

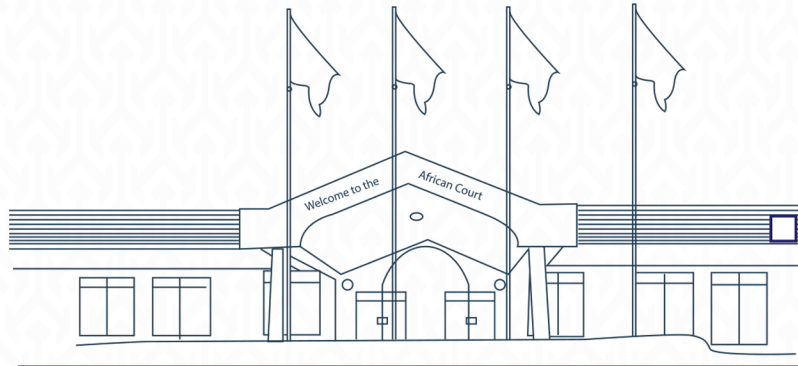


EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

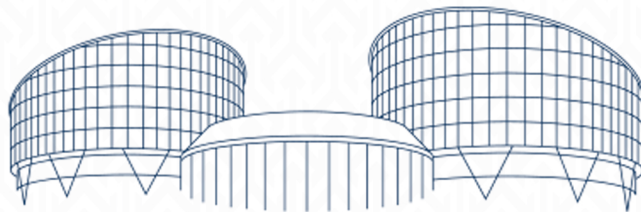


**I/A Court H.R.**  
Protecting Rights

# Joint Law Report 2019



AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS



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



INTER-AMERICAN COURT OF HUMAN RIGHTS

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Inter-American Court of Human Rights

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## **Joint Law Report 2019**

African Court on Human and Peoples' Rights  
European Court of Human Rights  
Inter-American Court of Human Rights

# Foreword

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In recent years the African Court on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights have built a solid judicial dialogue. This Joint Law Report 2019 is the product of their cooperation.

On July 18, 2018, on the occasion of the 40<sup>th</sup> anniversary of the entry into force of the American Convention on Human Rights, the three regional human rights courts of the world met in the seat of the Inter-American Court in San Jose, Costa Rica. Considering the benefits of institutional and jurisprudential dialogue, they adopted a historic Declaration. The Declaration of San Jose highlighted the relevance of this cooperation. It established a Permanent Forum of Institutional Dialogue that aimed to strengthen the protection of human rights and access to international justice of the people under the jurisdiction of the three courts. The said Permanent Forum of Institutional Dialogue will take place every two years.

On October 28 and 29, 2019, the African Court hosted the First International Human Rights Forum in Kampala, Uganda, as stated in the Declaration of San Jose. The Forum was a unique opportunity for the three courts to sit together and reflect on the human rights challenges faced by humanity. It was also a privileged occasion to exchange points of views regarding procedural and substantial issues and to share conceptual and jurisprudential standards of each Court for the common benefit. As result of the Forum, the three courts adopted the Kampala Declaration.

The Joint Law Report 2019 is a product of the Declarations of San Jose and Kampala. It is a first effort to present, in a single volume, a selection of the leading decisions delivered by each court in 2019. In addition to their importance in their own right, some of these decisions also serve to illustrate how the courts are increasingly having regard to each other's approach to human rights protection.

The value of this first Joint Law Report 2019 cannot be overstated. On the one hand, there is a similarity in the rights and freedoms protected by the respective treaties governing the work of the three courts. On the other, there is an increasing similarity of issues brought before each of the courts in their respective continents. Therefore, judicial dialogue may serve as a key instrument to enhance the protection of human and peoples' rights and access to justice of the people under their jurisdictions.

The Report is divided in three sections corresponding to the African Court on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights. In every section, each Court's Registry has selected the cases that represent new standards or innovative developments in its year-2019 jurisprudence. We have kept the structure, format and quotations of each sections corresponding to the ones used by each court. Therefore, they may vary from one section to the other.

We hope that this selection will assist in showing both the similarities and where the judicial approach differs. Moreover, this Joint Law Report 2019 aims to be a useful tool for human rights legal practitioners in Africa, Europe and Latin America.

