

# VIII

## **Developments** in the Court's Case Law



## VIII. Developments in the Court's Case Law

This section highlights recent developments in the Court's case law during the year 2023, and it also encompasses criteria that reaffirm the established case law by the Court. These developments establish relevant standards for State bodies and authorities at the domestic level when conducting control of conventionality within their respective jurisdictions.

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. 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 and the jurisprudence of the I/A Court H.R.

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 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.

### 1. Articles 1 and 2

#### ▶ Human rights and business: standards on equality and non-discrimination based on sexual orientation, gender identity, and gender expression

The Court highlighted three pillars of the Guiding Principles on Business and Human Rights: protect, respect, and remedy. This implies that States have a duty to protect human rights, companies must respect them, and access to remedies must be guaranteed. It is crucial that companies adopt policies to protect human rights, incorporate good corporate governance practices, conduct due diligence to prevent violations and remedy any harm. In particular, they must ensure remedies in cases that affect people living in poverty or vulnerable groups.

Regarding the LGBTQ+ community, the Court noted that stigma and stereotypes perpetuate discrimination in various spheres. To achieve real equality, the business sector needs to be involved. Businesses should take responsibility for respecting the rights of LGBTQ+ people, both at work and in their business relationships, through inclusive policies and diligence to prevent negative impacts. States should develop policies and regulatory activities to ensure that companies eliminate discriminatory practices, formulate inclusive policies, conduct due diligence to prevent and mitigate negative impacts and establish effective remedies for affected persons.<sup>110</sup>

#### ▶ Impacts of corruption on democracy and human rights

The Court highlighted that international organizations agree that corruption has a negative impact on human rights, affecting the rule of law, democracy, and human rights in general. Corruption, present in a variety of contexts, not only harms the individuals directly affected but also undermines trust in the government and the

<sup>110</sup> Cf. Case of Olivera Fuentes v. Peru. Preliminary objections, Merits, Reparations, and costs. Judgment of February 4, 2023. Series C No. 484, paras. 97, 100 - 104

democratic order. It particularly impacts vulnerable groups such as minorities, indigenous people, migrants, people with disabilities, refugees, people deprived of their liberty, women, children, the elderly, and people living in poverty, who are the most affected by its consequences.<sup>111</sup>

### ▶ **Right to defend human rights as an autonomous right**

The Court has emphasized the importance of human rights defenders in a democratic society, noting that respect for human rights in a state governed by the rule of law depends on effective guarantees so that they can conduct their activities freely. These activities, such as monitoring, reporting, and education, are essential to protect human rights and act as barriers against impunity, complementing the role of States and the Inter-American System.

The right to defend human rights is considered autonomous and encompasses various activities aimed at promoting and protecting human rights without limitations or risks. The quality of a defender does not depend on the frequency, scope, or type of activity performed, but on the very nature of these actions. States have a special duty to protect defenders, which includes recognizing, promoting, and guaranteeing their rights, as well as creating a safe environment for their work and investigating and punishing any attacks against them.

This special duty implies that States must refrain from imposing illegitimate obstacles to the work of defenders, adopt adequate protection measures, and ensure thorough investigation and punishment of any threats or attacks. In addition, they must formulate and implement public policies and legal provisions to ensure the free and safe exercise of the activities of human rights defenders.<sup>112</sup>

## **2. Article 7 (Right to Personal Liberty)**

### ▶ **The right not to be unlawfully deprived of liberty**

The Court recalled that Article 7(2) of the American Convention establishes that “[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the Constitution of the State Party concerned, or by a law established pursuant thereto.” As a consequence, by referring to the Constitution and laws established “pursuant thereto,” must be examined to determine whether they are compatible with Article 7(2) of the American Convention. This entails an analysis of compliance with the requirements established as precisely as possible and “beforehand” in such laws concerning the “grounds” and “conditions” for depriving an individual of their physical liberty. If domestic provisions have not been observed, either materially or formally, when an individual is deprived of their liberty, such deprivation will be unlawful and contrary to the American Convention, in light of Article 7(2).<sup>113</sup>

### ▶ **The right to be informed about the reasons for detention**

The Court reiterated its consistent case law stating that Article 7(4) of the American Convention encompasses two guarantees for the detained individual: i) oral or written information on the reasons for the detention, and ii) notification of the charges, which must be in writing. The information on the “grounds” for the detention must be provided “at the time of the arrest,” as a mechanism to prevent unlawful or arbitrary detentions from the very moment of the deprivation of liberty and, also, to ensure the individual’s right of defense. The Court has also indicated that the agent who makes the arrest must provide information in simple, jargon-free

111 Cf. Case of Viteri Ungaretti et al. v. Ecuador. Preliminary objections, Merits, Reparations, and Costs. Judgment of November 27, 2023, paras. 81 and 82.

112 Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia. Merits, Reparations, and Costs. Judgment of October 18, 2023, paras. 973, 977- 980.

113 Cf. Case of García Rodríguez et al. v. Mexico. Preliminary objections, Merits, Reparations, and costs. Judgment of January 25, 2023. Series C No. 482, para. 126.

language of the essential facts and legal grounds on which the detention is based. Thus, Article 7(4) of the Convention is not satisfied if only the legal basis is mentioned.<sup>114</sup>

▶ **The right to be brought promptly before “a judge or other officer authorized by law to exercise judicial power”**

The Court recalls that Article 7(5) of the Convention requires that a detained person “be brought” before “a judge or other officer authorized by law to exercise judicial power.” This implies that the judge must hear the detainee in person and consider all the explanations provided by the latter, in order to decide whether to release him or to maintain the deprivation of liberty.<sup>115</sup>

The Court recalled that immediate judicial oversight is a measure designed to prevent arbitrary or unlawful detentions, bearing in mind that in a State governed by the rule of law, it is the responsibility of the judge to guarantee the rights of the detained person, authorizing the adoption of precautionary or coercive measures when strictly necessary and, in general, ensuring that the accused is treated in a manner consistent with the presumption of innocence. In that case, the victims were brought before a judicial authority 47 and 31 days after their detention, for which reason the Court considered that it could not reasonably be inferred that these periods of detention without being brought before a judge complies with the provision American Convention.<sup>116</sup>

▶ **Pre-Trial Detention**

The Court reaffirmed that, according to the American Convention, no detention or imprisonment should be incompatible with respect for the fundamental rights of the individual, even when they are deemed lawful. The law, procedure, and general principles are required to be compatible with the Convention. The concept of “arbitrariness” goes beyond being “contrary to law” to include elements of impropriety, injustice, and unpredictability. For a precautionary measure restricting liberty to be legitimate and respect the right to the presumption of innocence, it must meet certain requirements: (i) It must be based on material assumptions related to an unlawful act and the link of the person being prosecuted to that act; (ii) it must pass the “proportionality test,” ensuring that the measure is legitimate, suitable, necessary, and proportional; and (iii) the decision imposing it must be sufficiently reasoned.

