. Costa Rica, the Court emphasized that “[t]he professional practice of journalism cannot be differentiated from freedom of expression. On the contrary, both are clearly intertwined, for the professional journalist is not, nor can he be, anything but someone who has decided to exercise freedom of expression in a continuous, regular and paid manner.” Indeed, the Court has characterized mass media as a true instrument of freedom of expression and has also indicated that “[i]t is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, inter alia, a plurality of means of communication, the barring of all monopolies thereof in whatever form, and guarantees for the protection of the freedom and independence of journalists.”²¹⁷

The Court recalled that, for the press to be able to play its role of journalistic control, it must not only be free to impart information and ideas of public interest, but also to collect, compile and evaluate that information and those ideas. Any measure that interferes in the journalistic activities of those who are performing this function will inevitably obstruct the right to freedom of expression in its individual and collective dimensions.²¹⁸

214 Case of Leguizamón Zaván et al. v. Paraguay. Merits, Reparations and Costs. Judgment of November 15, 2022. Series C No. 473, para. 55.

215 Case of Leguizamón Zaván et al. v. Paraguay. Merits, Reparations and Costs. Judgment of November 15, 2022. Series C No. 473, para. 57.

216 Case of Leguizamón Zaván et al. v. Paraguay. Merits, Reparations and Costs. Judgment of November 15, 2022. Series C No. 473, para. 58.

217 Case of Moya Chacón et al. v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 23, 2022. Series C No. 451, para. 66.

218 Case of Moya Chacón et al. v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 23, 2022. Series C No. 451, para. 67.

In the Case of Moya Chacón et al. v. Costa Rica, the Court considered that the journalist has a duty to verify reasonably, although not necessarily exhaustively, the facts he divulges. In other words, it is valid to require fairness and diligence in the comparison of sources and the search for information. This signifies the right of everyone not to receive a distorted version of the facts. Consequently, journalists are obliged to take a critical distance in relation to their sources and compare them with other relevant information. The European Court of Human Rights has indicated that, even though they are protected by freedom of expression, in the performance of their task, journalists must abide by the principles of responsible and “ethical journalism,” and this is particularly relevant in contemporary society where “not only do they inform; they can also suggest by the way in which they present the information how it is to be assessed.”²¹⁹

In addition, the Court determined that, given the importance of freedom of expression in a democratic society and the enhanced responsibility that this entails for professionals employed in the mass media, the State must not only minimize the restrictions to the circulation of information, but must also, insofar as possible, aim at a balanced participation of diverse information in public discussions, encouraging the pluralism of information. Lastly, the Court has indicated that it is essential that journalists who work in the media should enjoy the necessary protection and independence to perform their task effectively because it is they who keep society informed, and this is an indispensable requirement for the latter to enjoy full freedom and to enhance public debate.²²⁰

In the context of the protection that States must grant, the protection of journalistic sources is essential. This is a cornerstone of freedom of the press and, in general, of a democratic society, because it enables a society to benefit from investigative journalism in order to strengthen good governance and the Rule of Law. The confidential nature of journalistic sources is, therefore, essential for the work of journalists and for their role in society as providers of information concerning matters of public interest.²²¹

- **Subsequent liability and inadmissibility of the criminal action in the Case of public officials**

In the Case of Baraona Bray v. Chile, the Court considered that issues of public interest were those opinions or information on matters in which society has a legitimate interest to keep itself informed, in order to be aware of matters that influence the functioning of the State or have an impact on general interests or rights, or which have important consequences. This is the Case of statements on environmental matters. In this regard, the opinions, statements, ideas and information on the protection or management of the environment, as well as on the environmental impact and risks of activities or projects, should be considered matters of public interest in relation to the protection of freedom of expression because, as the Court has recognized in its Case Law, the respect and guarantee of human rights cannot be separated from environmental protection. It should also be pointed out that the Court has acknowledged the existence of an undeniable relationship between the protection of the environment and the exercise of other human rights, because environmental damage and the adverse effects of climate change have an impact on the effective enjoyment of human rights. Consequently, there can be no doubt that environmental issues should be considered matters of public interest in a democratic society and that it corresponds to the State to protect freedom of expression and encourage public participation in such matters.²²²

219 Case of Moya Chacón et al. v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 23, 2022. Series C No. 451, para. 68.

