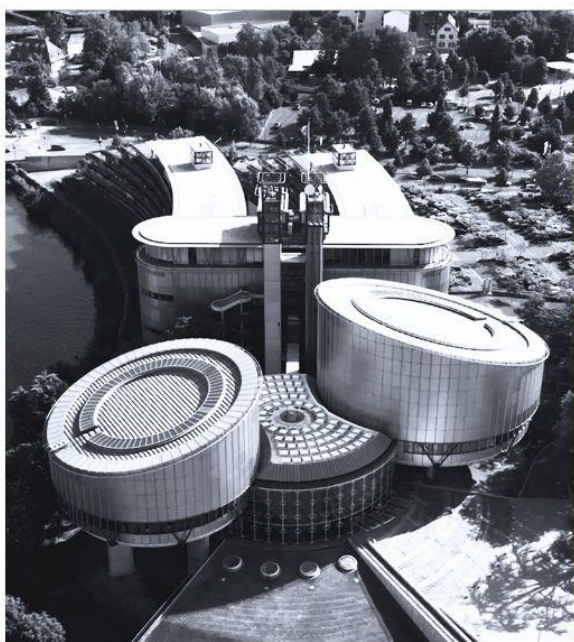




JOINT LAW REPORT

2022-2023

- AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
- EUROPEAN COURT OF HUMAN RIGHTS
- INTER-AMERICAN COURT OF HUMAN RIGHTS



AfCHPR
African Court on Human
and Peoples' Rights



**Inter-American Court
of Human Rights**

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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

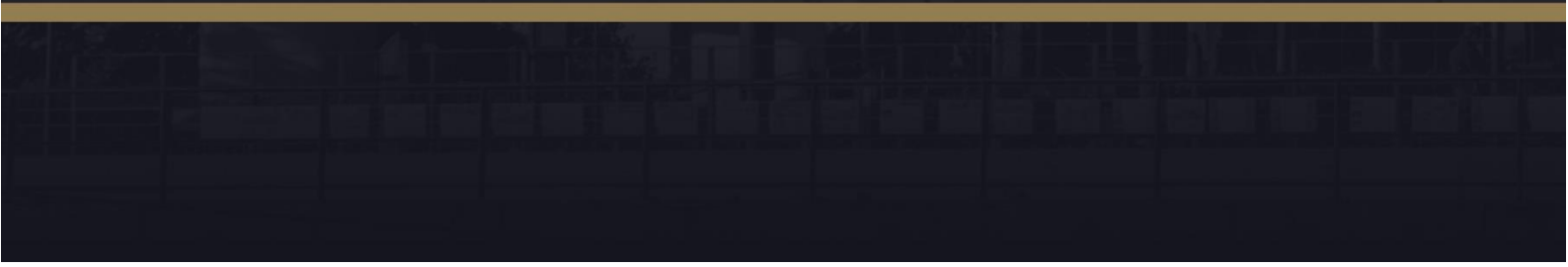


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Presentation

The contribution of the African Court on Human and Peoples' Rights (the Court) to the third edition of the Joint Digest of Case Laws (2022 and 2023) covers five (5) judgments, and include relevant and, in some cases, novel matters of law, relating particularly to the right to self-determination, the right to property, the right to reparations granted to an indigenous community, the right to non-discrimination and the right to health.

Regarding people's right to self-determination, the Court held in *Bernard Anbataayela Mornah v. Republic of Benin and 7 others* that the Respondent States did not violate the rights of the people of the Sahrawi Arab Democratic Republic (SADR). However, it reiterated that the Respondent States, and indeed, all State Parties to the African Charter on Human and Peoples' Rights (the Charter) and the Protocol to the Charter of the African Court on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol), have the responsibility, under international law, to find a permanent solution to the occupation, to ensure the enjoyment of the right to self-determination of the people of SADR and not to do anything that would give recognition to such occupation as lawful or impede their enjoyment of this right.

With regard to the right to property, in the *Harold Mbalanda Munthali v. Republic of Malawi* judgement, the Court, first of all, reaffirmed its jurisprudence according to which it has no jurisdiction over the actual confiscation of the applicant's property and would, therefore, not consider the alleged violation of the right to property. However, the Court considered, based on recharacterization, that it would examine the violation of the right to a remedy given that the issue raised by the applicant is the fact that the Respondent State has neither returned the property of the deceased nor paid compensation for the losses suffered.

With regard to the reparations awarded to the "Ogiek" indigenous populations in *African Commission on Human and Peoples' Rights v. Republic of Kenya* (reparations), the Court, after recalling that the international responsibility of the Respondent State had been incurred through the violation of Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter, ordered the Respondent State to pay pecuniary and non-pecuniary reparations to the said populations.

Regarding the right to non-discrimination, in *Legal and Human Rights Centre v. United Republic of Tanzania*, the Court examined the conformity of sections 148(5)(b) and (e) of the Tanzanian Criminal Procedure Act (CPA) to the provisions of Article 2 of the Charter which prohibits discriminatory treatment. The Court noted that, as the relevant provisions bar the Courts from considering an application for bail by accused persons who have served a sentence exceeding three years and those who have been charged with offences relating to property worth over ten million shillings, it, in effect, treats such accused persons less favourably as compared to accused persons charged with other offences

which fall out of the ambit of 148(5) of the CPA. Consequently, the Court held that sections 148(5)(b) and (e) of the CPA are discriminatory and, therefore, violated article 2 of the Charter.

Finally, regarding the right to health, in *Ligue Ivoirienne des Droits de l'Homme et autres V. Republic of Côte d'Ivoire*, the Court considered that the right presupposes the existence of the following essential and interrelated elements: availability, accessibility, acceptability and quality. The Court noted that following the dumping of toxic waste and its effects on the health of thousands of people, the Respondent State took a number of urgent measures to ensure that the victims received medical treatment. However, those measures were either insufficient or inadequate to meet the needs of all victims and the scale of the consequences of the dumping. The Court found, therefore, that the Respondent State violated the right to health protected by Article 16 of the Charter, firstly by failing to prevent the dumping of the toxic waste, and secondly, by failing to take all the necessary measures to ensure that persons affected by the disaster had full access to quality health care.

With these five judgments, the Court has strengthened and enriched its jurisprudence and understanding of the important principles of the Charter.

Dr Robert W. Eno

Registrar, African Court on Human and Peoples' Rights

Case of African Commission on Human and Peoples' Rights (ACHPR) v. Republic of Kenya – Application No. 006/2012, Judgment on reparations of 23 June 2022

FACTS OF THE MATTER

In its Application, the African Commission on Human and Peoples' Rights ("the Applicant" or "the Commission") alleged that, in October 2009, the Ogiek, an indigenous minority ethnic group in the Republic of Kenya ("the Respondent State"), had received a thirty (30) days eviction notice, issued by the Kenya Forestry Service, to leave the Mau Forest. The Commission filed the Application after receiving, on 14 November 2009, a Communication from the Centre for Minority Rights Development and Minority Rights Group International, both acting on behalf of the Ogiek of Mau Forest. In the Application, the Commission argued that the eviction notice failed to consider the importance of the Mau Forest for the survival of the Ogiek leading to violations of Articles 1, 2, 4, 8, 14, 17(2) and (3), 21, and 22 of the African Charter on Human and Peoples' Rights ("the Charter").

The Court delivered its judgment on the merits of the Application on 26 May 2017. In its Judgment, the Court found that the Respondent State had violated the rights of the Ogiek under Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter. The Court also decided that it would rule on reparations in a separate judgment and invited the Parties to file submissions on reparations.

SUBMISSIONS OF THE PARTIES

The Applicant prayed the Court to order the Respondent to:

- Undertake a process of delimiting, demarcation and titling of Ogiek ancestral land, within which the Ogiek fully participate, within a timeframe of 1 year of notification of the reparations order;
- Establish and facilitate a dialogue mechanism between the Ogiek (via the Original Complainants), KFS [Kenya Forest Service] (where relevant) and relevant private sector operators in order to reach mutual agreement on whether commercial activities on Ogiek land should cease, or whether they will be allowed to continue but operating via a lease of the land and/or royalty and benefit sharing agreement between the Ogiek communal title holders and the commercial operators, in line with provisions 35 to 37 of the Community Land Act, 2016, such dialogue to have concluded within a timeframe of 9 months of notification of the reparations order;
- Pay the sum of US\$297 104 578 in pecuniary and non-pecuniary damage into a Community Development Fund for the Ogiek within no more than 1 year of the Court's Order on Reparations;
- Take all the necessary administrative, legislative, financial and human resource measures to create a Community Development Fund for the benefit of the

members of the Ogiek people within 6 months of notification of the Court's Order on Reparations;

- Adopt legislative, administrative and other measures to recognize and ensure the right of the Ogiek to be effectively consulted, in accordance with their traditions and customs and/or with the right to give or withhold their free prior and informed consent, with regards to development, conservation or investment projects on Ogiek ancestral land, and implement adequate safeguards to minimize the damaging effects such projects may have upon the social, economic and cultural survival of the Ogiek;
- Provide for full consultation and participation of the Ogiek, in accordance with their traditions and customs, in the reparations process as a whole, including all steps that the Respondent State and its agencies take in order to comply with the requested Court order to restitute Ogiek land, provide the Ogiek with compensation, and provide other guarantees of satisfaction and non-repetition;
- Introduce specific legislative, administrative and other measures that are necessary to give effect to the obligations of the Respondent State with respect to the restitution, compensation and other guarantees of satisfaction and non-repetition herein sought, as well as with respect to consultation and participation of the Ogiek, which become apparent as the implementation process takes place, and as set out in this brief, with such processes to be completed within 1 year of the date of the Court's order on reparations, and the Applicant accordingly submits that the Respondent State must take appropriate action to comply with the same;
- Fully recognize the Ogiek as an indigenous people of Kenya, including but not limited to the recognition of the Ogiek language and Ogiek cultural and religious practices; provision of health, social and education services for the Ogiek; and the enacting of positive steps to ensure national and local political representation of the Ogiek; and
- Publicly issue a full apology to the Ogiek for all the violations of their rights as identified by the Judgment, in a newspaper with wide national circulation and on a radio station with widespread coverage, within 3 months of the date of the date of the Court's order on reparations; and
- Erect a public monument acknowledging the violation of Ogiek rights, in a place of significant importance to the Ogiek and chosen by them, the design of which also to be agreed by them, within 6 months of the date of the date of the Court's order on reparations.

The Respondent State prayed the Court to:

- Find that it remains committed to the implementation of the Court's judgment as evidenced by its establishment of a multi-agency Task Force to oversee the implementation of the Court's judgment;
- Order that guarantees of non-repetition together with rehabilitation measures are the most far-reaching forms of reparations that could be awarded to redress the root and structural causes of identified human rights violations;
- Order that the Court should use its offices to facilitate an amicable settlement with the Ogiek Community on the issue of reparations;
- Hold that restitution, for the Applicants, can be achieved by reverse action of guaranteeing and granting access to the Mau Forest, save where encroachment in the interest of public need or in the general interest of the community in accordance with the provisions of the appropriate law and that the modalities of how this can be undertaken to be advised by the Taskforce;

- Find that demarcation and titling is totally unnecessary for purposes of access, occupation and use of the Mau Forest by the Ogiek; and further that the right to occupy and use the Mau Forest would suffice as adequate restitution to the Ogiek and that the individual demarcation and titling would undermine common access and use of the land by other people i.e. nomadic groups that have seasonal access to the Mau Forest;
- Hold that the Respondent State's 2010 Constitution creates a legal super structure that is meant to address the structural and root causes of violations of Article 2 and that by virtue of the existing laws, the same have been substantially remedied and what is left can be attained by administrative interventions and guarantees of non-repetition;
- Find that the Court did not determine that the Ogiek were the owners of the Mau Forest. Additionally, that ownership is not a sine qua non for the utilization of land;
- Reject the community survey report submitted by the Applicant as not credible and the claim for US\$ 297,104,578, as compensation, as being premised on speculative presumptions which are neither fair nor proportionate. Further, that no evidence has been led to prove that the survey was actually conducted;
- Find that any compensation due to the Applicants cannot be computed in United States Dollars for a claim involving a country whose currency is not the United States Dollar;
- Order that the Respondent State's general liability for violations of the Charter can only be computed from 1992, the year when the Respondent became a party to the Charter. Specifically in relation to the eviction of the Ogiek from Mau Forest, that its liability can only be computed from 26 October 2009, when the notice of eviction from South Western Mau Forest was issued;
- Find that the Gazette Notice appointing the Task Force to give effect to the decision of the Court suffices as a public notice acknowledging violations of the Charter and should be deemed to be just satisfaction;
- Hold that there is no basis for ordering the erection of a monument for the Ogiek commemorating the violation of their rights since the Ogiek have no practice of monument erection and there is no evidence that the same would be of any significance to their community especially as the Respondent State already acknowledged its wrong and is actively taking steps to redress the same;
- Find that any award of reparation made by the Court must take into account the situation of the Respondent State as a country so as not to cause it undue hardship.
- Hold that the jurisprudence of the Inter-American Court of Human Rights is not binding on this Court and cannot be the basis for a claim for restitution before the Court;
- Hold that neither Minority Rights Group International nor the Ogiek Peoples' Development Program are representative of the Ogiek and that only the Ogiek Council of Elders is recognised as the body that can speak on behalf of the Ogiek;
- Find, overall, that the Applicant's claims are unsubstantiated and the Court should carefully assess all claims so as to exclude speculative claims.

FINDINGS OF THE COURT

In its judgment on reparations, the Court first had to consider three objections raised by the Respondent State. Firstly, the Respondent State argued that there was no basis for a claim for compensation for any violations before the year 1992, when it became a party to the Charter. In disposing of this objection, the Court recalled that this issue had already

been resolved in its merits judgment when it confirmed its temporal jurisdiction. The Court also noted that the violations alleged by the Applicant, which had been confirmed in its judgment of 26 May 2017, remained unaddressed up to the time it was considering reparations. The Court thus found that there was nothing barring it from considering events that occurred prior to 10 February 1992 in determining the reparations due to the Ogiek.

Secondly, the Respondent State submitted that the Court should consider ordering an amicable settlement in line with Article 9 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ("the Protocol"). The Court, after noting the Parties' disparate positions on the possibility of an amicable settlement, held that a key prerequisite for an amicable settlement is that the Parties must be willing to engage in the process. In the present Application, given the failure of an amicable settlement procedure at the merits stage, and also the Parties' failure to agree on the procedure at the reparations stage, the Court held that the conditions for an amicable settlement were not satisfied.

Thirdly, the Respondent State objected to the involvement of the Centre for Minority Rights Development ("CEMIRIDE"), Minority Rights Group International ("MRGI") and the Ogiek People's Development Programme ("OPDP") in the present proceedings on the basis that these organisations were not representative of the Ogiek. In disposing of this objection, the Court held that the Applicant before it was the Commission rather than the "original complainants" that filed the case, on behalf of the Ogiek. The Court, therefore, held that since the "original complainants" were not appearing before it as parties, it had proper parties to enable it dispose of the Application.

On reparations

In respect of reparations, the Court recalled that the wrongful acts generating the international responsibility of the Respondent State were the violation of Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter. The Court then proceeded to consider the claims for both pecuniary reparations and non-pecuniary reparations.

The Court noted that the Applicant had claimed compensation for both material prejudice as well as moral prejudice. In respect of material prejudice, the Applicant prayed for compensation to be awarded to the Ogiek as a result of the human rights violations suffered that they had suffered. In a bid to substantiate its claim, the Applicant submitted a report from a community survey which attempted to quantify the loss suffered by the Ogiek. The Respondent State submitted that the Applicant's claim for pecuniary damages was fanciful, had no basis in law or practice and prayed the Court to dismiss it.

The Court highlighted that while compensation is an important means for effecting reparations, it is not enough for an Applicant to show that the Respondent State violated a provision of the Charter, rather it is also necessary to prove the damage that the State was being required to indemnify. In respect of the community survey report submitted by the Applicant, the Court found that, and as conceded by the Applicant, that the report was marred by limitations. The Court thus held that it was not bound by the community survey report.

Nevertheless, having considered the Parties' submissions, as well as those by the *amici curiae* and independent experts, the Court, in the exercise of its equitable jurisdiction,

ordered the Respondent State to compensate the Ogiek with the sum of KES 57 850 000. (Fifty-seven million, eight hundred and fifty thousand Kenya Shillings) for the material prejudice suffered.

As for compensation for moral prejudice, the Applicant prayed for the payment of compensation as a result of violations related to the principle of non-discrimination (Article 2), the right to religion (Article 8), the right to culture (Article 17) and the right to development (Article 22) of the Charter. The Respondent State disputed the Applicant's claims for moral prejudice. Specifically, it reiterated its objection to the admissibility of the compensation analysis report filed by the Applicant and averred that all the information contained in the report was incorrect and without any factual basis.

In its findings, the Court confirmed that moral prejudice includes both the suffering and distress caused to the direct victims and their families, and the impairment of values that are highly significant to them, as well as other changes of a non-pecuniary nature, in the living conditions of the victims or their family.

In determining reparations for moral prejudice, the Court confirmed that it takes into consideration the reasonable exercise of judicial discretion and bases its decision on the principles of equity, taking into account the specific circumstances of each case. In the exercise of its discretion in equity, the Court ordered the Respondent State to compensate the Ogiek with the sum of KES100 000 000 (One hundred million Kenyan Shillings) for the moral prejudice suffered.

The Court then considered the Applicant's claims for non-pecuniary reparations covering the claims for restitution of Ogiek ancestral lands; recognition of the Ogiek as an indigenous people; the request for a public apology; the prayer for the erection of a public monument; the prayer for an order directing effective consultation and dialogue over matters affecting the Ogiek and the prayer for guarantees of non-repetition.

The Court held that, in international law, granting indigenous people privileges such as mere access to land is inadequate to protect their rights to land and that what is required is to legally and securely recognise their collective title to the land in order to guarantee their use and enjoyment of the same. The Court thus held that the Respondent State should undertake an exercise of delimitation, demarcation and titling in order to protect the Ogiek's right to property, which in this case revolved around their occupation, use and enjoyment of the Mau Forest and its various resources.

The Court further ordered that where concessions and/or leases had been granted over Ogiek ancestral land to non-Ogiek and other private individuals or corporations, the Respondent State must commence dialogue and consultations between the Ogiek and/or their representatives and the other concerned parties for purposes of reaching an agreement on whether or not they should be allowed to continue their operations by way of lease and/or royalty and benefit sharing with the Ogiek in line with the Community Land Act.

On the recognition of the Ogiek, the Court ordered that the Respondent State must take all necessary legislative, administrative and other measures to guarantee the full recognition of the Ogiek as an indigenous people of Kenya in an effective manner, including but not limited to according full recognition and protection to the Ogiek language and Ogiek cultural and religious practices within twelve (12) months of notification of the judgment.

In respect of the Applicant's prayer for a public apology, the Court held that its judgments, both on the merits and reparations, are a sufficient measure of satisfaction and that, therefore, it was not necessary for the Respondent State to issue a public apology for the violations suffered by the Ogiek.

Regarding the prayer for the erection of a public monument, the Court having considered all the circumstances of the case, especially the other orders on reparations, held that it was not necessary for the Respondent State to erect a monument for the commemoration of the violation of the rights of the Ogiek.

On the prayer for effective consultation and dialogue, the Court granted the Applicant's prayer and ordered that the Respondent State must take all necessary legislative, administrative or other measures to recognise, respect and protect the right of the Ogiek to be effectively consulted, in accordance with their tradition/customs, and/or with the right to give or withhold their free, prior and informed consent, with regards to development, conservation or investment projects on Ogiek ancestral land and to implement measures that would minimise the damaging effects of such projects on the survival of the Ogiek.

In respect of the prayer for guarantees of non-repetition, the Court ordered the Respondent State to adopt legislative, administrative and/or any other measures to avoid a recurrence of the violations established by the Court.

Having pronounced itself on all the pecuniary and non-pecuniary reparations, the Court then considered the question of the establishment of a development fund for the Ogiek. The Court ordered the Respondent State to establish a community development fund for the Ogiek which should be a repository of all the funds ordered as reparations in this case with the view that fund could be one mechanism for ensuring that all the Ogiek benefit from the outcome of the litigation. The Respondent State was also ordered to take the necessary administrative, legislative and any other measures to establish the Fund within twelve (12) months of the notification of the judgment.

In terms of administration of the community development fund, the Respondent State was ordered to coordinate the process of constituting a committee that would oversee the management of the fund and ensure adequate representation from the Ogiek.

On publication of the judgment the Court ordered that the Respondent State must, within six (6) months of notification of the judgment, publish the official English summaries, developed by the Registry of the Court, of the judgment together with that of the judgment of 26 May 2017. The summaries, it was further ordered, were to be published, once in the official Government Gazette and once in a newspaper with widespread national circulation. The Respondent State was also ordered to, within the six (6) months period earlier referred to, publish the full judgments on merits and on reparations together with the summaries provided by the Registry of the Court on an official government website where they should remain available for a period of at least one (1) year.

The Court also ordered the Respondent State to submit, within twelve (12) months from the date of notification of the judgment, a report on the status of implementation of all the Orders that it had made.

It was also the Court's holding that it would conduct a hearing on the status of implementation of the orders made in its judgment on a date to be appointed by the Court twelve (12) months from the date of the judgment.

On costs

Regarding costs of the Application, the Court ordered each party to bear its own costs.

Case of Harold Mbalanda Munthali v Malawi – Application No. 022/2017, Judgment on merits of 23 June 2022

FACTS OF THE MATTER

On 28 July 2017, Mr Harold Mbalanda Munthali (the Applicant) filed an application before the African Court on Human and Peoples' Rights (the Court) on his own behalf and on behalf of the estate of Mr Mbalanda Mweziwapala Munthali (the deceased).

The Applicant alleged that under the Forfeiture Act adopted in the pre-1994 dispensation, the Respondent State confiscated personal and real properties of the deceased in 1976 and vested it in the Government through the office of the Administrator General. The forfeiture, the Applicant alleged, did not require the Government to pay any compensation to the victim and the deceased did not receive any compensation. The Applicant also averred that in 1993 the deceased filed a complaint with the High Court which in 1995 transferred his case to the National Compensation Tribunal (the Tribunal) established under the new Constitution adopted by the Respondent State in 1994 to deal with cases of forfeiture. He further averred that the Tribunal located some of the properties and requested the authorities in the Respondent State to have them returned to the deceased but the authorities did not cooperate.

ALLEGED VIOLATIONS

The Applicant alleged that the conduct of the Respondent State constituted a violation of the rights to equal protection before the law, and to have one's cause heard protected under Articles 3(1), and 7(1) of the African Charter on Human and Peoples' Rights (the Charter); and Articles 14(1) and 16 of the International Covenant on Civil and Political Rights (the ICCPR). The Applicant further alleged the violation of the right to property guaranteed under Article 14 of the Charter.

SUBMISSIONS OF THE PARTIES AND FINDINGS OF THE COURT

The Applicant prayed the Court to make the following orders:

- Declare that the Respondent State's conduct in effecting a forfeiture of the deceased's property was unlawful and contrary to international law.
- Declare that by failing to resolve the deceased's claim, the Respondent State violated the Applicant's right to equal protection before the law; the right to have the deceased's cause heard and the right to property.
- Direct that the Applicant be paid the sum of US\$ 1,104,539.87 representing the loss suffered by the deceased as a result of the forfeiture of his property.
- Direct the Respondent State to compensate the Applicant and his family for the hardship suffered as a result of the conduct of the Respondent State.
- Make an order for costs.

The Respondent State on its part prayed the Court to:

- Dismiss the Application as inadmissible.
- Order that the Applicant should bear the costs.

On jurisdiction

No objection to the jurisdiction of the Court was raised. The Court, however, examined its personal, material, temporal and territorial jurisdiction and found that they were established.

On admissibility

The Respondent State objected to the admissibility of the Application on the grounds of non-exhaustion of local remedies and the Application not being filed within a reasonable time.

Regarding the first ground, the Court found that neither the Constitutional Court nor the Supreme Court of Appeal were effective remedies in the situation of the deceased and the Applicant because, under the Constitution, the Tribunal established by the Respondent State to deal with cases of forfeiture under the Forfeiture Act had exclusive jurisdiction over the issues in dispute. The Court also based its finding on the fact that the High Court dismissed the deceased's claim for compensation on the ground that the matter was statute barred and it lacked jurisdiction as the Tribunal had exclusive jurisdiction over the issues in dispute.

Regarding the requirement to file the Application within a reasonable time, the Court found that it did not apply given that the alleged violations were continuing and the Application could have been filed at any time, so long as the violations alleged remained unresolved.

Having found that other admissibility conditions were met, the Court declared the Application admissible.

On the merits

On the merits of the case, the Court first restated its finding that it did not have jurisdiction over the instantaneous act of confiscation and would therefore not examine the alleged violation of the right to property. The Court however held that it would examine the violation of the right to a remedy given that the actual issue raised by the Applicant is the failure of the Respondent State to return the deceased's properties and pay compensation for the related loss. The Court then examined the alleged violation of the rights to equal protection before the law; to have one's cause heard; and to a remedy.

On the right to equal protection before the law, the Applicant alleged that the Respondent State violated this right by not providing compensation and ousting the jurisdiction of domestic courts to entertain related claims. The Court found that the violation was established given that the Respondent State did not allow the Tribunal to address the claims of the deceased while many other Malawians in the same situation had their claims heard and had obtained compensation under the operations of the Tribunal.

On the right to have one's cause heard, the Applicant alleged that the Respondent State violated this right due to the failure to enforce the Tribunal's decision, the failure to extend the life span of the Tribunal, and ouster of ordinary court's jurisdiction to entertain related claims. The Court found that the violation was established since the Respondent State failed to extend the tenure of the Tribunal and it had ousted the jurisdiction of all courts and granted the Tribunal exclusive jurisdiction, which left the deceased, and later on the Applicant, in a legal limbo as to how to vindicate their rights.

Regarding the right to a remedy, the Applicant alleged that the Respondent State violated the deceased's right to have his confiscated properties returned and awarded compensation for the loss suffered. The Court found that the Respondent State violated the said right based on a joint reading of Articles 1 of the Charter and 26 of the Protocol due to the fact that there was no remedy available for the deceased and then to the Applicant in the domestic system to address the Respondent State's failure to return the properties and award compensation.

On reparations

The Applicant prayed the Court to award him damages in the amount of One Million One Hundred Four Thousand Five Hundred Thirty-Nine Dollars and Eighty-Seven Cents (US\$ 1 104 539.87). According to the Applicant, this amount was an assessment based on the appreciation of the initial loss as at the time of filing the Application; the initial evaluation as the time of seizure being Ten Million Two Hundred Eighty-Five Thousand Two Hundred Fifty-Four Malawian Kwacha and Ninety-Seven Cents (MKW 10,285,254.97).

Taking into account various parameters relating to the situation of the deceased and his family as at the time of confiscation and in the years that followed, the Court awarded material damages in the amount of Two Hundred Million Malawian Kwacha (MKW 200,000,000).

Regarding moral prejudice, the Court took into account the hardship that the deceased's family went through, and having established the family relationship, the Court awarded each of the nine (9) heirs of the deceased, including the Applicant, the amount of One Million Malawi Kwacha (MKW 1,000,000).

On costs

Having noted that Applicant did not specify the amounts for the costs claimed or provide justification or evidence for the same, the Court dismissed his prayer for costs, and consequently ruled that each party bears its own costs.

Case of Bernard Anbataayela Mornah vs. Republic of Benin, Burkina Faso, Republic of Côte D'Ivoire, Republic of Ghana, Republic of Mali, Republic of Malawi, Republic of Tanzania, Republic of Tunisia - Application No. 028/2018, Judgment of 22 September 2022

FACTS OF THE MATTER

On 14 November 2019, the Applicant filed an application before the African court alleging that the Respondent States had violated their international obligations under the African Charter on Human and Peoples' Rights ("the Charter") and the Constitutive Act of the African Union ("AU") by failing to safeguard the sovereignty, independence and territorial integrity of the Sahrawi Arab Democratic Republic ("SADR") and by admitting Morocco to the AU without requiring it to end its occupation of the SADR's territory.

ALLEGED VIOLATIONS

The Applicant alleged that the Respondent State violated:

- (i) Articles 3, 4 and 23 of the AU Constitutive Act; and
- (ii) Articles 1 and 2 of the African Charter on Democracy, Elections and Governance (hereinafter, "the ACDEG") and Articles 1, 2, 7, 13, 19, 20, 21, 22 23 and 24 of the Charter.

SUBMISSIONS OF THE PARTIES AND FINDINGS OF THE COURT

JURISDICTION

The Respondent States objected to the Court's material, personal, territorial and temporal jurisdiction.

a) Material Jurisdiction

With regard to its material jurisdiction, the Court identified and addressed four objections.

The first objection is that the application raised issues of political and diplomatic nature which are not within the Court's jurisdiction. On this point, the Court reiterated its jurisprudence and held that it had material jurisdiction as the Applicant had alleged violations of human rights protected under instruments ratified by the Respondent State. Relating to the issue of sovereignty, the Court noted that once States have willingly ceded their consent to the jurisdiction of an international tribunal, they cannot raise sovereignty as a defence or justification to preclude the tribunal from exercising its jurisdiction.

The second issue was whether the application was based on the Constitutive Act of the AU and the readmission of Morocco to the AU. In this regard, the Court held that the application was not exclusively based on the AU's decision to readmit Morocco but also on the alleged violations of the rights of the peoples' of SADR.

The Court then addressed the third issue of whether the application is akin to a request for advisory opinion. The Court noted that although the application alludes to Article 4 of the Protocol, the application was clearly intended to be a contentious application against the Respondent States.

As regards the fourth issue, that is, whether the AU Assembly has transferred the SADR's matter to the United Nations, the Court noted that any process involving the AU was a political process but that, it did not oust the jurisdiction of the Court which is judicial. In conclusion, the Court dismissed the Respondent States' objections and found that it had material jurisdiction to examine the application.

b) Personal Jurisdiction

As regards personal jurisdiction, the Court noted that all the Respondent States were parties to the Charter and the Protocol and had deposited the Declaration required under Article 34(6) of the Protocol. The Court noted further that, even though some of the Respondent States had withdrawn their Declaration, the withdrawal had no bearing on the present case which was filed before the withdrawal had taken effect.

The Court also held that the issue of *locus standi* of the Applicant did not arise as the notion of victimhood is not recognised in the Charter and therefore the Applicant was entitled to file this case before the Court.

c) Temporal jurisdiction

Concerning its temporal jurisdiction, the Court held that it had temporal jurisdiction as all the Respondent States, except Tunisia had ratified the Charter and the Protocol, and deposited the Declaration under Article 34(6) of the Protocol prior to the date when Morocco officially filed its request to join the AU, that is, on 22 September 2016. The Court further held, that the alleged violations of human rights as a result of the omission of the Respondent States is continuing in nature given that the peoples of SADR are still living under Morocco's occupation and thus, held that it had temporal jurisdiction.

d) Territorial jurisdiction

As regards to its territorial jurisdiction, the Court noted that the nature of the alleged violation that is, the right to self-determination imposes an obligation on all states to provide assistance in the struggle for liberation of peoples' from foreign domination. Therefore, the alleged violation was not limited by state boundaries and hence the Court's territorial jurisdiction was satisfied.

Having established that it had material, personal, temporal, and territorial jurisdiction, the Court concluded that it was competent to examine the application.

i. Admissibility

On the admissibility of the application, the Respondent States raised several objections relating to the requirements that the identity of the Applicant must be disclosed; that the application must comply with the Constitutive Act and the Charter, must not be based exclusively on news disseminated through the mass media, must be filed after exhaustion of local remedies, must be filed within a reasonable time and must not raise any matter or issue previously settled by the parties in accordance with the principles of the UN Charter, the Constitutive Act or any legal instrument of the Union, as enshrined under Rule 50 (2) (a)-(b) and (d)-(g) of the Rules, respectively.

With regard to the first condition, the Court noted that the Applicant has identified himself by name and accordingly held that the identity of the Applicant is sufficiently disclosed as required under Rule 50(2) (a) of the Rules.

In relation to the second condition of admissibility, the Court noted that in line with Rule 50(2)(b) of the Rules, the application, having been filed with a view to protecting the rights and freedoms of the people of the SADR, was compatible with the objective and principles of the Union. The Court also stressed that the mere fact that an application invokes provisions of the Constitutive Act does not render the application incompatible with the Act or the Charter.

Concerning the third condition, the Court noted that the term “exclusively” in Rule 50(2)(d) of its Rules makes it clear that what is prohibited is the complete reliance of an application on news obtained from the media. The Court also noted that the Applicant substantially relied on the various resolutions and decisions of organs of the UN and decisions of the AU which were not mere media reports. Accordingly, the Court held that the application complied with Rule 50(2)(d) of the Rules.

As regards the requirement of exhaustion of local remedies, the Court noted that since the application was directed against several Respondent States, it was unreasonable to require the Applicant to sue all the Respondent States in their respective courts, as he would be barred by the doctrine of sovereign immunity. The Court further noted that it would not only be cumbersome for the Applicant to sue all the Respondent States domestically but also it was foreseeable that there would be undue prolongation of the judicial processes resulting from the multiplicity of the Respondent States. Consequently, the Court held that the instant application should be deemed to have met the requirement of exhaustion of local remedies.

On the fifth condition that an application must be filed within a reasonable time, the Court noted that given the continuing nature of the Respondent States’ alleged failure to safeguard the independence and territorial integrity of the SADR and as a result, the violation of the rights and freedoms of its peoples, the date to compute reasonableness is immaterial. According to the Court, the alleged breach of the Respondent States’ obligation under the Charter renews itself every day and hence, an application could have been filed at any time as long as the Respondent States did not discharge their obligations. Accordingly, the Court held that the application was filed within a reasonable time and thus complied with the requirement of Rule 50(2) (f) of the Rules.

With regard to the condition that an application shall “not raise any matter or issues previously settled by the parties, the Court noted that the examination of compliance with this provision required it to ascertain that an application had not been settled “in accordance with the principles” of the UN Charter or the Constitutive Act or the provisions of the Charter. The Court recalled that a matter is considered as “settled”

within the meaning of Rule 50(2) (g) of its Rules only if three cumulative conditions are fulfilled: (i) the identity of the parties is the same; (ii) the issues for determination are identical or substantially similar as ones before the Court; and (iii) there already exists a decision on the substance or merits. In other words, there must be a final resolution of the matter.

In the instant case, the Court took note of the Respondent States' objections that the matter was already settled by the Advisory Opinion of the ICJ on Western Sahara of 16 October 1975 and the African Union Assembly's decision during the Nouakchott Summit of July 2018. The Court also indicated that in both the ICJ's Advisory proceedings and the AU Assembly meetings of Nouakchott, the instant Parties, including the Applicant, were not involved in the process nor were the reliefs sought in the instant application addressed. In view of this, the Court held that the matter could not be considered to have been 'settled' and was thus compatible with the admissibility condition specified under Rule 50(2)(g) of the Rules.

The Court also held that the application did not contain any language or remarks that could be considered as offensive or insulting. Thus, the Court held that the application was consistent with the requirements of Rule 50(2) (c) of the Rules.

Having found that all the admissibility requirements are met, the Court declared that the application was admissible within the terms of Rule 50 (2) of the Rules.

ii. Merits

The Court first pointed out that at the crux of the application was the Applicant's allegation that the admission of Morocco to the AU was not opposed by Respondent States in spite of their individual and collective obligation to defend the sovereignty of Western Sahara. However, considering the facts of the case and the submissions of the parties, the Court was of the view that the application was essentially linked to the right to self-determination.

Accordingly, the Court stated that, in the application of Article 20 of the Charter, which relates to the right to self-determination, the conduct of the Respondent States with regard to the SADR should be distinguished from that of Morocco, which the Applicant alleged to have directly violated the rights of the peoples of SADR through occupation. It was therefore the view of the Court that the conduct of the Respondent States should be determined in the light of their obligation arising from Article 20(3) of the Charter, which provides that "All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural".

The Court then found it pertinent that such determination of the Respondent States' responsibility should consider the nature of the right to self-determination in general, and its unique place and relevance in the African continent and to the African society, in particular.

In this regard, the Court observed that the notion of self-determination has strong resonance with Africa and carries a special and deep meaning to its people. The Court noted that for this reason, African States have consistently exhibited unwavering commitment to the right to self-determination by supporting or sponsoring resolutions

adopted within the AU, the UN and other regional and international fora. According to the Court, it is this fact that also underpinned Article 20 of the Charter, which weaves the right to self-determination into the *right to existence of peoples*, something that denotes a wholesale entitlement or right to survival as peoples.

The Court also observed that the right to self-determination is essentially related to peoples' right to ownership over a particular territory and their political status over that territory. In this regard, the Court indicated that both the UN and the AU recognise the situation of SADR as one of occupation and consider its territory as one of those territories whose decolonisation process is not yet fully complete.

The Court further stressed that the continued occupation of the SADR by Morocco is incompatible with the right to self-determination of the people of SADR as enshrined in Article 20 of the Charter. However, the Court observed that the responsibility of the Respondent States in this respect would be engaged only if three cumulative conditions are proven to have existed: *an act or omission violating international law*, that is, *an internationally wrongful act*; *the act must be attributed to the Respondent States (attribution)*; and *the act must cause a damage or loss (causal link)*.

Applying these conditions, the Court reiterated that the right to self-determination under Article 20 of the Charter imposes an international obligation on all State Parties to take positive measures to ensure the realisation of the right, including by giving assistance to oppressed peoples in their struggle for freedom and refraining from engaging in actions that are incompatible with the nature or full enjoyment of the right and that this obligation extended to the Respondent States.

However, the Court observed that, although both the Applicant and the SADR assert that the fact of admission in and of itself is not the basis of their application, the conduct of the Respondent States that they are complaining about is basically related to the said admission.

The Court accordingly noted that in order to establish the internationally wrongful act of the Respondent States, it had to examine the overall context of the decision to admit Morocco as a member to the AU and the role of the Respondent States in the process. In this regard, the Court held that there was no evidence before it showing the manner in which the Respondent States voted.

In view of the foregoing, the Court held that the Respondent States had not, individually or collectively, violated the right to self-determination of the people of the SADR guaranteed under Article 20 of the Charter.

With regard to the alleged human rights violations directly ensuing from Morocco's occupation, the Court found it unnecessary to examine or pronounce it to them, as Morocco was not a party to this case.

Having held that the Respondent States did not violate the rights of the people of SADR, the Court nevertheless reiterated that the Respondent States, and indeed, all State parties to the Charter and the Protocol, as well as all Member States of the AU, have the responsibility under international law, to find a permanent solution to the occupation and to ensure the enjoyment of the right to self-determination of the people of Western Sahara and not to do anything that would give recognition to such occupation as lawful or impede their enjoyment of this right.

iii. Reparations

The Court noted that an order for reparations was not warranted as it had not found a violation of human rights.

Case of Legal and Human Rights Centre and Tanzania Human Rights Defenders Coalition v. United Republic of Tanzania – Application No. 039/2020, Judgment of 13 June 2023

FACTS OF THE MATTER

The Applicants in this case are non-governmental organisations that filed the case before the Court challenging Section 148(5) of the Tanzanian Criminal Procedure Act (CPA) (CAP 20 R.E.2019) which provides for unbailable offences. The Applicants contended that section 148(5) CPA deprives individuals of their basic rights enshrined in the Constitution and relevant international human rights. They further contended that as a result of the mandatory nature of the provision, judicial officers are denied any discretion in determining bail applications pertaining to the said section.

ALLEGED VIOLATIONS

The Applicants alleged the violation of the following: the duty to recognise the rights and freedoms and adopt legislative or other measures protected under Article 1 of the African Charter on Human and Peoples' Rights (the Charter); the right to non-discrimination protected under Article 2 of the Charter; the right to liberty and security protected under Article 6 of the Charter; the right to be presumed innocent protected under Article 7 (1)(b) of the Charter.

SUBMISSIONS OF THE PARTIES AND FINDINGS OF THE COURT

The Applicants prayed the Court to make the following orders:

- Declare that the Respondent State is in violation of Articles 1, 2, 6 and 7 of the Charter through enacting section 148(5) of the CPA;
- Declare that the Respondent State, through enactment of section 148(5) has violated Articles 2, 9(1), (3), (4), 14(1), (2), 3(c) and 26 of International Covenant on Civil and Political Rights, and, 1, 2, 3, 6, 7, 9, 10 and 11(1) of the Universal Declaration of Human Rights.
- That the Respondent State puts in place constitutional and legislative measures to guarantee the rights provided for under Article 1, 2, 6 and 7 of the Charter and other international human rights instruments.
- Make an order that all suspects and accused persons charged with unbailable offences, be released on bail within one month from the date of the decision under the bail conditions set by the Respondents Courts, based on circumstances of each case.
- Make an order that the Respondent State reports to the Court, within a period of twelve (12) months from the date of judgment issued by the Court, on the implementation of this judgment and consequential orders.
- Any other remedy and/or relief that the Court will deem to grant; and
- Order the Respondent State to pay the Applicant's costs.