**Judge Sylvain Oré**  
President of the African Court of  
Human and Peoples' Rights

**Judge Robert Spano**  
President of the European Court  
of Human Rights

**Judge Elizabeth Odio Benito**  
President of the Inter-American  
Court of Human Rights



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**DEVELOPMENTS IN THE CASE LAW OF  
THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS  
2019**

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# Developments in the Case-Law of the African Court of Human and Peoples' Rights

## Presentation

In July 2019, during its 52<sup>nd</sup> Ordinary Session, the African Court on Human and Peoples' Rights (the African Court) published the first volume of its Law Report<sup>1</sup>, grouping decisions adopted since its establishment in 2006. The Court has made it a point to ensure the law report is published annually, and has since published a second volume in November 2019, which includes decisions delivered in the years 2017 and 2018. The third volume of the report is in preparation and will include decisions delivered during the year 2019. The African Court Law Report brings the Court to the public through its case law and also enables the Court to receive feedback from the public.

It was thus enlightening when the three main regional Courts (African, Inter-American and European), in the Kampala Declaration adopted during the First International Human Rights Forum hosted by the African Court in October 2019, called for a joint publication of the leading judgments of the three Courts. It is my hope that through this publication, the three regional courts will not only strengthen their already good relationship, but will further reinforce, through their jurisprudence, the notion of universality and interdependency of human rights, as well as learn from the specificity of each region.

This tripartite joint publication will be an annual digest featuring the judgments, with short commentaries, of landmark decisions of the three courts. It is a complement rather than a substitute to the annual editions of the African Court Law Reports.

This inaugural edition of the publication features landmark decisions of the African Court delivered during the year 2019, and from these decisions can be discerned the centrality of the Court in human rights dispute resolutions on the continent. The judgments deal with a wide range of human rights issues shaping the socio-economic and political landscape of the continent, including issues of access to the Court, its jurisdiction and the admissibility of cases before it; fair trial rights, especially the right to be tried by an impartial tribunal; freedom of movement; right to liberty; right to life and compatibility of mandatory death penalty; legal personality and the right to nationality; the right to participate in government, and related citizenship rights; the right to reparation, including the concept of loss of future opportunities.

Since its operationalization in 2006, the Court has, through its decisions, charted a viable path for the protection of human and peoples' rights on the continent. The Court has brought about renewed hope and optimism within the African human rights system, and positions itself firmly as a veritable instrument in the quest for regional integration, peace, unity, good governance, respect for human rights and development.

The present chapter on the African Court's case law for the year 2019 features the above stated contribution of the Court to the realization of human rights but also good governance and the rule of law as they feature in the objectives of the African Union. The chapter also presents the contribution of the Court to the global discourse on human rights and offers an opportunity for jurisprudential cooperation and exchange of judicial law making knowledge with the sister courts in the Americas and Europe.

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

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<sup>1</sup> See African Court Law Report, Volume 1 (2006-2016) <https://en.african-court.org/index.php/publications/african-court-law-report> (accessed 12 August 2020).

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# Right to life and mandatory death penalty (article 4 of the African Charter)

## *Ally Rajabu and Others v. United Republic of Tanzania*

Application No. 007/2015

Judgment of 28 November 2019 (merits and reparations)

### 1. Facts

The Applicants, Ally Rajabu, Angaja Kazeni alias Oria, Geoffrey Stanley alias Babu, Emmanuel Michael alias Atuu and Julius Petro are nationals of Tanzania who were sentenced to death for murder. They filed an Application before the Court on 26 March 2015 alleging the violation of certain fair trial rights during the proceedings before domestic courts.

### 2. Alleged violations

The Applicants alleged that the provision in the Penal Code of Tanzania on the mandatory imposition of the death penalty in cases of murder and the imposition of that penalty by domestic courts constituted a violation of their right to life guaranteed by Article 4 of the African Charter on Human and Peoples' Rights (the African Charter or the Charter). They further alleged that their execution by hanging as ordered by domestic courts violates their right to dignity protected under Article 5 of the Charter.

On 18 March 2016, the Court issued an Order for Provisional Measures in the matter enjoining the Respondent State not to implement the death sentence until this Application is concluded on the merits.

### 3. Submissions of the Parties and findings of the Court

The Rajabu judgment is of a critical importance in the case law of the African Court but also generally in the African human rights system as it was the first time the Court determined whether the mandatory imposition of the death penalty is a violation of the right to life under Article 4 of the Charter. It was therefore the first judicial pronouncement at the continental level on the right to life and the exception thereto in relation to the imposition of the death penalty under Article 4 of the Charter. The case therefore provided the Court with an opportunity to not only rule on that specific issue but also to set out the standards that are applicable to the implied exceptions to the right to life under Article 4 of the Charter as they relate to imposition of the death penalty.