Deprivation of liberty should be applied exceptionally and only when necessary to ensure the development of the procedure and to prevent evasion of justice. Alternative measures should be available and should be considered before imposing measures that restrict liberty. In addition, restrictions on freedom must be limited in time and must have a clear and reasoned justification to respect the presumption of innocence. Any measure restricting liberty must be proportional, necessary, justified, and compatible with the principles of the American Convention, guaranteeing the right to the presumption of innocence and avoiding arbitrariness.<sup>117</sup>

▶ **Automatic or Mandatory Pre-Trial Detention**

The Court analyzed a domestic legal and constitutional regulation that establishes the automatic application of pre-trial detention for certain serious crimes without considering the individual circumstances of the case. This practice, known as automatic or mandatory pre-trial detention, lacks a precautionary purpose and becomes an anticipated sentence. It also limits the judge’s independence and denies the accused the opportunity to challenge the measure.

The automatic application of mandatory pre-trial detention creates a differentiated treatment for those accused of certain crimes, violating the right to equality before the law and the minimum guarantees of due

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114 Cf. Case of García Rodríguez et al. v. Mexico, supra, para. 136.

115 Cf. Case of García Rodríguez et al. v. Mexico, supra, para. 139 to 141.

116 Cf. Case of García Rodríguez et al. v. Mexico, supra, para. 139 to 141.

117 Cf. Case of García Rodríguez et al. v. Mexico, supra, para. 155 - 160.

process established in the American Convention. The Court considered that this practice does not conform to international human rights standards and constitutes a violation of the fundamental rights of the accused.<sup>118</sup>

#### ▶ **Arraigo (confinement or detention for investigative purposes) as a pretrial liberty-restricting measure in Mexico**

Regarding the concept of arraigo, the Court reiterated that, in general terms, any pre-procedural measure that restricts a person's liberty in order to investigate a crime that he or she allegedly committed is intrinsically contrary to the provisions of the American Convention and clearly violates the rights to personal liberty and the presumption of innocence.<sup>119</sup>

#### ▶ **Duty of custody of persons deprived of personal liberty**

The Court noted that the Inter-American Convention on Forced Disappearance of Persons and other international norms do not cover all possible modalities of forced disappearance. Thus, the analysis based on traditional elements may be insufficient in certain cases.

In the specific case of the disappearance of Fredy Núñez Naranjo, which occurred while he was in state custody, the Court recalled that the State had a duty to protect him due to his situation. The lack of clarification by the State may be sufficient to assess evidence and clues suggesting the commission of enforced disappearance, especially when the disappeared person was under State custody. In this context, the State's defense cannot be based on the lack of evidence, given that it has control over the means to investigate the facts.<sup>120</sup>

#### ▶ **Force Majeure**

In analyzing the kidnapping of a person, the State alleged that the circumstances in which the kidnapping took place constituted force majeure because the police officers "lacked the physical and technical capacity to prevent and/or avoid the kidnapping [...] making it impossible to comply with the State's obligation to provide guarantees."<sup>121</sup> The Court emphasized that, due to its exceptional nature, force majeure places the burden of proving the unforeseen, irresistible, and uncontrollable nature of the circumstances that qualify as constituting force majeure on the party alleging it. Likewise, the recognition of force majeure requires proving that such circumstances made it impossible to comply with the obligations of the party claiming such force majeure.

Based on this criterion, the Court analyzed the specific case in order to determine whether the alleged fact (the kidnapping of an individual detained in a police station by third parties who forcibly entered) constituted one of the characteristics that would allow it to refer to a situation of force majeure. Thus, it analyzed the unforeseen nature of the situation, the characteristics of the kidnapping, and the evidence presented by the State, determining that in the specific case, the State failed to prove the circumstances constituting force majeure that would exempt it from its international responsibility.<sup>122</sup>

### **3. Articles 8 and 25 (Judicial Guarantees)**

#### ▶ **Principle of non-retrogression in the context of the right to judicial independence**

The Court considered that the mechanism for selecting and removing electoral judges must be consistent with the democratic political system as a whole. Indeed, non-compliance of the independence of electoral courts not only affects electoral justice but also the effective exercise of representative democracy, which is

118 Cf. Case of García Rodríguez et al. v. Mexico, *supra*, para. 168, 170-171, 173.

119 Cf. Case of García Rodríguez et al. v. Mexico, *supra*, para. 146.

120 Cf. Case of Nuñez Naranjo et al. v. Ecuador. Judgment of May 23, 2023. Merits, Reparations, and Costs, paras. 94 - 95, 97.

121 Cf. Case of Nuñez Naranjo et al. v. Ecuador, *supra*, para. 89.

122 Cf. Case of Nuñez Naranjo et al. v. Ecuador, *supra*, paras. 91 - 92.

the foundation of the Rule of Law. The co-optation of electoral bodies by other public powers transversely affects the entire democratic institutional framework, and to that extent constitutes a risk to the control of political power and the guarantee of human rights, as it undermines the institutional guarantees that allow for the control of arbitrary exercise of power. Thus, the existence of judicial mechanisms able to safeguard the protection of political rights ceases to exist, which is why guarantees of irremovability and stability of electoral judges must be buttressed. The Court therefore deems that any weakening or regression in the guarantees of independence, stability, and irremovability of electoral tribunals is a violation of the Convention, as it could produce a systematic, similarly regressive impact on the rule of law, institutional guarantees, and the exercise of fundamental rights overall. The protection of judicial independence in this sphere is particularly critical today, given current trends in the world and the region toward the erosion of democracy, where formal powers are being used to promote anti-democratic values, hollowing out institutions and leaving only their outward image intact.<sup>123</sup>

### ▶ **The rule excluding evidence obtained under coercion (Article 8(3))**

The Court reaffirmed that the confession of an accused is only valid if it is made without coercion of any kind, in accordance with Article 8(3) of the American Convention. It emphasized that any form of coercion that affects the spontaneous expression of a person's will requires the exclusion of coercively obtained evidence from the judicial process. This measure not only discourages the use of coercion but also guarantees a fair trial. It was emphasized that statements obtained under duress often lack truthfulness, as the person seeks to put an end to cruel treatment or torture. Therefore, accepting or giving probative value to such statements constitutes a violation of human rights. In addition, it was affirmed that the exclusion of evidence obtained under coercion extends to procedural acts, such as the determination of the appropriateness of precautionary measures depriving liberty in criminal proceedings.<sup>124</sup>

### ▶ **Right to Defense (Article 8(2) d, e, and f of the American Convention).**

The Court recalled that the right to defense in criminal proceedings includes the possibility for the accused to defend himself personally or to be assisted by legal counsel of his own choosing. In the event of failure to do so, he is entitled to a defense attorney provided by the State, whether paid or not, according to domestic law. This right guarantees an effective defense, including access to technical defense from the first statement made. Not allowing this assistance severely limits the right to defense and unbalances the process, leaving the individual unprotected against the punitive power. The appointment of a public defender only to comply with procedural formalities would be tantamount to having no technical defense. Therefore, it is crucial that public defenders undergo training and operate with functional autonomy. In addition, the right to examine witnesses is a minimum guarantee which embodies the principles of adversarial proceedings and procedural equality, allowing the accused to examine witnesses both for and against him.<sup>125</sup>

### ▶ **Right to the Presumption of Innocence (Article 8(2))**

The Court reaffirmed the right to the presumption of innocence under Article 8(2) of the American Convention, which establishes that everyone charged with a crime has the right to be presumed innocent until proven guilty according to law. This provision implies that judicial and other authorities should be discreet and prudent in their public statements about a criminal proceeding prior to the individual being tried and convicted. It also pointed out that the dissemination of information about a case by the media cannot be automatically attributed to the State unless proven otherwise. According to Article 8(5) of the Convention, criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice. The publicity of the process