The Respondent State on its part prayed the Court to:

- Dismiss the Application for being devoid of merit; and
- Order that the Applicant should bear the costs.

On jurisdiction

The Respondent State objected to the personal jurisdiction of the Court. In its decision, the Court held that the Applicants were a Non-Governmental Organisation (NGO) with observer status before the African Commission on Human and Peoples' Rights and therefore the Court's personal jurisdiction had been established. The Court also held that other aspects of its jurisdiction had been established.

On admissibility

On exhaustion of local remedies, the Court held that the constitutionality of Section 148(5) of the CPA had already been challenged before the Respondent State's courts in *Dickson Sanga Paul v. the Republic* with the Tanzanian Court of Appeal holding that Section 148(5) of the CPA was constitutional. The Court thus held that, the Applicants could not have been expected to seize the national courts on a public interest case regarding the same subject matter already decided by the Court of Appeal, as there would have been no prospect of success. Therefore, the Court held that the Application complied with Rule 50(2)(e) of the Rules as regards exhaustion of local remedies.

With regard to whether the Application was filed within a reasonable time after exhaustion of local remedies, the Court noted that the Court of Appeal case in *Dickson Sanga Paul* was decided on 5 August 2020, which is three (3) months and fifteen (15) days before the Applicants seized the Court. The Court held that this period was reasonable and thus the Application complied with Rule 50(2)(f) of the Rules.

The Court also decided that the matter had not been settled before as the previous case of *Anaclet Paulo v. United Republic of Tanzania* was on the process of denial of bail and not on the provisions of the law. Furthermore, the Court held that the prayers in the Anaclet Case were not the same as those prayed by the Applicants in the present case. Consequently, the Court held that the Application complied with Article 56(7) of the Charter and it was, therefore, declared admissible.

On the merits

On the merits, the Court considered whether Sub-sections 148(5)(b) and (e) of the CPA were discriminatory and therefore a violation of Article 2 of the Charter. The Court found that Sub-sections 148(5)(b) and (e) of the CPA out rightly barred courts from considering an application for bail by accused persons who have served a sentence exceeding three years and those who have been charged with offences relating to property worth over ten million Tanzanian Shillings (TZS 10,000,000). The Court held that in effect, the above-mentioned Sub-sections treat such accused persons less favourably as compared to accused persons charged with other offences which fall outside the ambit of Section 148(5) of the CPA. Consequently, the Court held that Sub-sections 148(5)(b) and (e) of the CPA were discriminatory and thus violated Article 2 of the Charter.

The Court then considered whether Sub-sections 148(5)(b) and (c) of the CPA violated the right to be presumed innocent. In this regard, the Court found that the outright barring of Courts from considering an application for bail provided for under Section 148(5) of the CPA is neither necessary nor proportionate to the aim that it seeks to achieve and thus it violated the right to be presumed innocent protected under Article 7(1)(b) of the Charter.

Furthermore, the Court considered whether Sub-sections 148(5)(b) and (c) of the CPA violated the right to be heard. The Court found that Section 148(5) of the CPA does not give judicial officers any choice as to the grant of bail once an accused person falls under one of the categories enumerated under Section 148(5) of the CPA. It held that, this effectively denies an accused person his right to be heard and especially to present his or her own unique circumstances that might allow the judicial officer to grant bail. Therefore, the Court held that Sub-sections 148(5)(b) and (c) of the CPA violated the right to be heard.

The Court further held that as a consequence of finding other violations of the Charter in the present case, Article 1 of the Charter was also violated.

On reparations

With regards to reparations, the Court ordered the Respondent State to take all necessary constitutional and legislative measures, within a reasonable time not exceeding two (2) years, to ensure Sub-sections 148(5) (b)-(e) of the CPA are amended and aligned with the provisions of the Charter so as to eliminate, among others, any violation of the Charter and other instruments ratified by the Respondent State. Furthermore, the Court ordered the Respondent State to take necessary measures within one (1) year of notification of this judgment to rehear applications for bail of accused persons charged with unbailable offences.

The Court also ordered the Respondent State to publish the Judgment within a period of three (3) months from the date of notification, on the websites of the Judiciary and the Ministry for Constitutional and Legal Affairs, and to ensure that the text of the Judgment remains accessible for at least one (1) year after the date of publication.

Lastly, that the Respondent State was ordered to report on measures taken to implement this Judgment within twelve (12) months of notification of the judgment.

On costs

The Court ordered each party to bear its own costs.

Ligue Ivoirienne des Droits de l'Homme (LIDHO) and Others v. Republic of Côte d'Ivoire - Application No. 041/2016, Judgment of 5 September 2023

FACTS OF THE MATTER

On 18 July 2016, the *Ligue Ivoirienne des Droits de l'Homme* (LIDHO), the *Mouvement Ivoirien des Droits Humains* (MIDH) and the International Federation for Human Rights (FIDH) ('the Applicants') filed an application before the African Court on Human and Peoples' Rights ('the Court') against the Republic of Côte d'Ivoire ('the Respondent State') alleging violations of human rights related to the dumping of toxic waste at several sites in the district of Abidjan. None of these sites had chemical waste treatment facilities. As a result of the waste dumping, the air was polluted and a stench spread throughout the district of Abidjan. On the same day, thousands of people flocked to health centres complaining of nausea, headaches, vomiting, skin rashes and nose bleeding. The Applicants state that, seventeen (17) people died as a result of inhaling toxic gas. Hundreds of thousands of other people were affected and environmental experts reported severe ground water contamination.

ALLEGED VIOLATIONS

In their application, the Applicants alleged a violation of the following rights:

- The right to an effective remedy;
- The right to seek compensation for damages suffered, protected by Article 7(1)(a) of the Charter, read in conjunction with Article 26 of the African Charter;
- Articles 2(3) of the International Covenant on Civil and Political Rights (ICCPR), 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), 4(1) and 4(4)(a) of the Convention on the Ban of the Import into Africa of Hazardous Wastes and on the Control of Transboundary Movements and Management of Hazardous Wastes within Africa ('Bamako Convention');
- The right to respect for life and for the physical and moral integrity of the person, protected by Articles 4 of the Charter and 6(1) of the ICCPR;
- The right to the enjoyment of the highest attainable standard of physical and mental health, protected by Articles 16 of the Charter, 11(1), and 12(1) and (2)(b) and (d) of the ICESCR;
- The right to a satisfactory and comprehensive environment, conducive to their development, protected by Article 24 of the Charter;
- The right to information, protected by Articles 9(1) of the Charter and 19(2) of the ICCPR; and
- The rights protected by the 2003 African Convention on the Conservation of Nature and Natural Resources ('Algiers Convention').

SUBMISSIONS OF THE PARTIES AND FINDINGS OF THE COURT

i. Jurisdiction

The Respondent State objected to the Court's material and temporal jurisdiction.

The Respondent State raised three objections to the Court's material jurisdiction on the grounds that, firstly, the Court is not an appellate court; secondly, the Algiers Convention is not a human rights instrument; and, thirdly, the Applicants failed to indicate the articles of the Algiers Convention which they allege to have been violated.

With regard to the first objection, the Respondent State argued that the Algiers Convention was not a human rights instrument and therefore did not fall within the Court's material jurisdiction. In its determination, the Court held that the Algiers Convention, is indeed human a rights instrument as it obligated States to protect the rights under Articles 16 and 24 of the Charter, namely the right to a satisfactory and comprehensive environment, conducive to development.

With regard to the second objection, that the Applicants had alleged a violation of the Algiers Convention without, however, specifying which provisions of that Convention had been violated, the Court held that Applicants are not mandated to specify the Articles violated in a human rights instrument. Furthermore, that it suffices for the subject of the application to relate to rights guaranteed by a human rights instrument ratified by the State concerned.

With regard to the third objection, that the Court is not a court of appeal which can review decisions rendered by the competent courts of a sovereign and independent State, the Court noted that even though it is not an appellate Court, it is empowered to determine whether or not the proceedings of national courts are in conformity with human rights instruments ratified by the State concerned.

The Respondent State also objected to the temporal jurisdiction on the grounds that, the Declaration required under Article 34(6) to allow individuals and NGOs to seize the Court directly did not have retroactive effect also that the violations alleged in the application were not of a continuing nature. In its decision, the Court held that the determination of temporal jurisdiction is from the date of entry into force of the Protocol in relation to the Respondent State. The Court noted therefore that the dumping of the toxic waste took place on 18 August 2006, which is after the Respondent State had become a party to the Protocol on 25 January 2004, accordingly, its temporal jurisdiction was satisfied.

ii. Admissibility

The Respondent State raised the following objections to the admissibility of the application: (i) the Applicants have no interest in bringing proceedings; (ii) the Applicants have not provided a power of attorney from the victims enabling them to represent them before the Court; (iii) the Applicants have not identified the said victims; and (iv) the application raises allegations of violations for the first time before the Court.

Regarding the *lack of standing* of the Applicants, the Court in rejecting the objection, held that an Applicant need not be directly affected by the alleged violations and that the Applicants in this case had filed it on a public interest basis.

With regard to the objection based on failure to adduce a power of attorney, the Court held that the Applicants' status as human rights NGOs entitled them to bring actions on behalf of the victims in matters affecting the public interest, and that they were therefore not obliged to provide a power of attorney on their behalf to represent them.

With regard to the objection based on the non-identification of the victims, the Court held that the Applicants' allegations fall within the scope of public interest litigation insofar as the challenged legal provisions concern all citizens whose interest is directly affected.

With regard to the admissibility conditions laid down in Article 56 of the Charter, the Respondent State raised objections to the admissibility of the application based on the non-exhaustion of local remedies, non-filing of the application within a reasonable time and that the matter had been settled.

With regard to the objection based on non-exhaustion of local remedies, the Court held that the local remedies had been exhausted, at least, in respect of more than sixteen thousand (16,000) victims who had participated directly in the domestic proceedings and that given that the case had been examined by the highest judicial body of the Respondent State, that is, its Supreme Court. Furthermore, the Court noted that the Memorandum of Understanding between the Respondent State and the companies involved in the toxic waste dumping case necessarily rendered domestic remedies unavailable and ineffective.

With regard to the objection that the application was time barred, the Court observed that local remedies were exhausted immediately after the judgment of 23 July 2014 was handed down by the Joint Chambers of the Supreme Court of the Respondent State. It follows that, as the application was filed on 18 July 2016, a period of one year, 11 months and 25 days elapsed after the exhaustion of local remedies. Furthermore, the Court held that the filing of the application required a minimum amount of preparation time, particularly in view of the number of victims involved and the serious nature of the alleged violations. The Court therefore declared that the application had been filed within a reasonable time.

As regards the objection to admissibility that the matter had been previously settled, the Court noted that the proceedings leading to the decisions handed down by the domestic courts were not conducted under the Charter of the United Nations, the Constitutive Act of the AU or the Charter. The Court noted further that, in any event, the Respondent State did not prove that the victims represented by the Applicants were the same in the various proceedings initiated before the foreign courts concerned.

iii. The Merits

The Applicants alleged five (5) violations of human rights: the right to respect for life and physical and moral integrity, the right to an effective remedy and adequate compensation for damages, the right to physical and mental health and the right to a satisfactory and comprehensive environment, as well as the right to information.

On the violation of the right to life and to physical and moral integrity, the Court held that the obligation to prevent the import into its territory of toxic waste whose impact on human life it could or should have known was incumbent on the Respondent State, by virtue of its international commitments. It also pointed out that the dumping of toxic

waste in the city of Abidjan and its suburbs had been authorized by the Respondent State and that such authorization constituted, *per se*, a breach of the obligation to respect the right to life. It also noted that the parties agreed that the dumping of the waste had led to the death of at least seventeen (17) people and the poisoning of more than one hundred thousand (100,000) others. In the Court's view, this causal link demonstrated that the Respondent State had not discharged its obligation to protect the right to life by taking the necessary measures, prior to the dumping of the waste, to prevent the loss of human life.

The Court held that the obligation to prevent the violation of the right to life applies to all victims and not only to cases where death has actually occurred. The Court observed that, although the responsibility, *inter alia*, to respect obligations under international law rests primarily with States, the same responsibility nonetheless rests with companies, in this case multinationals. The Court concluded that the Respondent State violated Article 4 of the Charter.

In relation to the alleged violation of the right to an effective remedy, the Court noted, in accordance with the parties agreement, that, the Respondent State perpetuated, for the benefit of TRAFIGURA and all the other persons involved, a regime of impunity through immunity from prosecution. This act rendered domestic remedies unavailable, at least for victims other than those who initiated proceedings before the national courts. The Court found that the Respondent State had failed to guarantee the right to an effective remedy with regard to the exhaustive identification of the victims and the decontamination of the sites concerned. It also found that domestic remedies, while available to some victims, had been neither effective nor satisfactory, given that thousands of other victims had been unable to exercise them and others had not obtained satisfaction even though the damage caused by the spill was indisputable. Therefore, the Respondent State had violated the victims' right to an effective remedy protected by Article 7(1) read in conjunction with Article 1 of the Charter.

On the alleged violation of the right to enjoyment of the highest attainable standard of physical and mental health, the Court held that the right to health presupposes the existence of the following essential and interdependent elements: availability, accessibility, acceptability and quality. The Court noted that, following the dumping of toxic waste and its effects on the health of thousands of people, the Respondent State had taken urgent measures to ensure that the victims received medical care. However, those measures were either insufficient or inappropriate to meet the needs of all the victims and the extent of the consequences of the dumping. The Court thus found that the Respondent State had violated the right to health protected by Article 16 of the Charter, firstly by failing to prevent the dumping of toxic waste, and secondly by failing to take all necessary measures to ensure that those affected by the disaster had full access to quality healthcare.

As regards the alleged violation of the right to a satisfactory and comprehensive environment, the Court found that the Respondent State had not taken adequate administrative measures to prevent the dumping of the cargo of toxic waste on its territory. This is because the Respondent State did not check whether the waste could be effectively treated with the necessary care from the point of view of environmental management. They had an obligation to ensure that the dumping of the waste was conducted in such a way as to protect human health and the environment from the harmful effects that could result from the toxic waste. Furthermore, the authorities of the Respondent State failed to verify, as required by the Bamako Convention, information on

proposed shipments and imports of hazardous and other waste into Africa, in order to be able to assess the consequences of such a process on human health and the environment. The Court also found that the Respondent State had not proved that it had effectively and promptly cleaned up the polluted sites, and therefore, it held that the Respondent State had breached Article 24 of the Charter.

On the alleged violation of the right to information, the Court noted that, despite the significant measures taken by the Respondent State, it failed to inform the public about many issues that were crucial in the circumstances of a disaster of this scale, the health and environmental effects of which, are continue to be felt in the lives of a large number of people. In particular, the Court noted that the Respondent State had not provided the public with useful information about the long-term consequences of the dumping of the toxic waste, the circumstances of the dumping, the exact composition of the waste, the possible impact on other areas or the number of people affected.

It noted that the Respondent State had also failed to provide any information on the health risks to which the population was exposed, in particular those who were in the vicinity of the contaminated sites between 19 August 2006 and 15 November 2016. The Court further noted that no official information or updated data on the number of people who died or were affected as a result of the dumping of toxic waste was available. The same applies to information on compensation under the terms of the memorandum of understanding. The Court thus held that the Respondent State had breached the right to information protected by Article 9(1) of the Charter.

iv. Pecuniary reparation

The Court ordered the Respondent State to pay reparations for the harm caused to the victims by creating, within one year of notification of the judgment, a compensation fund to be financed with the sums received from TRAFIGURA and sufficient additional resources taking into account the census previously carried out. The Court also ordered the Respondent State to pay each of the Applicants one (1) symbolic CFA franc as moral damages.

v. Non-pecuniary compensation

The Court ordered the Respondent State to take the following measures, within a period varying between six (6) months and one (1) year after service of the judgment:

- To open an independent and impartial enquiry into the dumping of the toxic waste in order to establish the criminal and individual responsibility of the perpetrators and initiate proceedings against them;
- Publish a transparent public report on the use of the funds allocated to it under the terms of the Memorandum of Understanding signed with TRAFIGURA;
- Conduct a general and updated national census of the victims;
- Ensure that victims receive medical and psychological assistance;
- Undertake legislative and regulatory reforms to implement the ban on the import and dumping of hazardous waste on its territory in accordance with the applicable international conventions to which it is a party;
- Amend its criminal law to provide for sanctions against legal persons involved in the dumping of toxic waste;

- Organise training for the officials concerned, to raise their awareness on the protection of human rights and the environment, and incorporate such training into school and university curricula in order to promote respect for human rights and the environment;
- Guarantee the presence of one or more representatives of the Ministry of the Environment in all its ports, giving them the power and the means to monitor the removal of waste from ships;
- Publish the judgment in French, together with the official summary, on the Government's official website and ensure that it remains accessible there for a minimum period of one (1) year;
- Submit to the Court, within six (6) months of the date of notification of this judgment, a report on the implementation of the measures ordered therein and, thereafter, every six (6) months until the Court considers that they have been fully complied with.

A black and white photograph of the European Court of Human Rights building in Strasbourg, France. The building features a large, curved glass facade and a central tower with a flag on top. In the foreground, a tram is visible on a track, and a person is riding a bicycle on a path. The sky is overcast.

EUROPEAN COURT OF HUMAN RIGHTS

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Presentation

The system of the European Convention, like Europe itself, was marked by Russia's aggression against Ukraine on 24 February 2022. On 16 March 2022 the Committee of Ministers of the Council of Europe decided that Russia was no longer a member of the Organisation. In a Resolution adopted by the Plenary on 22 March, the Court explained that it remained competent, pursuant to the "residual" jurisdiction conferred by Article 58 §§ 2 and 3 of the European Convention on Human Rights, to deal with applications directed against the Russian Federation in relation to acts or omissions capable of constituting a violation of the Convention, provided that they had occurred up to 16 September 2022. On that date, Russia ceased to be a High Contracting Party to the European Convention and the judge elected in respect of Russia ceased to hold office.

Following the exclusion of the Russian Federation, in 2023 the Council of Europe held a fourth historic summit of the Heads of State and Government. In the ensuing Reykjavík Declaration, the Heads of State and Government reaffirmed their deep and abiding commitment to the European Convention on Human Rights and the European Court of Human Rights as the ultimate guarantors of human rights across our continent, alongside our domestic democratic and judicial systems.

The Declaration also recommitted the States to resolving the systemic and structural human rights problems identified by the Court, ensuring the full, effective and prompt execution of final judgments, and providing sufficient and sustainable resources to enable the Court to exercise its judicial functions effectively and to deal with its workload expeditiously.

Against the background of these historic events the Court's work continued apace. By the end of 2023, the number of applications pending, although high (68,450), had significantly decreased, compared to the close of 2022 (74,650).

At Grand Chamber level, after a concerted effort, case-processing time has been reduced in both contentious proceedings and advisory opinions. With a very high number of inter-State applications pending at the beginning of 2023, particular attention has been paid to accelerating and rationalising case-processing in their regard, prioritising those relating to the ongoing conflict in Ukraine.

Procedural reforms have also been pursued. On 1 February 2022, pursuant to Protocol No. 15 to the European Convention on Human Rights, the time-limit for applying to the Court was shortened to four months from the date of the final domestic decision. In March 2023, a new Practice Direction on third party interventions was published. It sought to clarify the manner in which third parties can intervene, in particular as concerns time-limits for making written submissions. The Plenary Court also adopted several

decisions clarifying and codifying its existing practice relating to interim measures under Article 39¹.

As to the Superior Courts Network, by 2023, this included 105 member courts in 45 of the 46 Council of Europe member States. We were also particularly pleased to have welcomed to the network as observers the Inter-American Court of Human Rights in 2022, and the African Court of Human and Peoples' Rights in 2023. Including the Court of Justice of the European Union which joined in 2021, the network now includes three observer courts.

September 2023 marked the 70th anniversary of the entry into force of the European Convention on Human Rights. Over the years, the Court has dealt with well over one million applications and handed down more than 26,000 judgments and many thousands of decisions. Through these judgments and decisions, the Court has sought consistently to defend "the common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law". The most recent, key cases are set out in the summaries below.

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

Marialena Tsirli
Registrar
European Court of Human Rights

¹ A new practice direction in that regard was issued in 2024.

Summary

In 2022 the Grand Chamber delivered nine judgments, one decision and three advisory opinions.

Under Article 3, the Grand Chamber dealt with three cases concerning extradition. In *Khasanov and Rakhmanov* it clarified the scope and nature of the risk assessment under Article 3 in removal cases, as well as the methodology for cases brought by members of vulnerable groups allegedly exposed to systematic ill-treatment. In *Sanchez-Sanchez* the Grand Chamber examined the issue of whether life sentences without parole in third States requesting extraditions from member States are to be assessed using the standards which apply to Contracting States, as set out in *Vinter and Others*. In the decision in *McCallum*, the Grand Chamber confirmed its approach of distinguishing between the substantive obligation under Article 3 and the related procedural safeguards, the latter not being applicable in the extradition context.

In *Grzęda* the Grand Chamber considered a novel issue: the applicability of Article 6 § 1 (civil limb) to a dispute arising out of the premature termination of the term of office of a member of a judicial council (the National Council of the Judiciary) while he was still a serving judge. In doing so, it developed and clarified the first and the second conditions of the *Eskelinen* test. The Grand Chamber also had regard to the overall context of the reforms of the judicial system, finding that, as a result, the judiciary had been exposed to interference by the executive and legislative powers, and its independence and adherence to rule-of-law standards had been substantially weakened.

Under the criminal limb of Article 6 § 1, in *Vegotex International S.A.* the Grand Chamber clarified the criteria for assessing the compelling nature of the general interest grounds advanced to justify the introduction of retrospective legislation designed to influence the judicial determination of a dispute in a tax-related case.

Under Article 10, in *NIT S.R.L.* the Grand Chamber developed its case-law on pluralism in the media. For the first time it dealt with restrictions imposed on a broadcaster with the aim of enabling diversity in the expression of political opinions and enhancing the protection of the free-speech interests of others.

In *Beeler* the Grand Chamber looked at Article 14 read in conjunction with Article 8 and clarified the criteria used to determine “family life” under Article 8 in relation to social welfare benefits. Also under Article 14, in *Savickis and Others* the Grand Chamber dealt with the justification for differences in treatment based on nationality in the context of the restoration of a State’s independence after unlawful occupation and annexation.

In *H.F. and Others v. France* the Grand Chamber ruled, for the first time, on the existence of a jurisdictional link between a State and its “nationals” in respect of a complaint under Article 3 § 2 of Protocol No. 4. It examined the scope of this provision and the extent of a State’s procedural obligations in the context of a refusal to repatriate.

The Grand Chamber also delivered its second judgment in an infringement procedure (*Kavala*), finding that Türkiye had failed to abide by the Court's final judgment explicitly indicating, under Article 46, the need for an applicant's immediate release. In this connection, the Grand Chamber clarified certain matters concerning the roles of, and the institutional balance between, the Court and the Committee of Ministers of the Council of Europe.

The Grand Chamber also delivered three advisory opinions in response to requests under Protocol No. 16 to the Convention. In response to a request from the Armenian Court of Cassation (P16-2021-001), the Grand Chamber addressed aspects of its Article 3 and Article 7 case-law regarding the applicability of statutes of limitations to the prosecution, conviction and punishment for an offence constituting, in substance, an act of torture. In response to a request from the French *Conseil d'État* (P16-2021-002), the Grand Chamber clarified aspects of the practical application of the non-discrimination rule enshrined in Article 14. In response to a request from the Lithuanian Supreme Administrative Court (P16-2020-002), the Grand Chamber identified the limits of advisory opinions with regard to the execution of the Court's judgments. It also clarified the requirements and criteria relevant for the assessment as to whether the ban preventing an impeached former member of parliament to stand for election to the *Seimas* had become disproportionate for the purposes of Article 3 of Protocol No. 1.

The Court, sitting in Chamber formation, also delivered a number of judgments which were noteworthy in terms of the development of its case-law. Under Article 2 the Court applied the *Osman* positive obligation to take preventive operational measures to protect migrants during a sea rescue operation (*Safi and Others*) for the first time. It also examined, for the first time, whether an act of euthanasia was compatible with the Convention (*Mortier*). Under Article 3 the Court addressed the issue of the repeat victimisation of a rape victim (*J.I. v. Croatia*).

Under Article 8 the Court examined, for the first time, a complaint about age-assessment procedures for migrants requesting international protection and claiming to be minors (*Darboe and Camara*) and a complaint about sexual harassment in the workplace (*C. v. Romania*).

As to freedom of expression, the Court clarified the relevant factors to be used for assessing whether the protection of Article 10 extends to a given act or conduct prohibited by law (*Kotlyar*) and whether the measures aimed at protecting the reputational interests of a public body can be regarded as pursuing a "legitimate aim" under Article 10 § 2 (*OOO Memo*). Under Article 11 the Court addressed a new question, namely the applicability of this provision to a strike conducted by individual employees outside the framework of official trade-union action (*Barış and Others*).

As regards the prohibition of discrimination, in *Arnar Helgi Lárusson* the Court ruled, for the first time, that a complaint about a lack of accessibility of public buildings for disabled people fell within the ambit of "private life" and examined, under Article 14 taken in

conjunction with Article 8, whether the State had fulfilled its positive obligations in this respect. The Court also examined from this standpoint the allegations of racial profiling during an identity check (*Muhammad, Basu*).

The year 2022 has also seen the Court consider the interactions of the Convention with European Union law and the case-law of the Court of Justice of the European Union. Examples include cases concerning the intervention of the legislature influencing the judicial outcome of a dispute in a tax-related case (*Vegotex International S.A.*), sexual harassment in the workplace (*C. v. Romania*), age-assessment procedures for migrants requesting international protection (*Darboe and Camara*) and the reforms of the Polish judicial system (*Grzęda*).

In several cases the Court also noted the interactions between the Convention and international/European law. Examples include cases concerning allegations of racial profiling during an identity check (*Basu*) and the refusal to repatriate nationals held with their young children in Kurdish-run camps in Syria after the fall of the so-called “Islamic State” (*H.F. and Others v. France*). The Court referred in particular to the UN Convention on the Elimination of All Forms of Discrimination against Women (*Beeler*), the Vienna Convention on Consular Relations (*H.F. and Others v. France*), the International Convention on the Rights of the Child (*Darboe and Camara, H.F. and Others v. France*), the International Covenant on Civil and Political Rights (*H.F. and Others v. France*), and the UN Convention on the Rights of Persons with Disabilities (*Arnar Helgi Lárusson*), as well as the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence and the European Social Charter (*C. v. Romania, Barış and Others*). The Court also relied on the work of the Venice Commission (*Grzęda*), ECRI (*Basu*), the UN Human Rights Committee (*Basu, Mortier, H.F. and Others v. France*) and the International Law Commission (*H.F. and Others v. France*).

It should also be noted that in many areas the Court developed its case-law on positive obligations that must be fulfilled by member States under the Convention. Such areas included euthanasia (*Mortier*), the protection of migrants during a sea rescue operation (*Safi and Others*), age-assessment procedures for migrants requesting international protection and claiming to be minors (*Darboe and Camara*), protection against sexual harassment in the workplace (*C. v. Romania*), accessibility of public buildings (*Arnar Helgi Lárusson*), refusal to repatriate (*H.F. and Others v. France*), and the investigation into allegations of racial profiling during an identity check (*Basu, Muhammad*).

Lastly, the Court ruled on the breadth of the margin of appreciation that should be afforded to member States, for example in the areas of euthanasia (*Mortier*), the observance of political pluralism in the media (*NIT S.R.L.*), accessibility of public buildings (*Arnar Helgi Lárusson*), and a difference in treatment based exclusively on nationality in the context of the restoration of a State’s independence (*Savickis and Others*).

Jurisdiction and Admissibility

JURISDICTION OF STATES (ARTICLE 1)

The judgment in *H.F. and Others v. France*² concerned jurisdiction, the scope of the right to enter national territory, and procedural obligations in the context of a refusal to repatriate.

In 2014 and 2015 the applicants' daughters, who were French nationals, left France for Syria with their partners and gave birth to children there. Since 2019, following the fall of the so-called "Islamic State" (ISIS), they and their children had reportedly been detained in camps run by the Syrian Democratic Forces ("the SDF"), a local force fighting against ISIS and dominated by the Kurdish militia. The applicants unsuccessfully sought urgent repatriation of their daughters and grandchildren. The domestic courts refused to accept jurisdiction on the grounds that the requests were indissociable from interfering with how France conducted its international relations. The applicants complained under Article 3 of the Convention and Article 3 of Protocol No. 4 thereto. The Court held that the applicants' family members were outside the jurisdiction of France as regards the complaint under Article 3 (alleged ill-treatment in the camps). The jurisdiction of France was established in respect of the complaint under Article 3 of Protocol No. 4 and the Grand Chamber found a breach of that provision.

The Grand Chamber judgment is noteworthy in that the Court has, for the first time, ruled on the existence of a jurisdictional link between a State and its "nationals" in respect of a complaint under Article 3 § 2 of Protocol No. 4.

(i) The Court stated that the fact that Article 3 § 2 of Protocol No. 4 (unlike Article 1 of the Convention) applies only to nationals was not sufficient to establish the extraterritorial exercise of jurisdiction by a State. Secondly, the refusal to grant the applicants' request had not formally deprived their family members of the right to enter France or prevented them from doing so; they were physically unable to reach the French border (since they were being held in Syrian camps) and France neither exercised "effective control" over the relevant territory nor had any "authority" or "control" over them. In this regard, relying on the preparatory work and other international instruments, the Court noted that the right to enter was not limited to nationals already on the territory of the State concerned or under its effective control, but it also had to benefit those nationals outside of the State's jurisdiction. Furthermore, if Article 3 § 2 of Protocol No. 4 were to apply only to nationals who arrived at the national border or who had no travel documents, it would be deprived of effectiveness in the contemporary context of increasing globalisation/international mobility which presented new challenges in terms of security

² *H.F. and Others v. France* [GC], nos. 24384/19 and 44234/20, 14 September 2022.

and defence in the fields of diplomatic and consular protection, international humanitarian law and international cooperation.

On this basis, the Court did not exclude that certain circumstances relating to the situation of individuals who wished to enter the State of which they were nationals might give rise to a jurisdictional link with that State. Which circumstances would create such a link would depend on the specific features of each case and might vary considerably from one case to another. In the instant case, the following special features enabled the Court to establish France's jurisdiction in respect of the complaint raised under Article 3 § 2 of Protocol No. 4: repatriation had been sought officially and the requests referred to a real and immediate threat to the lives and health of the applicants' family members, including extremely vulnerable young children; the impossibility for them to leave the camps without the assistance of the French authorities; and the willingness of the Kurdish authorities to hand them over to France.

(ii) With regard to Article 3 of the Convention, the Court found that neither the French nationality of the applicants' family members nor the mere decision of the French authorities not to repatriate their daughters had the effect of bringing them within the scope of France's jurisdiction as regards the ill-treatment to which they were subjected in the Syrian camps under Kurdish control. Such an extension of the Convention's scope found no support in the case-law. Firstly, the mere fact that decisions taken at national level have had an impact on the situation of a person residing abroad does not establish the jurisdiction of the State concerned over them outside its territory. Secondly, neither domestic nor international law required the State to act on behalf of its nationals and to repatriate them. Moreover, the Convention did not guarantee the right to diplomatic or consular protection. Thirdly, despite the stated desire of local non-State authorities that the States concerned should repatriate their nationals, France would have had to negotiate with them as to the principles and conditions of any such operation and to organise its implementation, which would inevitably take place in Syria.

“Core” Rights

RIGHT TO LIFE (ARTICLE 2)

Obligation to protect life

The judgment in *Safi and Others v. Greece*³ concerned the application of the *Osman* obligations in the context of a sea rescue operation.

On 20 January 2014 a fishing boat transporting twenty-seven migrants sank in the Aegean Sea, off the coast of the island of Farmakonisi. The applicants were on board the fishing boat, which capsized as the Greek coastguard tried to tow it. The sinking of the boat resulted in the death of eleven people, including close relatives of the applicants. The applicants complained under Articles 2, 3 and 13 of the Convention. The Court found, in the first place, a violation of the procedural limb of Article 2 of the Convention on account of the ineffective investigation into the fatal accident. Secondly, while noting that it could not, in the absence of an effective investigation, express a position on several details of the rescue operation or on the question whether there had been an attempt to push the applicants back towards Turkish waters as alleged, the Court concluded, having regard to certain facts which were undisputed or otherwise established, that the Greek authorities had failed to comply with the duty under Article 2 to take preventive operational measures to protect the individuals whose lives were at risk. Thirdly, the Court found a violation of Article 3 on account of the treatment experienced by some of the applicants following their arrival on the island of Farmakonisi.

The judgment is noteworthy in that it concerns the application, for the first time, of the positive obligation to take preventive operational measures, set out in *Osman v. the United Kingdom*⁴, in the context of protecting migrants during a sea rescue operation.

The duty to take preventive operational measures under Article 2 of the Convention being one of means, not of result, the Court emphasised that the coastguard could not be expected to succeed in rescuing everyone whose life was at risk at sea. The captain and crew of vessels involved in sea rescue operations often had to make difficult and quick decisions and such decisions were, as a rule, at the captain’s discretion. However, it had to be demonstrated that these decisions were inspired by the essential effort to secure the right to life of the persons in danger. Having regard to a number of omissions and delays in the manner in which the rescue operation was conducted and organised, the Court found that the authorities had not done all that could reasonably be expected of them to provide all the applicants and their relatives with the level of protection required. The respondent State had, therefore, not fulfilled their positive protective obligation, and the Court concluded that there had been a violation of the substantive limb of Article 2 of the Convention.

³ *Safi and Others v. Greece*, no. 5418/15, 7 July 2022.

⁴ *Osman v. the United Kingdom*, 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII.

The judgment in *Mortier v. Belgium*⁵ concerned the death by euthanasia of the applicant's mother without the applicant or his sister having been informed. The applicant's mother had been living with diagnosed chronic depression for about forty years. Two months after she had submitted a formal request to that effect, a doctor carried out her euthanasia. No breaches of the Euthanasia Act were found either by a specialised review board or in a criminal investigation.

The applicant complained under Articles 2 and 8 of the Convention. The Court found no violation of Article 2 under its substantive head, considering that the legislative framework governing the pre-euthanasia procedure had provided sufficient substantive and procedural safeguards and that the act in question had been performed in compliance with the law. However, it found a violation of Article 2 under its procedural head, as a result of the lack of independence of the specialised review board and the excessive length of the criminal investigation. The Court also considered that neither the specific act of euthanasia nor the applicant's lack of involvement in the process had breached his Article 8 rights. In particular, the legislature could not be reproached for obliging doctors to respect the patient's wishes concerning contact with family members, or for imposing a duty of confidentiality and medical secrecy.

The judgment is noteworthy because the Court examined, for the first time, whether an act of euthanasia was compliant with the Convention. It clarified the nature and scope of the positive obligations (substantive and procedural) of a State under Article 2 in this specific context, where euthanasia had been requested by a patient experiencing mental rather than physical suffering, and whose death would not otherwise have occurred in the short term.

(i) The Court first addressed the question whether such an act could, in certain circumstances, be carried out without contravening Article 2. Referring to its end-of-life case-law (*Lambert and Others v. France*⁶; *Pretty v. the United Kingdom*⁷; and *Haas v. Switzerland*⁸), the Court had regard, in this context, to the right to respect for private life, guaranteed by Article 8, and to the concept of personal autonomy which it encompassed. The right of an individual to decide how and when his or her life should end was one aspect of the right to respect for private life. The Court concluded that, while it was not possible to derive a right to die from Article 2, the right to life enshrined therein could not be interpreted as prohibiting *per se* the conditional decriminalisation of euthanasia. However, in order to be compatible with Article 2, that decriminalisation had to be accompanied by suitable and sufficient safeguards to prevent abuse and thus secure respect for the right to life.

(ii) The Court went on to find that any complaint alleging that an act of euthanasia had breached Article 2 had to be examined under the head of the State's positive obligations

⁵ *Mortier v. Belgium*, no. 78017/17, 4 October 2022.

⁶ *Lambert and Others v. France* [GC], no. 46043/14, ECHR 2015 (extracts).

⁷ *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III.

⁸ *Haas v. Switzerland*, no. 31322/07, ECHR 2011.

to protect the right to life. In view of the complexity of this area and the lack of a European consensus, States had to be afforded a margin of appreciation, which, however, was not unlimited.

(iii) With regard to the substantive positive obligations at stake, the Court examined whether there was a legislative framework for pre-euthanasia procedures which met the requirements of Article 2, and whether it had been complied with in the particular circumstances of the case. In the Court's view, such a legislative framework had to ensure that the patient's decision to seek an end to his or her life had been taken freely and in full knowledge of the facts. Where the legislature had chosen not to provide for independent prior review of a specific act of euthanasia, the Court would look more carefully into the question of substantive and procedural safeguards. In addition, the law had to provide for enhanced safeguards surrounding the decision-making process in the case of a request by a patient experiencing mental rather than physical suffering, and whose death would not otherwise occur in the short term. For example, in this case the Court attached particular importance to the time that had to be allowed between the written request and the act of euthanasia (at least one month, under Belgian law), to the obligation for the principal doctor to consult other doctors (two other doctors, under Belgian law), and to the requirement that the doctors consulted had to be independent. It concluded that the legislative framework in question had ensured the protection of the patient's right to life, as required by Article 2, and that the euthanasia had been carried out in accordance with that framework.

(iv) As regards the procedural positive obligations in this area, the Court's examination focused on whether the subsequent review mechanism afforded all the safeguards required by Article 2. In the Court's view, where there was only a subsequent review of euthanasia, that review had to be carried out in a particularly rigorous manner in order to comply with the obligations laid down in Article 2 of the Convention. The requirement of independence was of utmost importance. In the present case, the Court analysed the subsequent review by the board responsible for verifying compliance with the procedure and conditions laid down by the Euthanasia Act. The Court noted that the law did not prevent the doctor who had performed the euthanasia from sitting on the board and voting on whether his or her own acts were compatible with the substantive and procedural requirements of domestic law. The Court considered that the fact of leaving it to the sole discretion of the member concerned to remain silent when he or she had been involved in the euthanasia under review could not be regarded as sufficient to ensure the independence of the board. In view of the crucial role played by the review board, the system of review had not guaranteed its independence, regardless of any real influence the doctor concerned might have had on the board's decision in the present case.

Prohibition of Torture and Inhuman or Degrading Treatment and Punishment (Article 3)

Effective investigation

The judgment in *J.I. v. Croatia*⁹ concerned the duty to conduct an effective investigation into serious threats against a rape victim by her abuser, as well as protection from repeat victimisation and intimidation.

The applicant's father, B.S., had been convicted and was serving a prison sentence for multiple acts of rape and incest perpetrated against her. During his prison leave, he allegedly threatened to kill the applicant. She contacted the police on several occasions. On none of those occasions did the police start a criminal investigation, even though a serious threat by a family member was a criminal offence subject to public prosecution under domestic law. The applicant's complaint about the police's conduct resulted in an unsuccessful internal inquiry at the Ministry of the Interior. Her complaint before the Constitutional Court was dismissed. The applicant complained to this Court of a failure by the authorities to protect her from intimidation and repeat victimisation by B.S. and to conduct an effective investigation into the alleged threats. In the Court's view, owing to the fear of further abuse and retaliation by B.S., the applicant had been subjected to inhuman treatment within the meaning of Article 3 of the Convention. The Court found a violation of this provision on account of the authorities' failure to conduct an effective investigation into her allegations of a serious threat to her life. While the Court also declared the applicant's complaint about the authorities' failure to protect her from repeat victimisation and intimidation admissible, it decided against a separate examination of the merits of this aspect.

The judgment is noteworthy in that it concerns a novel factual scenario: the applicant indirectly received death threats from her abuser, who, while serving his sentence, had been granted prison leave. The Court considered the effectiveness of the domestic investigation in the light of the need to protect the applicant from intimidation and repeat victimisation. In this connection, the Court reiterated the authorities' duty to take a comprehensive view of a given case, including the domestic violence to which a victim has previously been exposed (*Tunikova and Others v. Russia*¹⁰). The Court noted that the applicant had had to live in constant fear and uncertainty for a prolonged period, owing to the authorities' dismissive attitude towards her allegations. In a case, such as the present one, where the authorities had been well aware of the applicant's particular vulnerability on account of her sex, ethnic origin (Roma) and past traumas, the Court emphasised that they should have reacted promptly and efficiently to her criminal

⁹ *J.I. v. Croatia*, no. 35898/16, 8 September 2022.