**i. Assessing reasonableness of time taken to conclude proceedings should involve consideration of facts and law, and scheduling constraints of the domestic judicial system in cases involving imposition of the death sentence, Article 7(1) (d) of the Charter**

The Applicants alleged that the time of over four (4) years that it took the Court of Appeal to complete the review process violated their right to be tried within a reasonable time. The Respondent State averred rather that the delay was attributable to the Applicants who failed to file a copy of the review application.

It is worth recalling that, in matters such as *Norbert Zongo and Others v. Burkina Faso*<sup>2</sup>, and *Armand Guehi v. United Republic of Tanzania*<sup>3</sup>, the Court had dealt with the issue of reasonable time in adjudicating cases in

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<sup>2</sup> *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v. Burkina Faso (merits)* (2014) 1 AfCLR 219. *See also des Droits de l'Homme et des Peuples v. Burkina Faso (merits)* (2014) 1 AfCLR 219.

<sup>3</sup> *Armand Guehi v. United Republic of Tanzania (merits and reparations)* (2018) 2 AfCLR 477.

domestic courts; and set out a general benchmark of assessment on a case-by-case basis with a wide range of factors to be considered including the situation of the applicants, the duty of judicial authorities of the Respondent State to act in an expedited manner, and circumstances of the case at hand.<sup>4</sup>

One such leading case is that of the *Guehi v. Tanzania* where the Applicant had remained in custody for one (1) year, ten (10) months and six (6) days, during the investigation of his trial for murder, due to errors in proceedings. The Court found that in circumstances where the Applicant was in custody and did not impede the process, the Respondent State bore an obligation to ensure that the matter was handled with due diligence and expeditiously. Moreover, the Court noted that the delay was not caused by the complexity of the case. Finally, it noted that even after charging the Applicant afresh, the Respondent State's courts adjourned the matter on numerous occasions and it still took about two (2) years and six (6) months, before the trial actually started and the Court therefore decided that the length of the proceedings cannot be considered as reasonable<sup>5</sup>.

In the *Rajabu* case, the Court examined the allegation against the complexity of the matter and the behaviour of the Parties. On the first factor, the Court considered that the delay related to a review process which only involved the Court of Appeal examining issues that had been adjudicated twice by the High Court and the Court of Appeal itself, both in fact and in law, and therefore did not require so much time for completion.<sup>6</sup> The Court thus found that the complexity of the case was not a determinant in assessing reasonableness<sup>7</sup>.

On the second factor, that is the Parties' behaviour, the Court stated the issue as being that of who was responsible for the delay of the review proceedings. The Court first found that the Applicants did not provide the required documentation on time and did not prove failure and lack of due diligence on the part of the Respondent State.<sup>8</sup> Considering that the review was completed within a year of the filing of the proper documents, the Court found that the Court of Appeal needed some minimum time to give an ultimate ruling in a case of death penalty; and also that scheduling constraints in the domestic judicial system should be considered<sup>9</sup>.

The Court therefore found that the Respondent State did not violate the Applicants' right to be heard within a reasonable time protected under Article 7(1)(d) of the Charter.

**ii. Mandatory imposition of death penalty constitutes “arbitrary” deprivation of life, in breach of fairness and due process, as it takes away the inherent discretion of the judicial officer, Article 4 of the Charter (joint reading with Articles 7(1) and 26 of the Charter)**

The Applicants alleged that by providing in Section 197 of its Penal Code for the mandatory imposition of the death penalty, the Respondent State violated their right to life. The Respondent State submitted that the provision for the death penalty in its laws is in line with international norms, which do not prohibit the imposition of that sentence.

The Court first set out that being raised as a violation of Article 4 of the Charter, the Applicants' claim pertained to whether the mandatory imposition of the death penalty under Section 197 of the Tanzanian Penal Code constituted an arbitrary deprivation of the right to life<sup>10</sup>. On the arbitrary nature of the imposition of the death penalty, the Court relied on the jurisprudence of the African Commission on Human and Peoples' Rights to

<sup>4</sup> See *Guehi* (merits and reparations), §§ 122-124. See also *Alex Thomas v. Tanzanie* (merits) (2015) 1 AfCLR 465, § 104; *Wilfred Onyango Nganyi and Others v. United Republic of Tanzania* (merits) (2016) 1 AfCLR 507, § 155; and *Norbert Zongo and Others v. Burkina Faso* (merits) (2014) 1 AfCLR 219, §§ 92-97, 152.

<sup>5</sup> See *Guehi*, *idem*.

<sup>6</sup> *Ally Rajabu and Others v. United Republic of Tanzania*, AfCHPR, Application No. 007/2015, Judgment of 28 November 2019 (merits and reparations), § 67.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, §§ 68-71.

<sup>9</sup> *Ibid.*, § 72.