123 Cf. Case of Aguinaga Aillón v. Ecuador. Merits, Reparations, and Costs. Judgment of January 30, 2023, para. 71.

124 Cf. Case of García Rodríguez et al. v. Mexico, supra, para. 242, 245.

125 Cf. Case of García Rodríguez et al. v. Mexico, supra, para. 245- 247.

guarantees transparency, impartiality, and confidence in the courts of justice, allowing access to the information of the process by the parties involved and third parties.<sup>126</sup>

### ▶ **Right of the indicted to appoint a defense attorney of his choice**

The Court reaffirmed that the right to defense entails treating the individual as a subject of the legal process and not as an object thereof, and this manifests itself in two aspects: the material defense, where the accused actively participates in the process, and the technical defense, provided by an attorney. According to Article 8(2)(d) and (e) of the American Convention, the accused has the right to defend himself personally or to be assisted by counsel of his own choosing, or to have counsel provided by the State. The Court determined that it is crucial to allow the defendant time to appoint counsel, considering the need to establish a relationship of trust and the necessary preparation for the defense.<sup>127</sup>

### ▶ **Right of the accused to adequate time and means for the preparation of his defense**

The Court reaffirmed that the right to prepare a defense, according to Article 8(2)(c) of the Convention, implies that the State must allow the individual access to the case file against him, respecting the principle of adversarial proceedings. This includes the right to be involved in the analysis of the evidence and to present relevant materials and evidence. The Court assessed whether the State guaranteed this right by analyzing the time limits granted in a specific case, focusing on the time allowed for preparation of the defense.<sup>128</sup>

### ▶ **Right of the defense to question witnesses present in court**

The Court reaffirmed the right of the defense to cross-examine witnesses and get others to appear who may shed light on the facts, as a fundamental guarantee of due process. However, in one specific case, the Court pointed out that the judicial authority allowed witnesses to testify in the absence of the accused without due motivation and without considering the prejudice to the defense. This affected the accused parties' right to examine witness statements and prepare their defense strategy. The Court emphasized that, although in certain cases it may be admissible for witnesses not to confront the accused directly, this measure must be exceptional and duly grounded, guaranteeing procedural equality and adopting countermeasures to balance the limitation of the accused's right to defense.<sup>129</sup>

### ▶ **Lack of promotion of challenges**

The Court recalled that the international responsibility of the State may be compromised by the response provided through judicial bodies to actions or omissions attributable to the public defense. In cases in which it is evident that the public defense acted without due diligence, the judicial authorities have a duty of protection or control. Indeed, the judicial function must ensure that the right to defense is not rendered illusory through ineffective legal assistance. In this regard, the role of the judicial authorities in safeguarding due process is essential.<sup>130</sup>

### ▶ **Rejection of the complaint**

The Court pointed out that an improper substantiation exclusively attributable to the private technical defense is not a situation that causes domestic liability for the State. This is due to the fact that it is not up to the courts to correct the argumentative deficiencies by the litigants in that which is within their strict jurisdiction. For

126 Cf. Case of García Rodríguez et al. v. Mexico, *supra*, para. 258, 260- 261.

127 Cf. Case of Álvarez v. Argentina. Preliminary Objection, Merits, and Reparations. Judgment of March 24, 2023. Series C No. 487, paras. 108- 109, 114.

128 Cf. Case of Álvarez v. Argentina, *supra*, para. 117, 120- 123.

129 Cf. Case of Álvarez v. Argentina, *supra*, para. 128, 130- 131.

130 Cf. Case of Álvarez v. Argentina, *supra*, para. 150.

example, in the case under analysis, this would refer to the grounds of the challenge formulated, because if they did so, the judicial authority would replace the defense, thereby compromising its impartiality.<sup>131</sup>

### ▶ Right to Judicial Protection

The right to judicial protection recognized in Article 25 of the American Convention on Human Rights requires that States provide effective judicial remedies that are not mere formalities and that make it possible to examine the reasons invoked by the plaintiff. Notwithstanding the foregoing, “the mere fact that a domestic remedy does not produce a result favorable to the claimant does not, by itself, demonstrate a violation of the right to an effective remedy, since ‘for instance, it could be the case that the claimant did not promptly pursue the correct procedure.’”<sup>132</sup>

In this regard, “for reasons of legal security and for the proper application and functioning of the justice system, as well as the effective protection of rights, ‘States can and should establish budgets and criteria for the admissibility of domestic remedies, whether judicial or otherwise. Therefore, while these domestic remedies must be available to the interested party and must effectively and reasonably resolve the matter raised, as well as eventually provide adequate reparation, it should not be considered that domestic organs and courts must always and under any circumstances resolve the merits of the matter brought before them, without needing to verify the formal requirements of admissibility and admissibility of the particular remedy sought.’”<sup>133</sup>

### ▶ Representation of the alleged victim in the proceedings

The Court established that an alleged victim may change his legal counsel and position during the course of the proceedings, provided that said person’s manifestation of will in this regard is clear, genuine, and free. In the case of Indigenous and Tribal Peoples, in the exercise of their right to self-determination, they have the power to make decisions related to the defense of their rights, in accordance with their own forms of organization and cultural decisions. The possibility of filing a petition before the Inter-American Commission does not require prior authorization from authorities or community leaders, and it is up to the indigenous people or community to decide on its organizational structures and representation. Therefore, the Court determined that it will be up to the Indigenous or Tribal People, or community, to determine what is appropriate with respect to their organizational structures, leadership, and representation. The determination to be made by the Court refers strictly to the representation of the Indigenous or Tribal People, or an indigenous, ancestral, or other type of community in the case before the Inter-American Court, and does not extend to any other aspect, nor does it imply a ruling by the Court in relation to community leaders or authorities.<sup>134</sup>

### ▶ Right to judicial protection (Article 25)

The Court recalled that one of the components of the right to judicial protection, established in Article 25 of the American Convention, is that the States guarantee the means to execute the respective decisions and final judgments issued by competent authorities. This way, the rights that have been declared or recognized are effectively protected. This duty, specifically, is based on Article 25(2)(c) of the Convention, which establishes the right ‘to ensure that the competent authorities shall enforce such remedies when granted’ referred to in the first paragraph of that article. The Court affirmed that this right includes enforcement of the decision without hindrance or undue delay.<sup>135</sup> Thus, an unjustified delay in the execution of a judicial decision may imply a violation of the right to be tried within a reasonable period of time.<sup>136</sup>

131 Cf. Case of *Álvarez v. Argentina*, supra, para. 152.

132 Cf. Case of *Bendezú Tuncar v. Peru*. Preliminary Objections and Merits. Judgment of August 29, 2023. Series C No. 497, para. 114

133 Cf. Case of *Bendezú Tuncar v. Peru*, supra, para. 127.

134 Cf. Case of the *Maya Q’eqchi’ Indigenous Community of Agua Caliente v. Guatemala*. Merits, Reparations, and Costs. Judgment of May 16, 2023. Series C No. 488., paras. 35- 43.