¹⁰ *Tunikova and Others v. Russia*, nos. 55974/16 and 3 others, § 116, 14 December 2021.

complaints in order to protect her, not only from the alleged threat to her life, but also from intimidation and repeat victimisation.

Extradition

The judgment in *Khasanov and Rakhmanov v. Russia*¹¹ concerned the scope and nature of the risk assessment in removal cases, as well as the methodology for cases brought by members of vulnerable groups allegedly exposed to systematic ill-treatment.

The applicants, Kyrgyz nationals living in Russia, faced extradition to Kyrgyzstan where they were wanted on charges of aggravated misappropriation of funds (first applicant) and several counts of aggravated robbery, destruction of property and murder (second applicant). The applicants complained that in the event of their extradition they would face a real risk of ill-treatment because they belonged to a vulnerable ethnic group, the Uzbek minority. These allegations were dismissed in the proceedings concerning their extradition and refugee status. The applicants' extraditions were stayed on the basis of an interim measure granted by the Court under Rule 39 of the Rules of Court. In 2019 a Chamber of the Court found that there would be no violation of Article 3 if the applicants were extradited. The Grand Chamber endorsed this conclusion.

The Grand Chamber judgment is noteworthy in that the Court clarified matters relating to risk assessment under Article 3 in the context of removals, in particular: the level of scrutiny required in extradition cases; the scope of the assessment and specific methodology to be applied in cases concerning members of a targeted vulnerable group; and the nature of, and the material point in time for, such an assessment.

The judgment also provided a useful summary of the Court's case-law principles in this area.

(i) The Court underlined that, in extradition cases, a Contracting State's obligation to cooperate in international criminal matters was subject to the State's obligation to respect the absolute nature of the prohibition under Article 3 of the Convention. Therefore, any claim of a real risk of treatment contrary to that provision would be subjected to the same level of scrutiny regardless of the legal basis for the removal.

(ii) As to the scope of the assessment in removal cases, the Court clarified that its examination was not limited to an applicant's specific claims but might cover all three groups of risks, namely: those arising from the general situation in the destination country; those stemming from the alleged membership of a targeted vulnerable group; and those linked to the individual circumstances of the applicant.

(iii) The Court also confirmed that, in line with the *ex nunc* principle, the material point in time for the risk assessment in cases where an applicant had not already been removed

¹¹ *Khasanov and Rakhmanov v. Russia* [GC], nos. 28492/15 and 49975/15, 29 April 2022.

would be that of the Court's consideration of the case. A full and present-day evaluation would be required where it was necessary to take into account information that had come to light after the final decision had been taken by the domestic authorities.

Applying these principles, the Court examined the applicants' situation as it was at the time of its consideration of the case by assessing the existence of a real risk for all three groups of risk. In its view, the relevant material did not support a finding that the general situation in Kyrgyzstan had either deteriorated, as compared with previous assessments, or reached a level calling for a total ban on removals to that country. Turning to the applicants' individual circumstances, the Court found that they had failed to demonstrate the existence of ulterior political or ethnic motives behind their prosecution in Kyrgyzstan or further special distinguishing features which would expose them to a real risk of ill-treatment. In sum, substantial grounds had not been shown for believing that the applicants would face a real risk of being subjected to treatment contrary to Article 3 in the event of their extradition to Kyrgyzstan.

The judgment in *Sanchez-Sanchez v. the United Kingdom*¹² concerned the assessment of life sentences in the context of an extradition to a third State.

The applicant was a Mexican national detained in the United Kingdom. He faced extradition to the United States of America where he was wanted on federal charges of drug dealing and trafficking. According to United States sentencing guidelines, conviction for these offences could result in life imprisonment. The applicant appealed unsuccessfully to the High Court against his extradition. Before the Court, the applicant complained under Article 3. The Grand Chamber found that the applicant's extradition to the United States would not be in violation of Article 3, as the applicant had not provided sufficient evidence to show that he ran a real risk of a sentence of life imprisonment without parole.

The Grand Chamber judgment is noteworthy in that the Court established that the compliance with the Convention of a life sentence in a third State requesting extradition is not to be assessed against the full set of standards that apply to life prisoners in Contracting States. In so far as they comprise procedural safeguards, the principles set out in *Vinter and Others v. the United Kingdom*¹³ in respect of the domestic context are not applicable to the extradition context. The Court therefore developed an adapted approach for the extradition context, comprising a two-stage test.

(i) At the first stage, it must be established whether the applicant has adduced evidence capable of proving that there are substantial grounds for believing that, if extradited and convicted, there is a real risk of a sentence of life imprisonment without parole. Such a risk will more readily be established if the applicant faces a mandatory sentence of life imprisonment. If a risk is established under the first limb, the second limb will focus on

¹² *Sanchez-Sanchez v. the United Kingdom* [GC], no. 22854/20, 3 November 2022.

¹³ *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09.

the substantive guarantee which is the essence of the *Vinter and Others* case-law: prior to authorising an extradition, the relevant authorities of the sending State must establish whether, from the moment of sentencing, a review mechanism exists in the State requesting the extradition which would allow the competent authorities to consider the prisoner's progress towards rehabilitation or any other ground for release based on his or her behaviour or other relevant personal circumstances. The Court emphasised that the Article 3 prohibition of ill-treatment remained absolute, including in the extradition context, and a distinction could not be drawn between the domestic and extraterritorial contexts as regards the minimum level of severity required to meet the Article 3 threshold.

The decision in *McCallum v. Italy*¹⁴ also concerned life sentences in the extradition context.

The applicant was a United States national wanted in the State of Michigan as a suspect, along with others, in the murder of her then husband and the disinterring and burning of his corpse in that State. It is believed that she had been on the run for several years before she was arrested in Italy in 2020. The United States authorities requested her extradition. The Italian courts granted the request, rejecting the applicant's argument that her extradition would be contrary to Article 3 since, if convicted, she would face life imprisonment without parole, the prescribed sentence for first-degree murder under the State law of Michigan. She had also argued that the power of the State Governor to grant her early release was not sufficient to eliminate the risk, as this power was a purely discretionary one. The applicant then complained to this Court under Article 3, raising the same arguments. Under Rule 39 of the Rules of Court, the Court indicated to the Italian Government that the applicant should not be extradited for the duration of the proceedings before it. Subsequently, the United States embassy in Rome informed the Italian authorities that the Prosecuting Attorney in Michigan had given a commitment to try the applicant on the lesser charge of second-degree murder. The Diplomatic Note clarified that, if convicted of this charge, the applicable penalty would be imprisonment for life, or any term of years at the court's discretion and that, in either case, the applicant would be eligible for parole. The Court then lifted the Rule 39 interim measure and the applicant was extradited. The Grand Chamber rejected the application as manifestly ill-founded: there was no real risk of the applicant receiving an irreducible life sentence in the event of conviction on the charges now pending against her.

The Grand Chamber's decision is noteworthy in two respects. Firstly, the Court confirmed its position on Diplomatic Notes set out in *Harkins and Edwards v. the United Kingdom*¹⁵. Secondly, the Court proceeded on the basis of the distinction between the substantive obligation and the related procedural safeguards that derived from Article 3 when it came to the issue of life sentences in the extradition context, in accordance with the approach adopted in *Sanchez-Sanchez* (cited above)¹⁶.

¹⁴ *McCallum v. Italy* (dec.) [GC], no. 20863/21, 21 September 2022.

¹⁵ *Harkins and Edwards v. the United Kingdom*, nos. 9146/07 and 32650/07, 17 January 2012.

¹⁶ See summary above.

(i) The Court reiterated that Diplomatic Notes carried a presumption of good faith and that, in extradition cases, it was appropriate that that presumption be applied to a requesting State which had a long history of respect for democracy, human rights and the rule of law, and which had long-standing extradition arrangements with Contracting States (*Harkins and Edwards*, cited above, a case also concerning the United States). The Court therefore considered it justified to proceed on the basis that the applicant could now only be tried on the charges indicated in the Diplomatic Note and specified in the new extradition decree issued by the Italian Minister of Justice.

(ii) The Court noted that the applicant faced, at most, the prospect of life imprisonment with eligibility for parole, if convicted of the reduced charges. However, she had submitted that such a sentence had to be regarded as “irreducible” within the meaning of the Court’s case-law on account of the “decisive” role of the Governor of Michigan in the parole system in that State. The Court observed that this argument related to the issue of procedural safeguards and not to the substantive obligation, which was the essence of the *Vinter and Others* standard. However, as stipulated in *Sanchez-Sanchez* (cited above), the availability of procedural safeguards for “whole life prisoners” in the legal system of the requesting State was not a prerequisite for the Contracting State finding compliance with Article 3 of the Convention. The Court further reiterated that an applicant who alleged that their extradition would expose them to a risk of a sentence that would constitute inhuman or degrading punishment bore the burden of proving the reality of that risk (*Sanchez-Sanchez*). In the instant case, the applicant had not discharged that burden.

Procedural Rights

Right to a Fair Hearing in Civil Proceedings (Article 6 § 1)

Applicability

The judgment in *Grzęda v. Poland*¹⁷ concerned the applicability of Article 6 § 1 to the premature termination, following a legislative reform, of a judge’s term of office as a member of the National Council of the Judiciary (“the NCJ”).

The applicant was a judge of the Supreme Administrative Court. In 2016 he was elected by an assembly of judges for a four-year term as a member of the NCJ. Subsequently, and in the context of wide-scale judicial reform, the relevant legislation was amended to the effect that judicial members of the NCJ were to be elected by Parliament (the *Sejm*) and no longer by judges, and that the terms of office of the NCJ’s judicial members elected on the basis of the previous provisions would continue until the beginning of the

¹⁷ *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022.

term of office of its new members. In 2018 the *Sejm* elected fifteen new members to the NCJ and the applicant's term of office was therefore prematurely terminated *ex lege*. The applicant complained that he had been denied access to a court to contest this measure.

The Grand Chamber considered that, at the time of his election, there had, arguably, been a right in domestic law for a judge elected to the NCJ to serve a full term of office and that the new legislation constituted the object of a genuine and serious dispute over that right. Applying the test developed in *Vilho Eskelinen and Others v. Finland*¹⁸, the Grand Chamber left open the first condition – whether domestic law expressly excluded access to a court – because, in any event, its second condition had not been met; such an exclusion could not be justified on objective grounds in the State's interest given the reforms' adverse impact on the NCJ's independence. Article 6 § 1 was therefore applicable under its civil head.

The judgment is noteworthy in that the Court considered a novel issue: the applicability of Article 6 § 1 to a dispute arising out of the premature termination of the term of office of a member of a judicial council while he was still a serving judge. In doing so, the Court further developed the first condition of the *Eskelinen* test and clarified the relevant considerations related to judicial independence for the second condition.

(i) With regard to the first condition of the *Eskelinen* test, the Court noted that it was deliberately strict and was satisfied only in very rare cases where domestic law contained an explicit exclusion of access to a court. As the two conditions of the test were cumulative, where the first one was not met, that sufficed to find that Article 6 was applicable, without there being any need to consider the second limb of the test.

(ii) The Court also clarified the factors relevant to the second condition of the *Eskelinen* test. In the first place, for national legislation excluding access to a court to have any effect under Article 6 § 1 in a particular case, it had to be compatible with the rule of law. This meant that such an exclusion had to, in principle, be based on an instrument of general application, rather than target specific persons (in the instant case, judicial members of the NCJ elected under the previous regulations). Secondly, where the dispute at issue concerned a judge, due account had to be taken of the necessity to safeguard the independence of the judiciary, which was a prerequisite for the proper functioning of the Convention system and for upholding the rule of law.

In this connection, the Court clarified that judicial independence had to be understood in an inclusive manner and apply not only to a judge in his or her adjudicating role, but also to his or her other official functions that were closely connected with the judicial system. As for the NCJ, the Court observed that its independence had been undermined both as a result of the fundamental changes to the election process of its judicial members and as a result of the premature termination of the terms of office of its previous judicial members. It followed that the applicant's exclusion from access to a court, a fundamental

¹⁸ *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, ECHR 2007-II.

safeguard for the protection of an arguable civil right closely connected with the protection of judicial independence, could not be justified on objective grounds in the interest of a State governed by the rule of law. Article 6 § 1 was therefore applicable.

Right to a Fair Hearing in Criminal Proceedings (Article 6 § 1)

Fairness of proceedings

The judgment in *Vegotex International S.A. v. Belgium*¹⁹ concerned a set of proceedings in relation to a supplementary tax assessment, the issue of the retrospective application of new legislation, and a tax penalty which the applicant company had been ordered to pay. The Grand Chamber reaffirmed and further defined the principles concerning the compelling grounds of general interest that could justify interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute in a tax-related case.

The background to the case is as follows. The tax authorities had corrected a tax return filed by the applicant company and applied a penalty on the amount due. The applicant brought proceedings to challenge this decision. In 2000 the tax authorities issued a summons to pay which, in accordance with standard administrative practice, served to interrupt the limitation period before the tax debt became time-barred. While the applicant's case was pending at first instance, the Court of Cassation delivered a judgment on 10 October 2002 in which it adopted a new approach going against previous administrative practice. This judgment had retroactive effect and resulted in the limitation period not being interrupted and in the tax debt possibly becoming time-barred. In 2004, while the applicant's case was pending on appeal, the legislature intervened to reverse this decision and to restore the previous administrative practice by enacting the Miscellaneous Provisions Act of 9 July 2004, which was immediately applicable to pending proceedings. This Act was applied to the applicant's case by the Court of Cassation. The domestic courts eventually upheld the 50% penalty in respect of one part of the tax imposed and, with regard to the remainder, reduced the penalty to 10% of the tax deemed to be payable. The applicant company complained under Article 6 § 1. In 2020 a Chamber of the Court found no violation of this provision as the legislature's intervention in the proceedings had been driven by compelling grounds of general interest. Upon referral, the Grand Chamber endorsed this conclusion.

The Grand Chamber judgment is noteworthy in two respects. Firstly, the Court clarified the criteria for assessing the relevance and the compelling nature of general-interest grounds which are advanced to justify the use of retrospective legislation designed to

¹⁹ *Vegotex International S.A. v. Belgium* [GC], no. 49812/09, 3 November 2022.

influence the judicial determination of a dispute to which the State is a party. Secondly, the judgment highlights the specificity of such an assessment in a case where the guarantees of Article 6 do not apply with their full stringency, such as in tax-related cases which differ from the hard core of criminal law.

(i) When examining the relevance of the general-interest grounds advanced by the respondent Government, the Court observed the following. Firstly, while the State's financial interests alone do not, in principle, justify the retrospective application of legislation, the Court did not exclude the relevance of the question whether the financial stability of the State was threatened (however, no such threat was apparent in the present case). Secondly, by their nature, legislative initiatives regulate situations in general and abstract terms. Consequently, the reasons that motivated the legislature do not lose their legitimacy merely because they may not be relevant in respect of every person who is potentially affected. Thirdly, the Court confirmed that in a State governed by the rule of law, the legislature could amend legislation in order to correct an interpretation of the law given by the judiciary, subject to compliance with binding legal rules and principles.

The Court further observed that, in exceptional circumstances, retrospective legislation might be justified, especially in order to interpret or clarify an older legislative provision (*Hôpital local Saint-Pierre d'Oléron and Others v. France*²⁰), to fill a legal vacuum (*OGIS-Institut Stanislas, OGE Saint-Pie X and Blanche de Castille and Others v. France*²¹) or to offset the effects of a new line of case-law (*National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*²²). In the present case, the Court accepted the objectives of combating large-scale tax fraud, avoiding arbitrary discrimination between taxpayers, and restoring legal certainty by offsetting the effects of the relevant judgment of the Court of Cassation and re-establishing the settled administrative practice as relevant grounds.

(ii) The Court went on to assess the compelling nature of the relevant grounds. It noted that it would consider them as a whole and based on the following elements:

- (a) whether or not the line of case-law overturned by the legislative intervention in question had been settled;
- (b) the manner and timing of the enactment of the legislation;
- (c) the foreseeability of the legislature's intervention;
- (d) the scope of the legislation and its effects.

²⁰ *Hôpital local Saint-Pierre d'Oléron and Others v. France*, nos. 18096/12 and 20 others, 8 November 2018.

²¹ *OGIS-Institut Stanislas, OGE Saint-Pie X and Blanche de Castille and Others v. France*, nos. 42219/98 and 54563/00, 27 May 2004.

²² *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 23 October 1997, *Reports of Judgments and Decisions* 1997-VII.

With regard to the consideration of the scope of the legislation and its effects, it is noteworthy that in its *Advisory opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture*²³ the Court had recently held that the revival of criminal responsibility after the expiry of a limitation period was incompatible with the overarching principles of legality and foreseeability enshrined in Article 7. Nevertheless, the Grand Chamber distinguished the present case from the situation described in the above-mentioned advisory opinion, even though the legislature's intervention had made it possible to continue with a "prosecution". While the limitation period could have been considered to have expired following the unexpected development in the case-law of the Court of Cassation, that fact had not yet been established by a judicial decision, still less one with *res judicata* effect. Furthermore, unlike in *Antia and Khupenia v. Georgia*²⁴, the limitation period had not expired either when the tax penalty was imposed, or when the applicant had challenged it in the court of first instance. Lastly, the present case did not concern Article 7, but Article 6, and the latter's guarantees would not necessarily apply with their full stringency in a tax-related case. In sum, in this case the legislature's intervention had been foreseeable and justified on compelling grounds of general interest.

Other Rights in Criminal Proceedings

NO PUNISHMENT WITHOUT LAW (ARTICLE 7)

In response to a request submitted by the Armenian Court of Cassation under Protocol No. 16 to the Convention, the Court delivered an advisory opinion²⁵ on 26 April 2022, which concerned the applicability of statutes of limitation to the prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture.

In *Virabyan v. Armenia*²⁶ the Court had found that the applicant had been subjected to torture and that the authorities had failed to carry out an effective investigation, in violation of Article 3. In the context of the supervision of the execution of this judgment by the Committee of Ministers under Article 46 § 2, new criminal proceedings were instituted and charges were brought against the police officers implicated in Mr Virabyan's ill-treatment (Article 309 § 2 of the Criminal Code). The trial court found that the defendants had committed an offence under that provision but held that they were exempt from criminal responsibility by virtue of the ten-year limitation period provided for

²³ *Advisory opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture* [GC], request no. P16-2021-001, Armenian Court of Cassation, 26 April 2022.

²⁴ *Antia and Khupenia v. Georgia*, no. 7523/10, 18 June 2020.

²⁵ *Advisory opinion on the applicability of statutes of limitation to the prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture* [GC], request no. P16-2021-001, Armenian Court of Cassation, 26 April 2022. See also under Article 1 of Protocol No. 16 (Advisory opinions) below.

²⁶ *Virabyan v. Armenia*, no. 40094/05, 2 October 2012.

in Article 75 § 1 (3) of the Criminal Code, which had expired in 2014. This decision was upheld by the Court of Appeal. The prosecutor lodged an appeal on points of law with the Court of Cassation, seeking a determination of whether the ten-year limitation period was applicable or whether the proceedings in question were covered by the exception set out in Article 75 § 6 of the Criminal Code, according to which no limitation period could apply to certain types of offences (crimes against peace and humanity or those for which international treaties to which Armenia is a Party prohibit the application of limitation periods).

In this context, the Court of Cassation requested an advisory opinion from the Court on the following question:

“Would non-application of statutes of limitation for criminal responsibility for torture or any other crimes equated thereto by invoking the international law sources be compliant with Article 7 of the European Convention, if the domestic law provides for no requirement for non-application of statutes of limitation for criminal responsibility?”

(i) In this, its fourth advisory opinion under Protocol No. 16, the Court reiterated that the prohibition of torture had achieved the status of *jus cogens* or a peremptory norm in international law (*Al-Adsani v. the United Kingdom*²⁷). In cases concerning torture or ill-treatment inflicted by State agents, criminal proceedings ought not to be discontinued on account of a limitation period and the manner in which the limitation period is applied has to be compatible with the requirements of the Convention. It is thus difficult to accept inflexible limitation periods admitting of no exceptions (*Mocanu and Others v. Romania*²⁸).

(ii) Furthermore, the Court addressed the issue of a possible conflict between States’ positive obligations under Article 3 and the guarantees provided for in Article 7, notably in the process of the execution of its judgments. The Court confirmed its usual approach whereby it would be unacceptable for national authorities to compensate for the failure to discharge their positive obligations under Article 3 at the expense of the guarantees of Article 7, one of which was that the criminal law must not be construed extensively to an accused’s detriment (*Kononov v. Latvia*²⁹, and *Del Río Prada v. Spain*³⁰). In particular, and for the purposes of the present advisory opinion, the Court noted that it did not follow from the current state of the Court’s case-law that a Contracting Party was required under the Convention not to apply an applicable limitation period and thereby effectively to revive an expired limitation period.

(iii) The Court went on to clarify whether the revival of a prosecution in respect of a criminal offence which is time-barred is compatible with the guarantees enshrined in Article 7 of the Convention. It deduced from the relevant case-law that where criminal responsibility had been revived after the expiry of a limitation period, it would be deemed

²⁷ *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, §§ 60-61, ECHR 2001-XI.

²⁸ *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 326, ECHR 2014 (extracts).

²⁹ *Kononov v. Latvia* [GC], no. 36376/04, § 185, ECHR 2010.

³⁰ *Del Río Prada v. Spain* [GC], no. 42750/09, § 78, ECHR 2013.

incompatible with the overarching principles of legality (*nullum crimen, nulla poena sine lege*) and foreseeability enshrined in Article 7 (*Antia and Khupenia v. Georgia*³¹). On this basis, the Court concluded that where a criminal offence under domestic law was subject to a statute of limitations and became time-barred so as to exclude criminal responsibility, Article 7 would preclude the revival of a prosecution in respect of such an offence on account of the absence of a valid legal basis. To hold otherwise would be tantamount to accepting “the retrospective application of the criminal law to an accused’s disadvantage”.

(iv) Here the Court was asked to clarify whether it would be compatible with the defendants’ rights under Article 7 if the domestic courts were to refrain from applying the limitation period applicable in their case pursuant to the international rules, including Article 3 of the Convention, relating to the prohibition of torture and other forms of ill-treatment and the requirement to punish such acts. The Court replied as follows:

“[I]t is first and foremost for the national court to determine, within the context of its domestic constitutional and criminal-law rules, whether rules of international law having legal force in the national legal system, in the present instance pursuant to Article 5 § 3 of the Constitution ..., could provide for a sufficiently clear and foreseeable legal basis within the meaning of Article 7 of the Convention to conclude that the criminal offence in question is not subject to a statute of limitations.”

³¹ *Antia and Khupenia v. Georgia*, no. 7523/10, §§ 38-43, 18 June 2020.

Other rights and freedoms

Right to Respect for One's Private and Family Life, Home and Correspondence (Article 8)

Applicability

The judgment in *Darboe and Camara v. Italy*³² concerned the applicability of Article 8 to age-assessment procedures for migrants requesting international protection and claiming to be children.

The case concerned the procedural rights of a migrant requesting international protection and claiming to be a minor, in particular in respect of the procedure for determining his or her age. The applicant submitted that he had declared the fact that he was a minor and orally expressed his intention to apply for international protection shortly after his arrival in Italy. He was provided with a healthcare card by the local health authority, indicating a date of birth according to which he was 17 years old. After his initial placement in a centre for foreign unaccompanied children, the applicant was transferred to a reception centre for adults. A month later an X-ray examination of his wrist and hand was carried out, based on which the applicant was considered to be an adult. Following a request by the applicant and an exchange of submissions, the Court indicated to the Government, under Rule 39 of the Rules of Court, that they should transfer the applicant to facilities where his reception conditions as an unaccompanied minor could be ensured. He was transferred thereto four days later. The applicant complained under Articles 3, 8 and 13 of the Convention.

The Court found, in the first place, a violation of Article 8 on account of the authorities' failure to act with the necessary diligence to comply with their positive obligation to protect the applicant as an unaccompanied minor requesting international protection. Secondly, the Court found a violation of Article 3 on account of the length and conditions of the applicant's stay in the reception centre for adults. Thirdly, the Court found a violation of Article 13 (in conjunction with Articles 3 and 8), since the applicant had not been afforded an effective remedy under Italian law by which to lodge his complaints under Articles 3 and 8 of the Convention.

The judgment is noteworthy in that it is the first time that the Court has examined, under Article 8 of the Convention, a complaint about age-assessment procedures for migrants requesting international protection and claiming to be minors.

³² *Darboe and Camara v. Italy*, no. 5797/17, 21 July 2022.

As regards the applicability of Article 8 the Court considered that the age of a person was a means of personal identification and that the procedure to assess the age of an individual alleging to be a minor, including its procedural safeguards, was essential in order to guarantee that he or she had access to all the rights deriving from his or her status as a minor. It also emphasised the importance of age-assessment procedures in the migration context. Determining whether an individual was a minor was the first step to recognising his or her rights and all the necessary care arrangements that needed to be put in place. If a minor were wrongly identified as an adult, serious measures in breach of his or her rights might be taken.

Positive obligations

The judgment in *C. v. Romania*³³ concerned protection against sexual harassment in the workplace.

The applicant made a criminal complaint about sexual harassment in her workplace. A prosecutor examined the applicant (who described the acts carried out by her manager, X, which had taken place over a period of more than two years), as well as X and other witnesses. The prosecutor was given recordings made by the applicant of her interactions with her manager. A decision not to prosecute and to end the investigation was taken after two years because the acts in question had not been committed with the degree of criminal liability required by law. A court confirmed the dismissal of the applicant's complaint. While it found that the manager had asked for sexual favours from her, it considered that she had not felt threatened in her sexual freedom or humiliated, elements required by domestic law for the acts to constitute a criminal offence. Once the matter was reported to X's employer, the steps taken were limited to hearing the parties (including a confrontation between the applicant and X) and instructing the applicant to go to the police. When given a choice to continue working for the same employer or to resign, the applicant chose the latter option.

The Court found a violation of Article 8 (private life/personal integrity) on account of the authorities' failure to comply with their positive obligation to protect the applicant as an alleged victim of sexual harassment, despite the existing protective domestic laws.

The judgment is noteworthy in that it is the first time that the Court has examined, under Article 8 of the Convention, a complaint specifically about sexual harassment in the workplace³⁴.

(i) As regards the applicability of Article 8 to an attack on a person's private life, the Court applied the level of seriousness test. While the authorities confirmed that the acts which had taken place were not considered sufficiently severe to be of a criminal nature under domestic law, the Court considered that those acts, which concerned the

³³ *C. v. Romania*, no. 47358/20, 30 August 2022.

³⁴ See *Špadijer v. Montenegro* (no. 31549/18, 9 November 2021) as regards the obligation to protect employees against bullying in the workplace.

applicant's psychological integrity and sexual life, had reached the threshold required for Article 8 to come into play.

(ii) On the merits, the Court noted that the facts of the case fell within a category of acts for which the Court had already found that an adequate legal framework affording protection does not always require that an efficient criminal-law provision covering the specific act be in place. Therefore, the Court first examined the employer's response to the allegations of sexual harassment by an employee and emphasised that the impossibility of assessing whether any mechanisms had been put in place by the employer primarily to deal with sexual harassment in the workplace may itself run counter to the requirements of Article 8 of the Convention. Noting, in any event, that the applicant's complaint focused on the alleged deficient response of the authorities to her criminal complaint, the Court went on to examine whether the applicant's right to personal integrity had been sufficiently protected by the criminal proceedings which had resulted in (a) confirmation that X had asked the applicant for sexual favours at work, and (b) a final decision that the acts in question did not meet the requirements provided for by the criminal law to constitute a criminal offence.

In concluding that the State had breached its positive obligations under Article 8 in this specific situation, the Court referred to significant flaws in the investigation and decisions, namely that:

(a) the specific context of sexual harassment and the inherent difficulty for the victims to prove their allegations had not been taken into account. X's relationship of power and the subordination of the victim, as well as the alleged threats he had made against her, had not been considered and assessed;

(b) the psychological consequences of the alleged harassment on the applicant had not been analysed by a specialist, and whether any reasons existed for her to make false accusations had not been verified; and

(c) insensitive/irreverent statements by X about the applicant had been extensively reproduced in the prosecutor's decision, a stigmatisation of the victim which might be seen as contrary to Article 8.

Furthermore, the principle according to which the need for a confrontation with the victim must be carefully weighed against the need to protect the victim's dignity and sensitivity had not been respected. Referring to international standards, which require the protection of the rights and interests of victims along with the effective punishment of perpetrators, the Court criticised a failure by the investigating authorities to protect the applicant from secondary victimisation.

Freedom of Expression (Article 10)

Applicability

The judgment in *Kotlyar v. Russia*³⁵ concerned the applicability of Article 10 to a protest in the form of the deliberate submission of false information to authorities in breach of criminal law. The applicant, a human rights defender, provided legal advice and social assistance to persons who had decided to move to Russia from other republics of the former Soviet Union. In particular, she was a vocal critic of the deficiencies in the legal framework and its practical implementation which had prevented immigrants from accessing State benefits or applying for Russian citizenship. In protest against the residence registration system and on compassionate grounds, the applicant submitted false information to the authorities in respect of hundreds of non-Russian nationals seeking such registration: she certified that they were all living in her flat, whereas they were actually living elsewhere. She was convicted on this account and appealed unsuccessfully.

The applicant complained that the criminal proceedings against her had sought to stifle her freedom to express an opinion on a systemic social problem, in breach of Article 10, her actions constituting a form of civil disobedience. The Court found that the conduct for which the applicant had been sanctioned did not amount to an expressive act. As she had been held liable for breaching a generally applicable law that had not been designed to suppress, nor had it had the effect of interfering with, any “communicative activity” on her part, the conduct for which she had been sanctioned did not fall within the ambit of Article 10. Her complaint was therefore declared inadmissible as being incompatible *ratione materiae* with the provisions of the Convention.

The judgment is noteworthy in that the Court clarified the relevant factors for assessing whether the protection of Article 10 extends to a given act or conduct prohibited by law. The Court carried out a two-tier analysis: in the first place, it examined the specific law that had been infringed; and secondly, it considered the nature of the act in question.

(i) As to the specific law that had been breached, the Court focused on whether it was a generally applicable law; whether it had been designed to suppress freedom of expression; and, generally, what the legitimate aims pursued were. The residence registration law, which the present applicant was found to have infringed, was a law of general application. It did not target the exercise of freedom of expression as such or any specific form of expression. It went no further than requiring that the information about a person’s place of residence be truthful and accurate, so that the authorities could, among other things, reliably calculate how many public services were needed in each area and ensure that official correspondence was properly addressed and delivered.

³⁵ *Kotlyar v. Russia*, nos. 38825/16 and 2 others, 12 July 2022.

Providing untrue information about the place of residence impeded the achievement of those legitimate aims and the authorities could take measures to counteract such conduct by introducing administrative or criminal sanctions. The law made it an offence to provide deliberately false information in official applications for neutral regulatory purposes and the Court found nothing unusual or unreasonable in that approach.

(ii) In order to determine whether the law in question had had the effect of interfering with the applicant's freedom of expression, the Court analysed whether it had been infringed in a manner related to the exercise thereof. To this end, the Court relied upon and developed two key elements from *Murat Vural v. Turkey*³⁶, namely, the expressive character of the act or conduct seen from an objective point of view, and the purpose or intention of the person performing the act or engaging in the conduct in question. In the Court's view, for an activity to be expressive in objective terms, it should be communicative and aimed at a broader public. However, deliberately providing false information to the authorities was devoid of such features and therefore did not amount to an expressive act. As to the applicant's purpose, the Court noted the sincerity of her belief as regards the wrongfulness of the residence regulations and of her intention to convey a message of protest in this regard. However, it considered there to be a significant difference between being sanctioned for offering some form of resistance to the lawful activities of others and actively engaging in criminally reprehensible conduct by making false representations to the authorities. In the instant case, the Court was therefore unable to accept that the applicant's intention to protest released her from the duty to obey the law and conferred an objectively expressive character on the breach committed, all the more so as she had not been prevented by any repressive measures from bringing her views to the public's attention.

In the Court's view protest motives are insufficient *per se* to bring a criminally reprehensible act within the ambit of Article 10. However, where such an act pursues the purpose of preparing material for a communicative activity, it may fall within the scope of this provision. The Court referred in this respect to cases where the applicants had been held responsible for criminally reprehensible acts that had formed part of an investigation undertaken while gathering material for a planned publication or broadcast (*Erdtmann v. Germany*³⁷, where the applicant had carried a knife onto an aeroplane to prepare a television documentary about airport security flaws; *Salihu and Others v. Sweden*³⁸, where the applicant had illegally purchased a firearm to investigate how easy it was to do so; and *Brambilla and Others v. Italy*³⁹, where the applicants had illegally intercepted police communications). The Court distinguished the instant case from this case-law: the applicant had not claimed that she had committed the residence-regulation offences as part of an investigation into any official abuse or for the purposes of preparing material that was to be published.

³⁶ *Murat Vural v. Turkey*, no. 9540/07, 21 October 2014.

³⁷ *Erdtmann v. Germany* (dec.), no. 56328/10, 5 January 2016.

³⁸ *Salihu and Others v. Sweden* (dec.), no. 33628/15, 10 May 2016.

³⁹ *Brambilla and Others v. Italy*, no. 22567/09, 23 June 2016.

Freedom of expression

The judgment in *OOO Memo v. Russia*⁴⁰ concerned the question whether the measures aimed at protecting the reputational interests of a public body could be regarded as pursuing a “legitimate aim” under Article 10 § 2. A regional administration (the executive body of a constituent entity of the Russian Federation) brought successful civil defamation proceedings against an online media outlet – the applicant company – which was ordered to publish a retraction of several statements made in an article criticising the actions of the administration. The applicant company complained under Article 10 that the impugned measure had not pursued any legitimate aim because public authorities could not claim to enjoy any “business reputation”. The Court found a breach of this provision, considering that the defamation proceedings had indeed not pursued any of the legitimate aims thereunder.

The judgment is noteworthy in that the Court clarified matters concerning the question whether the ambit of the “protection of the reputation ... of others” aim in Article 10 § 2 extends to public bodies, and, more specifically, to bodies of the executive vested with State powers.

(i) In the first place, the Court explained in what circumstances it was appropriate to examine in greater detail the question whether the impugned interference was in pursuance of the legitimate aim of “protection of the reputation ... of others” when the interests of a public body were involved. While the Court generally deals with the question of legitimate aim summarily and with a degree of flexibility (*Merabishvili v. Georgia*⁴¹) and focuses on the assessment of the proportionality of the interference, including in this particular context (*Lombardo and Others v. Malta*⁴²; *Romanenko and Others v. Russia*⁴³; and *Margulev v. Russia*⁴⁴), the Court attached significance to the risks for democracy stemming from court proceedings instituted with a view to limiting public participation. With this in mind, the Court outlined two factors warranting a stricter, more detailed examination of the existence of the above-mentioned legitimate aim: the existence of a dispute between the parties in this regard, and the power imbalance between the claimant and the defendant in the domestic proceedings.

(ii) In some previous cases about the reputational interests of public bodies, the Court had been prepared to assume that the aim of the “protection of the reputation” was “legitimate” (*Romanenko and Others*, cited above, § 39; *Savva Terentyev v. Russia*⁴⁵; *Freitas Rangel v. Portugal*⁴⁶; and *Goryaynova v. Ukraine*⁴⁷). At the same time, a mere institutional interest did not necessarily attract the same level of guarantees as that

⁴⁰ *OOO Memo v. Russia*, no. 2840/10, 15 March 2022.

⁴¹ *Merabishvili v. Georgia* [GC], no. 72508/13, §§ 297 and 302, 28 November 2017.

⁴² *Lombardo and Others v. Malta*, no. 7333/06, § 50, 24 April 2007.

⁴³ *Romanenko and Others v. Russia*, no. 11751/03, § 39, 8 October 2009.

⁴⁴ *Margulev v. Russia*, no. 15449/09, § 45, 8 October 2019.

⁴⁵ *Savva Terentyev v. Russia*, no. 10692/09, § 60, 28 August 2018.

⁴⁶ *Freitas Rangel v. Portugal*, no. 78873/13, § 48, 11 January 2022.

⁴⁷ *Goryaynova v. Ukraine*, no. 41752/09, § 56, 8 October 2020.

accorded to “the protection of the reputation ... of others” within the meaning of Article 10 § 2 (*Margulev*, cited above, § 45, and *Kharlamov v. Russia*⁴⁸). The Court had also stressed that the limits of permissible criticism were wider with regard to a public authority than in relation to a private citizen, or even a politician (*Margulev*, § 53, and *Lombardo*, § 54, both cited above).

(iii) In the instant case, the Court clarified the matter by distinguishing between two types of public body: first, public entities that engaged in direct economic activities and, second, bodies of the executive vested with State powers. As to the former, the Court observed that public or State-owned corporations engaged in competitive activities in the marketplace relied on their good reputation to attract customers with a view to making a profit. In this connection, the Court reiterated its earlier findings recognising a legitimate “interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good” (*Steel and Morris v. the United Kingdom*⁴⁹, and *Uj v. Hungary*⁵⁰).

However, those considerations were inapplicable to the second type of public bodies, a body of the executive vested with State powers which did not engage as such in direct economic activities but was funded by taxpayers and existed to serve the public. By virtue of its role in a democratic society, the interests of such a body in maintaining a good reputation differed from the reputational interests of natural persons and of legal entities, whether private or public, that competed in the marketplace. In particular, the interests of a public authority were indissociable from the need to prevent abuse of power or corruption of public office by subjecting its activities to close scrutiny, not only by the legislative and judicial authorities but also through public opinion, and shielding bodies of the executive from media criticism would run counter to this objective in so far as it might seriously hamper freedom of the media. Allowing executive bodies to bring defamation proceedings against members of the media would place an excessive and disproportionate burden on the latter and would have an inevitable chilling effect (*Dyuldin and Kislov v. Russia*⁵¹, and *Radio Twist a.s. v. Slovakia*⁵²).

(iv) In view of the specific features and role of a public authority, the Court set forth a new general rule to the effect that civil defamation proceedings brought in its own name by a legal entity that exercises public power may not be regarded as being in pursuance of the legitimate aim of “the protection of the reputation ... of others” under Article 10 § 2 of the Convention. However, this general rule did not apply to individual members of a public body, who could be “easily identifiable”: they may be entitled to bring defamation proceedings in their own individual name. The Court drew inspiration from *Thoma v. Luxembourg*⁵³ and *Lombardo and Others* (cited above) to indicate the factors that would

⁴⁸ *Kharlamov v. Russia*, no. 27447/07, § 29, 8 October 2015.

⁴⁹ *Steel and Morris v. the United Kingdom*, no. 68416/01, § 94, ECHR 2005-II.

⁵⁰ *Uj v. Hungary*, no. 23954/10, § 22, 19 July 2011.

⁵¹ *Dyuldin and Kislov v. Russia*, no. 25968/02, § 43, 31 July 2007.

⁵² *Radio Twist a.s. v. Slovakia*, no. 62202/00, § 53, ECHR 2006-XV.

⁵³ *Thoma v. Luxembourg*, no. 38432/97, § 56, ECHR 2001-III.

make individual members of a public body “easily identifiable”: the nature of the allegations made against them, the limited number of officials working in a given public body, and the scale of its operations (notably in terms of the size of the population concerned by its activities).

(v) On the facts of the case, the Court found that the claimant in the domestic defamation proceedings was the highest body of the regional executive. It was hardly conceivable that it had an interest in protecting its commercial success and viability. Nor could it be said that its members had been “easily identifiable”. In any event, the defamation case had been brought on behalf of the legal entity and not of its individual members. Accordingly, the civil defamation proceedings instituted by the regional administration against the applicant media company had not pursued any of the legitimate aims set out in Article 10 § 2 of the Convention.

Freedom of the press

The judgment in *NIT S.R.L. v. the Republic of Moldova*⁵⁴ concerned the statutory obligation on broadcasters to observe political pluralism. The applicant company had a television channel (NIT) which it broadcast nationally. In 2009, following a change of government, NIT became a platform for criticism of the government and the promotion of the Party of the Communists (PCRM – the only opposition party at the material time). It was sanctioned for repeated and serious breaches of the statutory requirement to ensure political balance and pluralism, including for broadcasting distorted news items, favouring the PCRM and portraying its opponents (including the government) in a negative light without giving them a platform to reply, and using aggressive journalistic language (comparing one leader of the other political parties to “Hitler”, and referring to all of the leaders as “criminals”, “bandits”, “crooks” and “swindlers”). In 2012 their broadcasting licence was revoked.