<sup>10</sup> *Ibid.*, §§ 96-97.

establish three criteria for assessment: first, the sentence must be provided for by law; second, it must be imposed by a competent court; and finally, it must abide by due process<sup>11</sup>.

Having established that the death penalty is provided for in the Respondent State's Penal Code; and that both the High Court and Court of Appeal were competent to impose the sentence, the Court proceeded to examine whether the imposition as provided was in compliance with due process. On that point, the Court referred to a joint reading of Articles 1, 7(1) and 26 of the African Charter to find that due process encompasses not only procedural rights but also any rights related to the sentencing process, especially the discretion of courts to take into account particular circumstances of the accused<sup>12</sup>. The Court found that mandatory imposition of the death penalty is automatic and mechanical as applied by the High Court in the case of the Applicants;<sup>13</sup> that as such the provision of the sentence and its imposition do not permit consideration of mitigating evidence; applies to accused persons without distinction; takes away the discretion inherent in the judicial officer; and does not consider proportionality between the facts and the penalty<sup>14</sup>. The Court found as a consequence that the mandatory provision and imposition of the death sentence under the Respondent State's Penal Code does not uphold fairness and due process as guaranteed under Article 7(1) of the Charter<sup>15</sup>.

In light of this finding, the Court further found that lack of mention of the death penalty in Article 4 of the Charter and the strongly worded provision for the right to life therein are to the effect that the failure of the mandatory death sentence to pass the test of fairness renders the mandatory death penalty conflicting with the right to life under Article 4.<sup>16</sup> Against the abolition of the death penalty in some circumstances by the Second Optional Protocol to the ICCPR; the African Charter on the Rights and Welfare of the Child; the Maputo Protocol and Women's Rights in Africa,<sup>17</sup> the Court held that the mandatory death sentence for murder in Section 197 of the Tanzanian Penal Code constitutes an arbitrary deprivation of the right to life and therefore that the Respondent State has violated Article 4 of the Charter<sup>18</sup>.

**iii. Execution of the death sentence by hanging is a breach of the right to dignity as a consequence of the arbitrary imposition of the sentence, Article 5 of the Charter**

The Applicants alleged that the execution of the death penalty by hanging violates the right to dignity. The Respondent State submitted that the death penalty is not abolished in international law.

The Court found that methods of implementing the death penalty amount to torture; and inhuman and degrading treatment given the suffering inherent thereto; that due to the arbitrary nature of the mandatory imposition of the death penalty, its execution by hanging is consequently and inevitably in violation of the right to dignity in respect of the prohibition of torture and inhuman and degrading treatment<sup>19</sup>. The Court therefore found that the Respondent State has violated Article 5 of the Charter.

11 See *Interights and Others* (on behalf of Bosch) v. Botswana, §§ 42-48. See *International Pen and Others* (on behalf of Saro-Wiwa) v. Nigeria, Communications 137/94, 139/94, 154/96, 161/97 (2000) AHRLR 212 (ACHPR 1998), §§ 1-10, § 103. See *Forum of Conscience v. Sierra Leone*, Communication 223/98 (2000) AHRLR 293 (ACHPR 2000), § 20.

12 *Rajabu*, op. cit., § 107

13 *Ibid.*, § 108

14 *Ibid.*, § 109

15 *Ibid.*, § 111.

16 *Ibid.*, § 112.

17 See Article 3 of the Universal Declaration of Human Rights (which has authority in customary international law, and has inspired subsequent binding international human rights instruments); Articles 1 and 2 of the Second Optional Protocol to the International Covenant on Civil and Political Rights (which abolishes the death penalty in peacetime), Articles 5(3) and 30(e) of the African Charter on the Rights and Welfare of the Child, and 4(2)(j) of Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (both instruments place restrictions on the application of the death penalty).

18 *Rajabu*, op. cit., § 114.

19 *Ibid.*, §§ 118-119.

**iv. Obligation to give effect to rights guaranteed in the Charter involves aligning domestic law with the Charter, Article 1 of the Charter**

The African Court has developed a consistent case law on the breach of Article 1 of the Charter as a result of a violation of any substantive provision of the Charter. The Court has stressed in particular the two-fold aspect of the obligation arising from Article 1 that is an obligation of both means and result<sup>20</sup>.

In the *Rajabu* case, the Applicants alleged that by not amending its law to remove the mandatory death sentence, the Respondent State had allowed its courts to impose the sentence, therefore violating its obligation in Article 1 of the Charter to give effect to the right to life protected in Article 4 of the Charter. The Respondent State averred that the death sentence is allowed in international law.