220 Case of Moya Chacón et al. v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 23, 2022. Series C No. 451, para. 69.

221 Case of Moya Chacón et al. v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 23, 2022. Series C No. 451, para. 70.

222 Case of Baraona Bray v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2022, para. 114.

Therefore, considering the need to harmonize the protection of the right to freedom of expression and the right to honor, and the importance of freedom of expression in a democratic society, the Court reiterated that the imposition of subsequent liability based on the abusive exercise of the right to freedom of expression is exceptional. However, in keeping with international Case Law, and considering the relevance of statements that are of public interest and the fact that criticism of public officials should have greater acceptance, it indicated that, in the Case of the exercise of the right to freedom of expression on matters of public interest and, in particular, regarding criticism of public officials, a criminal response is contrary to the American Convention. Consequently, States should create mechanisms other than criminal law for public officials to obtain a rectification or response or civil redress when their honor or good name has been injured. The measures established should be applied in accordance with the principle of proportionality, because even in those cases in which there has been an abusive exercise of freedom of expression and in which it is appropriate to award onerous damages, the punishment imposed should be assessed based on the right to freedom of expression and, therefore, should be proportionate to the reputational harm suffered. In addition, guarantees should exist that permit protecting the person sanctioned against compensation awards that are disproportionate in relation to the amount established for reputational harm.

In the Case of *Baraona Bray v. Chile*, the Court recalled that it had established that, in the Case of speech that is protected due to its public interest, such as that relating to the conduct of public officials in the exercise of their functions, the punitive response of the State, using criminal law to protect the official's honor, is inadmissible under the Convention. That said, in each specific case, the classification of a statement as a matter of public interest depends on weighing three elements – subjective, functional and material – and this grants criminal judges a considerable margin of discretion. It means that the said analysis cannot be made before recourse has been had to the criminal jurisdiction, because a decision of this type is only admissible after criminal proceedings have been initiated. Thus, even though the competent judicial authority rules that the criminal sanction is not applicable, the threatening effect that infringes freedom of expression has already occurred.²²³

Consequently, the Court found it necessary to continue on the path of protecting the right to freedom of expression recognized in Article 13 of the Convention, in the understanding that, in the Case of offenses against honor that involve insults and the attribution of abusive acts, the prohibition of criminal prosecution should not be based on the possible classification of the statements that gave rise to subsequent liability as being of public interest, but rather on the condition of public official or public authority of the person whose honor has allegedly been harmed.²²⁴

In this way, the chilling effect caused by the filing of criminal proceedings would be avoided, as well as its repercussions on the enjoyment of freedom of expression, and the undermining and impoverishment of the discussion on matters of public interest. In addition, the right to freedom of expression is safeguarded effectively because, by immediately ruling out the possibility of initiating criminal proceedings, the use of this mechanism to inhibit or discourage dissident voices or complaints against public officials is avoided.²²⁵

ARTICLE 17 (RIGHTS OF THE FAMILY) AND ARTICLE 19 (RIGHTS OF THE CHILD)

In the Case of *Valencia Campos et al. v. Bolivia*, the Court established that the protection of private and family life and home involves the recognition that a personal sphere exists that must be exempt and

223 Case of *Baraona Bray v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2022, para. 128.

224 Case of *Baraona Bray v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2022, para. 129.

225 Case of *Baraona Bray v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2022, para. 130.

immune from abusive or arbitrary interference or invasion by third parties or public authorities. Thus, the home and private and family life are intrinsically linked because the home is a space in which private life and family life can be developed freely.²²⁶ In addition, the Court appreciated that the family – without establishing any particular model – is the natural and fundamental element of society and has a right to protection by society and the State. Given the importance of that right, recognized in Article 17 of the Convention, the Court has established that the State is obliged to facilitate the strengthening and development of the family unit. Therefore, it is obliged to take positive and negative measures to protect people from arbitrary or unlawful interference in their family and facilitate effective respect for family life. The Court also recalled that interference with the right to family life is more severe when it has an impact on the rights of children and adolescents and that their separation from their parents may, in certain situations, jeopardize the survival and realization of their rights, which should be guaranteed by the State pursuant to Article 19 of the American Convention and Article 6 of the Convention on the Rights of the Child, particularly by the protection of the family and an absence of unlawful or arbitrary interference in the family life of children, because the family plays an essential role in their development.²²⁷