The applicant company relied on Article 10 and Article 1 of Protocol No. 1. The Court found no violation of either of these provisions. In its view, Moldova’s licensing system was capable of contributing to the quality and balance of programmes and was thus consistent with the third sentence of Article 10 § 1. The manner in which the regulatory framework was designed did not exceed the State’s margin of appreciation, the news reporting in issue did not warrant the enhanced protection afforded to press freedom, and the revocation of the licence was considered to be justified, exempt of political motivation, accompanied by adequate safeguards and proportionate to the legitimate aims pursued.

The Grand Chamber judgment is noteworthy in that the Court developed its case-law on pluralism in the media. In particular, the Court dealt, for the first time, with restrictions imposed on a broadcaster with the aim of enabling diversity in the expression of political opinion and enhancing the protection of the free-speech interests of others in the audiovisual media (existing standards had been elaborated in the context of unjustified State interferences with an applicant’s Article 10 rights in breach of the principle of pluralism). In this regard, the Court clarified the interrelationship between the internal and external aspects of media pluralism, the scope of the margin of appreciation afforded to States, and the level of scrutiny applicable to restrictions in this area. It also outlined the factors for assessing a regulatory framework and its application.

(i) While previous cases were concerned with the external aspect of media pluralism⁵⁵, in the present case the Court considered its internal aspect (obligation on broadcasters to present different political views in a balanced manner, without favouring a particular party or movement). The Court clarified that both aspects had to be considered in combination with each other, rather than in isolation.

⁵⁴ *NIT S.R.L. v. the Republic of Moldova* [GC], no. 28470/12, 5 April 2022.

⁵⁵ Concerning issues such as the existence of a variety of outlets, each with a different point of view, and the concentration of media in the hands of too few, such as a monopoly or duopoly, see *Manole and Others v. Moldova* (no. 13936/02, ECHR 2009 (extracts)).

This meant that in a national licensing system involving a certain number of broadcasters with national coverage, what might be regarded as a lack of internal pluralism in the programmes offered by one broadcaster might be compensated for by the existence of effective external pluralism. However, it would not be sufficient to provide for the existence of several channels. What was required was to guarantee the diversity of overall programme content, reflecting as far as possible the variety of opinions in society. Having surveyed different approaches in member States to achieve this objective, the Court was of the view that Article 10 did not impose a particular model.

(ii) The Court further clarified that States' margin of discretion in determining the means of ensuring political pluralism in the area of licensing audiovisual media should be wider than that normally given to restrictions on the freedom of the press to report on matters of public interest or political opinion, which traditionally called for strict scrutiny. However, that discretion would be narrower depending on the nature and seriousness of any restriction on editorial freedom. In particular, the severity of the present sanction imposed on a media company called for closer scrutiny by the Court and for a narrower margin of appreciation.

(iii) As to assessing the relevant regulatory framework and its application in the concrete circumstances of a given case, the Court will analyse whether their effects, seen as a whole, are compatible with the guarantees of Article 10 and have been attended by effective safeguards against arbitrariness and abuse. The fairness of proceedings and procedural guarantees afforded are factors of particular relevance for the proportionality assessment, especially where the impugned measures are severe.

Freedom of Assembly and Association (Article 11)

Applicability

The decision in *Barış and Others v. Turkey*⁵⁶ concerned the applicability of Article 11 to a dismissal based on participation in unofficial strike action.

The applicants, company employees, were dismissed for having stopped working throughout a period of strike action which had not been initiated by a trade union, but instead by a large number of employees who had resigned *en masse* from their previous trade union after having lost confidence in it. Many of the ex-members, including the applicants, decided to join another trade union. The purpose of their action was to protest against the procedure by which the previous (recognised) trade union had negotiated a collective-bargaining agreement concluded with their employer and against the pressure allegedly exerted by the employer to join this trade union, or to remain in it.

⁵⁶ *Barış and Others v. Turkey* (dec.), nos. 66828/16 and 31 others, adopted on 14 December 2021 and delivered on 27 January 2022.

The applicants challenged their dismissal before the domestic courts without success. According to the facts, as established by the Court of Cassation, their dismissal had been based on participation in a strike that was not part of trade-union action, rather than on their wish to leave the trade union in question and join another one.

The Court declared the application inadmissible (incompatible *ratione materiae*), on the grounds that the disputed procedure did not come within the scope of Article 11 of the Convention.

The decision is noteworthy in that the Court addressed a new question, namely the applicability of Article 11 to a strike conducted by individual employees outside the framework of official trade-union action. The cases which the Court had previously examined had all concerned actions initiated by trade unions and involved strike action, or actions comparable to it (*Karaçay v. Turkey*⁵⁷; *Dilek and Others v. Turkey*⁵⁸; and the case-law summarised in *Association of Academics v. Iceland*⁵⁹). While the Court had recognised, in principle, that the protection of Article 11 extended to trade-union action, it had not previously accepted that a strike, not called by a trade union but by a trade union's members, or even non-members, would also be entitled to the same protection. In the present decision, the Court clarified:

“... strike action is, in principle, protected by Article 11 only in so far as it is called by trade-union organisations and considered as being effectively – and not only presumed to be – part of trade-union activity.”

In this connection, the Court referred to the case-law of the European Committee on Social Rights, which has found that reserving the right to strike to trade unions is compatible with Article 6 § 4 of the European Social Charter, provided that setting up a trade union is not subject to excessive formalities.

On this basis, and for the purpose of examining the applicability of Article 11 to the present case, the Court focused its attention on one particular aspect of the case, namely the applicants' negative right to freedom of association, having regard, in particular, to their wish to leave the trade union in question and the related allegations of pressure from their employer. However, as followed from the analysis by the Court of Cassation and the Constitutional Court, all of the measures taken by the employer were related to the employees' failure to resume working, and were not based on their membership, or non-membership, of a specific trade union. In addition, the conditions for membership of the trade union were not the subject matter of the strike action in which the applicants had taken part. Thus, the question whether the applicants had had the possibility to leave a trade union and join another trade union did not seem to be in issue in the present case.

⁵⁷ *Karaçay v. Turkey*, no. 6615/03, 27 March 2007.

⁵⁸ *Dilek and Others v. Turkey*, nos. 74611/01 and 2 others, 17 July 2007.

⁵⁹ *Association of Academics v. Iceland* (dec.), no. 2451/16, 15 May 2018.

In the light of all these factors, the Court concluded that the applicants could not claim a right to the freedom of association as protected under Article 11, in so far as they had not been dismissed for having taken part in a demonstration organised by a trade union, for having asserted professional rights as part of the activities of a trade union, for having withdrawn from a specific trade union or for having chosen not to join a specific trade union.

Prohibition of Discrimination (Article 14)

Article 14 taken in conjunction with Article 8

The judgment in *Arnar Helgi Lárusson v. Iceland* 60 concerned a lack of wheelchair access to two public buildings in the applicant's town and the State's positive obligations in this regard. The applicant, a wheelchair user, unsuccessfully brought proceedings with a view to improving the accessibility of two buildings housing arts and cultural centres. The domestic courts noted that the municipality had worked towards improving access further to domestic legislation which had taken into account the State's international obligations under the United Nations Convention on the Rights of Persons with Disabilities (CRPD). The municipality had devised and put into action a strategy to improve access to some of its buildings within its wide margin of appreciation as to the prioritisation of such projects and the allocation of funds available.

The applicant complained under Article 14 in conjunction with Article 8 (private life) about the lack of access to those two public buildings, which had led to him being unable to attend arts and cultural events and put him on an uneven footing with other inhabitants of the town. The Court found that there had been no violation of the Convention.

The judgment is noteworthy in that it was the first time that a complaint about the lack of accessibility of public buildings for persons with disabilities was considered to fall within the ambit of "private life". This allowed the Court to go on to examine, under Article 14 in conjunction with Article 8, whether the State had fulfilled its positive obligations, in the light of international standards, to take sufficient measures to correct factual inequalities which impacted the applicant's equal enjoyment of his right to private life.

(i) Distinguishing the applicant's case from previous cases (*Botta v. Italy*⁶¹; *Zehnalová and Zehnal v. the Czech Republic*⁶²; and *Glaisen v. Switzerland*⁶³) and finding that the

⁶⁰ *Arnar Helgi Lárusson v. Iceland*, no. 23077/19, 31 May 2022.

⁶¹ *Botta v. Italy*, 24 February 1998, *Reports of Judgments and Decisions* 1998-I.

⁶² *Zehnalová and Zehnal v. the Czech Republic* (dec.), no. 38621/97, ECHR 2002-V.

⁶³ *Glaisen v. Switzerland* (dec.), no. 40477/13, 25 June 2019.

present lack of wheelchair access did fall within the ambit of “private life” and Article 8, the Court: (a) stressed that the applicant had clearly identified two particular public buildings playing an important part in local life, the lack of access to which had prevented him from attending a substantial part of the cultural activities, social events and parties offered by his community; (b) underlined European and international standards to the effect that people with disabilities should be enabled to fully integrate into society and have equal opportunities for participation in the life of the community; and (c) considered that the situation in issue was liable to affect the applicant’s rights to personal development and to establish and develop relationships with the outside world, thereby falling within the ambit of Article 8.

(ii) As to whether there had been discrimination due to the lack of positive measures taken by the State, the Court specified, firstly, that a certain threshold was required to find that a difference in treatment was significant. Secondly, it clarified that the States’ margin of appreciation was wide when it came to a lack of access to public buildings in the context of the right to respect for private and family life. Thirdly, as Article 14 had already been read in the light of the requirements of the CRPD, the Court extended its previous considerations, regarding the “reasonable accommodation” which people with disabilities were entitled to expect, to their social and cultural life, by reference to Article 30 of the CRPD which required that persons with disabilities were guaranteed the opportunity to take part on an equal basis with others in cultural life. Lastly, the relevant test to be applied was whether the State had made the “necessary and appropriate modifications and adjustments” to accommodate and facilitate persons with disabilities. These modifications and adjustments should not impose “a disproportionate or undue burden” on the State.

(iii) When applying the above principles, the Court had regard to the following factors:

(a) the considerable efforts already made following a parliamentary resolution to improve access to public buildings in the municipality, having regard to the available budget and the necessary protection of the old buildings in question;

(b) the priority which had been given to educational and sports facilities, as regards improvements already made, which was neither arbitrary nor unreasonable; and

(c) the resulting general commitment of the State to work towards the gradual realisation of universal access in line with the relevant international materials (Recommendation Rec(2006)5 of the Council of Europe’s Committee of Ministers⁶⁴ and the CRPD).

In the circumstances and having regard to the positive obligation to reasonably accommodate the applicant, requiring the State to put in place further measures would

⁶⁴ Recommendation Rec(2006)5 of the Council of Europe’s Committee of Ministers to member states on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015.

amount to imposing a “disproportionate or undue burden” on it. The applicant’s lack of access to the two buildings in question did not therefore amount to a discriminatory failure by the State to take sufficient measures to correct factual inequalities in order to enable the applicant to exercise his right to private life on an equal basis with others.

The judgment in *Beeler v. Switzerland*⁶⁵ concerned the question whether a complaint relating to a welfare benefit fell within the ambit of “family life”.

Following the death of his wife, the applicant left employment to look after their children full time and was therefore paid a “widower’s pension”. In accordance with the domestic law, the right to receive that pension ended when his youngest daughter reached the age of majority. At that time, he was not yet eligible for an old-age pension and, since he had not been employed for over sixteen years, he claimed that he was unable to find a job. He argued that the termination of his widower’s pension was discriminatory because the relevant law did not deprive widows of their entitlement to such a pension even after their youngest child had reached adulthood.

The applicant complained under Article 14 taken in conjunction with Article 8. The Government stated that welfare benefits ordinarily fell within the scope of Article 1 of Protocol No. 1 (which had not been ratified by Switzerland) and not within that of Article 8. A Chamber of the Court found that the complaint fell within the ambit of Article 8, rendering Article 14 applicable, and the Grand Chamber reached the same conclusion (on different grounds). Like the Chamber, the Grand Chamber also found a violation of Article 14 (in conjunction with Article 8): no “very strong” or “particularly weighty and convincing” reasons had been shown to justify the difference in treatment on grounds of sex. In particular, there was no reason to believe that the applicant would have less difficulty returning to employment than a woman in a similar situation or that the end of the pension payments would have less impact on him than on a widow in comparable circumstances.

The Grand Chamber judgment is noteworthy in that the Court clarified, for the purposes of the applicability of Article 14, the relevant criteria to be applied to circumscribe what falls within the ambit of Article 8 under its “family life” aspect in the sphere of welfare benefits.

(i) In the vast majority of cases concerning entitlement to welfare benefits, the Court has carried out its analysis primarily under Article 1 of Protocol No. 1 (or under Article 14 in conjunction with Article 1 of Protocol No. 1) rather than under Article 8. The Court found that its case-law had taken on sufficient maturity and stability to provide a clear definition of the threshold required for the applicability of Article 1 of Protocol No. 1. In this connection, the Court reiterated and summarised the relevant principles set out in *Béláné Nagy v. Hungary*⁶⁶.

⁶⁵ *Beeler v. Switzerland* [GC], no. 78630/12, 11 October 2022.

⁶⁶ *Béláné Nagy v. Hungary* [GC], no. 53080/13, §§ 70-74 and 86-89, 13 December 2016.

(ii) The Court acknowledged that there was less clarity as regards the scope of Article 8 in the sphere of welfare benefits. While the concept of “family life” within the meaning of Article 8 also covered (in addition to social, moral and cultural relations) certain material interests which had necessary pecuniary consequences, there were fewer cases in which complaints concerning welfare benefits had been examined by the Court under Article 8 alone. In this connection, the Court emphasised that Article 8 alone could not be interpreted as imposing any positive obligations on the State in the social security sphere, and it did not guarantee the right to a welfare benefit.

(iii) At the same time, the Court observed that the scope of Article 14, read in conjunction with Article 8, could be more extensive than that of Article 8 read alone. Indeed, where a State created a right to a welfare benefit, thus going beyond its obligations under Article 8, it could not, in the application of that right, take discriminatory measures within the meaning of Article 14. The Court therefore analysed the factors capable of bringing the facts of a case of this kind within the ambit of Article 8, as they have emerged from previous cases where complaints concerning welfare benefits have been examined under Article 14 of the Convention in conjunction with Article 8.

(iv) The analysis of the relevant case-law revealed inconsistencies in defining the factors which trigger the applicability of Article 14 read in conjunction with Article 8. In particular, there were three different approaches. According to the first approach, applicability arose from a combination of circumstances involving granting parental leave and a related allowance, both measures aimed at enabling one of the parents to remain at home to look after children. In the applicants’ specific situations, such measures had necessarily affected the way in which their family life had been organised. In other words, a close link between the allowance associated with parental leave and the enjoyment of family life was considered necessary (*Konstantin Markin v. Russia*⁶⁷; *Petrovic v. Austria*⁶⁸; and *Topčić-Rosenberg v. Croatia*⁶⁹). The second approach, which had guided the Chamber in the instant case, was based on the hypothesis that the fact of granting or refusing the benefit was liable to affect the way in which family life was organised (*Di Trizio v. Switzerland*⁷⁰, and *Belli and Arquier-Martinez v. Switzerland*⁷¹). The third approach consisted of a legal presumption to the effect that, in providing the benefit in question, the State was displaying its support and respect for family life (*Dhahbi v. Italy*⁷²; *Fawsie v. Greece*⁷³; and *Yocheva and Ganeva v. Bulgaria*⁷⁴).

(v) In order to redress that inconsistency, the Court decided to no longer follow the second and third approaches. Indeed, there was a need to avoid the excessive extension of the ambit of Article 8. While all financial benefits generally had a certain effect on the

⁶⁷ *Konstantin Markin v. Russia* [GC], no. 30078/06, §§ 129-30, ECHR 2012 (extracts).

⁶⁸ *Petrovic v. Austria*, 27 March 1998, *Reports of Judgments and Decisions* 1998-II.

⁶⁹ *Topčić-Rosenberg v. Croatia*, no. 19391/11, 14 November 2013.

⁷⁰ *Di Trizio v. Switzerland*, no. 7186/09, 2 February 2016.

⁷¹ *Belli and Arquier-Martinez v. Switzerland*, no. 65550/13, 11 December 2018.

⁷² *Dhahbi v. Italy*, no. 17120/09, 8 April 2014.

⁷³ *Fawsie v. Greece*, no. 40080/07, 28 October 2010.

⁷⁴ *Yocheva and Ganeva v. Bulgaria*, nos. 18592/15 and 43863/15, 11 May 2021.

way in which the family life of the person concerned was managed, that fact alone could not suffice to bring them all within that ambit. In this regard, the Court bore in mind that the interests secured under Article 1 of Protocol No. 1 and Article 8 were different, even though their respective spheres of protection intersected and overlapped. This led the Court to choose the first of the above approaches, taking the judgment of *Konstantin Markin* (cited above) as the main reference. Accordingly, for Article 14 to be applicable in this specific context, the Court clarified that the subject matter of the alleged disadvantage must constitute one of the modalities of exercising the right to respect for family life as guaranteed by Article 8 of the Convention, in the sense that the measures sought to promote family life and necessarily affect the way in which it is organised.

The Court further specified a range of factors relevant for determining the nature of the benefit in question, in particular: the aim of the benefit, as determined by the Court in the light of the legislation concerned; the criteria for awarding, calculating and terminating the benefit as set forth in the relevant statutory provisions; the effects on the way in which family life was organised, as envisaged by the legislation; and the practical repercussions of the benefit, given the applicant's individual circumstances and family life throughout the period during which the benefit was paid. These factors are to be examined as a whole. In the present case, the Court found, in the first place, that the pension in issue sought to promote family life by enabling a surviving parent to look after children without having to engage in an occupation, and, secondly, that receipt of the pension had necessarily affected the way in which the applicant's family life had been organised throughout the relevant period. The facts of the case therefore fell within the ambit of Article 8, rendering Article 14 of the Convention applicable.

The judgment in *Basu v. Germany*⁷⁵ concerned allegations of racial profiling during an identity check.

Police officers carried out an identity check on the applicant, a German national of Indian origin, and his daughter on a train which had just crossed the Czech-German border. When asked about the reasons for the check, the officers said that it was a random check and that cigarettes were frequently smuggled on that train. They confirmed, however, that there had not been any specific suspicion in respect of the applicant in this regard. The applicant complained to the administrative courts that the check had only been carried out because of his dark skin colour, but the administrative courts declined to examine the merits of the complaint. The applicant then complained to this Court under Article 14 read in conjunction with Article 8 and the Court found a violation of this provision.

The judgment is noteworthy in two respects. Firstly, the Court clarified the criteria by which to assess whether an identity check, allegedly based on physical or ethnic motives, falls within the ambit of Article 8 under its "private life" aspect, thus triggering the

⁷⁵ *Basu v. Germany*, no. 215/19, 18 October 2022.

applicability of Article 14. Secondly, the Court clarified the scope of the procedural obligation in this context⁷⁶.

(i) The Court considered that not every identity check of a person belonging to an ethnic minority would fall within the ambit of Article 8. It specified that a check had to attain the necessary threshold of severity if it was to fall within the ambit of “private life”. That threshold was only attained if the person concerned had an arguable claim that he or she might have been targeted on account of specific physical or ethnic characteristics. In other words, for that threshold to be met, the Court required a certain level of substantiation for allegations of this kind. Such an arguable claim might exist where the person concerned submitted that he or she or persons having the same characteristics had been the only person or persons subjected to a check and where no other grounds for the check had been apparent, or where any explanations given by the officers carrying out the check had disclosed specific physical or ethnic motives. In this connection, drawing upon its case-law concerning an identity check accompanied by a detailed search (*Gillan and Quinton v. the United Kingdom*⁷⁷), the Court observed that the public nature of the check might have had an effect on a person’s reputation and self-respect.

Turning to the facts, the Court analysed how the applicant had substantiated both his racial-profiling allegations and the repercussions of the impugned check on his private life. As to the former, the applicant pointed out that, of the persons present in different compartments of the train carriage, he and his daughter had been the only persons with a dark skin colour and the only persons who had been subjected to the check. Furthermore, the explanations given by the police officer had not disclosed any other objective grounds for targeting the applicant. The applicant argued that the identity check under such conditions had made him feel stigmatised and humiliated. In the Court’s view, the applicant had substantiated his argument that the impugned check had had sufficiently serious consequences for his right to respect for his private life. The identity check in question therefore had fallen within the ambit of Article 8, rendering Article 14 applicable.

(ii) Regarding the procedural obligation in this context, the Court clarified that the authorities’ duty to investigate the existence of a possible link between racist attitudes and a State agent’s act, even of a non-violent nature, was to be considered implicit in their responsibilities under Article 14 when examined in conjunction with Article 8. The Court reached this conclusion on the basis of two considerations. In the first place, relying on the findings of the European Commission against Racism and Intolerance (ECRI) and the UN Human Rights Committee, the Court considered it essential to ensure protection from stigmatisation and to prevent the spread of xenophobic attitudes, so as to avoid protection against racial discrimination becoming theoretical and illusory in the context of non-violent acts falling to be examined under Article 8. Secondly, the Court drew on its

⁷⁶ This issue was also examined in *Muhammad v. Spain* (no. 34085/17, 18 October 2022 – see below), which also dealt with questions concerning the standard and burden of proof to be applied in this context.

⁷⁷ *Gillan and Quinton v. the United Kingdom*, no. 4158/05, ECHR 2010 (extracts).

case-law on racially induced violence (*B.S. v. Spain*⁷⁸; *Boacă and Others v. Romania*⁷⁹; *Burlya and Others v. Ukraine*⁸⁰; and *Sabalić v. Croatia*⁸¹) to outline the scope of the procedural obligation in this regard. In particular, State authorities had an obligation to take all reasonable measures to identify whether there had been racist motives and to establish whether or not ethnic hatred or prejudice might have played a role in the events. The Court reiterated that, generally, the duty to investigate served to ensure accountability through appropriate criminal, civil, administrative and professional avenues, the State enjoying a margin of appreciation as to the manner in which to organise its system to ensure compliance (*F.O. v. Croatia*⁸²).

In the instant case, the Court found that the State authorities had failed to comply with their duty to take all reasonable measures to ascertain through an independent body whether or not a discriminatory attitude had played a role in the identity check. The domestic courts had failed to consider the necessary evidence and, in particular, to hear the witnesses who had been present during the identity check. They had dismissed the applicant's action on formal grounds, finding that he did not have a legitimate interest in a decision on the lawfulness of his identity check. In the absence of an effective investigation into the applicant's arguable claim, the Court was unable to make a finding on the substantive aspect of his complaint, namely, on whether he had been subjected to the identity check on account of his ethnic origin.

The judgment in *Muhammad v. Spain*⁸³ also concerned allegations of racial profiling during an identity check.

The applicant and his friend, both Pakistani nationals, were stopped by the police while walking on a street in a tourist area in which pickpocketing was relatively common. The applicant was asked for his identification. He submitted that one of the officers had acknowledged that the applicant had been checked because of the colour of his skin and that they would not have stopped a "German", a submission contested by the police. According to the police report, the applicant was approached only in response to his provocative and insolent attitude. The applicant was arrested and taken to a police station where he was given an administrative fine for having refused to identify himself and displaying a lack of respect towards authority. While the domestic legal framework provided both a criminal and an administrative remedy in respect of racial discrimination, the applicant had recourse only to the administrative procedure. His State liability claim was dismissed on the grounds that he had not properly substantiated his allegation that the identity check had been discriminatory.

⁷⁸ *B.S. v. Spain*, no. 47159/08, 24 July 2012.

⁷⁹ *Boacă and Others v. Romania*, no. 40355/11, 12 January 2016.

⁸⁰ *Burlya and Others v. Ukraine*, no. 3289/10, 6 November 2018.

⁸¹ *Sabalić v. Croatia*, no. 50231/13, 14 January 2021.

⁸² *F.O. v. Croatia*, no. 29555/13, 22 April 2021.

⁸³ *Muhammad v. Spain*, no. 34085/17, 18 October 2022.

The applicant complained under Article 14 read in conjunction with Article 8. The Court found that the identity check in question fell within the ambit of Article 8: it had necessarily affected the applicant's private life and would have been sufficient to affect his psychological integrity and ethnic identity. Article 14 was therefore applicable. The Court went on to find no violation of the procedural limb of Article 14 in conjunction with Article 8: the State had not failed to comply with its obligation to investigate the existence of racist motives behind the check in issue. The Court also found no violation of the substantive limb of Article 14 in conjunction with Article 8: it did not consider that it had been established that racist attitudes played a role in the applicant's identity check and subsequent arrest.

The judgment is noteworthy in three respects. In the first place, the Court clarified the criteria by which to assess whether an identity check allegedly based on physical or ethnic motives fell within the ambit of Article 8 under its "private life" aspect, thus triggering the applicability of Article 14. Secondly, the Court clarified the scope of the procedural obligation in this context⁸⁴. Thirdly, the Court indicated the approach to be followed with regard to the standard and burden of proof in the context of allegations of racial profiling, reiterating its usual principle *affirmanti incumbit probatio* (the applicant has to prove his or her allegation) and noting that the burden of proof shifted to the Government only after an applicant had shown a difference in treatment (*D.H. and Others v. the Czech Republic*⁸⁵).

The Court further referred to the following principle, as set out in *Nachova and Others v. Bulgaria*⁸⁶: when it was alleged that a certain act of discrimination was motivated by racial prejudice, the Government could not be required to prove the absence of a particular subjective attitude on the part of the person/persons concerned.

Turning to the instant case, the Court noted that the applicant had relied heavily on the fact that nobody else belonging to the "majority Caucasian population" had been stopped on the same street immediately before, during or after his identity check. This, however, could not be taken as an indication *per se* of any racial motivation behind the request for him to show his identity document. The applicant had not shown any surrounding circumstances which could suggest that the police had been carrying out identity checks motivated by animosity against citizens who shared the applicant's ethnicity, or which could give rise to the presumption required to reverse the burden of proof at the domestic level as to the existence of any racial or ethnic profiling. The applicant's friend, also Pakistani, had not been arrested and both the police and the Government had denied that he had also been requested to identify himself. There was no reason for the Court to depart from the domestic courts' conclusion that it had been the applicant's attitude, and not his ethnicity, that had caused the police officers to stop him and perform an identity check.

⁸⁴ These two issues were also examined in *Basu* (cited above). For ease of reference, those developments are described in detail only in the summary of that case.

⁸⁵ *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, §§ 177-78, ECHR 2007-IV.

⁸⁶ *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 157, ECHR 2005-VII.

The applicant had submitted reports by a number of organisations, including intergovernmental bodies, expressing concerns regarding the occurrence of racially motivated police identity checks. The Court, however, did not find them sufficient to shift the burden of proof to the Government, as in cases concerning indirect discrimination (*D.H. and Others v. the Czech Republic*, cited above).

In sum, the Court was unable to find that the requirement on the applicant to identify himself on the street had been motivated by racism.

Article 14 taken in conjunction with Article 1 of Protocol No. 1

The judgment in *Savickis and Others v. Latvia*⁸⁷ concerned the justification for a difference in treatment based on nationality in the context of the restoration of a State's independence after unlawful occupation and annexation.

Following the restoration of Latvia's independence, a new system of occupational retirement pensions was introduced, which allowed for periods of employment accrued outside its territory to be counted towards the pension for Latvian nationals. Since the applicants were "permanently resident non-citizens", their years of service outside Latvia during the Soviet era were not taken into account for the calculation of their pensions. In *Andrejeva v. Latvia*⁸⁸ the Court had found that this difference in treatment amounted to a breach of Article 14 taken in conjunction with Article 1 of Protocol No. 1. Several of the present applicants had unsuccessfully applied to have their pensions recalculated on that basis. In 2011 the Constitutional Court declared the rule compatible with the Constitution and the Convention, drawing a clear distinction between the case of *Andrejeva* and the applicants' case: while Ms Andrejeva had resided in the territory of Latvia over the disputed periods, the applicants had worked outside it before establishing any legal ties with Latvia. In this connection, the Constitutional Court relied on the doctrine of State continuity, which had informed the implementation of the system of retirement pensions. According to this doctrine, while Latvian statehood had been lost *de facto* with the loss of Latvian independence in 1940, it had nevertheless remained in place *de jure* throughout the five decades of unlawful occupation and annexation by the former Soviet Union. Latvia was not, therefore, the successor of the rights and obligations of the Soviet Union. The Grand Chamber considered the above arguments to amount to "very weighty reasons" which justified the contested difference in treatment. It found no violation of Article 14 in conjunction with Article 1 of Protocol No. 1, thus reaching a different conclusion from that in *Andrejeva*.

This Grand Chamber judgment is an example of judicial dialogue with a national superior court. It is further noteworthy because of the way the Court assessed the justification

⁸⁷ *Savickis and Others v. Latvia* [GC], no. 49270/11, 9 June 2022.

⁸⁸ *Andrejeva v. Latvia* [GC], no. 55707/00, ECHR 2009.

for the difference in treatment based on nationality in the specific context of the restoration of the State's independence after decades of unlawful occupation and annexation. The relevant factors for determining the appropriate scope of the margin of appreciation, as well as the significance given to personal choice concerning legal status or citizenship in matters relating to financial benefits, are of particular interest.

(i) The Court drew a clear distinction between the context of State succession and the specific context in issue, thus agreeing with the Constitutional Court that Latvia was not obliged to assume the responsibilities of the Soviet Union upon the restoration of its independence. The Court accepted that the aim of safeguarding the constitutional identity of the State and avoiding retrospective approbation of the consequences of the immigration policy practised in the period of unlawful occupation and annexation of the country was legitimate. In the Court's view, the preferential treatment accorded to those possessing Latvian citizenship in respect of past periods of employment performed outside of Latvia was in line with this legitimate aim.

(ii) While the justification of a difference in treatment based exclusively on nationality requires "very weighty reasons", thus indicating a narrow margin, the Court clarified the application of this principle in a field where a wide margin is, and must be, granted to the State in formulating general measures (notably in the areas of economic and social policy). In particular, even the assessment of what may constitute "very weighty reasons" for the purposes of the application of Article 14 may have to vary in degree depending on the context and circumstances. In the instant case, the Court carried out this assessment against the background of a wide margin of appreciation and eventually concluded that the grounds relied upon by the Latvian authorities could be deemed to amount to "very weighty reasons". The Court based its analysis on the following factors.

In the first place, the Court reiterated its case-law acknowledging that there may be valid reasons for giving special treatment to those whose link with a country stemmed from birth within it or who otherwise had a special link with a country (*Abdulaziz, Cabales and Balkandali v. the United Kingdom*⁸⁹). Secondly, drawing upon *Bah v. the United Kingdom*⁹⁰, the Court accepted that, in the context of a difference in treatment based on nationality, there may be certain situations where the element of personal choice linked with the legal status in question may be of significance, especially where privileges, entitlements and financial benefits are at stake. Thirdly, the Court attached weight to the particular context of the difference in treatment in issue, holding that it warranted a substantial degree of deference to be afforded to the Government. Fourthly, the Court took note of the temporal scope of the preferential treatment in issue: it only concerned past periods of employment completed outside Latvia prior to the restoration of independence and the introduction of the pension scheme. Lastly, the difference in treatment complained of neither left the applicants without social cover (such as basic

⁸⁹ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A no. 94.

⁹⁰ *Bah v. the United Kingdom*, no. 56328/07, § 47, ECHR 2011.

pension benefits unrelated to employment history), nor entailed any deprivation, or other loss, of benefits based on financial contributions.

Right to Free Elections (Article 3 of Protocol No. 1)

Stand for election

In response to the request submitted by the Lithuanian Supreme Administrative Court under Protocol No. 16 to the Convention, the Court delivered its advisory opinion⁹¹ on 8 April 2022, which concerned the assessment of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings.

In 2014 Ms N.V. was removed from her position as a member of the *Seimas* in impeachment proceedings due to her non-participation without excuse in the *Seimas*'s meetings owing to her having fled Lithuania because of pending criminal proceedings. In 2020 the Central Electoral Commission refused to register her as a candidate for the upcoming *Seimas* elections because of the statutory ban on standing for election after removal from office in impeachment proceedings. In its 2011 judgment in *Paksas v. Lithuania*⁹², this Court had held that the permanent and irreversible nature of such a ban was disproportionate and in breach of Article 3 of Protocol No. 1. Ms N.V. challenged the decision of the Central Electoral Commission before the Supreme Administrative Court, which requested an advisory opinion from this Court on the following questions:

“1. Does a Contracting State overstep the margin of appreciation conferred to it by Article 3 of Protocol No. 1 to the Convention, if it does not guarantee the compatibility of the national law with the international obligations arising from the provisions of Article 3 of Protocol No. 1 to the Convention, which results in preventing a person, who has been removed from office of a Member of the *Seimas* under the impeachment proceedings, from implementing their ‘passive’ right to elections for six years?

In case of affirmative response, could such situation be justified by the complexity of the existing circumstances, directly related to providing an opportunity to the legislative body to align the national provisions of the constitutional level with the international obligations?

⁹¹ *Advisory opinion on the assessment, under Article 3 of Protocol No. 1, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings* [GC], request no. P16-2020-002, Lithuanian Supreme Administrative Court, 8 April 2022. See also under Article 1 of Protocol No. 16 (Advisory opinions) below.

⁹² *Paksas v. Lithuania* [GC], no. 34932/04, ECHR 2011 (extracts).

2. What are the requirements and criteria implied by Article 3 of Protocol No. 1 to the Convention, which determine the scope of the application of the principle of proportionality, and which the national court should take into account and verify whether they are complied with in the existing situation at issue?

In such situation, when assessing the proportionality of a general prohibition restricting the exercise of the rights provided for in Article 3 of Protocol No. 1 to the Convention, should not only the introduction of the time-limit, but also the circumstances of each individual case, related to the nature of the office from which a person has been removed and the act which resulted in impeachment, be held crucial?”

(i) In this, its third advisory opinion under Protocol No. 16, the Court identified the limits of advisory opinions as regards issues relating to the execution of the Court’s judgments. In particular, the Court understood the first question to essentially be asking whether the Supreme Administrative Court should take into account the difficulties encountered by the Lithuanian authorities in executing the *Paksas* judgment. In this respect, the Court stressed that Protocol No. 16 had not been envisaged as an instrument to be used in the context of execution. The Court also noted recent developments within the *Seimas* as regards the constitutional amendment process: the draft amendment (replacing the permanent ban with a ten-year one) was to be scheduled for a second vote during the *Seimas*’s spring session. Taking all these elements into account, the Court decided that it was not appropriate to give an answer to the first question.

(ii) The Court answered the second question from the perspective of the requesting court, in keeping with the object and purpose of Protocol No. 16. In this regard, it elucidated the requirements and criteria relevant for the assessment as to whether, in the concrete circumstances of a given case, the ban preventing an impeached former member of parliament from standing for election to the *Seimas* had become disproportionate for the purposes of Article 3 of Protocol No. 1. In this connection and with regard specifically to the facts relating to the present opinion, the Court reiterated its finding in *Paksas* according to which, in assessing the proportionality of a general measure restricting the exercise of the rights guaranteed by Article 3 of Protocol No. 1, decisive weight should be attached to the existence of a time-limit and the possibility of reviewing the measure in question.

Furthermore, while States enjoyed considerable latitude to establish rules governing the status of parliamentarians in their constitutional order, these rules should not be such as to exclude some persons or groups of persons from participating in the political life of a country and in the choice of the legislature (*Aziz v. Cyprus*⁹³). The Court also reiterated that, with the passage of time, general restrictions on electoral rights became more difficult to justify, thus requiring restrictive measures to be individualised (*Ādamsons v. Latvia*⁹⁴). On this basis, the Court went on to explain that the reference in *Paksas* to the weight to be attached to the existence of a time-limit and the possibility of reviewing the

⁹³ *Aziz v. Cyprus*, no. 69949/01, § 28, ECHR 2004-V.

⁹⁴ *Ādamsons v. Latvia*, no. 3669/03, § 125, 24 June 2008.

ban in question was not necessarily to be understood as requiring these two elements to be combined. Nor did it specify whether the time-limit applicable in a given case should be set in the abstract or on a case-by-case basis. What mattered in the end was for the ban in question to remain proportionate within the meaning of the *Paksas* judgment. This could be achieved by way of an appropriate legislative framework or judicial review of the duration, nature and extent of a ban applicable to the person concerned.

The Court developed a number of substantive and procedural requirements for a determination of the appropriate and proportionate length of a ban precluding an impeached person from being eligible for a given function. In the first place, it should be based on an individualised assessment, having regard to the particular circumstances of the person concerned. Secondly, it should have regard to the specific circumstances applicable at the time of the review. Lastly, the relevant procedure should be surrounded by sufficient safeguards designed to ensure respect for the rule of law and protection against arbitrariness, including the need for an independent body by which the person concerned would be heard and be provided with a reasoned decision.

Prohibition of Collective Expulsion of Nationals (Article 3 of Protocol No. 4)

Right to enter national territory

The judgment in *H.F. and Others v. France*⁹⁵ concerned jurisdiction, the scope of the right to enter national territory and procedural obligations in the context of a refusal to repatriate. In 2014 and 2015 the applicants' daughters, who were French nationals, left France for Syria with their partners, where they gave birth to children. Since 2019, after the military fall of the so-called "Islamic State" (ISIS), they had reportedly been detained with their children in camps run by the Syrian Democratic Forces ("the SDF"), a local force fighting against ISIS and dominated by the Kurdish militia. The applicants unsuccessfully sought urgent repatriation of their daughters and grandchildren. The domestic courts refused to accept jurisdiction on the grounds that the requests concerned the conduct by France of its international relations.

The applicants complained under Article 3 of the Convention and Article 3 of Protocol No. 4. The Court held that the applicants' family members were outside of the jurisdiction of France as regards the complaint under Article 3 (alleged ill-treatment in the camps). The jurisdiction of France was established in respect of the complaint under Article 3 of Protocol No. 4, the Grand Chamber finding a breach of that provision.

The Grand Chamber judgment is noteworthy in that the Court ruled, for the first time, on the existence of a jurisdictional link between a State and its "nationals" in respect of a complaint under Article 3 § 2 of Protocol No. 4 and examined the scope of that provision, including with regard to the extent of procedural obligations of the State in the context of a refusal to repatriate.

(i) As regards a jurisdictional link and Article 3 of Protocol No. 4, the Court first clarified that the fact that this Article (unlike Article 1 of the Convention) applied only to nationals was not sufficient to establish the extraterritorial exercise of jurisdiction by a State. Secondly, the refusal to grant the applicants' request had not formally deprived their family members of the right to enter France or prevented them from doing so: they were physically unable to reach the French border (since they were being held in Syrian camps) and France neither exercised "effective control" over the relevant territory nor had any "authority" or "control" over them. In this regard, relying on the preparatory work and other international instruments, the Court explained that the right to enter was not limited to nationals already on the territory of the State concerned or under its effective control, but it also had to benefit those nationals outside of the State's jurisdiction.

⁹⁵ *H.F. and Others v. France* [GC], nos. 24384/19 and 44234/20, 14 September 2022.

(ii) The Court went on to elucidate the meaning and scope of the right to enter national territory under Article 3 § 2 of Protocol No. 4, namely that: (a) the application of Article 3 § 2 of Protocol No. 4 did not exclude situations where the national had either voluntarily left the national territory and was then denied the right to re-enter or where the person had never set foot in the country concerned; (b) while the right to enter was an absolute one, there might be room for implied limitations, where appropriate, in the form of exceptional temporary measures; (c) it could not be ruled out that informal or indirect measures which deprived a national of the effective enjoyment of his or her right to return *de facto* might, depending on the circumstances, be incompatible with this provision; (d) as regards the implementation of the right to enter, the scope of any positive obligations would inevitably vary, depending on the diverse situations in the Contracting States and the choices to be made in terms of priorities and resources, and they must not be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities.

(iii) The Court clarified that there was no general right to repatriation on the basis of the right to enter national territory. It noted the potential risk, if such a right were to be instituted, of recognising an individual right to diplomatic protection which would be incompatible with international law and the discretionary power of States.