135 Cf. Case of *Meza v. Ecuador*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of 14 June 2023, para 59.

136 Cf. Case of *Meza v. Ecuador*, supra, para 62.



### ▶ Reasonable time in proceedings related to adoption, guardianship, and custody of children and adolescents.

The Court emphasized the importance of diligence and celerity in procedures related to the protection of the rights of children and adolescents, especially in cases of adoption, guardianship, and custody of children in their early childhood. The Court emphasized that the time that has elapsed may irreversibly affect the situation of the minors and their families, which requires exceptional attention from the authorities.

Regarding the right to reasonable periods of time, the Court reiterated that this must be evaluated in each specific case considering the complexity of the case, the procedural activity of the interested party, the conduct of the judicial authorities, and the impact on the legal situation of the alleged victim.

However, it stressed that considering eight months as a reasonable time period in an international child return process does not establish a general standard, as each case must be evaluated individually. The importance of complying with the deadlines established in international treaties such as the Hague Convention and the Inter-American Convention was stressed, given the sensitivity and urgency of matters related to children's rights.

In addition, in the Case of Córdoba v. Paraguay, the Court found that the decision to return the child to Argentina never materialized and that the lack of diligence and exceptional speed in complying with the return order, and in adopting measures aimed at building a bond between father and son, facilitated the consolidation of an unlawful situation to the detriment of Mr. Córdoba, in violation of the provisions of Article 25(2)(c) of the American Convention.<sup>137</sup>

### ▶ Judicial Independence

The Court stressed the importance of the judicial independence of electoral tribunals in a democratic system, as they are fundamental to ensuring fair and credible elections. The protection of this independence prevents undue interference by other branches of government, especially the executive branch, in the jurisdictional control processes that safeguard the political rights of voters and candidates.

The Court also stressed that the mechanism for the selection and dismissal of electoral judges must be in line with the democratic political system as a whole. The violation of the independence of these courts affects not only electoral justice but also the effective functioning of representative democracy and the rule of law. Therefore, it is crucial to strengthen the guarantees of independence, stability, and irremovability of electoral tribunals in order to preserve democratic institutions and protect fundamental rights in general, especially in a global context of democratic erosion.<sup>138</sup>

### ▶ Conduct of Judges

The Court emphasized that preserving the dignity of the office and maintaining judicial integrity is not only essential for the performance of judicial functions, but also stands as a cornerstone of judicial systems and is a fundamental requirement for the rule of law, the right to a fair trial, and public trust in the judiciary, which implies that judges and prosecutors must "ensure that their conduct is beyond reproach in the perspective of a reasonable observer."<sup>139</sup>

### ▶ The principle of legality in disciplinary matters and the duty to state the reasons for disciplinary action

The Court pointed out that the rules of case assignment constitute a guarantee for the independence and

137 Cf. Case of Córdoba v. Paraguay. Merits, Reparations, and Costs. Judgment of September 5, 2023. Series C No. 505, paras. 87 and 96.

138 Cf. Case of Aguinaga Aillón v. Ecuador. Merits, Reparations, and Costs. Judgment of January 30, 2023. Series C No. 483, paras. 70-71.

139 Cf. Case of Cajahuanca Vásquez v. Peru. Preliminary Objections and Merits. Judgment of November 27, 2023, para. 95.

impartiality of the administration of justice and that, therefore, their transgression through an irregular decision could affect the principle of the lawful judge.<sup>140</sup> Likewise, the Court reiterated that the principle of the lawful judge is one of the guarantees of due process, which has even been recognized by certain parts of doctrine as a presupposition of due process. It held that this principle implies that persons have the right to be judged, in general, by ordinary courts, in accordance with legally established procedures and that this aims to prevent manipulation of the court, to ensure the impartiality of the judges, and, ultimately, the legitimacy of justice.<sup>141</sup>

#### ▶ **The principle of application of the most favorable sanctioning law**

The Court recalled that Article 9 of the Convention refers to the principle of legality and the principle of application of the most favorable sanctioning law. The latter indicates that it is not possible “to impose a more severe penalty than the one applicable at the time of the commission of the crime” and that “if after the commission of the crime the law provides for the imposition of a lighter penalty, the offender shall benefit from it.” The Court recalled that a more favorable law must be interpreted as that which (i) establishes a lesser sanction; (ii) eliminates the consideration of a previously punishable conduct; or (iii) creates a new cause of justification, inculpability, or impediment to the operation of the sanction, though this does not constitute an exhaustive list.<sup>142</sup>

### **4. Article 11 (Right to Privacy)**

#### ▶ **Limitations on intelligence activities based on the scope of human rights.**

The analysis of intelligence activities requires consideration of both human rights and the legitimate limitations that may be imposed on them. State intelligence activities aim to protect individuals and their rights, but they also involve an intrusion into the sphere of private life, which requires delimiting requirements and controls to ensure compatibility with the rule of law and the American Convention.

The Court’s case law has established that Article 11 of the Convention prohibits any arbitrary or abusive interference with privacy, including aspects such as family, domicile, and correspondence privacy. Although the right to privacy is not absolute, it may be limited by States, provided that such limitations are provided for by law, pursue a legitimate aim, and comply with the principles of good standing, necessity, and proportionality.<sup>143</sup>

#### ▶ **Necessary legal provision for intelligence activities: the principle of legal confidentiality**

The Court referred to the legal framework of intelligence activities, the purposes to be pursued, and the powers of the competent bodies and authorities. In this sense, regulations on this matter must avoid the violation of the right to privacy through intelligence activities. Such a law, necessarily enacted by the Legislative Power (in other words, a law in the formal sense), must foresee, as precisely as possible, the different threats that determine the need to undertake intelligence activities by the State agents with competence in the matter, whose powers must also be clearly and exhaustively established, in order to effectively limit their actions, prevent arbitrariness in their actions, and make it possible for them to control and, eventually, the eventual attribution of responsibilities.<sup>144</sup> This first requirement, referring to the “principle of reserve of law” and characteristic of “democratic constitutionalism,” as the Court has stated, constitutes “an essential element for the rights [...] to be legally protected and to exist fully in reality,” while at the same time “effectively guarantee[ing] [...] adequate control over the exercise of the powers of the organs” of the State.<sup>145</sup> The need

140 Cf. Case of Cajahuanca Vásquez v. Peru, para. 107.

141 Cf. Case of Cajahuanca Vásquez v. Peru, para. 108.

142 Cf. Case of Cajahuanca Vásquez v. Peru, para. 114.

143 Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 520-521.

144 Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 528.