In this regard, the Court has considered that, in light of Article 11(2) of the Convention, obtaining due authorization or a court order to conduct a house search should be understood as the general rule, and its exceptions, such as *flagrante delicto*, are only valid in the circumstances established by law and, as exceptions, they must be interpreted strictly.²²⁸

In the Case of Valencia Campos et al. v. Bolivia, the Court considered that the house searches during the evening hours had a disproportionate impact on women and children. The home is the place, *par excellence*, where caregiving roles are realized and those roles have, historically, been the responsibility of women in particular. The domestic sphere is a particularly feminine sphere. Thus, a gender-based approach must be adopted in the execution of home searches.²²⁹

ARTICLE 19 (RIGHTS OF THE CHILD)

In the Case of Angulo Losada v. Bolivia, the Court understood that, pursuant to Article 19 of the American Convention, the State is obliged to facilitate special measures of protection in keeping with the principle of the best interests of the child, assuming its position of guarantor with greater care and responsibility considering their special vulnerability. The best interests of the child are based on the very dignity of the human being, on the inherent characteristics of children, and on the need to facilitate their development. Article 3 of the Convention on the Rights of the Child establishes that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” With regard to this principle, the Committee on the Rights of the Child has indicated that “[e]very legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children’s rights and interests are or will be affected by their decisions and actions - by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.”²³⁰

226 Case of Valencia Campos et al. v. Bolivia. Preliminary objection, Merits, Reparations and Costs. Judgment of October 18, 2022. Series C No. 469, para. 147.

227 Case of Valencia Campos et al. v. Bolivia. Preliminary objection, Merits, Reparations and Costs. Judgment of October 18, 2022. Series C No. 469, para. 148.

228 Case of Valencia Campos et al. v. Bolivia. Preliminary objection, Merits, Reparations and Costs. Judgment of October 18, 2022. Series C No. 469, para. 149.

229 Case of Valencia Campos et al. v. Bolivia. Preliminary objection, Merits, Reparations and Costs. Judgment of October 18, 2022. Series C No. 469, para. 153.

230 Case of Angulo Losada v. Bolivia. Preliminary Objections, merits and reparations. Judgment of November 18, 2022. Series C No. 475, para. 98.

- **The protection of children in the context of an armed conflict**

In the Case of Members and Militants of the Patriotic Union v. Colombia, the Court reiterated that alleged violations of other articles of the Convention, in which children are alleged victims, must be interpreted in light of the corpus iuris of children's rights. This means that Article 19, in addition to granting special protection to the rights recognized in the American Convention, establishes an obligation on the part of the State to respect and ensure the rights recognized for children in other applicable international instruments. In this context, the State must assume its special position of guarantor with greater care and responsibility, and must take special measures to this end. It should be recalled that the Court has pointed out that "the special vulnerability of children is even more evident in a situation of internal armed conflict, [...] since they are the least prepared to adapt or respond to such a situation and, sadly, they are the ones who suffer disproportionately from its excesses."²³¹

In the Case of Members and Militants of the Patriotic Union v. Colombia, the Court considered it necessary to draw attention to the particular consequences of the brutality with which the acts were committed to the detriment of the children in this case. Thus, the Court highlights the fact that the continuation over time of the acts of violence that were directed against the members of the Patriotic Union particularly affected the children of the said community.²³²

ARTICLE 23 (POLITICAL RIGHTS) IN RELATION TO ARTICLES 13 (FREEDOM OF EXPRESSION) AND 16 (FREEDOM OF ASSOCIATION)

- **The relationship between political rights, freedom of expression and freedom of association and their importance for democracy**

In the Case of Members and Militants of the Patriotic Union v. Colombia, the Court reiterated that it has recognized the relationship between political rights, freedom of expression and freedom of association, and that these rights, together with the right of Assembly, make democracy possible.²³³ In addition, it recalled that the democratic principle inspires, permeates and guides the application of the American Convention in a cross-cutting manner. It constitutes both a guiding principle and an interpretive guideline. As a guiding principle, it articulates the form of political organization chosen by the States of the Americas to achieve the values that the system seeks to promote and protect, among which is the full enjoyment of human rights.²³⁴