(iv) At the same time, in the Court's view, Article 3 § 2 of Protocol No. 4 could impose a positive obligation on the State where, in view of the specificities of a given case, a refusal to take any action would leave the national concerned in a situation comparable, *de facto*, to that of exile. In order to assess the existence of, and compliance with, any such obligations in a repatriation context, the Court developed a two-tier test: in the first place, it would ascertain whether there were exceptional circumstances (such as extraterritorial factors directly threatening the life and physical well-being of a child in a situation of extreme vulnerability); and, secondly, it would address the question whether the decision-making process had been surrounded by appropriate safeguards against arbitrariness. The Court went on to find that the present case disclosed such exceptional circumstances: the family members of the applicants had been in a humanitarian emergency and a legal vacuum; there was no prospect of their daughters being tried in Syria; and the Kurdish authorities, as well as international organisations, had repeatedly called on States to repatriate their nationals. However, the examination of the repatriation requests had not been surrounded by appropriate safeguards against arbitrariness, notably given the absence of a formal decision and the jurisdictional immunity raised by the domestic courts. France had therefore failed to comply with its procedural obligations under Article 3 of Protocol No. 4 to the Convention.

Binding Force and Execution of Judgments

(Article 46)

Infringement proceedings

The judgment in *Kavala v. Türkiye*⁹⁶ is the second judgment in an infringement procedure for failure to abide by the Court's final judgment, which explicitly indicated the need for an applicant's immediate release. In its first *Kavala* judgment⁹⁷, the Court found, *inter alia*, a violation of Article 5 § 1 taken separately and in conjunction with Article 18: the applicant's pre-trial detention had been not justified by any "reasonable suspicion" but rather had been based on the mere exercise of Convention rights by a human rights defender and had pursued the ulterior purpose of silencing him. It further indicated under Article 46 that the respondent State had "to secure his immediate release". Since he was not released, in 2022 the Committee of Ministers ("the CM") brought infringement proceedings in accordance with Article 46 § 4. In the Government's view, the *Kavala* judgment had been executed in full since the applicant was no longer detained on the basis of any of the charges which the Court had examined (Articles 309 and 312 of the Criminal Code): between 9 March 2020 and 25 April 2022, he had been placed in pre-trial detention on a new charge (Article 328 of the Criminal Code) and thereafter he was detained on a new ground, namely, to serve a life prison sentence following his conviction under Article 312 of the Criminal Code.

Applying the general principles set out in *Ilgar Mammadov v. Azerbaijan*⁹⁸, the Grand Chamber found that Türkiye had failed to fulfil its obligation under Article 46 § 1. As to the new charge under Article 328, there were striking similarities, or even complete duplication, between the facts invoked in this respect and those already scrutinised in the first judgment. However, a mere reclassification of the same facts could not, in principle, modify the basis for the Court's conclusions. The conviction under Article 312 had also been based on those same facts. Importantly, the finding of a violation of Article 5 § 1 read separately and in conjunction with Article 18 had vitiated any action resulting from the charges relating to those facts. In the absence of other relevant and sufficient circumstances capable of demonstrating that Mr Kavala had been involved in criminal activity, any measure – especially one depriving him of his liberty – on grounds pertaining to the same factual context had entailed a prolongation of the violations found and a breach of Article 46 § 1.

The Grand Chamber judgment is noteworthy in that the Court confirmed the general principles relating to infringement proceedings and also clarified certain matters concerning the roles of, and the institutional balance between, the Court and the CM,

⁹⁶ *Kavala v. Türkiye* (infringement proceedings) [GC], no. 28749/18, 11 July 2022.

⁹⁷ *Kavala v. Turkey*, no. 28749/18, 10 December 2019.

⁹⁸ *Ilgar Mammadov v. Azerbaijan* (infringement proceedings) [GC], no. 15172/13, 29 May 2019.

including: the nature of the CM's right to launch such proceedings; the role of the explicit indication in the initial judgment of individual measures under Article 46; the need for the applicant to lodge a new application with the Court in respect of the State's failure to execute the Court's initial judgment; and the possibility of a parallel examination by the Court and the CM of the domestic proceedings triggered by that judgment.

(i) The Government argued that the institution of the infringement proceedings by the CM had not been justified by any "exceptional circumstances" (as provided for by the CM Rules and the Explanatory Report to Protocol No. 14). It had, moreover, amounted to a breach of the Convention system, in so far as it had interfered in the ongoing domestic criminal proceedings. The Court responded that the criterion of "exceptional circumstances" was intended to indicate that the CM should apply a high threshold before launching this procedure, which had to be viewed therefore as a measure of last resort (notably in cases where the CM considered that the other means of securing the execution of a judgment had ultimately proved unsuccessful and were no longer adapted to the situation).

(ii) In contrast to the judgment in *Ilgar Mammadov*, the first *Kavala* judgment contained an explicit indication under Article 46, namely that Mr Kavala be released immediately. The Court clarified the role of such indications. On the one hand, according to its settled case-law, the ultimate choice of the measures to be taken to execute a judgment remained with the States under the supervision of the CM. On the other, by its very nature the violation found might not leave any real choice as to the measures required to remedy it. This was particularly true where the case concerned detention that the Court had found to be manifestly unjustified under Article 5 § 1, in that there was an urgent need to put an end to the violation in view of the importance of the fundamental right to liberty and security. This observation was all the more valid where, as in the present case, the violation had originated in detention that had also been held to be contrary to Article 18. In consequence, the fact of giving indications under Article 46, as in the present case, enabled the Court, in the first place, to ensure as soon as it delivered its judgment that the protection afforded by the Convention was effective and to prevent a continued violation of the rights in issue and, subsequently, to assist the CM in its supervision role. Such indications also enabled and required the State concerned to put an end, as quickly as possible, to the violation of the Convention found by the Court.

(iii) The Government also argued that Mr Kavala should have lodged a new application with the Court about his continued detention after the initial judgment and after having exhausted the domestic remedies. In the first place, the Court noted that pleas of inadmissibility were not relevant in the context of infringement proceedings. Secondly, the Court reconfirmed that it was for the CM to supervise and assess the specific measures to be taken in order to ensure the maximum possible reparation for the violations found by the Court. The question of compliance by the High Contracting Parties with its judgments fell outside the Court's jurisdiction if it was not raised in the context of the "infringement procedure" provided for in Article 46 §§ 4 and 5 of the Convention. The fact that Mr Kavala had not lodged a new application with the Court therefore had

no fundamental bearing on the purpose of its examination of whether Türkiye had complied with its obligation under Article 46 § 1.

(iv) In connection with the domestic implementation process, it was observed that the Court and the CM, in the context of their different duties, might be required to examine, even simultaneously, the same domestic proceedings without upsetting the fundamental institutional balance between them. The Court reiterated in this regard that Article 46 did not preclude its examination and that it had competence to entertain complaints in follow-up cases.

Advisory Opinions (Article 1 of Protocol No. 16)

In response to a request submitted by the Lithuanian Supreme Administrative Court under Protocol No. 16 to the Convention, the Court delivered its advisory opinion⁹⁹ on 8 April 2022. It concerned the assessment of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings.

In response to a request submitted by the Armenian Court of Cassation under Protocol No. 16 to the Convention, the Court delivered its advisory opinion¹⁰⁰ on 26 April 2022, which concerned the applicability of statutes of limitations to the prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture.

Lastly, in response to a request submitted by the French *Conseil d'État* under Protocol No. 16 to the Convention, the Court delivered its advisory opinion¹⁰¹ on 13 July 2022, which concerned the difference in treatment between landowner associations “having a recognised existence on the date of the creation of an approved municipal hunters’ association” and those set up after that date.

⁹⁹ *Advisory opinion on the assessment, under Article 3 of Protocol No. 1, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings* [GC], request no. P16-2020-002, Lithuanian Supreme Administrative Court, 8 April 2022. See also under Article 3 of Protocol No. 1 (Stand for election) above.

¹⁰⁰ *Advisory opinion on the applicability of statutes of limitation to the prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture* [GC], request no. P16-2021-001, Armenian Court of Cassation, 26 April 2022. See also under Article 7 (No punishment without law) above.

¹⁰¹ *Advisory opinion on the difference in treatment between landowners’ associations “having a recognised existence on the date of the creation of an approved municipal hunters’ association” and landowners’ associations set up after that date* [GC], request no. P16-2021-002, French *Conseil d'État*, 13 July 2022. See also under Article 14 taken in conjunction with Article 1 of Protocol No. 1 above.

Summary

In 2023 the Grand Chamber delivered thirteen judgments, a notable decision in the inter-State case of *Ukraine and the Netherlands v. Russia*, and two advisory opinions.

Under Article 3 the Court developed its case-law on solitary confinement (*Schmidt and Šmigol v. Estonia*), a case which concerned the consecutive enforcement of disciplinary punishments and security measures in prison. In *Krachunova v. Bulgaria* the Court considered whether a victim of trafficking could seek compensation in respect of lost earnings from coerced prostitution (Article 4), while in *FU QUAN, s.r.o. v. the Czech Republic* the Grand Chamber analysed whether the domestic courts' failure to apply the principle of *jura novit curia* amounted to excessive formalism, in breach of the right of access to a court guaranteed by Article 6 § 1.

The fairness of proceedings was at issue in *Yüksel Yalçınkaya v. Türkiye*, where the Grand Chamber clarified and confirmed the safeguards enshrined in Article 6 § 1 and Article 7. The factual matrix of this case made it particularly significant. The case concerned the fairness of the proceedings surrounding the conviction of a former teacher for membership of a terrorist organisation. The conviction had been based decisively on the applicant's use of an encrypted messaging application. The proceedings were examined in the context of the unique challenges faced by the Turkish authorities in their fight against terrorism in the aftermath of an attempted military coup. The Court went on to consider whether the impugned failure to observe the requirements of a fair trial could be justified by the Turkish derogation under Article 15.

In the field of private life, the Grand Chamber considered a statutory obligation to publish taxpayers' personal data was not "necessary in a democratic society" and therefore incompatible with Article 8 (*L.B. v. Hungary*). The Court also developed its case-law under the family-life limb of Article 8: in *B.F. and Others v. Switzerland* the Court examined, for the first time, the requirement of financial independence for family reunification for certain categories of 1951 Convention refugees.

In 2023 the Court also consolidated and confirmed the principles enshrined in its case-law with regard to the protection of whistle-blowers under Article 10. In *Halet v. Luxembourg* the Grand Chamber ruled on a former PricewaterhouseCoopers employee's right to freedom of expression and, in particular, his right to impart information that was of public interest. Another landmark case under Article 10 was *Macaté v. Lithuania*, in which the Grand Chamber assessed restrictions imposed on a book of modern fairy tales aimed at nine to ten-year-olds. The book, which normalised same-sex relationships and placed them on the same level as different-sex ones, was banned in Lithuania and then subsequently only allowed to be sold with a warning sticker stating that it was only suitable for children who were 14 years old or over. In *Sanchez v. France* the Grand Chamber again considered Article 10, this time in the context of the criminal conviction of a far-right politician who had failed to delete Islamophobic comments left by others on

his public Facebook “wall”, while in *Hurbain v. Belgium* it circumscribed the scope of the “right to be forgotten” from online press archives under Article 10. In *Humpert and Others v. Germany* the Grand Chamber examined the ban on strike action in the German civil service and its compatibility with the freedom of association under Article 11.

The Grand Chamber also delivered two advisory opinions under Protocol No. 16 to the Convention. In response to a request from the Supreme Court of Finland (P16-2022-001), the Grand Chamber clarified the applicability of Article 8 to legal proceedings for the adoption of an adult child and considered procedural requirements which would arise in that context. In response to a request from the Belgian *Conseil d’État* (P16-2023-001), the Grand Chamber examined the question whether being close to, or belonging to, a religious movement thought to be a threat to national security could constitute a sufficient ground under Article 9 § 2 for denying an individual authorisation to work in a particular profession.

In addition, the Court continued to develop and refine its case-law on the positive obligations that must be fulfilled by member States under the Convention. In *S.P. and Others v. Russia* the Court reinforced the positive obligation under Article 3 on the national authorities of member States to ensure that individuals are not subjected to torture or to inhuman or degrading treatment or punishment, including at the hands of private individuals. Under Article 4 a novel positive obligation to enable the victims of trafficking to claim compensation from their traffickers in respect of lost earnings was developed in the judgment of *Krachunova v. Bulgaria*. Another particularly notable judgment was given in *Fedotova and Others v. Russia*, a case which concerned the positive obligation under Article 8 to provide a legal framework which allowed the adequate recognition and protection for same-sex couples of their relationships. The judgment also circumscribed the scope of the margin of appreciation afforded to member States in that respect. The question whether a positive obligation to record transgender parents’ current gender on their children’s birth certificates existed under Article 8 was examined in *O.H. and G.H. v. Germany* and *A.H. and Others v. Germany*. In *G.T.B. v. Spain* the Court considered whether Article 8 imposed a positive obligation on member States to facilitate birth registration and the acquisition of identity documents for vulnerable minors.

A number of cases in 2023 led the Court to examine the matter of its own jurisdiction. In *Fedotova and Others v. Russia* the Grand Chamber, referring to Article 58, ruled, for the first time, on its jurisdiction to examine a case after a member State had ceased to be a Party to the Convention. A comparable situation arose in *Pivikina and Others v. Russia* (dec.), where the Court considered its temporal jurisdiction mainly with respect to acts or omissions spanning across the date on which a respondent State ceased to be Party to the Convention. In *Georgia v. Russia (III)* the Grand Chamber affirmed its jurisdiction to deal with non-substantive issues, such as the binding force of a judgment, after the relevant State was no longer a Party to the Convention. The issue in *Grosam v. the Czech Republic* again related to the jurisdiction of the Court, this time under Article

32, in relation to the Court's ability to recharacterise a complaint and to the distinction between complaints and secondary arguments.

Lastly, no summary of the case-law from 2023 would be complete without a reference to the Grand Chamber's decision in the inter-State case of *Ukraine and the Netherlands v. Russia* (dec.). The case concerned exclusion from jurisdiction in the context of the active phase of hostilities, as well the relevance of non-domestic remedies in inter-State cases for the purposes of the six-month rule. Not only did the Court shed light on how to interpret the exclusion from jurisdiction of "military operations carried out during an active phase of hostilities" principle from previous case-law, but it also examined the effectiveness of domestic remedies in the context of the sensitive political circumstances of the case and clarified how the inter-play between the six-month rule and the rule on the exhaustion of "domestic" remedies, enshrined in Article 35 § 1, might be transposed to potential remedies outside the respondent State.

Jurisdiction and Admissibility

JURISDICTION OF STATES (ARTICLE 1)

The decision in *Ukraine and the Netherlands v. Russia*¹⁰² concerned the conditions for establishing jurisdiction for military operations carried out during an active phase of hostilities.

In its two inter-State applications, the Ukrainian Government alleged that a pattern of “administrative practices” carried out by Russia had resulted in continuous violations of a number of Convention Articles in the areas of eastern Ukraine under separatist control. The inter-State application lodged by the Government of the Netherlands concerned the downing of flight MH17. In its decision, the Grand Chamber held that Russia had had effective control over all areas in the hands of separatists from 11 May 2014 and that the impugned facts fell within the spatial jurisdiction (*ratione loci*) of Russia within the meaning of Article 1, with the exception of the Ukrainian Government’s complaint about the bombing and shelling of areas outside separatist control. The question whether that particular complaint came under Russia’s personal jurisdiction (State agent authority and control) was joined to the merits. The Grand Chamber confirmed its *ratione materiae* jurisdiction to examine complaints concerning armed conflict. It dismissed the respondent Government’s further preliminary objections (the alleged lack of the “requirements of genuine application” (Article 33), non-exhaustion of domestic remedies and non-compliance with the six-month time-limit) and declared the following admissible: the Government of the Netherlands’ complaints under the substantive and procedural aspects of Articles 2, 3 and 13 in respect of the downing of flight MH17; and the Ukrainian Government’s complaints of an administrative practice contrary to Articles 2 and 3, Article 4 § 2 and Articles 5, 8, 9 and 10 of the Convention and Articles 1 and 2 of Protocol No. 1, Article 2 of Protocol No. 4, and Article 14 of the Convention in conjunction with Articles 2 and 3, Article 4 § 2 and Articles 5, 9 and 10 of the Convention and Articles 1 and 2 of Protocol No. 1¹⁰³.

The Grand Chamber decision is noteworthy because the Court shed light on how it will interpret the principles for the exclusion from jurisdiction of “military operations carried out during an active phase of hostilities”, set out in *Georgia v. Russia (III)*¹⁰⁴.

The Grand Chamber referred to its judgment in *Georgia v. Russia (III)* (cited above), according to which the first question to be addressed in cases concerning armed conflict

¹⁰² *Ukraine and the Netherlands v. Russia* (dec.) [GC], nos. 8019/16 and 2 others, adopted on 30 November 2022 and delivered on 25 January 2023. See also under Article 35 § 1 (Exhaustion of domestic remedies), Article 35 § 1 (Four-month period) and Article 33 (Inter-State cases) below.

¹⁰³ The Grand Chamber declared the following complaints by the Ukrainian Government inadmissible: individual complaints concerning the alleged abduction of three groups of children and accompanying adults (failure to exhaust domestic remedies); and complaints of administrative practices in breach of Article 11 (lack of sufficient prima facie evidence of the repetition of acts) and of Article 3 of Protocol No. 1 (presidential elections being outside the scope of this provision).

¹⁰⁴ *Georgia v. Russia (III)* [GC], no. 38263/08, 21 January 2021.

was whether the complaints concerned “military operations carried out during an active phase of hostilities”. In that case, the question had been answered in the affirmative and, as a result, the substantive complaints about events concerning the “active phase of hostilities” had fallen outside the “jurisdiction” of the respondent State for the purposes of Article 1, while the duty to investigate deaths which had occurred remained. In that same case, there had been a distinct, single, continuous five-day phase of intense fighting. The Court had therefore been able to separate the complaints which it had identified as concerning “military operations carried out during the active phase of hostilities”, in the sense of “armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos”. The alleged attacks falling under this exception covered “bombing, shelling and artillery fire”. In the present decision, the Grand Chamber clarified that the *Georgia v. Russia (III)* judgment could not be seen as authority for entirely excluding a specific temporal phase of an international armed conflict from a State’s Article 1 jurisdiction. Indeed, in that case the Court had found that jurisdiction existed in respect of the detention and treatment of civilians and prisoners of war, even during the “five-day war”. A State could therefore have extraterritorial jurisdiction in respect of complaints concerning events which had occurred while active hostilities were taking place. Unlike in *Georgia v. Russia (III)*, the majority of the complaints advanced in the present case (except those relating to the downing of flight MH17 and artillery attacks) concerned events unconnected with the military operations carried out within the area under separatist control and, therefore, they could not be excluded from Russia’s spatial jurisdiction on the basis of this exception.

As for the downing of flight MH17, which had taken place in the context of active fighting between the two opposing forces, the Court stated that it would be wholly inaccurate to invoke any “context of chaos” in this regard. It noted the exceptional and painstaking work of the international Joint Investigation Team, which had been able to pierce “the fog of war” and elucidate the specific circumstances of this incident. The Court further specified that the chaos that might exist on the ground as large numbers of advancing forces sought to take control of territory under cover of a barrage of artillery fire did not inevitably exist in the context of the use of surface-to-air missiles, which were used to attack specific targets in the air. Moreover, there was no evidence of fighting to establish control in the areas directly relevant to the missile launch site or the impact site, both being under separatist control and thus within Russia’s spatial jurisdiction. Russia’s jurisdiction in respect of this incident could, therefore, not be excluded on the basis of “the active phase of hostilities” exception.

As regards the Ukrainian Government’s complaint about the bombing and shelling, the victims had been outside the areas controlled by separatists and those complaints were excluded from Russia’s spatial jurisdiction. The Grand Chamber joined to the merits the question whether that complaint was also excluded from Russia’s personal jurisdiction (on account of State agent authority or control) by virtue of the above exception identified in *Georgia v. Russia (III)*.

Admissibility (Articles 34 and 35)

Petition (Article 34)

The judgment in *Grosam v. the Czech Republic*¹⁰⁵ concerned the limitations of the Court's ability to recharacterise a complaint.

The disciplinary chamber of the Supreme Administrative Court had found the applicant guilty of misconduct and fined him. In his application to the Court, he complained under Article 6 § 1 of the lack of fairness of the disciplinary proceedings. He also complained, under Article 2 of Protocol No. 7, that domestic law excluded appeals against the disciplinary chamber of the Supreme Administrative Court.

After notice of the case had been given to the respondent Government, a Chamber of the Court, of its own motion, invited the parties to submit further observations under Article 6 § 1 on whether, given its composition, the disciplinary chamber had met the requirements of a “tribunal established by law” within the meaning of that provision. In his observations of 5 November 2015, the applicant contended that it had not. In its judgment, the Chamber recharacterised the complaint under Article 2 of Protocol No. 7 as one to be examined under Article 6 § 1 and found a violation of that provision: the disciplinary chamber did not meet the requirements of an independent and impartial tribunal and, furthermore, there was no need to examine the admissibility or merits of the remaining complaints under Article 6 § 1 (fairness of the disciplinary proceedings).

The Grand Chamber disagreed, finding that the applicant's arguments under Article 2 of Protocol No. 7 could not be interpreted as raising a complaint that the disciplinary chamber had not been an independent and impartial tribunal within the meaning of Article 6 § 1. The applicant had not raised such a complaint in his application form but only subsequently in his observations to the Chamber, after it had given notice of the application to the respondent Government. The Grand Chamber therefore found this new complaint to be inadmissible, given that it had been submitted more than six months after the disciplinary proceedings against the applicant had ended (in 2012). Going on to examine the remaining complaints, the Grand Chamber dismissed the complaints under Article 6 § 1 (fairness of the disciplinary proceedings) as manifestly ill-founded and, having agreed with the Chamber that Article 6 § 1 was applicable under its civil but not its criminal head, the Grand Chamber rejected the complaint under Article 2 of Protocol No. 7 (the concept of “criminal offence” used in that provision corresponding to that of “criminal charge” in Article 6 § 1) as being incompatible *ratione materiae* with the provisions of the Convention.

¹⁰⁵ *Grosam v. the Czech Republic* [GC], no. 19750/13, 1 June 2023. See also under Article 32 (Jurisdiction of the Court) below.

The Grand Chamber judgment is noteworthy because the Court, being master of the characterisation to be given in law to the facts of a case, confirmed and clarified the limits of its power to recharacterise an applicant's complaints and, in so doing, it ensured that the scope of the case did not extend beyond the complaints contained in the application.

Exhaustion of domestic remedies (Article 35 § 1)

The decision in *Ukraine and the Netherlands v. Russia*¹⁰⁶ concerned, *inter alia*, the effectiveness of domestic remedies in the context of the downing of flight MH17.

In its decision, the Grand Chamber, *inter alia*, dismissed the respondent Government's preliminary objection concerning the non-exhaustion of domestic remedies and declared admissible the Netherlands Government's complaints under the substantive and procedural aspects of Articles 2, 3 and 13 in respect of the downing of flight MH17.

The Grand Chamber decision is noteworthy in that the Court examined the effectiveness of domestic remedies, taking into account the important political dimension of the case. The Court reiterated that the exhaustion requirement applied to inter-State applications denouncing violations allegedly suffered by individuals (*Ukraine v. Russia (re Crimea)*¹⁰⁷). When assessing the effectiveness of domestic remedies in this context, the Court had regard to the existence of a dispute as to the underlying facts. For example, as regards the Ukrainian Government's allegations about the abduction and transfer of three groups of children to Russia, the Russian investigative authorities had not contested the underlying facts (namely, the border crossing) but only the forcible nature of the transfer. The Court concluded that the Ukrainian Government ought to have afforded the Russian authorities with the opportunity to investigate their allegations and the evidence collected by them in the context of a judicial appeal. By contrast, as regards the downing of flight MH17, this complaint had been consistently met by the respondent Government with a blanket denial of any involvement whatsoever. In that context, the Court also emphasised the political dimension of the case, being unconvinced as to the effectiveness of domestic remedies in a case where State agents were implicated in the commission of a crime, especially one condemned by the United Nations Security Council. In this regard, the Court referred to its finding of a violation of the procedural aspect of Article 2 in *Carter v. Russia*¹⁰⁸, which concerned the high-profile poisoning of a Russian dissident abroad by State agents. In the instant case, the Court pinpointed the Russian authorities' formalistic failure to initiate an investigation into the allegation that Russian nationals had been involved in the downing of flight MH17. Indeed, the Russian authorities had been contacted on multiple occasions by victims' relatives and had had ample legal possibilities to launch such an investigation, even in the absence of a specific request.

¹⁰⁶ *Ukraine and the Netherlands v. Russia* (dec.) [GC], nos. 8019/16 and 2 others, adopted on 30 November 2022 and delivered on 25 January 2023. See also under Article 1 (Jurisdiction of States) above, and Article 35 § 1 (Four-month period) and Article 33 (Inter-State cases) below.

¹⁰⁷ *Ukraine v. Russia (re Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, 16 December 2020.

¹⁰⁸ *Carter v. Russia*, no. 20914/07, 21 September 2021.

The judgment in *FU QUAN, s.r.o. v. the Czech Republic*¹⁰⁹ concerned the domestic courts' failure to apply the principle of *jura novit curia* and whether this had a bearing on the obligation to exhaust domestic remedies.

The Grand Chamber judgment is noteworthy in that the Court confirmed that the courts' ability to apply the principle of *jura novit curia* had no bearing on the obligation on the applicants to exhaust domestic remedies under Article 35 § 1. It was not sufficient that a violation of the Convention was "evident" from the facts of the case or the applicant's submissions: rather, he or she must actually complain (expressly or in substance) of such a violation in a manner which left no doubt that the same complaint subsequently submitted to the Court had been raised at domestic level (*Farzaliyev v. Azerbaijan*¹¹⁰). The Grand Chamber considered that this, clearly, could not be said to have been the situation in the instant case.

The case of *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*¹¹¹ concerned measures in force from 17 March to 30 May 2020 which were adopted by the Swiss Government to counter the coronavirus disease 2019 (COVID-19), as well as the requirement to exhaust domestic remedies.

In May 2020 the applicant association refrained from organising a public event after a competent authority informed it, by telephone, that the requested authorisation would be refused given the enacted federal ordinance (Ordinance COVID-19 no. 2). Relying on Article 11 of the Convention, the applicant association alleged that the ordinance had deprived it of the right to organise or take part in public gatherings during the period from March to May 2020.

In 2022 a Chamber of the Court declared the application admissible and found a violation of Article 11 of the Convention. The Grand Chamber disagreed and declared the application inadmissible for failure to exhaust domestic remedies: an application for a preliminary ruling on constitutionality – lodged in the context of an ordinary appeal against a decision implementing federal ordinances – was a remedy which had been directly accessible to litigants and would have made it possible, if appropriate, to have had the provision at issue declared unconstitutional.

While this was the first time the Grand Chamber had addressed the exceptional context of the COVID-19 pandemic, it did so from the standpoint of the requirement to exhaust domestic remedies under Article 35 § 1 of the Convention. In that connection, the Court clarified two issues related to the fact that the complaint had stemmed from the content of a domestic-law provision (rather than a specific measure restricting freedom of assembly): in the first place, the applicant association's unjustified decision not to

¹⁰⁹ *FU QUAN, s.r.o. v. the Czech Republic* [GC], no. 24827/14, 1 June 2023. For the background and further information on the judgment, see under Article 6 § 1 (Right to a fair hearing in civil proceedings – Access to a court) and under "Rules of Court" below.

¹¹⁰ *Farzaliyev v. Azerbaijan*, no. 29620/07, § 55, 28 May 2020.

¹¹¹ *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* [GC], no. 21881/20, 27 November 2023.

continue with the authorisation procedure for the intended event had deprived it not only of its status as a “direct” victim, but also of an opportunity to bring the matter before the domestic courts; and, secondly, the requirement of judicial review in advance of the date of the planned event was not decisive for the determination of the effectiveness of a remedy allowing for review of a law’s compatibility with the Convention.

In the unprecedented and highly sensitive context of the COVID-19 pandemic, it was all the more important that the national authorities be given the first opportunity to strike a balance between the relevant competing private and public interests or between different rights protected by the Convention, taking into consideration the local needs, conditions and public-health situation as it stood at the relevant time (see the decision in *Zambrano v. France*¹¹²). Drawing attention to its fundamentally subsidiary role, the Court further reiterated that, in healthcare policy matters, the margin of appreciation afforded to States was a wide one. Accordingly, the Court concluded that the applicant association had failed to take appropriate steps to enable the national courts to fulfil their fundamental role in the Convention protection system, namely, to prevent or put right potential Convention violations through their own legal system.

Four-month period (Article 35 § 1)

The decision in *Ukraine and the Netherlands v. Russia*¹¹³ considered, *inter alia*, the relevance of non-domestic remedies in an inter-State case for the purposes of the six-month rule.

The inter-State application lodged by the Netherlands Government concerned the downing of flight MH17. In its decision, the Grand Chamber, *inter alia*, dismissed the respondent Government’s preliminary objection concerning non-compliance with the six-month time-limit and declared admissible the Netherlands Government’s complaints under the substantive and procedural aspects of Articles 2, 3 and 13 in respect of the downing of flight MH17.

The Grand Chamber decision is noteworthy in that the Court considered, in the novel and exceptional context of this complaint, how the interplay between the six-month rule and the exhaustion of “domestic” remedies, enshrined in Article 35 § 1, is to be transposed to potential remedies outside the respondent State or to avenues which States themselves may wish to pursue at the international level prior to lodging an inter-State case with the Court, especially where there is no clarity from the outset as to the circumstances of the alleged violation of the Convention and the identity of the State allegedly responsible for it.

¹¹² *Zambrano v. France* (dec.), no. 41994/21, § 26, 21 September 2021.

¹¹³ *Ukraine and the Netherlands v. Russia* (dec.) [GC], nos. 8019/16 and 2 others, adopted on 30 November 2022 and delivered on 25 January 2023. See also under Article 1 (Jurisdiction of States) and Article 35 § 1 (Exhaustion of domestic remedies) above, and Article 33 (Inter-State cases) below.

As there had been no effective remedy in Russia available to the relatives of the victims of flight MH17, the normal starting-point for the running of the six-month time-limit would be the date of the incident itself (17 July 2014). The Court, however, emphasised the novel factual nature of the present case: first, the identity of the State allegedly responsible for a violation of the Convention had not been apparent from the date of the act in issue itself (given the lack of clarity as to the identities of the perpetrators, the weapon used and the extent of any State's control over the area concerned, as well as Russia's denial of any involvement whatsoever); secondly, the criminal investigation carried out by the Dutch authorities with the assistance of the international Joint Investigation Team (JIT) could not be seen as a "domestic" remedy in respect of complaints lodged against Russia. The Court, therefore, considered the relevance of that investigation, as well as the international-law remedies pursued, for the purposes of compliance with the six-month time-limit in the inter-State context and in the exceptional circumstances of the present case. The Court had particular regard to the interests of justice and the purposes of Article 35 § 1. On the one hand, this provision could not be interpreted in a manner which would require an applicant State to submit its complaint to the Court before having reasonably satisfied itself that there had been an alleged breach of the Convention by another State and before that State had been identified with sufficient certainty. On the other hand, it would be unjust and contrary to the purpose of Article 35 § 1 if the effect of reasonably awaiting relevant findings of an independent, prompt and effective criminal investigation, in order to assist the Court in its own assessment of the complaints, were to render those complaints out of time. With this in mind, the Court concluded that it would be artificial to ignore the investigative steps taken in the Netherlands and in the context of the JIT, which had enabled the pertinent facts to be elucidated, all the more so as no investigation had been undertaken in the respondent State. Furthermore, as those steps had been carried out promptly and diligently, it could not be said that there had been a delay in the referral of the complaints to this Court which would have made it difficult to ascertain the pertinent facts or render a fair examination of the allegations almost impossible. In other words, the aim of the time-limit in Article 35 § 1 had not been undermined by the application being lodged some six years after the aircraft had been downed.

The Court further acknowledged the relevance of remedies under international law in an inter-State dispute, particularly where the allegation is that the State itself, at the highest level of government, bears responsibility. While such remedies are not mentioned in Article 35 § 1 and, as a result, the time-limit provided for in that Article is not linked to their prior exhaustion, the Court had already accepted that, in some circumstances, it might be appropriate to have regard to such remedies when assessing whether the obligation of diligence incumbent on applicants had been met (*Varnava and Others v. Turkey*¹¹⁴). It was, therefore, legitimate for the Netherlands Government to have explored the opportunity of negotiations with Russia, which had ended in 2020. In sum, in the exceptional circumstances of the case, the complaints had been lodged in time.

¹¹⁴ *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, § 170, ECHR 2009.

Competence ratione temporis (Article 35 § 3 (a))

The decision in *Pivkina and Others v. Russia*¹¹⁵ concerned the Court's temporal jurisdiction, mainly with respect to acts or omissions which had begun before the date on which a respondent State ceased to be a Party to the Convention.

On 16 March 2022 the Russian Federation ceased to be a member of the Council of Europe. Shortly thereafter, the Court, sitting in Plenary formation, adopted a Resolution stating that the Russian Federation would cease to be a High Contracting Party to the Convention on 16 September 2022 ("the termination date"). The applications in this case concerned different factual scenarios, alleging violations of various Convention provisions. Some of the facts occurred up until, some occurred after, and some spanned across the termination date. The Court reconfirmed its jurisdiction to deal with cases where all acts and judicial decisions leading to the alleged Convention violations had occurred up until the termination date¹¹⁶. The Court rejected complaints as incompatible *ratione personae* with the provisions of the Convention where both the triggering act and the applicant's judicial challenge had occurred after the termination date. With regard to the situations where the facts spanned across the termination date, the Court found that some of the complaints fell within its temporal jurisdiction and gave notice thereof to the respondent Government. It rejected the remaining complaints as incompatible *ratione temporis* with Article 35 § 3 of the Convention.

The decision is noteworthy in that the Court developed a test for determining its temporal jurisdiction with regard to alleged Convention violations spanning across the date on which a respondent State ceased to be a party to the Convention.

While the situation where a respondent State ceased to be a party to the Convention was novel, the Court observed that it was similar to situations where the acts or omissions had occurred or begun before the ratification date (prior to the entry into force of the Convention for the respective State) but their effects or a chain of appeals extended beyond that date. The Court therefore developed a test for determining its temporal jurisdiction with regard to acts or omissions spanning across the termination date, drawing upon its case-law (*Blečić v. Croatia*¹¹⁷) and the approach followed by the Inter-American Court of Human Rights¹¹⁸. The Court's jurisdiction is determined in relation to the facts constitutive of the interference. In cases where the interference occurs before the termination date but the failure to remedy it occurs after the termination date, it is the date of the interference that must be retained. It is therefore essential to identify, in

¹¹⁵ *Pivkina and Others v. Russia* (dec.), no. 2134/23 and 6 others, 6 June 2023. See also under Article 35 § 3 (a) (Competence *ratione personae*) and Article 32 (Jurisdiction of the Court) below.

¹¹⁶ *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, 17 January 2023.

¹¹⁷ *Blečić v. Croatia* [GC], no. 59532/00, ECHR 2006-III.

¹¹⁸ Judgment of the Inter-American Court of Human Rights in *Ivcher-Bronstein v. Peru* (competence), 24 September 1999, Series C No. 54; Advisory opinion OC-26/20 of the Inter-American Court of Human Rights of 9 November 2020, requested by the Republic of Colombia, Series A No. 26.

each specific case, the exact moment of the alleged interference, taking into account both the facts complained of and the scope of the Convention right alleged to have been violated. This approach ensures that complaints are not treated differently based solely on the length of the process of exhaustion of remedies and it prevents the State from evading responsibility by protracting remedial proceedings.

*Competence *ratione personae* (Article 35 § 3 (a))*

In the decision of *Pivkina and Others v. Russia*¹¹⁹, the Court briefly considered its competence *ratione personae*, rejecting complaints as incompatible *ratione personae* with the provisions of the Convention where both the triggering act and the applicant's judicial challenge had occurred after the termination date.

"Core" Rights

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

Inhuman or degrading treatment

The judgment in *Schmidt and Šmigol v. Estonia*¹²⁰ concerned the consecutive enforcement of disciplinary punishments and security measures in prison which resulted in prolonged periods of solitary confinement.

The applicants were two convicted prisoners, both of whom had been subject to a series of disciplinary sanctions in the form of solitary confinement in punishment cells. The consecutive enforcement of those measures resulted in lengthy, unbroken periods spent in solitary confinement. The first applicant spent periods of 69 days, 30 days, 65 days, 60 days and 747 days in a punishment cell. He was once held in a locked isolation cell for 33 consecutive days as an additional security measure (not considered to be punishment), owing to his dangerous behaviour. The breaks between those periods, during which he could return to the normal detention regime, lasted between 6 and 36 days. The second applicant was subjected to the punishment cell regime three times during a period of one year and four months, the respective periods lasting 392, 55 and 34 days with two two-day breaks in between.

The Court found a violation of Article 3 on account of the extended periods spent by the applicants in solitary confinement, taking the view that neither the breaks between those periods nor the various measures of social, psychological and medical support offered by

¹¹⁹ *Pivkina and Others v. Russia* (dec.), no. 2134/23 and 6 others, 6 June 2023. See also under Article 35 § 3 (a) (Competence *ratione temporis*) above and Article 32 (Jurisdiction of the Court) below.

¹²⁰ *Schmidt and Šmigol v. Estonia*, nos. 3501/20 and 2 others, 28 November 2023.

the prison authorities had been sufficient to alleviate the negative and damaging effects arising from such confinement.

Although the compatibility with Article 3 of the Convention of the solitary confinement of detainees is not a novel issue in the Court's case-law¹²¹, this was the first judgment to deal with consecutive disciplinary sanctions and security measures. While domestic law set an upper limit on the duration of each disciplinary sanction, the absence of such a limit on the overall duration of consecutive periods of uninterrupted sanctions had resulted, in the applicants' case, in their seclusion for excessive periods of time.

The judgment is therefore noteworthy in that the Court

(a) acknowledged the difference between solitary confinement as a disciplinary punishment and as a security measure, and acknowledged that it might not be possible to suspend/postpone a security measure owing to a variety of security concerns that prison authorities had to tackle in the interests of their personnel or prisoners;

(b) referring to the United Nations Standard Minimum Rules for the Treatment of Prisoners ("the Nelson Mandela Rules"), the European Prison Rules and the conclusions of the CPT, emphasised that solitary confinement as a punishment should only be used exceptionally and as a measure of last resort;

(c) indicated that solitary confinement should be alternated with periods of return to the normal prison regime. The longer the solitary confinement, the longer those intervening periods should be; and

(d) declared that prolonged solitary confinement, in itself, entailed an inherent risk of harm to any person's mental health, irrespective of the material conditions surrounding it, and even in the absence of any noticeable deterioration in the applicants' physical health.

Positive obligations

The judgment in *S.P. and Others v. Russia*¹²² concerned the authorities' failure to take action in the face of the segregation, humiliation and abuse of prisoners by fellow inmates.

The applicants, serving prisoners, complained of being constantly subjected to humiliating treatment and physical abuse by fellow inmates on account of being assigned to the

¹²¹ See, for example, with respect to solitary confinement applied as a disciplinary punishment, *Ramishvili and Kokhreidze v. Georgia* (no. 1704/06, §§ 79-88, 27 January 2009), *Razvyazkin v. Russia* (no. 13579/09, §§ 102-08, 3 July 2012) and *Khodorkovskiy and Lebedev v. Russia* (nos. 11082/06 and 13772/05, §§ 468-74, 25 July 2013); or, with respect to solitary confinement applied as a security/safety measure, see, for example, *Onoufriou v. Cyprus* (no. 24407/04, §§ 71-81, 7 January 2010), *Borodin v. Russia* (no. 41867/04, §§ 129-35, 6 November 2012) and *A.T. v. Estonia (no. 2)* (no. 70465/14, §§ 74-86, 13 November 2018).

¹²² *S.P. and Others v. Russia*, nos. 36463/11 and 10 others, 2 May 2023.

lowest “outcast” group in an informal prisoner hierarchy, enforced by threats or violence and tolerated by the prison authorities. The applicants described being constantly segregated, both socially and physically. They were allocated either separate or the least comfortable places in the dormitory and canteen and were prohibited from using any other areas, under threat of punishment. They were provided with separate cutlery (with holes) and lower quality or leftover food. Their access to prison resources, including showers and medical care, was limited or blocked. They were forbidden from coming into close proximity with other prisoners, under threat that that person would become “contaminated”. All the applicants were forced to perform what was considered “dirty work”, such as cleaning latrines or shower cubicles. Their complaints were summarily rejected by the authorities. The Court found a violation of Article 3 of the Convention (substantive aspect). In its view, the applicants’ stigmatisation and segregation, coupled with their assignment to menial labour and denial of basic needs, enforced by threats of violence as well as by occasional physical and sexual violence, meant that they had endured mental anxiety and physical suffering amounting to inhuman and degrading treatment. Furthermore, while being aware of the applicants’ vulnerable situation, the authorities had taken no individual or general measures to ensure their safety and well-being, or to address this systemic and widespread problem. The Court also found a violation of Article 13 in conjunction with Article 3 of the Convention.