145 Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 529.

for the law to be accessible to the public means that, unlike the intelligence activities themselves, the legal framework that authorizes and regulates them can never be of a reserved nature, thus allowing individuals to understand the powers of the State in this area and, based on that, to be able to foresee that such activities could eventually affect their own sphere of rights.<sup>146</sup>

▶ **Intelligence activities must pursue a legitimate and necessary purpose in a democratic society.**

The Court has established that the legitimacy of intelligence activities is conditioned to the pursuit of legitimate purposes, which must be clearly defined by domestic legislation and in accordance with the principles of a democratic society. These purposes may include the protection of national security, the maintenance of public order, the safeguarding of public health, and the protection of human rights. It is essential that the law establish these objectives in a precise and delimited manner to avoid the risk of arbitrariness on the part of the intelligence agencies. Furthermore, these activities may not be aimed at discrimination on grounds such as race, color, sex, religion, or any other social condition, and any discriminatory action based on political ideology, religious belief, economic position or other characteristics must be prohibited.<sup>147</sup>

▶ **Intelligence activities must comply, in the circumstances of the specific case, with the principles of good standing, necessity, and proportionality.**

The third requirement imposed on intelligence activities is that they comply with the requirements of good standing, necessity, and proportionality, that is, with the elements of the “proportionality test,” which inter-American jurisprudence has consistently applied in the evaluation and weighing of any measure restricting human rights.<sup>148</sup>

▶ **The controls and limitations to which intelligence activities must be subjected.**

It is also necessary for domestic legislation to provide for “a well-defined and comprehensive system for authorizing, monitoring, and supervising” intelligence activities in specific situations. In this regard, particularly focusing on the measures, actions, and strategies available to the intelligence agencies for the collection and gathering of information, it is necessary that the domestic law clearly set out, as precisely as possible, the following aspects: a) the types of measures and actions for obtaining and collecting information authorized in intelligence matters; b) the objectives pursued with such measures; c) the classes of persons and activities in respect of which it is permitted to obtain and collect information, depending, of course, on the identification of threats to the realization of the legitimate purposes identified above; d) the degree of suspicion that may justify the gathering and collection of information; e) the time limits within which the use of such measures and strategies is permitted; and f) methods that can be used for updating, monitoring, and reviewing the measures and actions employed for gathering and collecting information.<sup>149</sup>

▶ **Supervision of intelligence services and the possibility of filing complaints against arbitrary actions**

The Court has indicated that the legal framework should establish a civilian institution independent of the intelligence services and the Executive Branch, with powers to oversee intelligence activities. This institution must have full access to the necessary information and its mandate must cover aspects such as law enforcement, efficiency of activities, financial situation, and administrative methods of the intelligence services. At the

146 Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 530.

147 Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 531 - 535.

148 Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 536.

149 Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 538.

international level, it is necessary to provide mechanisms for those affected by arbitrary intelligence activities to obtain effective redress, including compensation for damages. These mechanisms must offer a simple, rapid, and effective remedy to the courts of justice, whose decisions must be fully complied with and enforced.<sup>150</sup>

▶ **The powers, limitations, and controls of intelligence agencies with respect to the collection and management of personal data**

In accordance with the above, the protection of the autonomy of the individual, his privacy, intimacy, and reputation, which in terms of the American Convention are safeguarded in the recognition of the rights to privacy and honor (Article 11), require providing a framework for action by the authorities in the area of the collection and use of personal data, in order to prevent their collection, use, retention, disclosure, and exchange in an inappropriate manner or incompatible with those rights. In this regard, although the standards that will be detailed below could be applied in the spheres of competence of the entire public administration and of private actors that lawfully collect and manage personal data, their inclusion in this judgment, due to the subject matter of the process under trial, is limited to the work of the intelligence services.<sup>151</sup>

The Court clarifies that in this Judgment the concept of “personal data” is used in accordance with the definition included in the updated Principles of the Inter-American Juridical Committee on Privacy and the Protection of Personal Data, with Annotations, in the sense that it covers “information that identifies or can reasonably be used to identify a natural person directly or indirectly,” which includes the different “factors referring specifically to his physical, physiological, genetic, mental, economic, cultural, or social identity [...] expressed in numerical, alphabetical, graphic, photographic, alphanumeric, acoustic, electronic, visual, or any other form.”<sup>152</sup>

▶ **Compilation, storage, and processing of personal data**

International standards on personal data protection require that the collection, storage, processing, and disclosure of personal data be carried out only with the free and informed consent of the owner or through a regulatory framework that allows it. States must adopt policies to prohibit the processing of personal data without legitimization or informed consent, informing individuals of their legal rights and conditions. Authorities, when collecting and storing personal data, should limit themselves to obtaining truthful, relevant, and necessary data, retaining such items in accordance with their purpose and for the necessary amount of time. In addition, they must guarantee the data is updated, secured, and protected. The law must precisely regulate the powers of intelligence services when it comes to collecting personal data, limiting their actions, and establishing parameters for their use, conservation, and disclosure.<sup>153</sup>

▶ **Periodic evaluation of the relevance and accuracy of personal data, and necessary monitoring of their management and processing.**

Intelligence agencies should periodically assess the need to retain personal data in their files and, where necessary, corroborate the accuracy of such information. Consequently, the authorities are required to update or rectify such data, in the event of any inaccuracy, or to delete them, if their conservation is no longer necessary for the fulfillment of their duties. These specific provisions and their effective enforcement are essential safeguards to mitigate the ongoing interference with the right to privacy implied by the existence and preservation of intelligence files that include personal data.<sup>154</sup>

At the international level, the need for an institution independent of the intelligence agencies to be in charge of supervising the use made by these authorities of all personal information and data is also pointed out.

150 Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 564-565.

151 Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 571.

152 Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 572.

153 Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 573.

154 Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 580.

For this purpose, in addition to being able to access intelligence files, the institution with supervisory duties must be empowered to order the competent authorities, depending on each case and in consideration of the legality and necessity of their preservation, to eliminate their records or the information contained therein, or the disclosure of this information to the affected individuals.<sup>155</sup>

#### ▶ Access to and control of personal data: the right to informational self-determination

The Court has emphasized that international standards on personal data protection establish the right to access and control data in public archives, guaranteeing autonomy and freedom for self-determination. This right includes: (i) knowing what data is in public records, how it was obtained, and what it is used for. (ii) requesting the rectification, amendment, or updating of inaccurate, incomplete, or outdated data, (iii) demanding the deletion of illegal or unjustified data for its conservation, as long as it does not affect other rights, (iv) objecting to the processing of data that causes harm or when regulations so require, (v) receiving the data in a structured format and requesting its transmission.

This right is recognized as informational self-determination and it is protected by the American Convention. According to the American Convention, States must establish streamlined and efficient mechanisms to handle requests for access to and control of data. In addition, they must guarantee judicial remedies to protect this right.

Restrictions on access to intelligence information must comply with the principles of good standing, necessity, and proportionality. Mechanisms for purging and declassifying intelligence files must be established to allow public access to information when its confidential nature is no longer justified, ensuring the confidentiality of sensitive data. States should provide judicial remedies to object to denials of access to data, ensuring the review of these decisions by administrative or judicial instances when necessary.<sup>156</sup>

### 5. Article 11 (Right to Family Life)

#### ▶ The right of children and adolescents to remain in their family of origin, unless there are reasons based on their best interests to opt for their removal.

The Court determined that children and adolescents must remain in their family of origin, unless there are decisive reasons, based on their best interests, to separate them from their family. On the possibility of separation, the Court referred to the Committee on the Rights of the Child, which held that “[b]efore resorting to separation, the State must provide support to parents to fulfill their parental responsibilities and restore or enhance the family’s capacity to care for the child, unless separation is necessary to protect the child. Economic motives should never serve as justification for separating a child from their parents.” Similarly, the Court recalled that the Commission has stated that “when the parents are young adolescents under 18 years of age and have expressed their willingness to temporarily or permanently relinquish their parental responsibilities, there is a special duty of protection in favor of the parents since they themselves deserve the protection afforded to them by Article 19 of the ACHR and VII of the ADHR (American Declaration of Human Rights) given that they are persons under 18 years of age.” Therefore, the State must take measures not only in favor of the child but also in favor of his or her parents, who are also subject to special protection.<sup>157</sup>

#### ▶ Protection of private and family life

In the Cases of Córdoba v. Paraguay and María et al. v. Argentina, the Court defined a series of standards related to the protection of private and family life. Firstly, it recalled that any arbitrary or abusive interference in family life by third parties or the State is prohibited and that it is the duty of the latter to adopt positive

155 Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 581.