The Court reiterated that the effective exercise of political rights constitutes an end in itself and, at the same time, a fundamental means for democratic societies to guarantee the other human rights provided for in the Convention. Moreover, in accordance with Article 23 of the Convention, their holders, i.e., citizens, must not only enjoy rights, but also "opportunities." This last term implies the obligation to guarantee, through positive measures, that every person who formally holds political rights has the real opportunity to exercise them. Political rights and their exercise promote the strengthening of democracy and political pluralism. Therefore, the State must provide the conditions and mechanisms so that these rights can be

231 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 358.

232 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 389.

233 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 304.

234 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 308.

exercised effectively, respecting the principle of equality and non-discrimination. Political participation may include wide-ranging and diverse activities that people carry out individually or that are organized, with the purpose of intervening in the selection of those who will govern a State or who will be in charge of the administration of public affairs, and also to have an impact on the formulation of State policy through mechanisms of direct participation or, in general, to intervene in matters of public interest, such as the defense of democracy.²³⁵

The Court recalled its Case Law on freedom of expression and affirmed that, particularly in matters of public interest, "it is a cornerstone for the very existence of a democratic society." Without an effective guarantee of freedom of expression, the democratic system is weakened and pluralism and tolerance are undermined, the citizen oversight and complaint mechanisms may become inoperative and, in short, a fertile ground is created for the entrenchment of authoritarian systems.²³⁶ In addition, freedom of expression, has both an individual and a social dimension and requires, on the one hand, that no one be arbitrarily limited or prevented from expressing his or her thoughts and therefore represents a right of each individual; but, on the other hand, it also involves a collective right to receive any information and to know the expression of the thoughts of others.²³⁷

The Court referred to the essential role that freedom of expression plays in the consolidation and dynamics of a democratic society. Without effective freedom of expression, materialized in all its terms, democracy fades, pluralism and tolerance begin to break down, the citizen oversight and complaint mechanisms begin to become inoperative and, in short, a fertile ground for authoritarian systems to take root in society begins to be created.²³⁸

Regarding freedom of association, the Court recalled that Article 16(1) of the American Convention establishes the right of individuals to associate freely for ideological, religious, political, economic, labor, cultural, sports or any other purpose. The right of association is characterized by enabling individuals to create or participate in entities or organizations for the purpose of acting collectively in pursuit of the most diverse purposes, as long as these are legitimate. The Court has established that those subject to the jurisdiction of the States Parties have the right to associate freely with other persons, without the intervention of the public authorities limiting or hindering the exercise of this right. In other words, this is the right to associate in the common realization of a lawful objective, and the correlative negative obligation of the State not to exert pressure or interfere in such a way as to alter or distort the said purpose.²³⁹

- **The rights to life, personal integrity and liberty, and the legitimate exercise of political rights, and the freedoms of expression and association**

In the Case of Members and Militants of the Patriotic Union v. Colombia, the Court reiterated that when a violation of the right to life, integrity or personal liberty attributable to the State has the objective of impeding the legitimate exercise of another right protected in the Convention, such as political rights, freedom of expression or association, a violation of these rights is also constituted. In this way, it must be

235 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 309.

236 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 310.

237 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 311.

238 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 312.

239 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 316.

determined, in general terms, whether the alleged violations of personal integrity, life and personal liberty were intended to impede the progress and development of the Patriotic Union party and whether these actions were derived not only from a failure to comply with the duty of protection on the part of the State, but also from actions directly attributable to the State, thus failing to comply with its duty to respect.²⁴⁰

In the Case of Members and Militants of the Patriotic Union v. Colombia, the Court considered that the climate of victimization and stigmatization did not create the necessary conditions for the militants and members of the Patriotic Union to fully exercise their political rights of expression and assembly. Their political activity was hindered by both physical and symbolic violence against a party that was labeled as an “internal enemy” and whose members and militants were subjected to homicide, forced disappearance and threats.²⁴¹

- **The recognition of a political party as a vehicle for political rights and a fundamental pillar of a democratic system**