The Court restated its case law that violations of substantive provisions of the Charter will amount to a consequent violation of Article 1. The Court found that, the Respondent State having enacted its Penal Code or amended it subsequent to the entry into force of the African Charter, the Respondent State was under the duty to bring the Code in line with the Charter upon ratification.<sup>21</sup> The Court therefore found that the failure to do so and its finding of violations of Article 4 and 5 of the Charter amount to a violation of Article 1.

**v. The mandatory imposition of the death penalty inherently causes moral prejudice, which warrants reparations even when the sentence is not carried out, Article 27 of the Protocol**

The Applicants prayed the Court to grant them damages for the moral prejudice that ensued from their trial and imprisonment. The Court dismissed the prayer on the ground that it did not make any finding to the effect that their incarceration was unlawful.<sup>22</sup>

The Court made the same finding with respect to anguish due to trial and imprisonment. However, in light of its finding that the mandatory imposition of the death penalty violates the right to life, the Court found that since moral prejudice is presumed in cases of human rights violation<sup>23</sup>; the mandatory imposition of the death penalty caused moral prejudice; particularly since the death penalty is one of the most severe punishment with the gravest psychological consequences as the sentenced persons are bound to lose their ultimate entitlement that is life;<sup>24</sup> that the prejudice was effective from the date of the judgment of the High Court sentencing the Applicants to death; that eight (8) years elapsed until the present Judgment<sup>25</sup>; that the waiting added to the psychological tension experienced by the Applicants who lived for that long with the uncertainty as to when they would be executed.<sup>26</sup>

As a consequence of these findings, the Court awarded each of the Applicants the amount of Tanzanian Shillings Four Million (TZS 4,000,000) as moral damages.

**vi. Reparation should be limited to the mandatory nature of the death penalty and translate into setting aside and substituting the sentence, Article 27 of the Protocol**

The Applicants prayed the Court to quash their conviction, set aside the sentence and order their release. The Court dismissed the prayers for the conviction to be quashed on the ground that its findings did not affect the

20 See *Guehi*, op. cit., §§ 149-150. See also *Kennedy Owino Onyachi and Another v. United Republic of Tanzania* (merits) (2017) 2 AfCLR 65, §§ 158-159; *Thomas*, op. cit., § 135.

21 *Rajabu*, op. cit., §§ 124-125.

22 *Ibid.*, § 145.

23 *Ibid.*, §§ 146.

24 *Ibid.*, § 147.

25 *Ibid.*, § 148.

26 *Idem*.

Applicants' conviction<sup>27</sup>.

With respect to the prayer that the sentence should be set aside, the Court found that, given its finding that the mandatory imposition of the death penalty violated the right to life protected in Article 4 of the Charter; however, in light of its further finding that its decision in the present Judgment did not affect the Applicants' conviction, their sentencing is affected only to the extent of the mandatory nature of the penalty, therefore a remedy is warranted only in so far as their sentence is concerned<sup>28</sup>.

The Court therefore ordered the Respondent State to set aside the sentence and replace it with any other sentence that it will deem appropriate within its internal processes. This order is to be implemented within one (1) year of the notification of the Judgment.

The Court dismissed the Applicants' prayer for release on the same ground stated above in relation to the prayers for the conviction to be quashed<sup>29</sup>.

**vii. Guarantee of non-repetition in a case of mandatory imposition of the death penalty requires a systemic measure, Article 27 of the Protocol**

The Applicants prayed the Court to order the Respondent State to guarantee non-repetition of the violations. The Court found that its finding that the death penalty meted against the Applicants should be set aside amounts to a guarantee of non-repetition since it will inevitably require a change in the law<sup>30</sup>.

The Court therefore made a consequential order that the Respondent State undertakes the necessary measures to repeal from its Penal Code the provision for the mandatory imposition of the death penalty in cases of murder. This order is to be implemented within one (1) year of the notification of the Judgment<sup>31</sup>.

**viii. Publication of a judgment is warranted where the pronouncement is systemic in nature and involves the right to life as a supreme right in the Charter, Article 4 of the Charter, Article 27 of the Protocol**

Although the Applicants did not pray for the publication of the Judgment, the Court recalled that it can order publication *suo motu* where it deems this necessary.<sup>32</sup> The Court found that the violation of the right to life by provision for the mandatory imposition of the death penalty is established beyond the case of the Applicants; and is therefore systemic in nature;<sup>33</sup> that the finding bears on a supreme right in the Charter that is life; that an order for publication is therefore warranted for these reasons.<sup>34</sup>

The Court therefore ordered the Respondent State to publish the Judgment on the websites of the Judiciary and the Ministry of Constitutional and Legal Affairs and avail it for at least one (1) year after the date of publication. This order is to be implemented within three (3) months of the notification of the Judgment.