The judgment is noteworthy because the Court considered, for the first time, as a specific phenomenon, the degrading effects of an informal prisoner hierarchy, a systemic and widespread problem in penal facilities in Russia¹²³. The judgment is interesting in three respects: firstly, because of the way in which the Court proceeded to establish the facts; secondly, on account of the Court’s analysis of the ritualistic and symbolic features of the treatment complained of; and, thirdly, because of the application, in this particular novel context, of the established positive obligation to take necessary measures to protect the physical or psychological integrity and well-being of prisoners (*Preminyin v. Russia*¹²⁴).

The Court examined whether the respondent State had complied with its positive obligation to protect individuals from inter-prisoner violence, as set out in *Preminyin* (cited above, §§ 82-88). In the first place, the Court noted that the authorities had, or ought to have had, knowledge of the heightened risk of such violence faced by the applicants on account of belonging to a particularly vulnerable category of “outcast” prisoners. Secondly, the Court emphasised the structural nature of the problem and noted that individual measures would be incapable of changing the power structures underlying the informal prisoner hierarchy or the applicants’ subordinate place in it. Consequently, a systemic and comprehensive response was called for on the part of the authorities, but

¹²³ See also the concluding observations of the United Nations Committee against Torture (CAT) on the fourth periodic report of Armenia (2017) (CAT/C/ARM/CO/4) and on the third periodic report of Kazakhstan (2014) (CAT/C/KAZ/CO/3); see also the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Armenia (CPT/Inf (2021) 10), to Georgia (CPT/Inf (2022) 11), to Lithuania (CPT/Inf (2023) 01) and to the Republic of Moldova (CPT/Inf (2020) 27).

¹²⁴ *Preminyin v. Russia*, no. 44973/04, § 83, 10 February 2011, and the cases cited therein.

the Court observed a lack of action at all levels. As to a breach of Article 3, the Court emphasised, in view of the extent of the problem, that the authorities' failure to take action could be seen as a form of complicity in the abuse inflicted upon the prisoners under their protection.

PROHIBITION OF SLAVERY AND FORCED LABOUR (ARTICLE 4)

Positive obligations

The judgment in *Krachunova v. Bulgaria*¹²⁵ concerned the positive obligation to enable a victim of trafficking to claim compensation from her trafficker in respect of lost earnings from coerced prostitution.

The applicant had been a sex worker until she was intercepted by the police. Her pimp (X) was later convicted of human trafficking. While the domestic courts allowed the applicant's claim against X for compensation for non-pecuniary damage, her claim for compensation for pecuniary damage, based on the estimated earnings from prostitution that X had allegedly taken away from her, was dismissed on the basis that it concerned money earned in an immoral manner. The applicant complained under Article 4 of the Convention. The Court held that this provision was applicable and found a violation thereof.

The judgment is noteworthy in that it is the first time that the Court considered the issue of whether a trafficking victim could seek compensation in respect of lost earnings from coerced prostitution. In the first place, and as to the applicability of Article 4, the Court confirmed that the presence of the "means" element from the international definition of trafficking in human beings¹²⁶ could be established even in the absence of physical violence or threats. Secondly, the Court laid down a novel positive obligation to enable victims of trafficking to claim compensation from their traffickers in respect of lost earnings. Thirdly, and as to earnings obtained through prostitution, the Court clarified that non-compliance with the above-mentioned obligation could not be automatically justified on the grounds of morality and had to be assessed in the light of the compelling public policy against human trafficking and in favour of protecting its victims.

¹²⁵ *Krachunova v. Bulgaria*, no. 18269/18, 28 November 2023.

¹²⁶ See Article 3 (a) of the Palermo Protocol and Article 4 (a) of the Anti-Trafficking Convention.

Procedural Rights

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

Access to a court

The judgment in *FU QUAN, s.r.o. v. the Czech Republic*¹²⁷ concerned the domestic courts' failure to apply the principle of *jura novit curia*.

The applicant company's property (mostly merchandise) had been seized during criminal proceedings against the managing director and the company's one other member. Following their acquittal, the company brought a civil action for the damage caused to its property by the State. The action was dismissed for lack of *locus standi*, the company not having been a party to the criminal proceedings. The company complained to the Court under Article 6 § 1 and Article 1 of Protocol No. 1. A Chamber considered that it had been up to the domestic courts, applying the principle of *jura novit curia*, to subsume the facts of the case under the relevant domestic-law provisions in order to deal with the merits of the action. The Chamber therefore dismissed the Government's preliminary objection (exhaustion of domestic remedies) and found a breach of Article 1 of Protocol No. 1, given the unjustified protracted retention of the property. The Chamber also decided that there was no need to rule separately on the complaint under Article 6 § 1 concerning the alleged denial of access to a court resulting from a formalistic and restrictive interpretation of national law by the domestic courts.

The Grand Chamber, however, considered that the complaint under Article 6 § 1 was the applicant company's main complaint and rejected it as manifestly ill-founded. Furthermore, having ascertained the scope of the complaints under Article 1 of Protocol No. 1, the Grand Chamber observed that the Chamber had examined only one of the complaints raised, even though there were three altogether. Given its findings concerning the complaint in respect of access to a court, the Grand Chamber rejected two of these complaints for non-exhaustion of domestic remedies: the applicant company had not properly availed itself of the possibility of obtaining compensation for the undue delay in lifting the order for the seizure of its property and for the authorities' alleged failure to take care of the property. As regards the third complaint (damage to the property following the unwarranted prosecution and detention of the company's managing director and other member), such a compensation claim did not have a sufficient basis in domestic law. The guarantees of Article 1 of Protocol No. 1 were therefore inapplicable and the Grand Chamber rejected this complaint as incompatible *ratione materiae* with the provisions of the Convention.

¹²⁷ *FU QUAN s.r.o. v. the Czech Republic* [GC], no. 24827/14, 1 June 2023. See also under Article 35 § 1 (Exhaustion of domestic remedies) above and under "Rules of Court" below.

The Grand Chamber judgment is noteworthy in that the Court analysed whether the domestic courts' failure to apply the principle of *jura novit curia* amounted to excessive formalism, in breach of the right of access to a court guaranteed by Article 6 § 1. Unlike the Chamber, the Grand Chamber focused on the manner in which the applicant company had presented the facts in its action. First, it had not expressly specified which of the two statutory causes of action – an unlawful decision or irregular official conduct – it had intended to pursue. Secondly, when the domestic courts had treated its action as being against an unlawful decision and dismissed it for lack of *locus standi*, the applicant company had not argued, in pursuing subsequent remedies, that the lower court(s) had misconstrued their action and that they should have treated it as an action based on irregular official conduct. Its arguments rather suggested that the courts' refusal to grant *locus standi* in disregard of the applicable statutory provision had been excessively formalistic. By contrast, in its subsequent submissions before the Chamber of this Court, the applicant company had adopted a totally different attitude, arguing that the excessive formalism consisted of the domestic courts' failure to treat its civil action as being based on irregular official conduct, rather than on an unlawful decision. The Grand Chamber emphasised that parties could not validly put forward arguments before the Court which they had not made before the domestic courts. In those circumstances, the domestic courts could not be blamed for not treating the applicant company's action as one based on irregular official conduct. Lastly, it had been open to the applicant company, for a further four months after the dismissal of its action, to bring a new one specifying irregular official conduct as the cause of the damage. The Grand Chamber therefore dismissed the complaint in respect of access to a court.

Fairness of the proceedings

The judgment in *Yüksel Yalçinkaya v. Türkiye*¹²⁸ concerned a conviction for membership of a terrorist organisation based on the use of an encrypted messaging application.

The applicant was convicted of membership of an armed terrorist organisation ("FETÖ/PDY")¹²⁹, considered by the domestic authorities to have been behind the attempted coup of 2016. The conviction was based decisively on his use of an encrypted messaging application, ByLock, which the domestic courts had found to have been designed for the exclusive use of the members of FETÖ/PDY.

The applicant complained mainly under Articles 6, 7 and 11. The Grand Chamber found a violation of Article 7 on account of the domestic courts' unforeseeable interpretation of the domestic law, which attached objective liability to the mere use of ByLock. It also found a breach of Article 6 § 1 on account of the domestic courts' failure to put in place appropriate safeguards to enable the applicant to challenge the key evidence (electronic data) effectively, to address the salient issues lying at the core of the case and to provide sufficient reasons. In the Grand Chamber's view there had also been a breach of Article

¹²⁸ *Yüksel Yalçinkaya v. Türkiye* [GC], no. 15669/20, 26 September 2023. See also under Article 7 (No punishment without law) and Article 15 (Derogation in time of emergency) below.

¹²⁹ "Fetullahist Terror Organisation/Parallel State Structure".

11, as the domestic courts had deprived the applicant of the minimum protection against arbitrary interference and had extended the scope of the relevant offence when relying, to corroborate his conviction, on his membership of a trade union and an association (purportedly affiliated with FETÖ/PDY), both of which had been operating lawfully at the material time.

The Grand Chamber judgment is noteworthy in that the Court confirmed and clarified the application of the safeguards enshrined in Article 6 § 1 with regard to two specific features of the instant case: in the first place, the unique challenges faced by the domestic authorities in their fight against terrorism in its covert, atypical forms and in the aftermath of the attempted military coup; and, secondly, the use of a high volume of encrypted electronic data stored on the server of an internet-based communication application.

In addressing the specific nature and scope of the evidence from the standpoint of the relevant guarantees under Article 6 § 1, the Court noted that electronic evidence differed in many respects from traditional forms of evidence and raised distinct reliability issues. Furthermore, the handling of electronic evidence, particularly where it concerned data that was encrypted and/or vast in volume or scope, might present law-enforcement and judicial authorities with serious practical and procedural challenges. In this connection, the Court made clear that those factors did not call for a different application of the safeguards under Article 6 § 1. The Court, therefore, adhered to its usual approach, namely, to assess whether the overall fairness of the proceedings had been ensured through the lens of the procedural and institutional safeguards and the fundamental principles of a fair trial.

In the instant case, the Court did not have sufficient elements to impugn the accuracy of the ByLock data – at least to the extent that they established the applicant’s use of that application. However, as the raw data obtained from the ByLock server had not been disclosed to the applicant, he had been unable to verify first-hand the integrity and reliability of that evidence and to challenge the relevance and significance attributed to it. In the Court’s view, that situation placed a greater onus on the domestic courts to subject those issues to the most searching scrutiny. The Court concluded that the prejudice to the defence on that account had not been counterbalanced by adequate procedural safeguards. In particular, the domestic courts had neither provided reasons for the impugned non-disclosure, nor responded to the applicant’s request for an independent examination of the data or to his concerns as to its reliability; and the applicant had not been given the opportunity to acquaint himself with the decrypted ByLock material, which would have constituted an important step in preserving his defence rights, especially given the preponderant weight of that evidence in securing his conviction. Importantly, the courts had not sufficiently explained how it was ascertained that ByLock was not, and could not have been, used by anyone who was not a “member” of FETÖ/PDY. While acknowledging that electronic evidence of such a kind might, in principle, be very important in the fight against terrorism or other organised crime, the Court emphasised

that it could not be used by the domestic courts in a manner that undermined the basic tenets of a fair trial.

Other Rights in Criminal Proceedings

NO PUNISHMENT WITHOUT LAW (ARTICLE 7)

The judgment in *Yüksel Yalçinkaya v. Türkiye*¹³⁰ concerned a conviction for membership of a terrorist organisation, based on the use of an encrypted messaging application.

The Grand Chamber judgment is noteworthy in that the Court confirmed and clarified the application of the safeguards enshrined in Article 7 in the context of the unique challenges faced by the domestic authorities in their fight against terrorism in the aftermath of the attempted military coup and the use of a high volume of encrypted electronic data stored on the server of an internet-based communication application.

The Court reiterated that Article 7 enshrines a non-derogable right that is at the core of the rule-of-law principle. It emphasised that the fundamental safeguards guaranteed by that provision could not be applied less stringently when it came to the prosecution and punishment of terrorist offences, even when these were allegedly committed in circumstances threatening the life of the nation. The Court clarified in the course of its judgment that it was not sufficient for national law to clearly set out an offence: domestic courts also had to comply with the law and not circumvent it through its interpretation and application to the specific facts of a case.

In the instant case, while the use of ByLock was neither criminalised as such nor part of the *actus reus* of the relevant offence, the domestic courts' interpretation had had the effect of equating such use with knowingly and willingly being a member of an armed terrorist organisation. For the Court, the issue was not the assessment of the relevance or weight to be attached to a particular item of evidence, an issue not within its remit under Article 7. Rather, the issue in the present case was that the applicant's conviction had been secured without duly establishing the presence of all the constituent elements of the offence (including its specific intent) in an individualised manner.

It also confirmed the right of an individual, under Article 7, not to be punished without the existence of a mental link through which an element of personal liability could be established (*G.I.E.M. S.r.l. and Others v. Italy*¹³¹). While the Court acknowledged the significant challenges involved in accessing the content of secure communications used by organisations operating in secrecy, it was against the principles of legality and

¹³⁰ *Yüksel Yalçinkaya v. Türkiye* [GC], no. 15669/20, 26 September 2023. See also under Article 6 § 1 (Fairness of the proceedings) above and under Article 15 (Derogation in time of emergency) below.

¹³¹ *G.I.E.M. S.r.l. and Others v. Italy* [GC], nos. 1828/06 and 2 others, §§ 242 and 244, 28 June 2018.

foreseeability, and thus in disregard of the guarantees laid down in Article 7, to attach criminal liability in a virtually automatic manner to all ByLock users.

Other Rights and Freedoms

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

Private life

The judgment in *L.B. v. Hungary*¹³² concerned the statutory requirement to publish taxpayers' personal data, including their home addresses, in response to non-compliance with tax obligations.

As required by the legislation, the National Tax and Customs Authority published the applicant's personal data on its website. Introduced as a tool to tackle non-compliance with tax regulations, the systematic and mandatory publication of such data applied to all taxpayers who, at the end of the quarter, owed a large amount in tax over a period of longer than 180 consecutive days.

The applicant complained under Article 8. A Chamber of the Court found no violation: the impugned publication had not placed a substantially greater burden on the applicant's private life than had been necessary to further the State's legitimate interest. Upon referral, the Grand Chamber disagreed and found a breach of Article 8 of the Convention. The reasons relied upon by the Hungarian legislature in enacting the mandatory publication scheme, although relevant, had not been sufficient and a fair balance had not been struck between the competing interests at stake, namely, on the one hand, the public interest in ensuring tax discipline and the economic well-being of the country and the interest of potential business partners in obtaining access to certain State-held information concerning private individuals; and, on the other, the interest of private individuals in protecting certain forms of data retained by the State for tax collection purposes.

The Grand Chamber judgment is noteworthy in that the Court examined, for the first time, whether, and to what extent, the imposition of a statutory obligation to publish taxpayers' personal data was compatible with Article 8 of the Convention. The Court defined the scope of the margin of appreciation available to the State when regulating questions of that nature and it specified the relevant criteria which should be used to carry out the balancing exercise between the competing interests at stake.

¹³² *L.B. v. Hungary* [GC], no. 36345/16, 9 March 2023.

(i) The Court had regard to the degree of consensus at national and European level. While the majority of the States concerned provided unrestricted access to taxpayer information, only a few of those disclosed the home addresses of taxpayers.

The Court also drew on three sets of principles: general principles in its case-law on the disclosure of personal data (see, *inter alia*, *Z v. Finland*¹³³; *S. and Marper v. the United Kingdom*¹³⁴; and *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*¹³⁵); specific principles concerning data protection (notably, the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data¹³⁶) and applied by the Court; and, lastly, principles on the adoption and implementation of general measures (*Animal Defenders International v. the United Kingdom*¹³⁷).

Taking all the above factors into account, the Court found that the Contracting States enjoyed a wide margin of appreciation when assessing the need to establish a scheme for the dissemination of personal data of taxpayers who failed to comply with their tax payment obligations, as a means, *inter alia*, of ensuring the proper functioning of tax collection as a whole.

In this particular context, the Court had to be satisfied that the competent domestic authorities had performed a proper balancing exercise between the competing interests. The existence of procedural safeguards could also play an important role.

(ii) In assessing whether the Hungarian legislature had acted within the margin of appreciation afforded to it, the Court singled out two features of the impugned publication scheme: the inclusion of a home address among a taxpayer's personal data that were subject to the mandatory publication; and the lack of any discretion on the part of the tax authority to conduct an individualised proportionality assessment. With this in mind, the Court analysed the quality of the parliamentary review and identified numerous shortcomings. Accordingly, the Court concluded that, notwithstanding the respondent State's wide margin of appreciation, the interference complained of had not been "necessary in a democratic society".

On 13 April 2023, in response to a request submitted by the Finnish Supreme Court, the Court delivered its advisory opinion¹³⁸ on the procedural status and rights of a biological parent in proceedings for the adoption of an adult.

¹³³ *Z v. Finland*, 25 February 1997, *Reports of Judgments and Decisions* 1997-I.

¹³⁴ *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, ECHR 2008.

¹³⁵ *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, 27 June 2017.

¹³⁶ Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CET 108.

¹³⁷ *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, ECHR 2013 (extracts).

¹³⁸ *Advisory opinion on the procedural status and rights of a biological parent in proceedings for the adoption of an adult* [GC], request no. P16-2022-001, Supreme Court of Finland, 13 April 2023. See also under Article 1 of Protocol No. 16 (Advisory opinions) below.

The request for an advisory opinion arose out of proceedings before the Finnish courts concerning the adoption of an adult, C, by his aunt, B, with whom he had lived from the age of three until adulthood. During that period, B had had supplementary custody over C, granted at the request of his biological mother, A. His mother had, however, remained involved in his upbringing and they still had contact. She objected to the adoption and was heard as a witness by the District Court, on its own initiative. That court granted the adoption, finding that the statutory conditions had been met, namely that C had been brought up by B and that, while the adoptee had still been a minor, they had had a relationship comparable to that of a child and parent. A's appeal was dismissed by the Court of Appeal without consideration of the merits. Under the Adoption Act, a parent of an adult was not a party to a matter concerning adoption and had no right of appeal. The biological mother applied to the Supreme Court, who in turn requested an advisory opinion based on the following questions:

“(1) Should the Convention on Human Rights be interpreted in such a way that legal proceedings concerning the granting of an adoption of an adult child in general, and especially in the circumstances of the case at hand, are covered by the protection of a biological parent referred to in Article 8 of the Convention on Human Rights?

(2) If the answer to the question asked above is affirmative, should Articles 6 and 8 of the Convention on Human Rights be interpreted in such a way that a biological parent of an adult child should in all cases, or especially in the circumstances of this case, be heard in legal proceedings concerning the granting of adoption?

(3) If the answer to the questions asked above is affirmative, should Articles 6 and 8 of the Convention on Human Rights be interpreted in such a way that a biological parent should be given the status of a party in the matter, and that the biological parent should have the right to have the decision concerning the granting of adoption reviewed by a higher tribunal by means of appeal?”

In this, its sixth advisory opinion under Protocol No. 16, the Court clarified whether Article 8 was applicable to legal proceedings concerning the granting of adoption of an adult child, under its family or private life aspects, and what procedural requirements were to be complied with in that context.

(i) As regards the “family life” aspect, the Court noted that the relationship between the biological mother (A) and the adopted adult (C) was not characterised by any factors of dependence (*Emonet and Others v. Switzerland*¹³⁹; *Bierski v. Poland*¹⁴⁰; and *Savran v.*

¹³⁹ *Emonet and Others v. Switzerland*, no. 39051/03, 13 December 2007.

¹⁴⁰ *Bierski v. Poland*, no. 46342/19, 20 October 2022.

*Denmark*¹⁴¹) or by a pecuniary or patrimonial aspect (*Marckx v. Belgium*¹⁴²). It concluded that it was therefore inappropriate to analyse the case pending before the requesting court from the standpoint of “family life”.

As regards the “private life” aspect of Article 8, the Court observed the importance of biological parentage as a component of identity (*Mennesson v. France*¹⁴³, and *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship*¹⁴⁴), the right to self-determination (*Paradiso and Campanelli v. Italy*¹⁴⁵), and the principle of personal autonomy (*Fedotova and Others v. Russia*¹⁴⁶). In the light of the above principles, and in so far as the biological parent’s identity was at stake given the effect of the discontinuation of the legal parental relationship with the adult child, the Court concluded that legal proceedings concerning the granting of adoption of an adult child could be regarded as affecting a biological parent’s private life under Article 8 of the Convention.

(ii) The Court went on to clarify the procedural requirements under Article 8 applicable to the proceedings in question and, notably, whether the biological parent of the adult adoptee had to be afforded a right to be heard, a right to be granted the status of “a party”, and a right to appeal against the granting of adoption. The Court pointed out that, while the biological parent was entitled to due respect for his or her personal autonomy, that had to be understood as being delimited by the personal autonomy and private life of the adopter and adult adoptee which were also, and if anything to a greater degree, concerned by such proceedings. While noting that the right to be heard by the domestic court was not provided for in the relevant Finnish law, the Court reiterated that its task was not to assess, in a general way, the rationale and structure of the applicable domestic law but rather to give guidance to the requesting court, so that it could ensure that the proceedings before it were conducted in accordance with the Convention. The Court emphasised the importance of the notion of personal autonomy in this respect.

At the same time, where an individual’s interests protected by Article 8 were at stake, such as those of a biological parent of the adult adoptee, an elementary procedural safeguard was that he or she be given the opportunity to be heard and that the arguments made were taken into account by the decider to the extent relevant. In this connection, the Court observed that this was what appeared to have happened before the District Court. Lastly, the Court did not consider that any additional specific safeguards were called for: having regard to the wide margin of appreciation to which the State was entitled in the regulation of the procedure for adult adoption, respect for Article 8 did not

¹⁴¹ *Savran v. Denmark* [GC], no. 57467/15, § 174, 7 December 2021.

¹⁴² *Marckx v. Belgium*, 13 June 1979, § 52, Series A no. 31.

¹⁴³ *Mennesson v. France*, no. 65192/11, ECHR 2014 (extracts)

¹⁴⁴ *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* [GC], request no. P16-2018-001, French Court of Cassation, 10 April 2019.

¹⁴⁵ *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, 24 January 2017.

¹⁴⁶ *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, 17 January 2023.

require that a biological parent be granted the status of a party or the right to appeal against the granting of the adoption.

Family life

The judgment in *B.F. and Others v. Switzerland*¹⁴⁷ concerned the requirement of financial independence for family reunification of certain 1951 Convention refugees.

The applicants, who resided in Switzerland, were all recognised as refugees within the meaning of the Convention relating to the Status of Refugees¹⁴⁸ (“the 1951 Convention”). In line with domestic law, they had been granted provisional admission rather than asylum, since the grounds for their refugee status had arisen following their departure from their countries of origin and as a result of their own actions (so-called “subjective post-flight grounds”), namely their illegal exit from those countries. This meant that they were not entitled to family reunification (in contrast to refugees who had been granted asylum), but it was discretionary and subject to certain cumulative conditions being met. Their applications for family reunification (with minor children and/or spouses) were rejected because one of those cumulative criteria, non-reliance on social assistance, had not been satisfied and because the refusals were deemed not to breach Article 8. The Court found a violation of Article 8 in three applications, and no violation of that provision in the fourth.

The judgment is significant as the Court examined, for the first time, the requirement of financial independence for family reunification of (certain) 1951 Convention refugees.

(i) The Court observed that common ground could be discerned at international and European levels in favour of not distinguishing between different 1951 Convention refugees as regards requirements for family reunification. This reduced the margin of appreciation afforded to the respondent State, as did the consensus at international and European level that refugees needed to have the benefit of a more favourable family reunification procedure than other aliens. The Court was not convinced that there was a difference, in terms of nature and duration, between the stay of refugees granted asylum and those provisionally admitted. The Court’s case-law did not require that the circumstances in which the departure from the country of origin and the separation from the family members had occurred be taken into account, but it was not manifestly unreasonable to do so *per se*. The Court thus concluded that member States enjoyed a margin of appreciation in relation to requiring non-reliance on social assistance before granting family reunification in the case of refugees who had left their countries of origin without being forced to flee persecution and whose grounds for refugee status had arisen following their departure and as a result of their own actions. However, that margin was considerably narrower than that afforded to member States in relation to the introduction of waiting periods for family reunification when such a reunification was requested by

¹⁴⁷ *B.F. and Others v. Switzerland*, nos. 13258/18 and 3 others, 4 July 2023.

¹⁴⁸ Convention relating to the Status of Refugees, adopted on 28 July 1951.

persons who had not been granted refugee status, but rather subsidiary or temporary protection status (compare *M.A. v. Denmark* ¹⁴⁹).

(ii) (a) The Court considered that the particularly vulnerable situation in which refugees *sur place* found themselves needed to be adequately taken into account in the application of a condition (such as the requirement of non-reliance on social assistance) to their family reunification requests, with insurmountable obstacles to enjoying family life in the country of origin progressively assuming greater importance in the fair-balance assessment as time passed. The requirement of non-reliance on social assistance needed to be applied with sufficient flexibility, as one element of the comprehensive and individualised fair-balance assessment. Having regard to the waiting period applicable to the family reunification of provisionally admitted refugees under Swiss law, this consideration was applicable by the time provisionally admitted refugees became eligible for family reunification. More generally, the Court observed that refugees, including those whose fear of persecution in their country of origin had arisen only following their departure from the country of origin and as a result of their own actions (as in the present case), should not be required to “do the impossible” in order to be granted family reunification. In particular, where the refugee present on the territory of the host State was and remained unable to meet the income requirements, despite doing all that he or she reasonably could do to become financially independent, the application of the requirement of non-reliance on social assistance without any flexibility as time passed could potentially lead to the permanent separation of families.

(b) The Court observed that Swiss law and practice provided for some flexibility in the application of the requirement at issue but that there were also conditions circumscribing that flexibility. Only a small number of family reunification requests by provisionally admitted persons had been granted (30 to 50 persons thus admitted per year, while there were nearly 40,000 provisionally admitted persons, of whom nearly 10,000 were provisionally admitted refugees).

(iii) In two of the applications, the Court found that the gainfully employed applicants had done all that could reasonably be expected of them to earn a living and to cover their and their family members’ expenses. In the third application, the Court was not satisfied that the Federal Administrative Court had sufficiently examined whether the applicant’s health would enable her to work, at least to a certain extent, and consequently whether the requirement at issue needed to be applied with flexibility in view of her health. By contrast, the Court found no violation as regards the fourth case, considering that the Federal Administrative Court had not overstepped its margin of appreciation when it had taken the applicant’s lack of initiative in improving her financial situation into account when balancing the competing interests.

Positive obligations

¹⁴⁹ *M.A. v. Denmark* [GC], no. 6697/18, § 161, 9 July 2021.

The judgment in *Fedotova and Others v. Russia*¹⁵⁰ concerned the positive obligation to provide a legal framework allowing adequate recognition and protection for same-sex couples, as well as the scope of the margin of appreciation afforded to States in this respect.

The applicants, three same-sex couples, gave notice of marriage to their local departments of the Register Office. Their notices were rejected on the grounds that the relevant domestic legislation defined marriage as a “voluntary marital union between a man and a woman”, thus excluding same-sex couples. The applicants challenged those decisions without success.

Before the Court, the applicants complained that it was impossible for them to have their respective relationships formally registered and that, because of the legal vacuum in which they found themselves as couples, they were deprived of any legal protection and faced substantial difficulties in their daily lives. A Chamber of the Court found a violation of Article 8 in this respect, and the Grand Chamber endorsed this finding.

The Grand Chamber judgment is noteworthy in that the Court confirmed that Article 8 gives rise to a positive obligation for States Parties to provide a legal framework allowing same-sex couples to enjoy adequate recognition and protection of their relationship. The Court also clarified the scope of the margin of appreciation afforded to States in this respect.

(i) The Court based its interpretation of Article 8 on the degree of consensus found at the national and international level. The Court observed a clear ongoing trend in the States Parties towards legal recognition of same-sex couples (through the institution of marriage or other forms of partnership), since a majority (thirty) of State Parties had already legislated to that effect. This trend was further consolidated by the converging positions of a number of international bodies, including several Council of Europe bodies. Moreover, the Court was guided by the ideals and values of a democratic society. In its view, allowing same-sex couples to be granted legal recognition and protection undeniably promoted pluralism, tolerance and broadmindedness. Indeed, recognition and protection conferred legitimacy on such couples and promoted their inclusion in society and served to combat stigmatisation, prejudice and discrimination against homosexual persons.

(ii) The Court went on to clarify the scope of the national authorities’ margin of appreciation in this regard. In its view, the margin of appreciation of the States Parties was significantly reduced when it came to affording same-sex couples the possibility of legal recognition and protection on account of the particularly important facets of an individual’s personal and social identity that were at stake and the clear trend within the member States of the Council of Europe. At the same time, no similar consensus could be found as to the form of such recognition and the content of such protection. It followed

¹⁵⁰ *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, 17 January 2023. See also under Article 58 (Cessation of membership of the Council of Europe) below.

that the State Parties had to be afforded a more extensive margin of appreciation in determining the exact nature of the legal regime to be made available to same-sex couples. States had the “choice of the means” to be used in discharging their positive obligations inherent in Article 8. The discretion afforded to them in that respect related both to the form of recognition and to the content of the protection. In particular, regarding the form of recognition, the Court underlined that it did not necessarily have to be that of marriage. This interpretation of Article 8 coincides with the Court’s interpretation of Article 12, which cannot be construed as imposing such an obligation either (*Schalk and Kopf v. Austria*¹⁵¹; *Hämäläinen v. Finland*¹⁵²; *Oliari and Others*, cited above; and *Orlandi and Others*, cited above). Furthermore, it is consonant with the Court’s conclusion under Article 14, in conjunction with Article 8, that States remain free to restrict access to marriage to different-sex couples only (*Schalk and Kopf*, cited above; *Gas and Dubois v. France*¹⁵³; and *Chapin and Charpentier v. France*¹⁵⁴).

On the facts, the Court found that the respondent State had overstepped its margin of appreciation and had failed to comply with its positive obligation to secure adequate recognition and protection for the applicants.

The judgments in *O.H. and G.H. v. Germany*¹⁵⁵ and *A.H. and Others v. Germany*¹⁵⁶ concerned the legal impossibility for two transgender parents’ current gender, which did not reflect the biological reality, to be indicated on the birth certificate of children conceived after gender reclassification.

The two cases concerned transgender parents who conceived their children after obtaining recognition of their gender change in the courts. In *O.H. and G.H. v. Germany*, a single transgender man, born female, gave birth to a child who had been conceived through sperm donation and the transgender man was thus recorded as the mother on the birth certificate. In *A.H. and Others v. Germany*, a transgender woman who was born male could only be recorded in the birth register as the father, because the child had been conceived with her sperm. Her female partner, who had given birth to the child, was recorded as the mother. Relying on Articles 8 and 14, the applicants complained about the legal impossibility for the transgender parents’ current gender, which did not reflect the biological reality, to be indicated on the birth certificate of a child conceived after the parents’ gender reclassification. Finding Article 8 to be applicable under its “private life” head, the Court found that there had been no violation: the German courts had struck a fair balance between the rights of transgender parents and any partner concerned, the interests of their children, considerations as to their children’s welfare and public interests. The Court dismissed the complaints, under Article 14 taken together with Article 8, as manifestly ill-founded.

¹⁵¹ *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010.

¹⁵² *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014.

¹⁵³ *Gas and Dubois v. France*, no. 25951/07, ECHR 2012.

¹⁵⁴ *Chapin and Charpentier v. France*, no. 40183/07, 9 June 2016.

¹⁵⁵ *O.H. and G.H. v. Germany*, nos. 53568/18 and 54741/18, 4 April 2023.

¹⁵⁶ *A.H. and Others v. Germany*, no. 7246/20, 4 April 2023.

The interest of the judgments lies in the fact that the Court addressed, for the first time, the question whether an entry recording a transgender parent under his or her former gender and former forename on a child's birth certificate was compatible with Article 8. Examining this issue from the perspective of the State's positive obligations and in the light of the principles summed up in *Hämäläinen* (cited above), the Court defined the margin of appreciation and clarified the criteria to be considered in weighing up the private and public interests at stake.

The Court explained that the authorities had a broad margin of appreciation based on the lack of a consensus in Europe, which reflected the fact that gender change combined with parenthood raised sensitive ethical questions. It then looked at the complexity of the balancing exercise in the present case. Firstly, as to the rights of the transgender parents, their complaints concerned an indication in the birth register in respect of another person (their respective children), and not their own official documents. Secondly, as far as the children were concerned, the issue was the possible disclosure of information relating to the transgender identity of their parents, and not their own gender identity. In addition, the right of children to be informed of the details of their biological descent was capable of limiting the rights relied upon by the transgender parents. The authorities had also taken account of the children's interest in having a stable legal connection with their parents. It followed that the margin of appreciation was not narrowed by the rights relied upon by the applicants, even though they did relate to a basic aspect of private life. Lastly, consideration had to be given to the public interest in the coherence of the legal system and in the accuracy and completeness of civil registration records, which were of particular evidential value. In the instant case the Court found that the German courts had struck a fair balance between the competing interests, in accordance with the requirements of Article 8 of the Convention.

The judgment in *G.T.B. v. Spain*¹⁵⁷ concerned the positive obligation to facilitate "birth registration" and the process of obtaining identity documents for a vulnerable minor in the case of parental negligence.

The applicant, a Spanish national, was born to his Spanish mother in Mexico in 1985. His birth was not registered and shortly after, following an earthquake, he and his mother were repatriated to Spain. When he was 12 years old his mother applied to have his birth registered in Spain. Owing to her lack of diligence, but also to the onerous requests of the administration, the applicant's birth was not registered until 2006 when he was 21. The registration finally allowed him to obtain identity documents.

Relying on Articles 3 and 8 of the Convention as well as on Article 2 of Protocol No. 1, the applicant complained about the suffering and difficulties, including in the educational and private sphere, of having been undocumented for so many years in Spain. The Court

¹⁵⁷ *G.T.B. v. Spain*, no. 3041/19, 16 November 2023.

considered the case from the standpoint of Article 8 and found a violation of that provision.

The judgment is noteworthy in a number of respects. In the first place, the Court stated that an individual's right to have his or her birth registered and to obtain, on that basis, access to identity documents was a protected interest under Article 8. Secondly, the Court specified the relevant considerations for striking a fair balance between the public and private interests at stake. Thirdly, the Court established a positive obligation to facilitate the registration of births, and the process of obtaining identity documents. Lastly, the Court developed a test for assessing whether domestic authorities had complied with that positive obligation.

After finding that the authorities had been sufficiently aware of the applicant's particular situation from 2002 onwards and that there had been no justification for the delay in assisting the applicant to obtain his birth certificate, the Court concluded that the domestic authorities had failed to discharge their positive obligation to assist the applicant in having his birth registered and, therefore also, to obtain identity documents.

FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION (ARTICLE 9)

Manifest one's religion or belief

In response to a request submitted by the Belgian *Conseil d'État*, the Court delivered its advisory opinion¹⁵⁸ on 14 December 2023, which concerned the question whether an individual may be denied authorisation to work as a security guard or officer on account of being close to, or belonging to, a religious movement considered by the national authorities to be dangerous.

The request for an advisory opinion arose in the context of proceedings pending in the Belgian *Conseil d'État* concerning a decision of the Minister of the Interior to withdraw from a Belgian national, S.B., an identification card entitling him to work as a security guard on the Belgian railway network and to refuse to issue him with a second card for a similar function. That decision was based on the fact that, according to the information held by the intelligence services, S.B. was a follower of the "scientific" Salafist movement, he frequented other followers thereof and he engaged in proselytising, by electronic means, among friends and family. Since scientific Salafism was, according to the authorities, incompatible with the Belgian model of society, harmful to the basic democratic values of a State governed by the rule of law and represented a threat to the country, S.B. did not fulfil the statutory conditions to work as a security guard. In its judgment of 4 April 2023, the *Conseil d'État* noted that the administrative file held on

¹⁵⁸ *Advisory opinion as to whether an individual may be denied authorisation to work as a security guard or officer on account of being close to, or belonging to, a religious movement* [GC], request no. P16-2023-001, Belgian *Conseil d'État*, 14 December 2023. See also under Article 1 of Protocol No. 16 (Advisory Opinions) below.

S.B. lacked evidence of any concrete or specific acts imputable to him which might indicate that he would put religious imperatives before strict respect for legality or that he might discriminate against certain categories of people for religious reasons. On that basis the *Conseil d'État* put the following question to the Court:

“Does the mere fact of being close to or belonging to a religious movement that, in view of its characteristics, is considered by the competent administrative authority to represent a threat to the country in the medium to long term, constitute a sufficient ground, in the light of Article 9 § 2 (right to freedom of thought, conscience and religion) of the Convention, for taking an unfavourable measure against an individual, such as a ban on employment as a security guard?”

In this, its seventh advisory opinion under Protocol No. 16, the Court responded that:

(i) There is a distinction between the two aspects of Article 9, one concerning the right to hold a belief (the *forum internum* of each person, an absolute and unqualified right) and the right to manifest one's belief (the *forum externum*, with its potential restrictions under the second paragraph of Article 9 –see *Ivanova v. Bulgaria*¹⁵⁹, and *Mockutė v. Lithuania*¹⁶⁰). As to the fact of “being close to” or “belonging to” a movement or an ideological orientation, the Court stressed the need to ensure, in the particular circumstances of each case, whether the accusation against the individual related to the *forum internum* or the *forum externum* and thus, in other words, whether it was mere adherence in thought or a more concrete manifestation of such adherence through acts. The Court found the notion of “being close” too uncertain and preferred to focus on “belonging”, which related only to the *forum externum*.

(ii) The Court declared, for the first time, that activities on the internet and social media might in principle constitute a “manifestation” of a religion or a belief – in the form of “worship”, “teaching” (encompassing the right to try to convince one's neighbour), “practice” and “observance” – and were thus protected by Article 9 of the Convention.

(iii) The Court recognised that the established fact that an individual belonged to a religious movement that was considered by the competent administrative authority to represent a threat, in the medium to long-term, to a democratic society and its values might in principle justify a preventive measure against that person. However, it laid down a series of conditions that such a measure had to satisfy in order to be compatible with Article 9, namely: (a) the measure had to have an accessible and foreseeable legal basis; (b) the measure had to be adopted in the light of the conduct or acts of the individual concerned; (c) the measure had to have been taken for the purpose of averting a real and serious risk for democratic society, and had to pursue one or more of the legitimate aims under Article 9 § 2 of the Convention. The assessment as to whether the risk was real

¹⁵⁹ *Ivanova v. Bulgaria*, no. 52435/99, § 79, 12 April 2007.

¹⁶⁰ *Mockutė v. Lithuania*, no. 66490/09, § 119, 27 February 2018.

and likely to materialise, and also as to its scale, was a matter for the competent national authorities; (d) the measure had to be proportionate to the risk that it sought to avert and to the legitimate aim or aims that it pursued; and (e) it had to be possible for the measure to be referred to a judicial authority for a review that was independent, effective and surrounded by appropriate procedural safeguards, such as to ensure compliance with the requirements listed above.

(iv) The Court emphasised that the authorities had to avoid any form of discrimination prohibited under Article 14 of the Convention in access to employment, particularly that based on religion, under the guise of protecting the values of a democratic society.

FREEDOM OF EXPRESSION (ARTICLE 10)

Freedom of expression

The judgment in *Halet v. Luxembourg*¹⁶¹ concerned the protection of whistle-blowers. A former employee (A.D.) of PricewaterhouseCoopers (PwC), a private company, disclosed several hundred confidential tax documents to the media. They were published by various media outlets to draw attention to highly advantageous tax agreements concluded between PwC (acting on behalf of multinational companies) and the Luxembourg tax authorities. Following those revelations, the applicant, who was also a PwC employee, handed over several tax returns of multinational companies to a journalist, which were then used in a television programme. The applicant was dismissed by PwC. He was also sentenced to a criminal fine of 1,000 euros, the whistle-blower defence having been refused to him even though he had been acquitted on that basis.

A Chamber of the Court found no violation of Article 10: the applicant's disclosure had been of insufficient public interest to counterbalance the harm caused to the company, and the sanction was a proportionate one. The Grand Chamber disagreed and found a breach of this provision.

The Grand Chamber judgment is noteworthy in that the Court confirmed and consolidated the principles concerning the protection of whistle-blowers. In doing so, it refined and clarified the criteria identified in *Guja v. Moldova*¹⁶², having regard to the current European and international context as well as to the specific features of the instant case (a breach of the statutory obligation to observe professional secrecy, as well as prior revelations by a third party concerning the same activities of the same employer).