The Court recalled that recognition of the rights of legal persons may involve, directly or indirectly, the protection of the human rights of associated natural persons. In the same way, the effects on legal persons may involve, directly or indirectly, the violation of the human rights of natural persons. In this sense, the Court has already analyzed the possible violation of the right to property of certain persons in their capacity as shareholders or partners of legal persons. Also, the Court referred to its Case Law in which it has indicated that restrictions to freedom of expression frequently materialize through actions of the State or private individuals that affect not only the legal person that constitutes a media outlet, but also the plurality of natural persons, such as its shareholders or the journalists who work there and who carry out acts of communication through it and whose rights may also be violated.²⁴²

It also asserted that just as the media are vehicles for freedom of expression, trade unions are instruments for the exercise of the right to freedom of association of workers, and political parties are vehicles for the exercise of the political rights of citizens. Consequently, actions that prescribe or limit the activities of parties can affect the political rights not only of their members and militants, but of the entire citizenry. Also, as vehicles of political rights, States must develop measures to protect political parties, particularly opposition parties.²⁴³

In this regard, the Court recalled that it had already emphasized that opposition voices are essential for a democratic society, without which it is not possible to reach agreements that address the different visions prevailing in a society. Therefore, the effective participation of individuals, groups, organizations and opposition political parties in a democratic society must be guaranteed by the States, through adequate regulations and practices that enable their real and effective access to the different deliberative spaces on equal terms, but also through the adoption of the necessary measures to guarantee their full exercise, taking into account the situation of vulnerability in which certain social sectors or groups find themselves.²⁴⁴

240 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 318.

241 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 325.

242 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 329.

243 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 330.

244 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 331.

In the Case of Members and Militants of the Patriotic Union v. Colombia, the Court noted that the inability of the Patriotic Union to obtain the results required to maintain its legal standing was closely linked to the circumstances of persecution and extermination to which its militants, sympathizers and members were subjected.²⁴⁵ The Court considered that the withdrawal of the Patriotic Union's legal status was an arbitrary decision, since it did not take into account the particular circumstances that affected the real capacity of the party to mobilize electoral forces. Consequently, by not allowing the participation of this group in the elections held since 2002, the State impaired the political rights of the members and militants of this group and, taking into account the role of the opposition political parties in the strengthening of democracy, of the citizens in general.²⁴⁶

- **Women victims of a systematic extermination of a political party**

In the Case of Members and Militants of the Patriotic Union v. Colombia, the Court noted that a significant number of the direct victims of the systematic extermination of UP members and militants were women.²⁴⁷ In this regard, the Court noted that, during armed conflicts, women and girls face specific situations that affect their human rights, such as acts of sexual violence, which is often used as a symbolic means of humiliating the opposing party or as a means of punishment and repression. The use of the state power to violate the rights of women in an internal conflict, in addition to affecting them directly, may be aimed at having an impact on society as a whole by means of such violations, and by delivering a message or lesson. In particular, rape constitutes a paradigmatic form of violence against women the consequences of which even transcend the person of the victim.²⁴⁸

- **Journalists victims of the systematic extermination of a political party**

In the Case of Members and Militants of the Patriotic Union v. Colombia, the Court noted that several of the direct victims of the extermination of the Patriotic Union were journalists by profession.²⁴⁹ In this regard, it recalled that violations of the right to freedom of expression recognized in Article 13 of the American Convention ranged from the excessive restriction of freedom of expression to its total suppression. One of the most violent forms of suppressing the right to freedom of expression is through the murder of journalists and social communicators. This type of violence against journalists may also have a negative impact on other journalists who must cover events of this nature, who may fear experiencing similar acts of violence. The Court also referred to the need to protect journalists from all types of violence, and the particular risk faced by women journalists, and indicated that when adopting measures for the protection of journalists, States should apply a strongly differentiated approach that takes into account gender considerations, conduct a risk assessment, and implement protection measures that take into account the risk faced by women journalists as a result of gender-based violence.²⁵⁰

245 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 335.

246 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 336.

247 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 392.

248 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 393.

249 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 396.

250 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 399.