Justice Blaise Tchikaya appended a separate opinion to this judgment. In his opinion, he took the view that the distinction adopted by the Court between the death penalty and the mandatory death penalty is irrelevant,

27 *Ibid.*, § 156-160.

28 *Ibid.*, § 158.

29 *Ibid.*, § 159.

30 *Ibid.*, § 163.

31 *Idem*.

32 See *Guehi*, op. cit., § 194; *Reverend Christopher R. Mtikila v. United Republic of Tanzania* (reparations) (2014) 1 AfCLR 72, §§ 45 and 46(5); and *Norbert Zongo and Others v. Burkina Faso* (reparations) (2015) 1 AfCLR 258, § 98.

33 *Rajabu*, op. cit., § 166.

34 *Idem*.

relative and insufficient. He advances that such a distinction sounds like there is higher death penalty, which would apply to higher offences. In the opinion of the Judge, a single regime should apply to both the mandatory and non-mandatory death penalties because the current state of international law does not distinguish between the two types of death penalties. He invokes the Second Optional Protocol to the ICCPR, and Protocol 13 to the European Convention on Fundamental Rights and Freedoms and takes the view that the African Court adopted a restrictive reading of Article 4 of the African Charter, which provides for the right to life.

The Judge advances that the African Court should have sufficiently considered the “quasi total trend against the death penalty” in Africa as exemplified by over twenty (20) countries being de facto abolitionist and many others having moratorium in force. Furthermore, Article 4 of the Charter which proclaims an absolute right to life does not make any mention of the death penalty. The Judge took the opinion that, therefore, by ordering the Respondent State to take remedial measures only with respect to the mandatory death penalty leaves loopholes for a breach of an absolute right to life under Article 4 of the Charter.

## **Right to legal personality and nationality (article 5 of the African Charter)**

### ***Robert John Penessis v. United Republic of Tanzania***

Application No. 013/2015

Judgment of 28 November 2019

#### **1. Facts**

The Applicant, Robert John Penessis, is an individual who claimed to be a Tanzanian citizen. On 8 January 2010, he was arrested and subjected to legal proceedings for illegal entry and presence in the territory of the Respondent State. He was subsequently sentenced on 17 January 2011, to a fine of Eighty Thousand Tanzanian Shillings (TZS 80,000) or, in default, to two (2) years in prison, a sentence subsequently upheld by both the High Court and the Court of Appeal of the Respondent State. The Applicant maintained that he is Tanzanian by birth just like his parents.

#### **2. Alleged violations**

The Applicant alleged that the Respondent State violated his right to nationality, his right to freedom of movement and his right not to be unlawfully detained which are all protected by the Tanzanian Constitution, Article 59(1) of the Additional Protocol 1 to the Geneva Convention and Articles 1 to 4 of the 1949 Geneva Convention. He further alleged the violation of Articles 1 and 12(1) and (2) of the African Charter.

#### **3. Submissions of the Parties and finding of the Court**

- i. An application filed by means of a simple letter is admissible so long as it contains sufficient information for its processing and examination**

The Respondent State argued that the document originally filed by the Applicant is not an Application within the meaning of the Protocol as it was a mere letter from the Applicant's grandmother, Georgia J Penessis to the Court, asking for directions as to how to pursue her complaints; that it did not contain all the requirements of a standard Application and especially that since it did not contain any undertaking to pursue the matter before the Court, it was incomplete and thus the Court has no jurisdiction to admit or hear this Application.

The Applicant disputed the Respondent State's assertion and argued that the grievances raised by his grandmother and the information given in the letter have the force of an application because all the necessary information is contained therein.

The Court at the outset noted that the question of the form of the letter and its content relate to the issue of admissibility and not of jurisdiction. On this basis, the Court observed that in so far as the form or modality of seizure is concerned, it has adopted a flexible approach in its previous jurisprudence. In this regard, it recalled the case of *Anudo Ochieng Anudo v. United Republic of Tanzania*<sup>35</sup>, where it decided to admit an application filed via email and communicated as such. According to the Court, the question of whether a particular application qualifies as a proper one depends on the specific conditions of each applicant and the circumstances surrounding its filing. In this regard, the most important thing is that the application offers sufficient details to the Respondent State to understand the content of the Applicant's grievances and for the Court to consider the matter. On this basis, the Court found that the letter sent by the Applicant's grandmother fulfilled the requirements of an application.