156 Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, paras. 585 - 608.

157 Cf. Case of María et al. v. Argentina. Merits, Reparations, and Costs. Judgment of August 22, 2023. Series C No. 494, para. 89.

and negative actions to protect individuals from this type of conduct.<sup>158</sup> Secondly, the Court affirmed that the family to which every child has a right is primarily his or her biological family, which must provide his protection. Thus, the Court recalled that children must remain with their direct families unless there are decisive reasons, based on the children’s best interests, to separate them. Since there is no single model of family, this standard should not be restricted to a traditional notion of family, but rather relatives with close personal ties may also be entitled to this right.<sup>159</sup> Thirdly, it recalled that protection of the family implies not only arranging and directly implementing measures for the protection of children, but also promoting, in the broadest sense, the development and strength of the family nucleus.<sup>160</sup> Finally, the Court held that, in situations or contexts of separation, States have the duty to adopt measures aimed at promoting and guaranteeing family reunification. In this regard, it recalled that “the State must take measures to favor family reunification, including providing support to the children’s families to avoid separation or its perpetuation, as well as the possibility of visits or other forms of maintaining contact or personal relations between parents and children.” Furthermore, in the Court’s opinion, family reunification should not only be understood as the reestablishment of legal ties after arbitrary terminations but also implies the adoption of short and long-term measures that promote a progressive rapprochement between family members who were arbitrarily separated, through the creation of spaces for connection.<sup>161</sup>

## 6. Article 13 (Freedom of Thought and Expression)

### ► Impacts of corruption on the right to freedom of expression

The Court ruled on the link between freedom of expression and the quality of democracy, emphasizing that expressions related to reports of alleged acts of corruption made by public officers or other persons in public office, should enjoy greater protection given their critical role in the functioning of democracy. The Court considered that democratic control fosters transparency and accountability of officials, thus promoting a broad and necessary debate in society. In addition, the Court established that the reporting of acts of corruption constitutes specially protected speech under the right to freedom of expression. The Court also noted that, in certain cases, regulations imposing a duty of confidentiality may conflict with the right to freedom of expression, especially when it comes to allegations of corruption. In such cases, the duty of confidentiality must be precisely and clearly limited to information that represents a real and significant risk to a legitimate national security interest.<sup>162</sup>

To guarantee the right to freedom of expression and promote the reporting of corruption, the Court indicated that States must provide adequate channels to facilitate and encourage reporting, both internal and external, to the institutions involved. These channels must be independent, and impartial, and guarantee the confidentiality of the identity of the whistleblower and the information received. In addition, States must establish protection mechanisms for whistleblowers, including measures to preserve humane treatment and to prevent reprisals.<sup>163</sup>

158 Cf. Case of Cordoba v. Paraguay, *supra*, para. 99 and Case of María et al. v. Argentina para. 88.

159 Cf. Case of Cordoba v. Paraguay, *supra*, para. 100 and Case of María et al. v. Argentina para. 89.

160 Cf. Case of Cordoba v. Paraguay, *supra*, para. 101.

161 Cf. Case of Cordoba v. Paraguay, *supra*, 102.

162 Cf. Case of Viteri Ungaretti et al. v. Ecuador. Merits, Preliminary Objections, Reparations, and Costs. *supra*, paras. 6 and 98.

163 Cf. Case of Viteri Ungaretti et al. v. Ecuador. Merits, Preliminary Objections, Reparations, and Costs. *supra*, paras. 73.

## 7. Article 15 (Right of Assembly)

### ▶ Right to Protest

The Court highlighted the obligation of States to facilitate the peaceful demonstration of protest, ensuring access to public spaces and protecting protesters against external threats, especially those from marginalized groups. The Court also stressed the State's responsibility to protect children during these demonstrations, guaranteeing their rights of movement, assembly, freedom of thought, expression, and association. During protests, state agents must uphold peace and protect people and their property.

That said, the rights of assembly and movement are not absolute, as they may be subject to restrictions established by law and necessary in a democratic society, which could include the need to protect national security, public order, public health or morals, or the rights and liberty of others. Restrictions based on "public safety" must only be applied if there is a significant and immediate risk to the life or physical integrity of individuals or to prevent serious damage to property. Restrictions based on "public order" or "national security" must be justified in detail and never specifically target certain categories of protesters based on nationality, race, ethnicity, age, sexual orientation, gender identity, or political opinion.<sup>164</sup>

The Court highlighted that peaceful protests should not automatically be considered a threat to public order, in efforts to promote political participation by citizens. However, the use of force by protesters may justify state intervention to protect those involved. It is crucial to handle demonstrations in a manner that minimizes injuries, upholds human rights, employs graduated restrictions, and refrains from the indiscriminate use of firearms. Law enforcement officers must be properly trained and equipped, and clear protocols must be established for accountability and immediate medical attention if needed.<sup>165</sup>

## 8. Article 19 (Rights of the Child)

### ▶ International restitution of children

The Court noted that the international return of children is regulated by a series of universal and inter-American norms that seek to ensure the prompt return of children when they are transferred internationally in violation of custody or visitation rights.<sup>166</sup> The Court indicated that in cases of international child abduction, the following concepts apply: (i) wrongful removal or retention is deemed wrongful when it violates custody rights; (ii) wrongful removal or retention is harmful to the child; and (iii) the authorities of the State of habitual residence are better suited to determine custody and access rights. Accordingly, it argued that, in the context of restitution proceedings, substantive issues related to custody and visitation are of a confidential nature to the country of habitual residence, indicating that a return application is different from a custody proceeding.<sup>167</sup>

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164 Cf. *Tavares Pereira et al v. Brazil*. Merits, Reparations, and Costs, Judgment of November 16, 2023, para. 91 - 94.

165 Cf. *Tavares Pereira et al v. Brazil*. Merits, Reparations, and Costs, Judgment of November 16, 2023, para. 91 - 94.

166 Cf. *Case of Córdoba v. Paraguay*, supra, para. 71.

167 Cf. *Case of Cordoba v. Paraguay*, para. 73.

## ▶ Rights of the child linked to environmental and intergenerational equity issues

The Court considers that the special protection of children, as a particularly vulnerable group to the effects of environmental pollution, is of special relevance considering the principle of intergenerational equity. By virtue of this principle, the right to a healthy environment is a universal interest owed to both present and future generations. In this sense, it has been pointed out that the rights of future generations place a responsibility on States to hold and ensure the fulfillment of children's human rights and to refrain from any conduct that endangers their rights in the future. In this sense, the Committee on the Rights of the Child, in its General Comment No. 26 has considered that, in accordance with the concept of "intergenerational equity," States must take into account the needs of future generations, as well as the short, medium, and long-term effects of measures related to children's development.<sup>168</sup>

The Court considers that the principle of best interest constitutes a mandate to prioritize the rights of children over any decision that may affect them (positively or negatively) in the judicial, administrative, and legislative spheres. Therefore, and by virtue of the principle of intergenerational equity, the State must prevent the polluting activities of companies from affecting the rights of children, and must consequently implement special protective measures to mitigate the effects of environmental pollution, particularly when it poses a significant risk to children. Additionally, measures should be taken to provide assistance for those impacted by such pollution and prevent the continuation of associated risks. In particular, where the pollution generated by business operations poses a significant risk to children's rights, States should demand a more stringent due diligence process and effective monitoring system<sup>169</sup>.