(i) In view of the lack of an unequivocal legal definition at international and European level, the Court refrained from providing an abstract and general definition of the concept of "whistle-blower". However, it confirmed the three pertinent elements for the

¹⁶¹ *Halet v. Luxembourg* [GC], no. 21884/18, 14 February 2023.

¹⁶² *Guja v. Moldova* [GC], no. 14277/04, ECHR 2008.

application of the relevant regime of protection: first, whether the employee or civil servant concerned was the only person, or part of a small category of persons, aware of what was happening at work (*Guja*, cited above, § 72, and *Heinisch v. Germany*¹⁶³); secondly, the duty of loyalty, reserve and discretion inherent in a work-based relationship and, where appropriate, the obligation to comply with a statutory duty of secrecy; and, thirdly, the position of economic vulnerability *vis-à-vis* the person, public institution or enterprise on which they depended for employment and the risk of suffering retaliation from them. Relying on the Recommendation of the Committee of Ministers of the Council of Europe on the protection of whistleblowers, the Court clarified that it was the *de facto* working relationship of the whistle-blower, rather than his or her specific legal status, which was decisive. Lastly, the assessment of whether a person was to be protected as a whistle-blower would follow the usual case-by-case approach, taking account of the circumstances and specific context of each case.

(ii) The Court reconfirmed its approach of verifying compliance with each of the *Guja* criteria, without establishing a hierarchy between them or an order of examination, and it also refined certain of these criteria. In relation to the public interest in the disclosed information in the instant case, the Court clarified that the sole fact that a public debate had already been under way when the disclosure had taken place could not, in itself, rule out the possibility that the disclosed information might have been of public interest: the purpose of whistle-blowing was not only to uncover and draw attention to information of public interest, but also to bring about change, which sometimes required that the alarm be raised several times on the same subject. By helping the general public to form an informed opinion on a subject of great complexity, the tax returns disclosed by the applicant had contributed to the transparency of the tax practices of multinational companies seeking to shift profits to low-tax countries, as well as the political choices made in Luxembourg in this regard. The disclosure had therefore been in the public interest, not only in Luxembourg, but also in Europe and in the other States whose tax revenues could be affected by the said practices. As to the weight of that public interest, the Court noted the important economic and social issues involved in view of the place now occupied by global multinational companies. Having conducted the balancing exercise, the Court concluded that the public interest in the disclosure in issue outweighed the detrimental effects. It took into account, in particular, the above findings as to the importance (at national and European level) of the public debate on the tax practices of multinational companies, to which the information disclosed had made an essential contribution.

As a result of a global analysis of all the *Guja* criteria, the Court found that the interference with the applicant's right to freedom of expression, in particular his freedom to impart information, had not been "necessary in a democratic society" and was in breach of Article 10 of the Convention.

¹⁶³ *Heinisch v. Germany*, no. 28274/08, § 63, ECHR 2011 (extracts).

The judgment in *Macatė v. Lithuania*¹⁶⁴ concerned the question whether restrictions on a children's book presenting same-sex relationships as essentially equivalent to different-sex ones pursued a legitimate aim.

The applicant was a children's author and was homosexual. She wrote a book of fairy tales aimed at nine to ten-year-olds, seeking to encourage the tolerance and acceptance of various marginalised social groups. Some associations and members of the *Seimas* expressed concerns about two of the fairy tales, which depicted marriage between persons of the same sex. The distribution of the book was suspended for a year. When it resumed, the book was marked with a warning label stating that its content could be harmful to children under the age of 14 based on section 4(2)(16) of the Law on the protection of minors from the negative effects of public information ("the Minors Protection Act"). The applicant unsuccessfully brought civil proceedings against the publisher.

Before the Court, the applicant complained under Article 10 of the Convention. The Grand Chamber was unable to subscribe to the Government's argument that the aim of the measures taken against the applicant's book had been to protect children from sexually explicit content or content which "promoted" same-sex relationships as superior to different-sex ones by "insulting", "degrading" or "belittling" the latter (there was no support in the text of the book for such a conclusion). In the Grand Chamber's view, the impugned measures had actually sought to limit children's access to information presenting same-sex relationships as essentially equivalent to different-sex ones. However, such an aim could not be accepted as legitimate under Article 10 § 2, which led the Court to find a violation of this provision.

The Grand Chamber judgment is noteworthy in that the Court assessed, for the first time, restrictions imposed specifically on children's literature depicting same-sex relationships. The judgment is interesting in two respects: first, because of the manner in which the Court determined the aim pursued by the impugned measures; and, secondly, on account of the assessment of the legitimacy of that aim.

(i) Having dismissed the aims relied on by the Government, the Court turned to the legislative history of section 4(2)(16) of the Minors Protection Act. Even though the explicit reference to homosexual or bisexual relations had been removed from the final text, every single instance in which that provision had been applied concerned information about LGBTI-related issues. The Court therefore had no doubt that its intended aim was to restrict children's access to content which presented same-sex relationships as being essentially equivalent to different-sex ones. Having regard to the relevant domestic court decisions, the Court concluded that the aim of the impugned measures against the applicant's book had been the same, namely, to bar children from such information.

¹⁶⁴ *Macatė v. Lithuania* [GC], no. 61435/19, 23 January 2023.

(ii) As to whether the above-mentioned aim could be considered legitimate, the Court's analysis was based on the following factors. In the first place, the Court assessed the issue from the standpoint of the best interests of children; there was no scientific evidence that information about different sexual orientations, when presented in an objective and age-appropriate way, could cause any harm to children; and the lack of such information and the stigmatisation of LGBTI persons in society had been shown to be harmful to children, especially those who identified as LGBTI or came from same-sex families. Furthermore, the laws of a significant number of Council of Europe member States either explicitly included teaching about same-sex relationships in the school curriculum or contained provisions on ensuring respect for diversity and for the prohibition of discrimination on grounds of sexual orientation in teaching.

Secondly, the Court had regard to the manner in which the information in issue had been presented. It emphasised that equal and mutual respect for persons of different sexual orientations was inherent in the whole fabric of the Convention. It followed that insulting, degrading or belittling persons on account of their sexual orientation, or promoting one type of family at the expense of another, was never acceptable under the Convention. However, such an aim or effect could not be discerned in the facts of the present case. On the contrary, to depict, as the applicant had done in her writings, committed relationships between persons of the same sex as being essentially equivalent to those between persons of a different sex rather advocated respect for, and acceptance of, all members of a given society in this fundamental aspect of their lives.

Thirdly, the Court outlined another key element in its assessment of the restrictions on children's access to information about same-sex relationships. The Court underlined that any such measures taken solely on the basis of sexual orientation had wider social implications. Such measures, whether they were directly enshrined in the law or adopted in case-by-case decisions, demonstrated that the authorities had a preference for certain types of relationships and families over others and that they saw different-sex relationships as more socially acceptable and valuable than same-sex relationships, thereby contributing to the continuing stigmatisation of the latter. Therefore, such restrictions, however limited in their scope and effects, were incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society.

In sum, where there was no other basis in any other respect to consider information about same-sex relationships to be inappropriate or harmful to children's growth and development, restrictions on access to such information did not pursue any aims that could be accepted as legitimate, for the purposes of Article 10 § 2, and were therefore incompatible with Article 10 of the Convention.

The judgment in *Sanchez v. France*¹⁶⁵ concerned the liability of a politician – who used social networks for political and electoral purposes – for hate speech posted by other users on his social media account.

¹⁶⁵ *Sanchez v. France* [GC], no. 45581/15, 15 May 2023.

The applicant, who at the time was a locally elected councillor and a candidate in the legislative elections, was found guilty of inciting hatred and violence against Muslims. He was sentenced to a fine for not having deleted Islamophobic comments, left by other people, from his public Facebook “wall”. The conviction was the result of a complaint filed by the partner of one of the applicant’s political opponents. Feeling personally targeted, she confronted one of the authors, who deleted his message immediately and told the applicant, who subsequently posted on his Facebook “wall” a message asking internet users to be careful with the content of their comments, but without moderating those already posted. In 2021 a Chamber of the Court found no violation of Article 10, finding that the conviction had been based on relevant and sufficient reasons, “necessary in a democratic society”. On referral, the Grand Chamber reached the same conclusion.

This Grand Chamber judgment is noteworthy in that the Court examined, for the first time, the question of the liability of users of social networks or other types of non-commercial internet fora in relation to comments posted by third parties. The Court thus consolidated and supplemented its *Delfi AS v. Estonia*¹⁶⁶ case-law, which concerned the liability on a similar basis of a large internet news portal. In view of the specific features of the present case, the Court approached the question from the angle of “duties and responsibilities”, within the meaning of Article 10 § 2, which must be assumed by politicians when they decide to use social networks for political purposes, in particular for an election campaign, by opening fora that are accessible to the public on the internet in order to receive their reactions and comments.

(i) In the Court’s view, there was no difficulty in principle for the liability of a social network account holder to be engaged on account of third-party comments, provided safeguards existed in the attribution of such liability and that there was a shared liability between all actors involved.

(ii) In order to determine which steps an account holder was required to take, or could reasonably be expected to take, in relation to unlawful comments by third parties, the Court set out the factors that were relevant to its analysis: (a) the nature and context of the impugned comments; (b) the introduction of automatic filtering of comments and the practical possibility of prior moderation; (c) the traffic on an account; (d) the deliberate choice to make access to the account forum (Facebook “wall”) totally public; (e) knowledge of the unlawful comments of third parties; (f) the promptness of the reaction; and (g) the status of the account holder.

(iii) The fact that the authors of the unlawful comments had been convicted in the present case did not rule out the possibility of separately establishing the liability of the account holder on other charges and under a different regime. In addition, in spite of the chilling effects for users of social networks or online fora, the Court confirmed that

¹⁶⁶ *Delfi AS v. Estonia* [GC], no. 64569/09, ECHR 2015.

criminal-law measures were not to be ruled out in cases of hate speech or calls to violence. Moreover, the fine of EUR 3,000 had had no negative consequences for the applicant's political career or any chilling effect on the exercise of his freedom of expression.

The judgment in *Hurbain v. Belgium*¹⁶⁷ concerned measures taken with regard to lawful content in online press archives, on the grounds of the "right to be forgotten", and the criteria and principles for weighing up the rights at stake.

In a civil judgment the applicant, the publisher of a daily newspaper, had been ordered to anonymise, on the grounds of the "right to be forgotten", the electronic archived version of an article originally published in 1994 in the newspaper's print edition and published online in 2008. The article mentioned the full name of G., a driver responsible for a fatal road-traffic accident.

In 2021 a Chamber of the Court held that there had been no violation of Article 10. The Grand Chamber agreed with that conclusion.

The Grand Chamber judgment is noteworthy in that the Court circumscribed the scope of claims arising out of the "right to be forgotten" and established the principles and criteria to be applied in order to resolve a conflict between rights under Articles 8 and 10 of the Convention, specifically in cases where the measures requested related to information that had been published in a lawful and non-defamatory manner and where the request did not concern the initial publication of the information but rather its continued dissemination online, in the press archives and for journalistic purposes.

(i) The Court acknowledged the adverse effects of the continued availability of certain information on the internet, and in particular the considerable impact on the way in which the person concerned was perceived by public opinion, as well as the risks linked to the creation of a profile of the person concerned and to a fragmented and distorted presentation of the reality. Nevertheless, the Court clarified that a claim of entitlement to be forgotten did not amount to a self-standing right protected by the Convention. To date, the Court has not upheld any measure removing or altering information that had been published lawfully for journalistic purposes and archived on the website of a news outlet.

(ii) The Court noted the emergence of a consensus within Europe regarding the importance of archives, which should, as a general rule, remain authentic, reliable and complete so that the press could carry out its mission. Accordingly, the integrity of press archives should be the guiding principle in examining any request for the removal or alteration of all or part of an archived article, especially if its lawfulness had never been called into question. Such requests called for particular vigilance and thorough examination by the national authorities.

¹⁶⁷ *Hurbain v. Belgium* [GC], no. 57292/16, 4 July 2023.

(iii) In the light of the specific context of the case (online press archives), the Court further developed and clarified the criteria for balancing the various rights at stake, drawing on the general principles and in particular the need to preserve the integrity of those archives, and also, to some extent, on the practice of the courts in the Council of Europe member States.

In the context of a balancing exercise between the various rights at stake, the criteria to be applied did not all carry the same weight. Particular attention was to be paid to properly balancing, on the one hand, the interests of the individuals requesting the measures and, on the other hand, the impact of such requests on the publishers. The principle of preservation of the integrity of press archives required the alteration and, *a fortiori*, the removal of content to be limited to what was strictly necessary, so as to prevent any chilling effect on the performance by the press of its task of imparting information and maintaining archives.

(iv) In the present case the national courts had taken into account the fact that the article, which concerned a short news item, had no topical, historical or scientific interest, and the fact that G. was not well known and had suffered serious harm as a result of the continued online availability of the article with unrestricted access, which had been apt to create a “virtual criminal record” in view of the length of time that had elapsed since the original publication. After reviewing the measures that might be considered, the courts had held that anonymisation did not impose an excessive and impracticable burden on the applicant, while constituting the most effective means of protecting G.’s privacy. In the Court’s view, that balancing exercise between the rights at stake had satisfied the requirements of the Convention.

FREEDOM OF ASSEMBLY AND ASSOCIATION (ARTICLE 11)

Freedom of association

The judgment in *Humpert and Others v. Germany*¹⁶⁸ concerned a blanket ban on strikes by civil servants.

The applicants were State school teachers (with the status of civil servants) and members of a trade union. They were reprimanded or fined in disciplinary proceedings for having breached their duties by participating in strikes organised by their union during their working hours. The Federal Constitutional Court dismissed their constitutional complaints, holding that the banning of all civil servants from going on strike was a well-established principle applying to career civil servants within the German constitutional order, systemically connected with, and indissociable from, the civil servants’ duty of loyalty and the “principle of alimentation”, namely, their individual right to claim appropriate remuneration from the State. The Constitutional Court noted that the

¹⁶⁸ *Humpert and Others v. Germany* [GC], nos. 59433/18 and 3 others, 14 December 2023.

prohibition in question did not render the freedom of association that civil servants enjoyed entirely ineffective as the legislature had taken sufficient compensating measures, such as allowing umbrella organisations of civil servant trade unions to participate in the drafting of relevant statutory provisions, thus enabling trade unions to make their voices heard, as well as making it possible for civil servants to have the constitutionality of their level of remuneration reviewed by the courts. The Grand Chamber found no violation of Article 11, finding that, in the specific circumstances of the case, the measure at issue did not render civil servants' trade-union freedom devoid of substance and struck a fair balance between different, potentially competing, constitutional interests: the margin of appreciation afforded to the respondent State had therefore not been exceeded.

The Grand Chamber judgment is noteworthy because the Court adopted a more nuanced approach than in *Enerji Yapı-Yol Sen v. Turkey*¹⁶⁹, in which it had stated that a prohibition on strikes could not extend to civil servants in general but only to some clearly and narrowly defined categories of persons. The Court introduced a case-by-case approach, declaring that the question whether such a measure affected an essential element of trade-union freedom by rendering it devoid of substance was context-specific and could not be answered in the abstract. An assessment of all the circumstances of the case was required, in view of, *inter alia*, the totality of the measures taken by the respondent State to secure trade-union freedom, to allow unions to make their voice heard and to protect their members' occupational interests. The Court distinguished the present case from *Enerji Yapı-Yol Sen*, where no proper balancing exercise had been carried out at the domestic level.

The Court reiterated that, while strike action was an important part of trade-union activity, it was not the only means for trade unions and their members to protect the relevant occupational interests. In principle, Contracting States remained free to decide what measures they wished to take to safeguard trade-union freedom as guaranteed by Article 11, provided that that freedom did not become devoid of substance. In the case of a general ban, as in the instant case, the Court needed to examine, taking into account all the relevant circumstances, whether other guarantees sufficiently compensated for that restriction, enabling those concerned to protect their occupational interests effectively.

The Court accepted the respondent Government's argument, based on a conclusion of the Federal Constitutional Court, that the prohibition generally pursued the overall aim of maintaining good administration and guaranteed the effective performance of functions delegated to the civil service, thereby ensuring the protection of the population, the provision of services of general interest and the protection of the rights enshrined in the Convention – in this case, the right of others to education as protected by both the German Basic Law and Article 2 of Protocol No. 1 to the Convention – through effective public administration in manifold situations.

¹⁶⁹ *Enerji Yapı-Yol Sen v. Turkey*, no. 68959/01, § 32, 21 April 2009.

The Court restated and clarified the breadth of the margin of appreciation afforded to the State, specifying that it would be reduced if the restriction in question struck at the core of trade-union activity and if it affected an essential element of trade-union freedom.

The Court noted that the approach taken by the respondent State, namely, to prohibit strikes by all civil servants, was clearly not in line with the trend emerging from specialised international instruments, as interpreted by the competent monitoring bodies, or from the practice of Contracting States. Moreover, those monitoring bodies had repeatedly criticised the status-based ban on strikes in the German civil service, particularly in respect of teachers. The Court emphasised that its assessment had to be limited to verifying compatibility with the Convention and had to be based on the specific facts of the case. Therefore, while all these elements were undoubtedly relevant, they were not in and of themselves decisive for the Court's conclusion as to whether the impugned prohibition on strikes, and the disciplinary measures imposed on the applicants, remained within the margin of appreciation afforded to the respondent State under the Convention.

Just satisfaction (Article 41)

Non-pecuniary damage

The judgment in *Georgia v. Russia (II)*¹⁷⁰ concerned just satisfaction in an inter-State case where the respondent State had ceased to be a member of the Council of Europe.

In its principal judgment¹⁷¹ of 21 January 2021, the Court found that there had been a series of administrative practices on the part of the Russian Federation, in the context of the armed conflict between Georgia and Russia in August 2008, in violation of Articles 2, 3, 5 and 8 of the Convention, of Article 1 of Protocol No. 1 and of Article 2 of Protocol No. 4. The Court also held that Russia had failed to comply with its obligations under Article 38 of the Convention. The examination of Article 41 was reserved. The applicant Government then submitted their claims for just satisfaction, and the respondent Government did not react to the Court's invitation to submit their comments in reply. In the meantime, on 16 March 2022 the Russian Federation ceased to be a member of the Council of Europe and on 22 March 2022 the plenary Court adopted the Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights, stating that the Russian Federation would cease to be a Party to the Convention on 16 September 2022.

The Court held that it had jurisdiction to deal with the applicant Government's just satisfaction claims (notwithstanding the cessation of the Russian Federation's

¹⁷⁰ *Georgia v. Russia (II)* (just satisfaction) [GC], no. 38263/08, 28 April 2023. See also under Article 46 (Binding force and execution of judgments – Execution of judgments) below.

¹⁷¹ *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021.

membership of the Council of Europe) and that the respondent Government's failure to cooperate did not present an obstacle to its examination. It awarded the applicant Government a lump sum in respect of non-pecuniary damage for every violation found in the principal judgment, except in respect of the 1,408 alleged victims of the administrative practice of torching and looting of houses in the "buffer zone" because the evidence submitted by the applicant Government did not allow the Court to establish that the houses had indeed belonged to the persons on the list or had constituted their home or dwelling within the meaning of Article 8.

The Grand Chamber judgment is noteworthy in that the Court, firstly, affirmed its jurisdiction to deal with non-substantive issues (such as just satisfaction) after the relevant State was no longer a High Contracting Party to the Convention and, secondly, it further clarified the application of Article 41 in inter-State cases (following *Cyprus v. Turkey*¹⁷², and *Georgia v. Russia (I)* (just satisfaction)¹⁷³).

(i) The Court restated the principles and methodology of counting and identifying alleged individual victims of a violation for the purposes of the application of Article 41 in an inter-State case, as defined in *Georgia v. Russia (I)* (just satisfaction) (§§ 68-71, cited above). In this connection, it specified that the duty of the High Contracting Parties to cooperate (Article 38 of the Convention and Rule 44A of the Rules of Court) applied to both parties to the proceedings: not only to the respondent Government, in respect of whom the existence of an administrative practice in breach of the Convention had been found in the principal judgment, but also to the applicant Government, who, in accordance with Rule 60 of the Rules of Court, had to substantiate their claims.

(ii) Regarding the just satisfaction for the administrative practice of plundering or destroying private property, the Court imposed on the applicant Government a strict requirement to produce additional evidence of the alleged direct victims' title to property or of residence.

Pecuniary damage

The judgment in *G.I.E.M. S.r.l. and Others v. Italy*¹⁷⁴ concerned the elements to be taken into account when assessing the extent of pecuniary damage caused by confiscation of property in violation of Article 1 of Protocol No. 1 to the Convention.

The applicants, four companies and one individual, had complained about the automatic and complete confiscation of unlawfully developed land. In 2018 the Grand Chamber found that the measure had breached Article 1 of Protocol No. 1 in respect of all the applicants; it also found a violation of Article 7 of the Convention in respect of the companies, but not the individual, and lastly a violation of Article 6 § 2 in respect of the

¹⁷² *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, ECHR 2014.

¹⁷³ *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, 31 January 2019.

¹⁷⁴ *G.I.E.M. S.r.l. and Others v. Italy* (just satisfaction) [GC], nos. 1828/06 and 2 others, 12 July 2023.

individual. The property has been returned to all the applicants. In the present judgment, taking the violation of Article 1 of Protocol No. 1 as the sole basis for compensation, the Grand Chamber made awards in respect of pecuniary damage, particularly on account of the applicants' inability to use their land. However, it refused compensation for the deterioration of the buildings, given that they had been erected in breach of administrative permits. It also refused to take account of the loss of value of the land resulting from circumstances which had no causal link to the confiscation, or the violations found. Lastly, the Grand Chamber awarded sums to the applicants for non-pecuniary damage and for costs and expenses.

This Grand Chamber judgment is noteworthy as the Court explained the relevant factors to be taken into consideration when establishing the extent of pecuniary damage resulting from the confiscation of property in violation of Article 1 of Protocol No. 1.

The Court began by confirming its well-established approach, whereby it was in principle for the applicant to adduce evidence of the existence and quantum of any pecuniary damage and to prove that there was a causal link between the claim being made and the violation(s) found.

As to the elements to be taken into account in order to assess pecuniary damage in that context, they included the value of the land and/or constructions prior to the confiscation, whether or not the land could be built upon at that time, the designated use of the property under the relevant legislation and land-use plans, the duration of the inability to use the land and the loss of value caused by the confiscation, while if necessary deducting the cost of demolishing illegal constructions.

The Court applied the approach developed in its *Sud Fondi S.r.l. and Others v. Italy* (just satisfaction)¹⁷⁵ judgment, although it did distinguish the present case from certain other aspects of that judgment. The approach followed was that the compensation due for the inability to use the land should be based on the probable value of the land at the beginning of the situation complained of. The damage caused by that inability for the period in question could be compensated for by a sum corresponding to the statutory interest accruing throughout that period, as applied to the value of the land.

In assessing the duration for which the property, since returned, had been unusable, the Court took as the starting-point the actual confiscations and not any previous measures of seizure, given that only the confiscations had been found to constitute the violations in the judgment on the merits.

The Court thus ascertained, in each case, whether the land could be built on, noting that that status had a significant impact on the value of land. Where it was possible to build on the land to a very limited extent, it was necessary for the Court to consider whether

¹⁷⁵ *Sud Fondi S.r.l. and Others v. Italy* (just satisfaction), no. 75909/01, 10 May 2012.

it could have been sold in spite of any construction thereon which did not comply with the specifications stipulated in the planning permission.

Binding force and execution of judgments (Article 46)

Execution of judgments

The judgment in *Georgia v. Russia (III)* ¹⁷⁶ concerned just satisfaction in an inter-State case where the respondent State had ceased to be a member of the Council of Europe.

The Grand Chamber judgment is noteworthy in that the Court affirmed its jurisdiction to deal with non-substantive issues (such as the binding force of a judgment) after the relevant State was no longer a High Contracting Party to the Convention.

(i) The Court made it clear that the cessation of a Contracting Party's membership of the Council of Europe did not release it from its duty to cooperate with the Convention bodies, and that this duty continued for as long as the Court remained competent to deal with applications against that State. Since the facts giving rise to the present inter-State application had occurred prior to 16 September 2022 ("the termination date"), the Court confirmed that it had jurisdiction to examine the just satisfaction claims in this case. It clarified that Article 38 (the respondent Government's duty to cooperate), Article 41 (just satisfaction) and Article 46 (binding force and execution of judgments) of the Convention, as well as the corresponding provisions of the Rules of Court, continued to be applicable after the respondent State had ceased to be a High Contracting Party to the Convention.

(ii) The Russian Federation was required by Article 46 § 1 of the Convention to implement the Court's judgments despite the cessation of its membership of the Council of Europe. Article 46 § 2, which requires that the Committee of Ministers set forth an effective mechanism for the implementation of the Court's judgments, was also applicable in cases against a State which had ceased to be a High Contracting Party.

¹⁷⁶ *Georgia v. Russia (III)* (just satisfaction) [GC], no. 38263/08, 28 April 2023. See also under Article 41 (Just satisfaction – non-pecuniary damage) above.

Other Convention Provisions

DEROGATION IN TIME OF EMERGENCY (ARTICLE 15)

The judgment in *Yüksel Yalçinkaya v. Türkiye*¹⁷⁷ concerned a conviction for membership of a terrorist organisation based on the use of an encrypted messaging application.

The Court examined the question whether the impugned failure to observe the requirements of a fair trial could be justified by the Turkish derogation under Article 15 (in connection with the attempted coup). In this connection, the Court emphasised that such a derogation, even if justified, neither had the effect of dispensing the States from the obligation to respect the rule of law (*Pişkin v. Turkey*¹⁷⁸), nor did it give them *carte blanche* to engage in conduct that could lead to arbitrary consequences for individuals. Accordingly, when determining whether a derogating measure was strictly required by the exigencies of the situation, the Court would also examine whether adequate safeguards had been provided against abuse and whether the measure undermined the rule of law. In the present case, no sufficient connection had been established between the fair-trial issues and the special measures taken during the state of emergency. The Court therefore found a breach of Article 6 § 1 of the Convention.

JURISDICTION OF THE COURT (ARTICLE 32)

The judgment in *Grosam v. the Czech Republic*¹⁷⁹ concerned the distinction between complaints and secondary arguments, and the consequent delimitation of the Court's ability to recharacterise a complaint.

The Grand Chamber judgment is noteworthy because the Court, being master of the characterisation to be given in law to the facts of a case, confirmed and clarified the limits of its power to recharacterise an applicant's complaints and, in so doing, ensured that the scope of the case did not extend beyond the complaints contained in the application.

The Court reiterated that it could base its decision only on the facts "complained of", which ought to be seen in the light of the legal arguments underpinning them and vice versa, these two elements of a complaint being intertwined (*Radomilja and Others v. Croatia*¹⁸⁰). The Court emphasised that it was not sufficient that a violation of the Convention was "evident" from the facts of the case or the applicant's submissions. Instead, the applicants had to complain that a certain act or omission had entailed a violation of the rights set forth in the Convention or the Protocols thereto, in a manner

¹⁷⁷ *Yüksel Yalçinkaya v. Türkiye* [GC], no. 15669/20, 26 September 2023. See also under Article 7 (No punishment without law) and Article 6 § 1 (Fairness of the proceedings) above.

¹⁷⁸ *Pişkin v. Turkey*, no. 33399/18, § 153, 15 December 2020.

¹⁷⁹ *Grosam v. the Czech Republic* [GC], no. 19750/13, 1 June 2023. See under Article 34 (Petition) above.

¹⁸⁰ *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, 20 March 2018

which should not leave the Court to second-guess whether a certain complaint had been raised or not (*Farzaliyev v. Azerbaijan*¹⁸¹). Referring to a similar position of the International Court of Justice (ICJ – compare the judgments in the cases of *Nuclear Tests (Australia v. France)*¹⁸² and *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*¹⁸³), the Court emphasised that it had no power to substitute itself for the applicant and formulate new complaints simply on the basis of the arguments and facts advanced. Drawing inspiration again from the *Nuclear Tests* judgment of the ICJ, the Court clarified that it was necessary to distinguish between complaints (that is, the arguments pointing to the cause or the fact constitutive of the alleged violations of the Convention) and secondary arguments.

On that basis, the Court considered whether the applicant's complaint under Article 2 of Protocol No. 7, as formulated in his application, could be examined under Article 6 § 1 (as a complaint about an independent and impartial tribunal) as the Chamber had done after recharacterising it to fall within that provision. In his application, the applicant did not claim that the inclusion, in the composition of the disciplinary chamber, of members who were not professional judges entailed a violation of Article 2 of Protocol No. 7. Rather, he argued that that body could not be regarded as the "highest tribunal" within the meaning of paragraph 2 of that provision, as its lay members were not subject to the same requirements of expertise and independence as judges. That argument was therefore aimed only at excluding the application of the exception provided for in Article 2 § 2 of Protocol No. 7, according to which the right of appeal did not apply where an accused had been tried in the first instance by the highest tribunal. Moreover, the applicant emphasised that the composition of the disciplinary chamber was atypical among the higher judicial institutions in the Czech Republic, which normally did not involve lay assessors. In short, he did not argue that the disciplinary chamber was not a "tribunal" but merely that it was not the "highest tribunal".

In the Court's view, that was a secondary argument which could not be equated with a complaint: indeed, the applicant had not claimed the composition of the disciplinary chamber to be the cause or fact constitutive of a violation of Article 2 of Protocol No. 7. His argument could not therefore be interpreted as raising a complaint that the disciplinary chamber was not an independent and impartial tribunal within the meaning of Article 6 § 1. If the applicant had wished, at that stage, to complain of a breach of the guarantees set forth in Article 6 § 1, he should have stated so in his application form in a clear manner. Although the applicant had formulated such a complaint in his observations to the Chamber, that was a new complaint since it related to distinct requirements arising from Article 6 § 1. It could therefore not be viewed as concerning a particular aspect of his initial complaint under Article 2 of Protocol No. 7.

¹⁸¹ *Farzaliyev v. Azerbaijan*, no. 29620/07, 28 May 2020.

¹⁸² *Nuclear Tests (Australia v. France)*, judgment of 20 December 1974, *ICJ Reports* 1974, p. 253.

¹⁸³ *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, judgment of 1 December 2022, *ICJ Reports* 2022, p. 614.

Accordingly, by raising a question concerning compliance with the requirement of a “tribunal established by law” under Article 6 § 1, the Chamber had extended, of its own motion, the scope of the case beyond the one initially referred to it by the applicant in his application. It had thereby exceeded the powers conferred on the Court by Articles 32 and 34 of Convention.

The decision in *Pivkina and Others v. Russia*¹⁸⁴ concerned the Court’s temporal jurisdiction, mainly with respect to acts or omissions spanning across the date on which a respondent State ceased to be a Party to the Convention.

Russia’s Federal Law no. 43-FZ of 28 February 2023 provided that the Convention was to be considered as having ceased to be applicable to the Russian Federation as of 16 March 2022 (not the termination date of 16 September 2022). The Court, however, emphasised that its ability to determine its own jurisdiction was essential to the Convention’s protection system. By acceding to the Convention, the High Contracting Parties had undertaken to comply not just with its substantive provisions but also with its procedural provisions, including Article 32, which gave the Court exclusive authority over disputes regarding its jurisdiction. The Court’s jurisdiction could not therefore be contingent upon events extraneous to its own operation, such as domestic legislation that sought to affect or limit its jurisdiction in pending cases, such as the above-mentioned Russian law.

CESSATION OF MEMBERSHIP OF THE COUNCIL OF EUROPE (ARTICLE 58)

The judgment in *Fedotova and Others v. Russia*¹⁸⁵ is noteworthy in that the Court ruled, for the first time, on its jurisdiction to examine a case against Russia after it had ceased to be a Party to the Convention.

Referring to the wording of Article 58 (§§ 2 and 3), the Court confirmed that a State which ceased to be a Party to the Convention – by virtue of the fact that it had ceased to be a member of the Council of Europe – was not released from its obligations under the Convention in respect of any act performed by that State before the date on which it ceased to be a Party to the Convention. The Court thus reiterated its reading of this provision set out in its Resolution concerning Russia¹⁸⁶ delivered after sitting in plenary session. In the present case, the facts giving rise to the alleged violations of the Convention had taken place before 16 September 2022, when Russia ceased to be a Party to the Convention. Since the applications had been lodged with it in 2010 and

¹⁸⁴ *Pivkina and Others v. Russia* (dec.), nos. 2134/23 and 6 others, 6 June 2023. See under Article 35 § 3 (a) (Competence *ratione temporis*, and Competence *ratione personae*) above.

¹⁸⁵ *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, 17 January 2023. See also under Article 8 (Positive obligations) above.

¹⁸⁶ Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights, adopted on 22 March 2022.

2014, the Court had jurisdiction to deal with them. The Court found a violation of Article 8 on the grounds that the respondent State had failed to comply with its positive obligation to secure adequate recognition and protection for the applicants, who were same-sex couples.

Inter-State cases (Article 33)

The decision in *Ukraine and the Netherlands v. Russia* ¹⁸⁷ concerned exclusion from jurisdiction in the context of the active phase of hostilities, as well as the relevance of non-domestic remedies in an inter-State case for the purposes of the six-month rule.

The Grand Chamber decision is noteworthy in several respects. In the first place, the Court shed some light on how to interpret the exclusion from jurisdiction of “military operations carried out during an active phase of hostilities”, in accordance with the principle set out in *Georgia v. Russia (II)* ¹⁸⁸. Secondly, and with regard to the downing of flight MH17, the Court examined the effectiveness of domestic remedies, taking into account the important political dimension of the case. Thirdly, and in the novel and exceptional context of that same complaint, the Court clarified how the interplay between the six-month rule and the exhaustion of “domestic” remedies, enshrined in Article 35 § 1, was to be transposed to potential remedies outside the respondent State or to avenues which States themselves might wish to pursue at the international level prior to lodging an inter-State case with this Court, especially where there was no clarity from the outset as to the circumstances of the alleged violation of the Convention and the identity of the State allegedly responsible for it.

Advisory opinions (Article 1 of Protocol No. 16)

In response to a request submitted by the Finnish Supreme Court, the Court delivered its advisory opinion ¹⁸⁹ on 13 April 2023. It concerned the procedural status and rights of a biological parent in proceedings for the adoption of an adult.

In response to a request submitted by the Belgian *Conseil d’État*, the Court delivered its advisory opinion ¹⁹⁰ on 14 December 2023, which concerned the question whether an individual could be denied authorisation to work as a security guard or officer on account

¹⁸⁷ *Ukraine and the Netherlands v. Russia* (dec.) [GC], nos. 8019/16 and 2 others, adopted on 30 November 2022 and delivered on 25 January 2023. See also under Article 1 (Jurisdiction of States), Article 35 § 1 (Exhaustion of domestic remedies) and Article 35 § 1 (Four-month period) above.

¹⁸⁸ *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021.

¹⁸⁹ *Advisory opinion on the procedural status and rights of a biological parent in proceedings for the adoption of an adult* [GC], request no. P16-2022-001, Supreme Court of Finland, 13 April 2023. See also under Article 8 (Private life) above.

¹⁹⁰ *Advisory opinion as to whether an individual may be denied authorisation to work as a security guard or officer on account of being close to, or belonging to, a religious movement* [GC], request no. P16-2023-001, Belgian *Conseil d’État*, 14 December 2023. See also under Article 9 (Manifest one’s religion or belief) above.

of being close to, or belonging to, a religious movement considered by the authorities to be dangerous.

Rules of Court

The judgment in *Svetova and Others v. Russia*¹⁹¹ dealt with the consequences of a State's failure to participate in the proceedings after it had ceased to be a Party to the Convention.

The applicant journalists complained of an unjustified search of their homes and the indiscriminate seizure of personal belongings. In 2021 the Court notified the respondent Government of the applicants' complaints under Articles 8, 10 and 13.

In the context of a procedure launched under Article 8 of the Statute of the Council of Europe, the Committee of Ministers of the Council of Europe adopted a Resolution¹⁹², in accordance with which the Russian Federation ceased to be a member of the Council of Europe as from 16 March 2022. Shortly thereafter the Court, sitting in plenary formation, adopted a Resolution¹⁹³ stating that the Russian Federation would cease to be a High Contracting Party to the Convention on 16 September 2022.

Referring to the wording of Article 58 (§§ 2 and 3) of the Convention and its Resolution of 22 March 2022, the Court established its jurisdiction to deal with the present case¹⁹⁴ since the facts giving rise to the alleged violations of the Convention had taken place before 16 September 2022. The Court further noted that, by failing to submit their written observations when requested to do so, the respondent Government had demonstrated their intention to abstain from further participating in the examination of the present case. Nevertheless, and relying on Rules 44A and 44C of the Rules of Court, the Court considered it could examine the case on the merits and found violations of Articles 8 and 10 of the Convention and of Article 13 in conjunction with Article 8.

The judgment is noteworthy in that a Chamber formation of the Court dealt with procedural matters arising from the cessation of membership of the Russian Federation to the Council of Europe.

¹⁹¹ *Svetova and Others v. Russia*, no. 54714/17, 24 January 2023.

¹⁹² Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe, adopted on 16 March 2022.

¹⁹³ Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights, adopted on 22 March 2022.

¹⁹⁴ The Court ruled, for the first time, on this matter in *Fedotova and Others v. Russia* ([GC], nos. 40792/10 and 2 others, 17 January 2023). See also *Kutayev v. Russia* (no. 17912/15, 24 January 2023).

(i) Firstly, the Court addressed the appointment of an *ad hoc* judge in Russian cases after 16 September 2022. On 5 September 2022 the Court, sitting in plenary formation, took formal notice of the fact that the office of the judge with respect to the Russian Federation would cease to exist after 16 September 2022. Consequently, there was no longer a valid list of *ad hoc* judges who would be eligible to take part in the consideration of the cases against Russia. Having informed the parties, the President of the Chamber decided to appoint an *ad hoc* judge from among the members of the composition, applying by analogy Rule 29 § 2 (b) of the Rules of Court.

(ii) Secondly, the Court addressed the consequences of the Government's failure to participate in the proceedings, finding that this omission could not be an obstacle to its examination.

The Court drew on case-law principles developed in the context of Articles 34 and 38 of the Convention as to the obligations on States to furnish all necessary facilities to make a proper and effective examination of applications possible (*Georgia v. Russia (I)*¹⁹⁵, and *Carter v. Russia*¹⁹⁶). The Court also relied on Rule 44A of the Rules of Court on the parties' duty to cooperate with the Court, emphasising that the cessation of a Contracting Party's membership of the Council of Europe did not release it from this duty. It was a duty which continued for as long as the Court remained competent to deal with applications arising out of acts or omissions capable of constituting a violation of the Convention, provided that the said act/omission had taken place prior to the date on which the respondent State had ceased to be a Contracting Party to the Convention.

The Court also referred to Rule 44C § 2, which provides that "[f]ailure or refusal by a respondent Contracting Party to participate effectively in the proceedings shall not, in itself, be a reason for the Chamber to discontinue the examination of [an] application". In the Court's view, this provision acted as an enabling clause for the Court, making it impossible for a party unilaterally to delay or obstruct the conduct of proceedings.