- **The stigmatization of members and militants of a political party owing to comments by senior authorities**

In the Case of Members and Militants of the Patriotic Union v. Colombia, the Court reiterated that, in a democratic society, it is not only legitimate, but sometimes a duty of the State authorities to comment on matters of public interest. However, in doing so, they are subject to certain limitations in that they must reasonably, although not necessarily exhaustively, verify the facts on which they base their opinions, and do so with even greater diligence than is expected of private individuals, due to their high office, the broad scope and possible effects that their statements may have on certain sectors of the population, as well as to prevent citizens and other interested persons from receiving a distorted version of certain facts. In addition, they must bear in mind that as public officials they have a position of guarantor of the fundamental rights of the individual and, therefore, their statements may not disregard these or constitute forms of direct or indirect interference or harmful pressure on the rights of those who seek to contribute to public discussion through the expression and dissemination of their thoughts. This duty of special care is particularly accentuated in situations of increased social conflict, alterations of public order, and social or political polarization, precisely because of the risks they may involve for certain persons or groups at a given moment.²⁵¹

The Court concluded that the State not only failed to prevent attacks on the reputation and honor of the alleged victims, but that, through its officials and, in particular, its senior authorities, it contributed to them and had a direct participation in them, exacerbating their vulnerable situation and creating reasons to promote attacks against them.²⁵² In turn, this victimization through stigmatization increased the intimidating effects on party members and militants, which obstructed their participation in the democratic game and, therefore, the exercise of their political rights, as well as the full exercise of their political rights to freedom of expression and assembly.²⁵³

ARTICLE 25 (RIGHT TO JUDICIAL PROTECTION)

- **Special protection of the right to judicial protection of older persons**

In the Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru, the Court indicated that the obligation to comply with the final decisions and judgments of the competent authorities is greater with respect to older persons and requires a higher standard of promptness. This increased duty of protection, which is based on the special vulnerability of older persons, is a general principle of public international law.²⁵⁴

In this regard, the Inter-American Convention on Protecting the Human Rights of Older Persons has developed and defined this principle by recognizing the States' obligation to guarantee equality and non-discrimination (Article 3(d)), proper treatment and preferential care (Article 3(k)) and effective judicial protection (Article 3(n)). Article 31 of this international treaty also recognizes the right of access

251 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 406.

252 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 414.

253 Case of Members and Militants of the Patriotic Union v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 415.

254 Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru. Preliminary Objections, merits and reparations. Judgment of February 1, 2022. Series C No. 448, para. 79.

to justice and indicates that “older persons have the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against them or for the determination of their rights and obligations of a civil, labor, fiscal, or any other nature.” Paragraph three of that article states that “the States Parties shall ensure due diligence and preferential treatment to the older person for the processing, settlement and enforcement of decisions in legal and administrative proceedings at any stage.” This creates a right to preferential treatment for older persons in the enforcement of judgments in their favor and a correlative State duty to guarantee a diligent, prompt and effective access to justice for older persons, in administrative as well as judicial processes.²⁵⁵

Therefore, it may be concluded that in the Case of persons who are in a situation of vulnerability, a reinforced standard of expeditiousness can be required in all judicial and administrative proceedings, including the execution of judgment.²⁵⁶

ARTICLE 26 (ECONOMIC, SOCIAL AND CULTURAL RIGHTS)

• Right to work

The Court reiterated that the right to work is a right protected by Article 26 of the Convention. In this regard, the Court has noted that Articles 45(b) and (c), 46 and 34(g) of the OAS Charter establish a series of provisions that identify the right to work. In particular, the Court has observed that Article 45(b) of the OAS Charter establishes that: “[w]ork is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working.” Thus, the Court has considered that there is a reference with a sufficient degree of specificity to the right to work to derive its existence and implicit recognition in the OAS Charter.²⁵⁷

In the Cases of *Mina Cuero v. Ecuador* and *Benites Cabrera et al. v. Peru*, the Court reiterated that the analysis that the competent authority makes of a judicial appeal – which contests constitutional rights such as job security and the right to due process – cannot be reduced to a mere formality and omit arguments submitted by the parties, because it must examine their reasons and rule on them pursuant to the standards established by the American Convention.²⁵⁸

Also, in the Cases of *Mina Cuero v. Ecuador* and *Benites Cabrera et al. v. Peru*, the Court indicated that job security does not consist in an unrestricted permanence in the post; but rather, among other measures, to respect this right by granting due guarantees of protection to the worker so that, if he or she is dismissed this is with justification, which means that the employer must provide sufficient reasons to impose this sanction with due guarantees, and that the worker may appeal this decision before the domestic authorities,

255 Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru. Preliminary Objections, merits and reparations. Judgment of February 1, 2022. Series C No. 448, para. 80.