In addition, the Court highlights the relationship between the protection of children and actions against the climate emergency. Since the Paris Agreement, ratified by Peru on July 22, 2016, it has been recognized that "climate change is a problem of all humanity." The United Nations has pointed out that mining and other industrial processes involving the burning of coal, oil, or gas produce greenhouse gases, which contribute to climate change and thus constitute a risk to human health. In this regard, the Committee on the Rights of the Child has noted that children may be particularly affected by climate change, "both in the way they experience its effects and in the way, climate change is likely to affect them throughout their lives." The Court finds that, for this reason, States have a reinforced duty to protect children and actions against risks to their health produced by the emission of polluting gases that contribute to climate change<sup>170</sup>.

## 9. Article 21 (Right to Property)

### ▶ Right to Property

In the Case of *Boleso v. Argentina*, the Court restated its case law emphasizing that salary remunerations constitute part of individuals' assets.<sup>171</sup> Similarly, it pointed out that Article 21 of the American Convention on Human Rights provides that "[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."<sup>172</sup>

168 Cf. Case of *La Oroya Population v. Peru*. Preliminary objections, Merits, Reparations, and costs. Judgment of November 27, 2023, para. 141.

169 Cf. Case of *La Oroya Population v. Peru*, supra, para. 142.

170 Cf. Case of *La Oroya Population v. Peru*, supra, para. 143.

171 Cf. Case of *Boleso v. Argentina*. Preliminary objections, Merits, Reparations, and costs. Judgment of May 22, 2023. Series C No. 490, para. 55.

172 Cf. Case of *Boleso v. Argentina*, para. 53.



### ▶ Right to Communal Property

The Court highlighted the importance of the communal property of indigenous and tribal communities, protected by Article 21 of the American Convention. This protection extends to the intimate connection of these peoples with their lands and natural resources, which are fundamental to their culture, subsistence, and worldview. The intrinsic connection between territory and natural resources must be preserved to guarantee the physical and cultural survival of these communities, as well as respect for their identity and traditions. Furthermore, the Court pointed out that condominium property does not provide adequate legal certainty to indigenous communities, since it is potentially divisible and was granted in exchange for conditions imposed by the State, instead of recognizing a pre-existing right based on the possession of the land and the indigenous identity of the community.<sup>173</sup>

### ▶ The obligation to delimit, demarcate, and grant collective property titles to the territories of indigenous and tribal communities.

The Court established that the duty of States to ensure the right to property of indigenous and tribal peoples implies delimiting, demarcating, and titling their territories. This requires the implementation of legislative and administrative measures to establish an effective mechanism for the formal recognition of communal property, ensuring legal certainty against third parties or state agents. The Court's case law also emphasizes that traditional possession of indigenous lands is equivalent to a freehold title and grants the right to demand official recognition and registration of property. In addition, States are obligated to guarantee the effective utilization and enjoyment of indigenous property and may employ measures such as legal warranty. It is crucial to respect the autonomy and self-determination of indigenous communities over their lands, which implies recognizing their legal personality and adapting domestic law to enable them to exercise their rights in alignment with their traditions and organizational structures.<sup>174</sup>

## 10. Article 23 (Political Rights)

### ▶ The Right to Participation and Prior Consultation

The Court stressed the importance of the right to prior consultation of indigenous and tribal peoples, not only as a conventional norm but also as a general principle of international law, rooted in their intimate connection with the territory and respect for their collective property and cultural identity. In a pluralistic and democratic society, this implies that States must guarantee the participation of these peoples in decisions that may affect their rights, including their right to communal property, in accordance with their values and organizational structures. This obligation, in line with ILO Convention 169, implies consulting indigenous peoples through appropriate procedures whenever legislative or administrative measures that directly affect them are envisaged.

On the other hand, the Court highlighted that prior consultation is related to the general duty of the State to guarantee the full and free exercise of the rights recognized in the American Convention. This requires that States organize their governmental apparatus and structure their norms and institutions in such a way that consultation with indigenous communities can be conducted effectively, in accordance with international standards. Furthermore, consultations must be conducted in advance and good faith, with

173 Cf. I/A Court H.R. Case of the Maya Q'eqchi' Indigenous Community of Agua Caliente v. Guatemala. Merits, Reparations, and Costs. Judgment of May 16, 2023. Series C No. 488, para. 218.

174 Cf. Case of the Garifuna Community of San Juan and its members v. Honduras, *supra*, para. 94 - 99.

the aim of reaching a mutually agreeable outcome, and must provide access to relevant information, thus linking the right to consultation with the right of access to information recognized in the Convention.<sup>175</sup>

### ▶ **The Right to Prior Consultation and its Linkage to the Right to Communal Property**

The Court established that the State, in order to safeguard the right to collective property, must guarantee the right to consultation and participation in any project or measure that could impact the territory of an indigenous community, as well as other rights crucial to their survival as a people. This should be done from the earliest stages of the development or planning of the proposed project or measure, so that indigenous peoples can truly participate and influence the decision-making process, in accordance with relevant international standards.<sup>176</sup> Following the above guidelines, it is also necessary by virtue of the right of indigenous peoples to participate in decisions that affect their rights. In this sense, the Court has indicated that, due to the 'political rights' of participation, enshrined in Article 23 of the Convention, indigenous peoples must be consulted in an appropriate manner through their own representative institutions and procedures, when faced with the use or exploitation of natural resources in their traditional territory.<sup>177</sup>

### ▶ **On the right to prior consultation and the right to access information**

The Court highlighted the importance of access to information in the context of consultations with indigenous peoples, linking this right to the right to participation and transparency in public administration. In particular, the Court stressed that access to information on environmental issues and projects that may affect indigenous communities is crucial for informed and effective participation in prior consultation processes. Furthermore, it emphasized the need to provide information in the indigenous peoples' own language to ensure active participation and prevent exclusion.