While the Court was not, therefore, prevented from examining the present case, it had to assess the consequences of a failure to participate for the distribution of the burden of proof. In accordance with its usual standard of proof "beyond reasonable doubt", the distribution of the burden of proof remained intrinsically linked to the specificity of the facts, the nature of the allegations made and the Convention right at stake, as well as the conduct of the parties (*Georgia v. Russia (I)*, cited above, §§ 93-95 and 138, and *Abu Zubaydah v. Lithuania*¹⁹⁷). As regards the last-mentioned aspect, the Court referred to Rule 44C (§ 1 *in fine*) which empowered it to draw such inferences as it deemed appropriate from a party's failure or refusal to participate effectively in the proceedings. At the same time, such a failure by the respondent State should not automatically lead

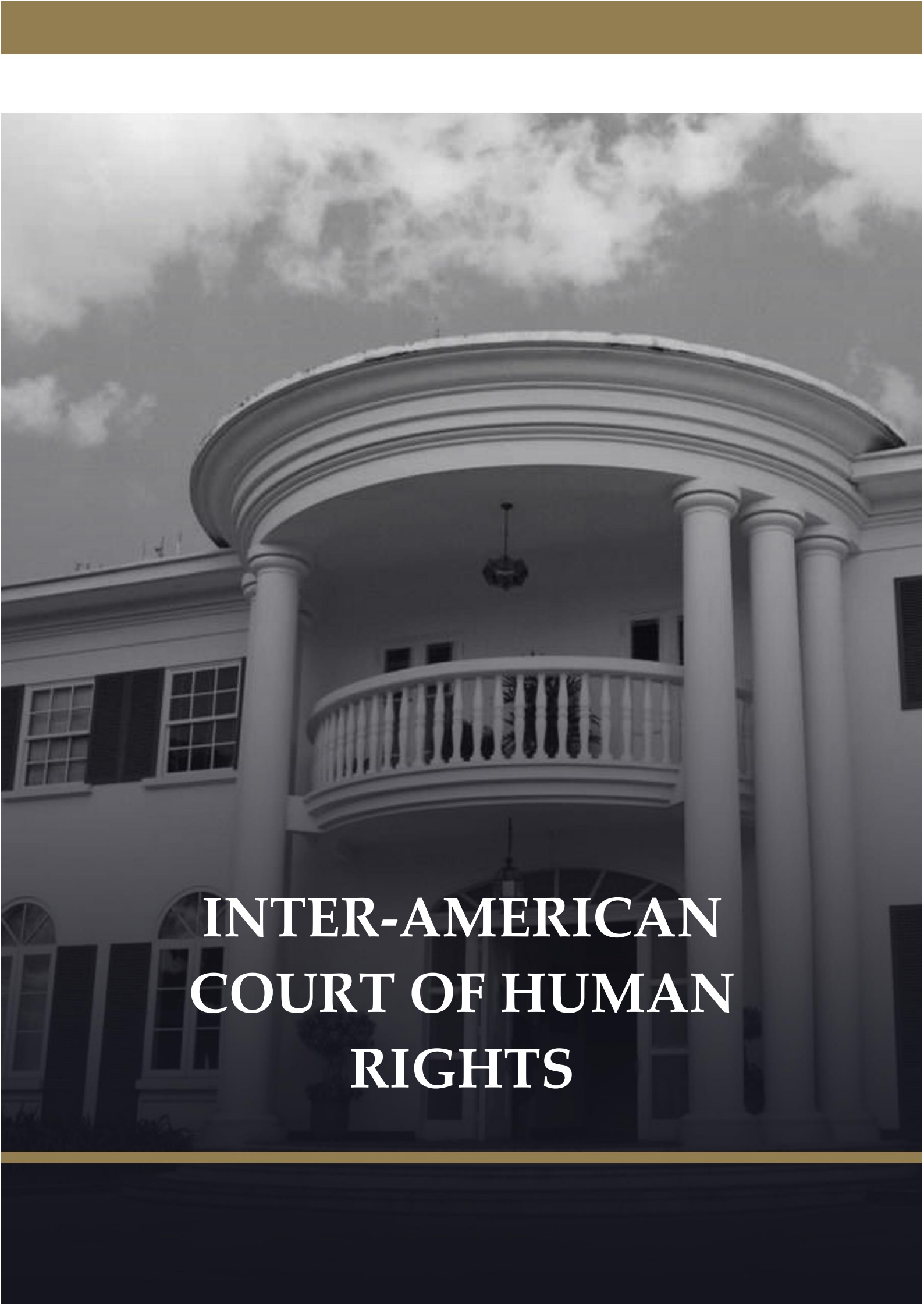
¹⁹⁵ *Georgia v. Russia (I)* [GC], no. 13255/07, § 99, ECHR 2014 (extracts).

¹⁹⁶ *Carter v. Russia*, no. 20914/07, §§ 92-94, 21 September 2021.

¹⁹⁷ *Abu Zubaydah v. Lithuania*, no. 46454/11, §§ 480-83, 31 May 2018.

to the acceptance of the applicants' claims, and the Court had to be satisfied by the available evidence that the claim was well founded in fact and law.

In the instant case, faced with the respondent State's choice not to participate in the proceedings or to submit any documents or arguments in its defence, the Court examined the application on the basis of the applicants' submissions, which were presumed to be accurate where supported by evidence and in so far as other evidence available in the case file did not lead to a different conclusion.



INTER-AMERICAN COURT OF HUMAN RIGHTS

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Presentation

This chapter outlines the most important standards developed in the Inter-American Court of Human Rights' jurisprudence during 2022 and 2023, as well as pertinent criteria derived from the Court's existing jurisprudence. These legal developments provide essential guidelines for domestic judicial organs and officials to conduct proper conventionality control within their respective jurisdictions. Moreover, they pave the way for other international courts to reference and incorporate this evolving jurisprudence into their own rulings.

In this regard, the Court has affirmed that all state authorities have the obligation to exercise *ex officio* a conventionality control ensuring that domestic norms align with the American Convention, within the scope of their respective competences and procedural frameworks. This entails that State organs and agents must ensure the compatibility of domestic laws and practices with the American Convention and the jurisprudence of the Inter-American Court. In their respective decisions and actions, these entities must uphold the general obligation to protect the rights and freedoms enshrined by the American Convention, ensuring that domestic legal provisions do not contravene this treaty, and that the Convention, along with the jurisprudential standards set by the Inter-American Court- the definitive interpreter of the American Convention- is correctly applied.

During 2023 and 2022, the Court has continued to address innovative issues and consolidate important international human rights standards. It has reaffirmed its jurisprudence on several key issues, including the standards on equality and non-discrimination based on sexual orientation, gender identity, and gender expression in business and human rights; the impacts of corruption on democracy and human rights; the autonomous right to defend human rights; the right to personal liberty, including the prohibition of unlawful detention and the right to be informed of reasons for detention; the right to a fair trial and judicial protection, including judicial independence and the exclusion of evidence obtained under coercion; the right to privacy with limitations on intelligence activities; the protection of private and family life for children and adolescents; the right to freedom of thought and expression, with an emphasis on corruption; the right of assembly, particularly the right to protest; the rights of the child concerning environmental and intergenerational equity; the right to property, including communal property of indigenous and tribal communities; the right to a healthy environment, including clean air and water; and the permissible limitation of political rights for elected officials, ensuring participation and prior consultation.

Thus, in these two years, the Court has issued 67 judgements, of which 51 judgements on preliminary objections, merits, reparations and costs, 16 were Interpretation Judgements. It is important to mention that 2023, was the year in which the largest number of judgements on merit were issued. This report details the substantive rights established in the American Convention on Human Rights, followed by sections

highlighting the Court's established and evolving jurisprudence on specific issues derived from cases adjudicated by the Court.

The Court has continued to address groundbreaking issues and solidify significant international human rights standards. We have reinforced our case law on various matters, including: the denunciation of the American Convention and the OAS Charter, and their impact on a State's human rights obligations; the right of girls to live free from sexual violence, especially within educational environments; the prohibition of child labor; violence against the LGBTI community rooted in prejudice; the use of stereotypes during arrests and racial profiling; access to justice for individuals in situations of human mobility; the security of tenure for prosecutors appointed provisionally; judges' freedom of expression and the aspect of internal independence; the economic, social, cultural, and environmental rights of indigenous peoples, with a focus on the right to a healthy environment, adequate food, water, and participation in cultural life; and the standards for justifiable limitations on the political rights of elected officials.

This section is divided into the substantive rights established in the American Convention on Human Rights that incorporate these standards and that develop their scope and content. In addition, sub-headings have been included that underscore the topics, and the content includes references to specific judgments from which the case law was extracted.

Pablo Saavedra Alessandri
Registrar
Inter-American Court of Human Rights

Article 1 (Obligation to Respect and to Ensure Rights)

The attribution of responsibility to the State

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.¹⁹⁸

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.¹⁹⁹

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.²⁰⁰ These obligations are also applicable to acts of non-State actors.²⁰¹

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.²⁰²

¹⁹⁸Cf. 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.

¹⁹⁹Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para. 260.

²⁰⁰Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para. 261.

²⁰¹Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para. 262.

²⁰²Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para. 265.

Articles 1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects)

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 LGBTIQ+ 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 LGBTIQ+ 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 persons²⁰³

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 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 consequences²⁰⁴

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 InterAmerican System.

²⁰³Cf. 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

²⁰⁴Cf. Case of Viteri Ungaretti et al. v. Ecuador. Preliminary objections, Merits, Reparations, and Costs. Judgment of November 27, 2023, paras. 81 and 82.

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.²⁰⁵

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

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.²⁰⁶

In this way, 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. 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

²⁰⁵Cf. 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.

²⁰⁶Cf. Case of Guevara Díaz v. Costa Rica. Merits, Reparations and Costs. Judgment of June 22, 2022. Series C No. 453, para. 48.

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.²⁰⁷

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. Moreover, 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.²⁰⁸

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. 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.²⁰⁹

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

The Court established that, following the disappearance of their close relatives, women may experience stigmatization, violence and discrimination associated with gender roles. When the disappeared person is a male head of household, the victimization of his family members may be even greater.²¹⁰

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 historical obstacles that limit their search, and guaranteeing the permanency of the life

²⁰⁷Cf. Case of Guevara Díaz v. Costa Rica. *supra*. para. 49.

²⁰⁸Cf. Case of Guevara Díaz v. Costa Rica. *supra*. para. 50.

²⁰⁹Cf. Case of Guevara Díaz v. Costa Rica. *supra*. para. 53.

²¹⁰Cf. Case of Movilla Galarcio et al. v. Colombia. Merits, Reparations and Costs. Judgment of June 22, 2022. Series C No. 452, para. 180.

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.²¹¹

Article 4 (Right to Life)

The death row phenomenon in cases involving the death penalty

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. This includes the way in which the sentence was imposed from the perspective of due process, and also the characteristics of the condemned man.²¹²

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.”²¹³

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.²¹⁴

²¹¹Cf. Case of Movilla Galarcio et al. v. Colombia. *supra*. para. 181.

²¹²Cf. Case of Dial et al. v. Trinidad and Tobago. Merits and reparations. Judgment of November 21, 2022. Series C No. 476, para. 71.

²¹³Cf. Case of Dial et al. v. Trinidad and Tobago. *supra*. para. 72.

²¹⁴Cf. Case of Dial et al. v. Trinidad and Tobago. *supra*. 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

The Court 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.²¹⁵ It 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.²¹⁶ 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.²¹⁷

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.²¹⁸ In addition, 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.²¹⁹

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.²²⁰

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. It implies 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

²¹⁵Cf. Case of Brítez Arce et al. v. Argentina. *supra*. para. 59.

²¹⁶Cf. Case of Brítez Arce et al. v. Argentina. *supra*. para. 70.

²¹⁷Cf. Case of Brítez Arce et al. v. Argentina. *supra*. para. 72.

²¹⁸Cf. Case of Brítez Arce et al. v. Argentina. *supra*. para. 73.

²¹⁹Cf. Case of Brítez Arce et al. v. Argentina. *supra*. para. 74.

²²⁰Cf. Case of Brítez Arce et al. v. Argentina. *supra*. para. 75.

pathologize the natural reproductive processes, among other intimidating actions in the context of health care during pregnancy, birth and the postpartum period.²²¹

Article 5 (Right to Personal Integrity)

Sexual violence and torture suffered by women

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.²²²

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.” Moreover, if they are motivated by gender stereotypes, this is contrary to Article 7 of the Convention of Belém do Pará.²²³

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.²²⁴

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

The Court stated 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.²²⁵

²²¹Cf. Case of Brítez Arce et al. v. Argentina. *supra*. para. 81.

²²²Cf. 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.

²²³Cf. Case of Brítez Arce et al. v. Argentina. *supra*. para. 188.

²²⁴Cf. Case of Brítez Arce et al. v. Argentina. *supra*. para. 190.

²²⁵Cf. 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 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.²²⁶

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.²²⁷ 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.²²⁸

Differentiated approaches applicable to women who are pregnant, in labor, postpartum and breastfeeding, as well as primary caregivers, 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.²²⁹

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)

²²⁶Cf. Differentiated approaches with respect to certain groups of persons deprived of liberty. *supra*.

²²⁷Cf. Differentiated approaches with respect to certain groups of persons deprived of liberty. *supra*.

²²⁸Cf. Differentiated approaches with respect to certain groups of persons deprived of liberty. *supra*.

²²⁹Cf. Differentiated approaches with respect to certain groups of persons deprived of liberty. *supra*.

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.²³⁰

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

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.²³¹

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.²³²

Differentiated approaches applicable to LGBTI 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.²³³

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

²³⁰Cf. Differentiated approaches with respect to certain groups of persons deprived of liberty. *supra*.

²³¹Cf. Differentiated approaches with respect to certain groups of persons deprived of liberty. *supra*.

²³²Cf. Differentiated approaches with respect to certain groups of persons deprived of liberty. *supra*.

²³³Cf. Differentiated approaches with respect to certain groups of persons deprived of liberty. *supra*.

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.²³⁴

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 answering 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, the adoption of culturally appropriate measures for rehabilitation and reintegration, and (E) prevention of violence against indigenous persons deprived of liberty.²³⁵

Differentiated approaches applicable to 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.²³⁶

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.²³⁷

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

The Court recalled that the State has the obligation to guarantee security and maintain public order within their territory and that, consequently, it 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

²³⁴Cf. Differentiated approaches with respect to certain groups of persons deprived of liberty. *supra*.

²³⁵Cf. Differentiated approaches with respect to certain groups of persons deprived of liberty. *supra*.

²³⁶Cf. Differentiated approaches with respect to certain groups of persons deprived of liberty. *supra*.

²³⁷Cf. Differentiated approaches with respect to certain groups of persons deprived of liberty. *supra*.

to achieve this end, regardless of the severity of certain actions and the guilt of the presumed perpetrators. In particular, 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.²³⁸

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

The Court reiterated that, to fulfil the requirements for restricting the right to personal liberty by means of a precautionary measure, such as pre-trial detention, there should be sufficient evidence 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.²³⁹ 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.²⁴⁰ 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.²⁴¹

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.²⁴²

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.²⁴³ 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.²⁴⁴

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

²³⁸Cf. 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.

²³⁹Cf. Case of Tzompaxtle Tecpile et al. v. Mexico. *supra*. para. 100.

²⁴⁰Cf. Case of Tzompaxtle Tecpile et al. v. Mexico. *supra*. para. 101.

²⁴¹Cf. Case of Tzompaxtle Tecpile et al. v. Mexico. *supra*. para. 102.

²⁴²Cf. Case of Tzompaxtle Tecpile et al. v. Mexico. *supra*. para. 103.

²⁴³Cf. Case of Tzompaxtle Tecpile et al. v. Mexico. *supra*. para. 105.

²⁴⁴Cf. Case of Tzompaxtle Tecpile et al. v. Mexico. *supra*. para. 104.

verified in each case, based on the true and objective circumstances.²⁴⁵ Nor can the elements that prove the existence of the legitimate purposes be presumed, but must also be based on the true and objective circumstances of each specific case. It must be verified by the prosecution and not by the accused, who also must be able to exercise the right of defense, and be duly assisted by a lawyer.²⁴⁶

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.²⁴⁷ The Court has also indicated that 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.²⁴⁸

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

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.²⁴⁹ 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.²⁵⁰ 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.²⁵¹

House searches

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 sphere of protection of the right to private life and privacy. Therefore, they cannot be subject to arbitrary interference by third parties or authorities.²⁵²

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

²⁴⁵Cf. Case of Tzompaxtle Tecpile et al. v. Mexico. supra. para. 106.

²⁴⁶Cf. Case of Tzompaxtle Tecpile et al. v. Mexico. supra. para. 108.

²⁴⁷Cf. Case of Tzompaxtle Tecpile et al. v. Mexico. supra. para. 110.

²⁴⁸Cf. Case of Tzompaxtle Tecpile et al. v. Mexico. supra. para. 112.

²⁴⁹Cf. Case of Tzompaxtle Tecpile et al. v. Mexico. supra. para. 171.

²⁵⁰Cf. Case of Tzompaxtle Tecpile et al. v. Mexico. supra. para. 125.

²⁵¹Cf. Case of Tzompaxtle Tecpile et al. v. Mexico. supra. para. 216.

²⁵²Cf. Case of Tzompaxtle Tecpile et al. v. Mexico. supra. para.189.

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 involves analyzing if the law precisely and previously establishes the “grounds” and “conditions” for depriving someone 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).²⁵³

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 person: 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 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.²⁵⁴

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 “is 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.²⁵⁵

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.²⁵⁶

Pre-Trial Detention

The Court reaffirmed that, according to the American Convention, no detention or imprisonment should be incompatible with 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

²⁵³Cf. 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.

²⁵⁴Cf. Case of García Rodríguez et al. v. Mexico, *supra*, para. 136.

²⁵⁵Cf. Case of García Rodríguez et al. v. Mexico, *supra*, para. 139 to 141.

²⁵⁶Cf. Case of García Rodríguez et al. v. Mexico, *supra*, para. 139 to 141.

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 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.²⁵⁷

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 person 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 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.²⁵⁸

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.²⁵⁹

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.

²⁵⁷Cf. Case of García Rodríguez et al. v. Mexico, supra, para. 155 to 160.

²⁵⁸Cf. Case of García Rodríguez et al. v. Mexico, supra, para. 168, 170-171, 173

²⁵⁹Cf. Case of García Rodríguez et al. v. Mexico, supra, para. 146.

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.²⁶⁰

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."²⁶¹ 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.

Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection)

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

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 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."²⁶²

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. To do otherwise, would jeopardize the principles of independence and objectivity required by their office, to ensure that investigations conducted and claims brought before the

²⁶⁰Cf. Case of Nuñez Naranjo et al. v. Ecuador. Judgment of May 23, 2023. Merits, Reparations, and Costs, paras. 94 - 95, 97

²⁶¹Cf. Case of Nuñez Naranjo et al. v. Ecuador, *supra*, para. 89.

²⁶²Cf. Case of Nissen Pessolani v. Paraguay. Merits, Reparations and Costs. Judgment of November 21, 2022. Series C No. 477, para. 57

Courts are directed exclusively towards doing justice in each individual case, in accordance with the provisions of Article 8 of the Convention. Moreover, 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.

Based on the foregoing considerations, the Court reiterated that, for prosecutors, the guarantee of stability in office and irremovability means: (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.²⁶³

Right to a competent and independent Judge

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 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.²⁶⁴

The alleged violation of the guarantee of an impartial Judge

The Court recalled that it had established that impartiality requires the judicial authority who intervene 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 that 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 preconceived 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.²⁶⁵

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. 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.²⁶⁶

In proceedings instituted against judicial authorities, which could eventually lead to their removal, the guarantee of irremovability that protects them, to safeguard their

²⁶³Cf. Case of Nissen Pessolani v. Paraguay. *supra*. para. 59.

²⁶⁴Cf. Case of Nissen Pessolani v. Paraguay. *supra*. para. 61.

²⁶⁵Cf. Case of Nissen Pessolani v. Paraguay. *supra*. para. 64.

²⁶⁶Cf. Case of Nissen Pessolani v. Paraguay. *supra*. para. 65.

independence, requires that such proceedings are processed and decided objectively and impartially; in other words, as required by the guarantees of due process.²⁶⁷

²⁶⁷Cf. Case of Nissen Pessolani v. Paraguay. *supra*. para. 66.

Due diligence in the investigation of violence against human rights defenders

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, to combat impunity, and to 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.²⁶⁸

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 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, as is essential to guarantee that they are able to carry out their work freely and safely.²⁶⁹

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 the whole 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.²⁷⁰

Environmental defenders

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

²⁶⁸Cf. Case of Sales Pimenta v. Brazil. Preliminary objection, Merits, Reparations and Costs. Judgment of June 30, 2022. Series C No. 454, para. 86.

²⁶⁹Cf. Case of Sales Pimenta v. Brazil. supra. para. 88.

²⁷⁰Cf. Case of Sales Pimenta v. Brazil. supra. para. 89.

intermittently or occasionally, so that the condition of human rights defender is not necessarily a permanent situation.²⁷¹

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, including environmental defenders.²⁷²

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..²⁷³ In this regard, article 9 of the Escazu 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 expression.”

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.”²⁷⁴ The Court considered that, given the importance of their work, the free and full exercise of their rights, States have a 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 are 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 of threats, acts of violence, and the murder of environmentalists due to their work can be observed.²⁷⁵

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

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. 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.²⁷⁶

²⁷¹Cf. Case of Baraona Bray v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2022. Series C No. 481. para. 71.

²⁷²Cf. Case of Baraona Bray v. Chile. *supra*. para. 72.

²⁷³Cf. Case of Baraona Bray v. Chile. *supra*. para. 75.

²⁷⁴Cf. Case of Baraona Bray v. Chile. *supra*. para. 78.

²⁷⁵Cf. Case of Baraona Bray v. Chile. *supra*. para. 78.

²⁷⁶Cf. Case of Angulo Losada v. Bolivia. Preliminary Objections, merits and reparations. Judgment of November 18, 2022. Series C No. 475, para. 94.

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, as well as 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 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.²⁷⁷

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. 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.²⁷⁸

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.²⁷⁹ 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.²⁸⁰

The Court recalled 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. 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 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,

²⁷⁷Cf. Case of Angulo Losada v. Bolivia. *supra*. para. 99.

²⁷⁸Cf. Case of Angulo Losada v. Bolivia. *supra*. para.100.

²⁷⁹Cf. Case of Angulo Losada v. Bolivia. *supra*. para.102.

²⁸⁰Cf. Case of Angulo Losada v. Bolivia. *supra*. para.103.

“considering 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.”²⁸¹

With regards to 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 recalled the importance of adopting a care protocol aiming to reduce the consequences on the victim’s bio-psychosocial well-being. 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.²⁸²

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 guaranteeing 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 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.²⁸³

Regarding the physical examination, the Court recalled that authorities must avoid 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. It is recommendable

²⁸¹Cf. Case of Angulo Losada v. Bolivia. *supra*. para.104.

²⁸²Cf. Case of Angulo Losada v. Bolivia. *supra*. para.105.

²⁸³Cf. Case of Angulo Losada v. Bolivia. *supra*. para.106.

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, considering 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 the procedure, 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.²⁸⁴

Consent in crimes of sexual violence, and access to justice

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 be prosecuted, 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.²⁸⁵

The Court highlighted 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.”²⁸⁶

Also, 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

²⁸⁴Cf. Case of Angulo Losada v. Bolivia. *supra*. para.107.

²⁸⁵Cf. Case of Angulo Losada v. Bolivia. *supra*. para.145.

²⁸⁶Cf. Case of Angulo Losada v. Bolivia. *supra*. para.146.

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.²⁸⁷ 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.²⁸⁸

Intervention and limits to the military criminal jurisdiction

The Court recalled its consistent Case Law regarding the restriction of the military jurisdiction from examining facts that constitute human rights violations. 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 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. On the contrary, the prosecution of those responsible always corresponds to the common or ordinary system of justice.²⁸⁹

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 regard, 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.²⁹⁰

The Court recalled 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.²⁹¹

²⁸⁷Cf. Case of Angulo Losada v. Bolivia. *supra*. para.147.

²⁸⁸Cf. Case of Angulo Losada v. Bolivia. *supra*. para.148.

²⁸⁹Cf. 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.

²⁹⁰Cf. Case of Casierra Quiñonez et al. v. Ecuador. *supra*. para. 151.

²⁹¹Cf. Case of Casierra Quiñonez et al. v. Ecuador. *supra*. para. 154.

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

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.²⁹²

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 act in the respective proceedings so that they are able to set out their claims and present evidence. These should be examined fully and effectively by the authorities before a decision is taken on facts, responsibilities, penalties and reparations.²⁹³

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 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. 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.²⁹⁴

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, including the factual information in the indictment. 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.²⁹⁵

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.²⁹⁶

²⁹²Cf. Case of Mina Cuero v. Ecuador. Preliminary objection, Merits, Reparations and Costs. Judgment of September 7, 2022. Series C No.464, para. 80.

²⁹³Cf. Case of Mina Cuero v. Ecuador. *supra*. para. 83

²⁹⁴Cf. Case of Mina Cuero v. Ecuador. *supra*. para.84.

²⁹⁵Cf. Case of Mina Cuero v. Ecuador. *supra*. para. 85.

²⁹⁶Cf. Case of Mina Cuero v. Ecuador. *supra*. para. 86.

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 the foundation of the Rule of Law. The co-optation of electoral bodies by other public powers transversely affects the entire democratic institutional framework. It also 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, that 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.

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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 require 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.²⁹⁸

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

²⁹⁷Case of Aguinaga Aillón v. Ecuador. Merits, Reparations, and Costs. Judgment of January 30, 2023. Series C No. 483, para. 71.

²⁹⁸Cf. Case of García Rodríguez et al. v. Mexico, *supra*, para. 242, 245.

procedural equality, allowing the accused to examine witnesses both for and against him.
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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 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.³⁰⁰

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.³⁰¹

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.³⁰²

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

²⁹⁹Cf. Case of García Rodríguez et al. v. Mexico, supra, para. 245- 247.

³⁰⁰Cf. Case of García Rodríguez et al. v. Mexico, supra, para. 258, 260- 261.

³⁰¹Cf. Case of Álvarez v. Argentina. Preliminary Objection, Merits, and Reparations. Judgment of March 24, 2023. Series C No. 487, paras. 108- 109, 114.

³⁰²Cf. Case of Álvarez v. Argentina, supra, para. 117, 120- 123.

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.³⁰³

³⁰³Cf. Case of Álvarez v. Argentina, *supra*, para. 128, 130- 131.

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.³⁰⁴

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 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.³⁰⁵

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.’”³⁰⁶

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.’”³⁰⁷

³⁰⁴Cf. Case of Álvarez v. Argentina, *supra*, para. 150.

³⁰⁵Cf. Case of Álvarez v. Argentina, *supra*, para. 152.

³⁰⁶Cf. Case of Bendejú Tuncar v. Peru. Preliminary Objections and Merits. Judgment of August 29, 2023. Series C No. 497, para. 114

³⁰⁷Cf. Case of Bendejú Tuncar v. Peru, *supra*, para. 127.

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, if the person's manifestation of will 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 for their organizational structures, leadership, and representation. The determination of 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.³⁰⁸

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.³⁰⁹ 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.³¹⁰

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. Regarding the right to a reasonable period 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.

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

³⁰⁸Cf. 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.

³⁰⁹Cf. Case of Meza v. Ecuador. Preliminary Objection, Merits, Reparations, and Costs. Judgment of 14 June 2023, para 59.

³¹⁰Cf. Case of Meza v. Ecuador, supra, para 62.

international treaties such as the Hague Convention and the InterAmerican Convention was remarked, given the sensitivity and urgency of matters related to children's rights.

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.³¹¹

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 stated 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.³¹²

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."³¹³

³¹¹Cf. Case of Córdoba v. Paraguay. Merits, Reparations, and Costs. Judgment of September 5, 2023. Series C No. 505, paras. 87 and 96.

³¹²Cf. Case of Aguinaga Aillón v. Ecuador. Merits, Reparations, and Costs. Judgment of January 30, 2023. Series C No. 483, paras. 70- 71.

³¹³Cf. Case of Cajahuanca Vásquez v. Peru. Preliminary Objections and Merits. Judgment of November 27, 2023, para. 95.

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 impartiality of the administration of justice and that, therefore, their transgression through an irregular decision could affect the principle of the lawful judge.³¹⁴ 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.³¹⁵

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 demands 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.³¹⁶

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 established by law, pursue a legitimate goal, and comply with the principles of good standing, necessity, and proportionality.³¹⁷

³¹⁴Cf. Case of Cajahuanca Vásquez v. Peru, para. 107.

³¹⁵Cf. Case of Cajahuanca Vásquez v. Peru, para. 108.

³¹⁶Cf. Case of Cajahuanca Vásquez v. Peru, para. 114.

³¹⁷Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 520-521.

Necessary legal provision for intelligence activities: the principle of legal confidentiality

The Court referred to the legal framework of intelligence activities, its purposes, and the functions 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. Their 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, as well as for the eventual attribution of responsibilities.³¹⁸

As the Court has stated, this first requirement, referring to the “principle of reserve of law”, which is characteristic of “democratic constitutionalism,” 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.³¹⁹ The need 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.³²⁰

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

The Court has established that the legitimacy of intelligence activities should pursue 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.³²¹

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.³²²

³¹⁸Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 528.

³¹⁹Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 529.

³²⁰Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 530.

³²¹Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 531 - 535.

³²²Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 536.

The controls and limitations of intelligence activities

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 types of persons and activities for whom 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.³²³

Supervision of intelligence services and complaints against arbitrary actions

The Court has stated 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 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.³²⁴

³²³Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 538.

³²⁴Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 564-565.

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

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. This aims to prevent their collection, use, retention, disclosure, and exchange in an inappropriate manner or incompatible with those rights.

The Court clarifies that in this Judgment the concept of “personal data” is used in accordance with the definition included in the Inter-American Juridical Committee's Updated Principles on Privacy and Personal Data, in the sense that it covers “information that identifies or can reasonably be used to identify a natural person directly or indirectly.” It 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.”³²⁵

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.³²⁶

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.³²⁷

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. For this purpose, in addition to being able to

³²⁵Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 572.

³²⁶Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 573.

³²⁷Cf. Case of Members of the “José Alvear Restrepo” Lawyers Collective v. Colombia, para. 580.

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.³²⁸

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. So, 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.³²⁹

Article 13 (Freedom of Thought and Expression)

The murder of journalists as an extreme form of censorship

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, 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-censorship that the professionals may impose on themselves as a strategy to safeguard their life and integrity,³³⁰ thus creating a fertile ground for

³²⁸Cf. Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, para. 581.

³²⁹Cf. Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, paras. 585 - 608.

³³⁰Cf. Case of Leguizamón Zaván et al. v. Paraguay. Merits, Reparations and Costs. Judgment of November 15, 2022. Series C No. 473, para. 55.

authoritarian regimes. Guaranteeing pluralism intrinsic to democratic societies requires the greatest possible circulation of articles and opinions on matters of public interest that allow the peoples' right of access to information and ideas representing diverse positions.³³¹

It is also evident that an adequate fight against corruption requires transparency. 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. 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 for the survival of the democratic system.³³²

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

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."³³³

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.³³⁴

The Court considered that the journalist has a duty to verify reasonably, although not necessarily exhaustively, the facts he divulges. This means 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.

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 encourage the pluralism of information, aimed at a balanced participation of diverse information in public discussions. 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 they

³³¹Cf. Case of Leguizamón Zaván et al. v. Paraguay. *supra*. para. 57.

³³²Cf. Case of Leguizamón Zaván et al. v. Paraguay. *supra*. para. 58.

³³³Cf. 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

³³⁴Cf. Case of Moya Chacón et al. v. Costa Rica. *supra*. para. 67.

are who keep society informed, and this is an indispensable requirement for the latter to enjoy full freedom and to enhance public debate.³³⁵

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

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. 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.³³⁶

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, 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. In addition, guarantees should exist that permit the protection of the person sanctioned against disproportionate compensation awards, in relation to the amount established for reputational harm.

The Court recalled that, in the Case of a speech 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.³³⁷ 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, 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.³³⁸ Consequently, 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.³³⁹

³³⁵Cf. Case of Moya Chacón et al. v. Costa Rica. *supra*. para. 69.

³³⁶Cf. Case of Baraona Bray v. Chile. *supra*. para. 114.

³³⁷Cf. Case of Baraona Bray v. Chile. *supra*. para.128.

³³⁸Cf. Case of Baraona Bray v. Chile. *supra*. para.129.

³³⁹Cf. Case of Baraona Bray v. Chile. *supra*. para.130.

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. 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.³⁴⁰

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.³⁴¹

³⁴⁰Cf. Case of Viteri Ungaretti et al. v. Ecuador. Merits, Preliminary Objections, Reparations, and Costs. *supra*, paras. 6 and 98.

³⁴¹Cf. Case of Viteri Ungaretti et al. v. Ecuador. *supra*, paras. 73.

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.³⁴²

The Court highlighted those peaceful protests should not automatically be considered a threat to public order, as an effort 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.³⁴³

Article 17 (Right to Family Life)

The protection of private and family life during house searches

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 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.³⁴⁴ 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

³⁴²Cf. Case of Tavares Pereira et al v. Brasil. Preliminary objections, Merits, Reparations, and costs. Judgment of November 16, 2023, Series C No. 507. paras. 91 - 94.

³⁴³Cf. Case of Córdoba v. Paraguay, supra, para. 71.

³⁴⁴Cf. Case of Valencia Campos et al. v. Bolivia. supra. para.147.

has established that the State is obliged to facilitate the strengthening and development of the family unit. Therefore, the State 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.³⁴⁵

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.³⁴⁶

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.³⁴⁷

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 American Declaration of Human Rights (ADHR) 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.³⁴⁸

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

³⁴⁵Cf. Case of Valencia Campos et al. v. Bolivia. supra. para.148.

³⁴⁶Cf. Case of Valencia Campos et al. v. Bolivia. supra. para. 149.

³⁴⁷Cf. Case of Valencia Campos et al. v. Bolivia. supra. para. 153.

³⁴⁸Cf. Case of María et al. v. Argentina. Merits, Reparations, and Costs. Judgment of August 22, 2023. Series C No. 494, para. 89.

prohibited and that it is the duty of the latter to adopt positive and negative actions to protect individuals from this type of conduct.³⁴⁹ 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.³⁵⁰ 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.³⁵¹

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.³⁵²

Article 19 (Rights of The Child)

The principle of the best interests of the child

The Court understood that, pursuant to Article 19 of the American Convention, the State is obliged to facilitate special measures to guarantee 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.³⁵³

³⁴⁹Cf. Case of Cordoba v. Paraguay, *supra*, para. 99 and Case of María et al. v. Argentina para. 88

³⁵⁰Cf. Case of Cordoba v. Paraguay, *supra*, para. 100 and Case of María et al. v. Argentina para. 89.

³⁵¹Cf. Case of Cordoba v. Paraguay, *supra*, para. 101.

³⁵²Cf. Case of Cordoba v. Paraguay, *supra*, para. 102.

³⁵³Cf. Case of Angulo Losada v. Bolivia. *supra*, para. 98.

The protection of children in the context of an armed conflict

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. 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."³⁵⁴

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.³⁵⁵ 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.³⁵⁶

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.³⁵⁷

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

³⁵⁴Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para.358.

³⁵⁵Cf. Case of Córdoba v. Paraguay, *supra*, para. 71.

³⁵⁶Cf. Case of Córdoba v. Paraguay, para. 73.

³⁵⁷Cf. Case of La Oroya Population v. Peru. Preliminary objections, Merits, Reparations, and costs. Judgment of November 27, 2023, Series C No. 511. para. 141.

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.³⁵⁸

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.³⁵⁹ 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."³⁶⁰

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 to respect 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.³⁶¹

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, as it 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

³⁵⁸Cf. Case of *La Oroya Population v. Peru*, supra, para. 142.

³⁵⁹Cf. Case of *Boleso v. Argentina*. Preliminary objections, Merits, Reparations, and costs. Judgment of May 22, 2023. Series C No. 490, para. 55.

³⁶⁰Cf. Case of *Boleso v. Argentina*, para. 53.

³⁶¹Cf. 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.

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.³⁶²

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, 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 there are legislative or administrative measures that directly affect them.

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 in good faith, with 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.³⁶³

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. 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.³⁶⁴ 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

³⁶²Case of the Garifuna Community of San Juan and its members v. Honduras, Preliminary objections, Merits, Reparations, and costs. Judgment of August 29, 2023. Series C No. 496. paras. 94 - 99.

³⁶³Cf. Case of the Garifuna Community of San Juan and its members v. Honduras, *supra*, para. 119 - 123.

³⁶⁴Cf. 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. 250.

through their own representative institutions and procedures, when faced with the use or exploitation of natural resources in their traditional territory.³⁶⁵

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.³⁶⁶

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

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.³⁶⁷ 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.³⁶⁸

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

³⁶⁵Cf. Case of the Maya Q'eqchi' Indigenous Community of Agua Caliente v. Guatemala, *supra*, para. 251.

³⁶⁶Cf. Case of the Maya Q'eqchi' Indigenous Community of Agua Caliente v. Guatemala, *supra*, para. 252 - 275.

³⁶⁷Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para.304.

³⁶⁸Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para.308.

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 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.³⁶⁹

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.³⁷⁰ 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.³⁷¹

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.³⁷²

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

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.³⁷³

³⁶⁹Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para.309.

³⁷⁰Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para.310.

³⁷¹Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para. 311.

³⁷²Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para.316.

³⁷³Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para.318.

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.³⁷⁴

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.³⁷⁵

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, considering the vulnerability of certain social sectors or groups.³⁷⁶

Women victims of a systematic extermination of a political party

The Court noted that a significant number of the direct victims of the systematic extermination of UP members and militants were women.³⁷⁷ 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.³⁷⁸

³⁷⁴Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para.329.

³⁷⁵Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para.330.

³⁷⁶Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para. 331.

³⁷⁷Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para. 392.

³⁷⁸Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para. 393.

Journalists victims of the systematic extermination of a political party

The Court noted that several of the direct victims of the extermination of the Patriotic Union were journalists.³⁷⁹ 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, and 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.³⁸⁰

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

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.³⁸¹

In this case, 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.³⁸² 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.³⁸³

³⁷⁹Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para. 396.

³⁸⁰Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para. 399.

³⁸¹Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para. 406.

³⁸²Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para. 414.

³⁸³Cf. Case of Members and Militants of the Patriotic Union v. Colombia. *supra*. para. 415.

Article 25 (Right to Judicial Protection)

Special protection of the right to judicial protection of older persons

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. 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.³⁸⁴

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.³⁸⁵ 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.³⁸⁶

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, 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.³⁸⁷

Protection of the right to work of older persons

The Court recalled that older persons have the right to increased protection and, consequently, this requires the adoption of differentiated measures.³⁸⁸ The Court also noted that wages have a nutritional and survival nature as they are necessary to satisfy

³⁸⁴Cf. Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru. *supra*. para. 83.

³⁸⁵Cf. Case of Mina Cuero v. Ecuador. *supra*. para.116.

³⁸⁶Cf. Case of Mina Cuero v. Ecuador. *supra*. para.133.

³⁸⁷Cf. 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.

³⁸⁸Cf. Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru. *supra*. para. 110.

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.³⁸⁹

Right to work of persons with disabilities

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.³⁹⁰

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 respecting the rights of persons with disabilities in the context of administrative and judicial remedies analyzing violations of the right to work. First, 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.³⁹¹

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 lies 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.³⁹²

³⁸⁹Cf. Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru. *supra*. para. 111

³⁹⁰Cf. Case of Guevara Díaz v. Costa Rica. *supra*. para. 73.

³⁹¹Cf. Case of Guevara Díaz v. Costa Rica. *supra*. para. 74.

³⁹²Cf. Case of Pavez Pavez v. Chile. Merits, Reparations and Costs. Judgment of February 4, 2022. Series C No. 449, para. 119.

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.³⁹³

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.³⁹⁴

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 the State since they are not specifically related to religious beliefs or to the organizational life of the communities.³⁹⁵

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.³⁹⁶ 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.³⁹⁷

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

³⁹³Cf. Case of Pavez Pavez v. Chile. supra. para. 124.

³⁹⁴Cf. Case of Pavez Pavez v. Chile. supra. para. 128.

³⁹⁵Cf. Case of Pavez Pavez v. Chile. supra. para. 129.

³⁹⁶Cf. Case of Pavez Pavez v. Chile. supra. para. 130.

³⁹⁷Cf. Case of Pavez Pavez v. Chile. supra. para.131.

therapy; a position that was totally unacceptable from the perspective of the Rule of Law, under which human rights must be respected.³⁹⁸

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.³⁹⁹

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*). 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.⁴⁰⁰

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.⁴⁰¹

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.⁴⁰² 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.⁴⁰³

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, such as guaranteeing [such access] without discrimination and adopting measures to achieve its full realization.” Furthermore,

³⁹⁸Cf. Case of Pavez Pavez v. Chile. *supra*. paras. 134 and 135.

³⁹⁹Cf. Case of La Oroya Population v. Peru, *supra*, para. 118.

⁴⁰⁰Cf. Case of La Oroya Population v. Peru, *supra*, para. 129.

⁴⁰¹Cf. Case of La Oroya Population v. Peru, *supra*, para. 119.

⁴⁰² Cf. Case of La Oroya Population v. Peru, *supra*, para. 120.

⁴⁰³Case of La Oroya Population v. Peru, *supra*, para. 121.

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.”⁴⁰⁴

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.⁴⁰⁵

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.⁴⁰⁶

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 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.⁴⁰⁷

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.⁴⁰⁸

⁴⁰⁴ Cf. Case of La Oroya Population v. Peru, supra, para. 123.

⁴⁰⁵ Case of La Oroya Population v. Peru, supra, para. 124.

⁴⁰⁶ Cf. Case of La Oroya Population v. Peru, supra, para. 133.

⁴⁰⁷ Cf. Case of La Oroya Population v. Peru, supra, para. 204.

⁴⁰⁸ Cf. Case of La Oroya Population v. Peru, supra, para. 207.



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