**ii. Nationality is an implied right from the right to “recognition of legal status”, Article 5 of the Charter**

Here is the fundamental issue arising in this case, for the first time the Court determined that there is a right to nationality under Article 5 of the Charter even though the said provision does not expressly provide for the right. This finding of the Court constitutes a new development but also a departure from its precedent in the *Anudo* case<sup>36</sup>.

It is worth noting that the Court mainly drew from the interpretation previously adopted by the African Commission on Human and Peoples' Rights in the matter of *Open Society Justice Initiative v. Côte d'Ivoire*<sup>37</sup>. The Court's pronouncement in *Penessis* is aligned to a law development based on recent consensus within the African Union on the right to nationality<sup>38</sup>.

**iii. The evidentiary standard of “he who alleges bears the onus of proof” applies in context in establishing nationality – onus is borne by both parties where evidence is likely to be controlled by Respondent State, general principle of law**

On the onus of proof, the Court noted that the general rule is that anyone who alleges a fact shall prove it. However, recalling its jurisprudence in the matter of *Kennedy Owino and Another v. Tanzania*<sup>39</sup>, the Court observed that this rule cannot be applied rigidly in human rights cases, especially when “the means to verify the allegation are likely to be controlled by the State”. It held that, in such instances, the onus of proof should be borne by both parties.

In view of this, the Court observed that the Applicant who alleges that he holds a certain nationality bears the onus of proof. Once he has discharged the *duty prima facie*, the burden shifts to the Respondent State to prove otherwise. In determining nationality, a person whose nationality is being questioned only needs to provide a minimum level of justification of a link with the concerned State. Once this is done, it is incumbent on the latter to prove the contrary beyond reasonable doubt, failing which, a link of nationality is presumably established.

35 *Anudo Ochieng Anudo v. Republic of Tanzania* (merits) (2018) 2 AfCLR 248.

36 *Idem*.

37 Communication 318/06, *Open Society Justice Initiative v. Republic of Côte d'Ivoire*, §§ 95-97

38 See Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to Nationality and the Eradication of Statelessness in Africa [https://au.int/sites/default/files/newsevents/workingdocuments/35139-wd-pa22527\\_e\\_origina-lexplanatory\\_memoandum.pdf](https://au.int/sites/default/files/newsevents/workingdocuments/35139-wd-pa22527_e_origina-lexplanatory_memoandum.pdf) (accessed 12 August 2020).

39 *Kennedy Owino Onyachi & Charles John Mwanini Njoka v. United Republic of Tanzania* (merits) (2017) 2 AfCLR 65.

Relying on these principles, the Court noted that the Applicant provided a copy of his birth certificate showing that he was born in Tanzania and an emergency temporary travel document was issued to him, pending issuance of his passport. These two documents were provided by the authorities of the Respondent State. The Court observed that, according to the Respondent State's 1995 Citizenship Act, at the time of the Applicant's birth, that is, 1968, a person could acquire Tanzanian nationality by birth if that person was born in the United Republic of Tanzania after Union Day, provided either of his parents is Tanzanian.

In this vein, the Court observed that Anastasia Pennesis who claimed to be the Applicant's mother appeared before the Court and testified that her son, the Applicant, was born in Buguma Estate, Tanzania, in 1968, where the family has property. The Court further noted that the same name of Anastasia Penessis is on the copy of the birth certificate indicated as the mother of the Applicant and recognized as Tanzanian. This, and the fact that the birth certificate clearly shows that the Applicant was born in Tanzania, in the opinion of the Court, established a presumption that the Applicant is a Tanzanian by birth and it was for the Respondent State to refute this presumption.

The Court then proceeded to examine the Respondent State's contention that the said birth certificate was fraudulent and that the Applicant had British and South African passports, which the Respondent State adduced copies thereof. The Court noted that these passports bore different names and the Respondent State did not provide compelling evidence to substantiate its averment that both passports belong to the Applicant. The Court also noted that the Applicant refused to acknowledge those passports as his.

The Court observed that all the documents tendered by the Parties are copies or certified copies and that neither of them adduced original documents. In the circumstances, the Court held that the Respondent State, as a depositary and guarantor of public authority and custodian of the civil status registry, had the necessary means to correctly establish whether the Applicant was a Tanzanian, South African or a British citizen. The Respondent State could also have obtained and produced concrete evidence but which it failed to, to support its assertion that the Applicant held other nationalities, which, according to Tanzanian law, would have meant that the Applicant had renounced his Tanzanian nationality. In view of this, the Court concluded that the Applicant's right to Tanzanian nationality has been violated, contrary to Article 5 of the Charter and Article 15 of UDHR.