256 Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru. Preliminary Objections, merits and reparations. Judgment of February 1, 2022. Series C No. 448, para.83.

257 Case of *Mina Cuero v. Ecuador*. Preliminary objection, Merits, Reparations and Costs. Judgment of September 7, 2022. Series C No. 464, para. 116.

258 Case of *Mina Cuero v. Ecuador*. Preliminary objection, Merits, Reparations and Costs. Judgment of September 7, 2022. Series C No. 464, para. 133.

who must verify that the justification given is not arbitrary or unlawful. In addition, the State fails to comply with its obligation to guarantee the right to work and, consequently, job security, when it fails to protect state officials from arbitrary dismissal from their employment.²⁵⁹

- **Protection of the right to work of older persons**

In the Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru, the Court recalled its considerations in the Case of Poblete Vilches et al. v. Chile, in which it stressed that older persons have the right to increased protection and, consequently, this requires the adoption of differentiated measures, as indicated in Teachers of Chañaral and other municipalities v. Chile, which required a reinforced standard of promptness in all judicial and administrative proceedings, including execution of judgment.²⁶⁰

The Court also noted that wages have a nutritional and survival nature as they are necessary to satisfy the worker's basic needs, which means that any disruption in receiving a wage has an impact on the enjoyment of other rights of the Convention, especially those contained in Article 26 of the American Convention, the increased protection of which has been emphasized by the UN Committee on Economic, Social and Cultural Rights in its General Comment No. 6 on older persons, when indicating that "the States Parties to the Covenant are obligated to pay particular attention to promoting and protecting the economic, social and cultural rights of older persons."²⁶¹

- **Right to work of persons with disabilities**

In the Case of Guevara Díaz v. Costa Rica, the Court noted that in the public sector, States have an enhanced responsibility to respect the right to work of persons with disabilities. This obligation translates, first of all, into a prohibition of any act of discrimination based on disability with respect to the exercise of their labor rights, particularly with respect to the selection and hiring of the employee, as well as their permanence in the position or promotion, and workplace conditions. Second, derived from the mandate of real or material equality, it translates into an obligation to take affirmative action to incorporate persons with disabilities into the workforce, an action that must be aimed at progressively removing the barriers that prevent them from fully exercising their labor rights. In this regard, States are required to adopt measures to ensure that persons with disabilities have effective and equal access to competitive public hiring processes through vocational training and education, as well as by making special adjustments to evaluation mechanisms so as to enable them to participate on an equal footing and make it possible to employ persons with disabilities in the public sector.²⁶²

Additionally, the Court found that the enhanced obligation to protect the right to work of persons with disabilities entails specific obligations for authorities examining complaints alleging acts of discrimination in the workplace. This obligation requires rigorous diligence in guaranteeing and

259 Case of Mina Cuero v. Ecuador. Preliminary objection, Merits, Reparations and Costs. Judgment of September 7, 2022. Series C No. 464, para. 134, and Case of Benites Cabrera et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 4, 2022. Series C No. 465, para. 114.

260 Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru. Preliminary Objections, merits and reparations. Judgment of February 1, 2022. Series C No. 448, para. 110.

261 Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru. Preliminary Objections, merits and reparations. Judgment of February 1, 2022. Series C No. 448, para. 111.

262 Case of Guevara Díaz v. Costa Rica. Merits, Reparations and Costs. Judgment of June 22, 2022. Series C No. 453, para. 73.

respecting the rights of persons with disabilities in the context of administrative and judicial remedies analyzing violations of the right to work. First, therefore, the authorities must refrain from basing their decisions on discriminatory reasoning. Second, they must analyze more rigorously whether the right to work of people with disabilities could have been affected by discriminatory acts committed by the authorities or third parties. On this point, the Court considered that the authorities examining such remedies must analyze whether it has been sufficiently demonstrated that a different treatment for a person with a disability is justified, with special consideration accorded to their situation of vulnerability.²⁶³

- **Regarding the selection of teachers of religious classes by religious authorities and the autonomous nature of their decisions**