The Court also highlighted the significance of facilitating the active participation of indigenous communities in consultations, fostering a dialogue founded on mutual trust and respect. This implies allowing the free participation of the community as a whole, as well as its leaders or legitimate representatives, respecting their organizational structure and decision-making. The Court emphasized that there is no single model for consultation and that it must be adapted to national circumstances and the specific characteristics of the indigenous communities, prioritizing their genuine, free, and effective participation in the decision-making process that affects them.<sup>178</sup>

## **11. Article 26 (Economic, Social, and Cultural Rights)**

### ▶ **Right to a Healthy Environment**

The Court reiterates that the right to a healthy environment is of universal interest and constitutes a fundamental right for the preservation of humanity. This also comprises a set of procedural and substantive elements. From the former arise obligations in terms of access to information, political participation, and access to justice. The latter include air, water, food, ecosystem, and climate, among others.<sup>179</sup>

175 Cf. Case of the Garifuna Community of San Juan and its members v. Honduras, *supra*, para. 119 - 123.

176 Cf. Case of the Maya Q'eqchi' Indigenous Community of Agua Caliente v. Guatemala, *supra*, para. 250.

177 Cf. Case of the Maya Q'eqchi' Indigenous Community of Agua Caliente v. Guatemala, *supra*, para. 251.

178 Cf. Case of the Maya Q'eqchi' Indigenous Community of Agua Caliente v. Guatemala, *supra*, para. 252 - 275.

179 Cf. Case of La Oroya Population v. Peru, *supra*, para. 118.

States have recognized the right to a healthy environment, which entails an obligation of protection that concerns the international community as a whole. It is challenging to envision international obligations of greater significance than those safeguarding the environment against unlawful or arbitrary conduct that causes serious, extensive, lasting, and irreversible damage to the environment in a scenario of the climate crisis that threatens the survival of species. Given the above, international protection of the environment requires the progressive recognition of the prohibition of such conduct as a peremptory norm (*jus cogens*) that gains the recognition of the international community as a whole as a norm from which no derogation is permitted. This Court has pointed out the significance of the legal expressions of the International Community whose superior universal value is crucial to ensure essential or fundamental values. In this regard, ensuring the interest of both present and future generations and the preservation of the environment against its radical degradation is fundamental for the survival of humanity.<sup>180</sup>

### ▶ Right to air and water as components of a healthy environment

The Court warned that air and water pollution may constitute a cause of adverse effects on the existence of a healthy and sustainable environment. Likewise, it can affect rights that include the right to a healthy environment, life, health, food, housing, and a dignified life when it produces significant damage to the basic goods protected by such rights.<sup>181</sup>

The Court indicated that individuals enjoy the right to breathe clean air as a substantive component of the right to a healthy environment, and therefore, the State is obliged to: (i) establish laws, regulations, and policies that regulate air quality standards that do not constitute health risks; (ii) monitor air quality and inform the population of possible health risks; (iii) conduct action plans to control air quality that include the identification of the main sources of air pollution, and implement measures to enforce air quality standards. In this regard, States must design standards, plans, and measures for air quality control in accordance with the best available science and with the criteria of availability, accessibility, sustainability, quality, and adaptability, even when this comes through international cooperation.<sup>182</sup>

The Court indicated that people enjoy the right to have water free from levels of contamination that constitute a significant risk to the enjoyment of their human rights, particularly the rights to a healthy environment, the right to health, and the right to life<sup>183</sup>.

Furthermore, the Court considered that States must design standards, plans, and measures for air quality control in accordance with the best available science and in accordance with the criteria of availability, accessibility, sustainability, quality, and adaptability, even when this comes through international cooperation.<sup>184</sup>

Regarding the normative content of the right to water as an autonomous right, the Court has expressed that “access to water [...] includes ‘consumption, sanitation, washing, food preparation, and personal and domestic hygiene,’ as well as for some individuals and groups also [...] ‘additional water resources due to health, climate, and working conditions.’” Also, “access to water” implies “obligations of progressive realization,” but “nevertheless, States have immediate responsibilities,

180 Cf. Case of La Oroya Population v. Peru, *supra*, para. 129.

181 Cf. Case of La Oroya Population v. Peru, *supra*, para. 119.

182 Cf. Case of La Oroya Population v. Peru, *supra*, para. 120.

183 Cf. Case of La Oroya Population v. Peru, *supra*, para. 121.

184 Cf. Case of La Oroya Population v. Peru, *supra*, para. 121.

such as guaranteeing [such access] without discrimination and adopting measures to achieve its full realization.” Furthermore, that States must provide protection against acts of private parties, so that third parties do not impair the enjoyment of the right to water, as well as “guaranteeing a minimum essential water supply,” in those “particular cases of persons or groups of persons who are unable to access water themselves [...], for reasons beyond their control.”<sup>185</sup>

The right to water, as a fundamental aspect of the right to a healthy environment, is closely interconnected with the right to water as an autonomous entitlement. The first aspect protects water bodies as elements of the environment that inherently hold value, as a universal interest, and because of their importance for other living organisms, including human beings. The second aspect recognizes the determining role that water plays in human beings and their survival and therefore protects its access and use by human beings. Thus, the Court understands that the substantive aspect of the right to a healthy environment that protects this component is based on an ecocentric premise, while -for example- the right to drinking water and its sanitation is based on an anthropocentric vision. Both aspects are interrelated, however, noncompliance with one does not always imply noncompliance with the other. Thus, the protection of one of these rights is not conditioned to the affectation of the other.<sup>186</sup>

On the other hand, the Court recalled that the right to a healthy environment includes the right to clean air and water. This right is covered by the obligation to respect and guarantee, provided for in Article 1(1) of the Convention. Preventing violations is one of the ways observance is upheld. This obligation extends to the private sphere in order to prevent third parties from violating the protected legal rights and encompasses all legal, political, administrative, and cultural measures that promote the safeguarding of human rights and ensure that any violations are effectively considered and treated as unlawful acts. Along these lines, the Court pointed out that in certain instances, States are obligated to establish adequate mechanisms to monitor and oversee specific activities with the aim of safeguarding human rights, protecting them from actions by both public entities and private individuals<sup>187</sup>.

### ▶ Right to health and environmental pollution

The Court noted that health constitutes a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity. Health requires certain preconditions for a healthy life and is therefore directly related to access to food and water. Therefore, environmental pollution can, in turn, seriously alter the preconditions of human health, and can lead to violations of the right to health as it can affect soil, water, and air. Thus, the guarantee of the right to health includes protection against serious damage to the environment.<sup>188</sup>

The Court considers that in cases where a) it is proven that certain environmental pollution is a significant risk to the health of persons; b) the individuals were exposed to such pollution under conditions that endangered them; and c) the State is responsible for the breach of its duty to prevent such environmental pollution, it is not necessary to prove direct causality between the acquired diseases and their exposure to pollutants. In these cases, to establish State liability for violations of

185 Cf. Case of La Oroya Population v. Peru, supra, para. 123.

186 Cf. Case of La Oroya Population v. Peru, supra, para. 124.

187 Cf. Case of La Oroya Population v. Peru, supra, para. 125.

188 Cf. Case of La Oroya Population v. Peru, supra, para. 133.

the right to health, it is sufficient to establish that the State allowed the existence of pollution levels that pose significant health risks to the people and that the people were effectively exposed to environmental pollution, thus endangering their health. Thus, it will be up to the State to demonstrate that it was not responsible for the existence of high levels of contamination and that this did not pose a significant risk to individuals.<sup>189</sup>.

Finally, the Court recalled that States must act in accordance with the precautionary principle to prevent the violation of the rights of individuals in cases where there are plausible indicators that an activity could cause serious and irreversible damage to the environment, even in the absence of scientific certainty. For this reason, the Court considered that the lack of scientific certainty about the particular effects that environmental pollution may have on people's health cannot be a reason for States to postpone or avoid the adoption of preventive measures, nor can it be invoked as a justification for the failure to adopt measures of general protection for the population<sup>190</sup>.

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189 Cf. Case of La Oroya Population v. Peru, *supra*, para. 204.

190 Cfr. Caso Habitantes de La Oroya v. Perú, *supra*, párr. 207.