Regarding the autonomy of the decisions made by the religious authorities when selecting persons who are suitable to teach religion classes, this Court noted that there was no dispute that, based on the right to freedom of conscience and religion, religious communities must be free from any arbitrary interference by the State in areas related to religious beliefs and the organizational life of the community and, in particular, in matters concerning their internal organization. Nevertheless, for the Court, the central point of the discussion lay in determining whether the selection by a religious authority or community of the persons in charge of teaching religious education classes in a public educational establishment was included within the sphere of the autonomy inherent in the right to religious freedom.²⁶⁴

Accordingly, the Court has affirmed that an education that is imparted in violation of human rights does not allow for the fulfilment of the goal of achieving the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms. Moreover, it is completely contrary to them and, therefore, violates the right to education. Therefore, States must take adequate steps to prevent violations of human rights during the process to provide children with an education.²⁶⁵

- **Regarding the ministerial exception in relation to acts relating to the functioning of a religious community**

With regard to the so-called “ministerial exception,” the Court understood that it operates in matters relating to the functioning of religious communities, such as the determination of the membership of the church, its ministers and its hierarchies. However, when this ministerial exception is applied in other areas, it becomes weaker and less robust, particularly in the field of education in public establishments, where the principles and values of tolerance, full respect for human rights, fundamental freedoms and non-discrimination are mandatory for the State.²⁶⁶

The Court indicated that although the appointment of teachers of a particular religious creed by the religious communities concerned may include a certain margin of autonomy, which would be consistent with the right to religious freedom, this cannot be absolute. This is because Catholic religion classes, which are part of a public education program in public schools, financed with public funds, are not within the scope of religious freedom that should be free from any interference by

263 Case of Guevara Díaz v. Costa Rica. Merits, Reparations and Costs. Judgment of June 22, 2022. Series C No. 453, para. 74.

264 Case of Pavez Pavez v. Chile. Merits, Reparations and Costs. Judgment of February 4, 2022. Series C No. 449, para. 119.

265 Case of Pavez Pavez v. Chile. Merits, Reparations and Costs. Judgment of February 4, 2022. Series C No. 449, para. 124.

266 Case of Pavez Pavez v. Chile. Merits, Reparations and Costs. Judgment of February 4, 2022. Series C No. 449, para. 128.

the State since they are not specifically related to religious beliefs or to the organizational life of the communities.²⁶⁷

Thus, religious authorities have broad autonomy when it comes to granting a certificate of suitability to teach religious education classes; however, given that this subject is part of the education program for children, this power, which derives directly from the right to religious freedom, must be adapted to the other rights and obligations in force in the area of equality and non-discrimination. This power of the religious authorities also applies to the revocation of the certificate of suitability, as long as the State's mandatory obligations and rights in the sphere of public education are respected.²⁶⁸ Taking into account the foregoing, the ministerial exception and the discretionary nature of the decisions of religious communities are not applicable in the area of education in public establishments.²⁶⁹

1. Regarding violations of the right to privacy and personal liberty through an infringement of labor rights

In the Case of Pavez Pavez v. Chile, the Court found that the rights to personal liberty and privacy of Sandra Pavez Pavez were affected in two different ways: (a) because the revocation of her certificate of suitability was specifically due to her sexual orientation, and because her sexual life was also subject to interference by the Vicariate, which allegedly urged her to end her homosexual life and made her continued employment as a teacher of the Catholic religion conditional upon her undergoing medical or psychiatric therapy; a position that was totally unacceptable from the perspective of the Rule of Law, under which human rights must be respected.²⁷⁰

²⁶⁷ Case of Pavez Pavez v. Chile. Merits, Reparations and Costs. Judgment of February 4, 2022. Series C No. 449, para. 129.

²⁶⁸ Case of Pavez Pavez v. Chile. Merits, Reparations and Costs. Judgment of February 4, 2022. Series C No. 449, para. 130.

²⁶⁹ Case of Pavez Pavez v. Chile. Merits, Reparations and Costs. Judgment of February 4, 2022. Series C No. 449, para. 131.

²⁷⁰ Case of Pavez Pavez v. Chile. Merits, Reparations and Costs. Judgment of February 4, 2022. Series C No. 449, paras. 134 and 135.