#### **iv. The breach of the right to liberty is consequential to that of the right to nationality and to resident status, Article 6 of the Charter**

On the Applicant's allegation that the Respondent State violated his right to liberty by unlawfully imprisoning him, the Court noted that the Applicant was initially detained on the basis of the Respondent State's criminal laws for having allegedly entered and stayed in its territory unlawfully. The Applicant's conviction for the same was premised on the assumption that he was not a Tanzanian national.

However, the Court recalling its earlier finding that the Respondent State has not provided evidence to substantiate that the Applicant is not a Tanzanian before or at the time of his arrest or conviction, it held that his arrest, conviction and detention were unlawful. The Court stressed that the Applicant remained in prison notwithstanding that he fully served the two (2) years' imprisonment from by 2012 in default of the fine to be paid following his conviction. The Court also emphasised that his alleged refusal to cooperate for the purpose of his expulsion is not a reasonable justification for the Respondent State continuing to keep him in prison indefinitely.

Accordingly, the Court held that the Applicant's arrest and indefinite detention on the ground that he was not a national of Tanzania was a violation his right to liberty. As the Applicant was presumably a Tanzanian by birth, restriction of his liberty on such ground was not compatible with Article 6 of the Charter.

**v. Freedom of movement is breached as a consequence of the established violation of the rights to liberty and nationality, Article 12 of the Charter**

The Applicant asserted that as a national of the Respondent State, he was entitled to fully enjoy his rights and should not have been arrested or unlawfully detained. He averred further that his conviction and sentence to two (2) years in prison, that is, from 2010 to 2012 and his continued detention to this date, are illegal and in violation of his right to freedom of movement protected under Article 12 of the African Charter.

The Court, applying the same reasoning it used to find a violation of the Applicant's right to liberty, noted that the Applicant is presumed to be a national of the Respondent State and as such, was considered to have been "lawfully present" in the territory of the Respondent state within the terms of Article 12 of the Charter. Consequently, the Applicant had the right to exercise his right to freedom of movement and his arrest, conviction, sentencing, imprisonment and subsequent continued detention even after having served the two (2) years prison sentence were unjustified and thus, contravene the Applicant's right to freedom of movement.

**vi. Moral prejudice is presumed and warrants damages where breach of liberty is established as a consequence of deprivation of nationality**

The Court noted that Article 27(1) of the Protocol provides that "If the Court finds that there has been a violation of a human and peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation".

The Court derives its power to grant reparations from Article 27(1) of the Protocol. While the Court requires documentary evidence in support of claims for material prejudice, it has used its long standing precedent that moral prejudice is presumed once a human rights violation is established.

The Applicant contended that having been illegally detained for a period of one hundred and two (102) months, he requested United States Dollars one hundred and thirteen thousand three hundred and thirty-three dollars (US\$113,333) for moral damages.

The Respondent State, for its part, contended that a link between the alleged violation and the prejudice suffered must be established and that the Applicant bears the burden of proof in this regard.

The Court observed that the Applicant's illegal detention since 2010 not only breached his right to liberty and freedom of movement but also undoubtedly disrupted his normal life and jeopardized his social status; thereby, causing the Applicant serious physical deterioration and moral anguish. This according to the Court was warranted granting the Applicant's prayer for reparation pursuant to Article 27(1) of the Protocol for the moral prejudice suffered during his illegal detention. The Court thus, awarded him the amount of ten million Tanzanian Shillings (TZS 10,000,000) as fair compensation for the moral damage he suffered from 2012 to the date of the judgment, and three hundred thousand Tanzanian Shillings (TZS 300,000) for every month he remains in detention after the judgment is notified to the Respondent State until the date he is released.

**vii. Prejudice to close family members is presumed as indirect victims and warrants an award for moral damages**

The Applicant also indicated that his mother suffered as an indirect victim as a result of her son's absence on account of the unlawful detention and accordingly, requested the Court to grant United States Dollars two hundred and sixty-one thousand one hundred and eleven dollars (US\$261,111) to his mother, Anastasia Penessis, as an indirect victim.

For the Respondent State, the Applicant did not provide any evidence of a relationship between him and any indirect victim, and also did not provide any evidence showing that indirect victims suffered as a result of his detention.

The Court observed that according to its established jurisprudence, members of an Applicant's family who suffered either physically or psychologically from the prejudice suffered by the victim are also considered as "victims" and may also be entitled to reparation.

The Court noted that in the natural order of family relationships, it is reasonable to presume that a mother would suffer psychologically as a result of the [unlawful] arrest and [unlawful] long detention of her son. The Applicant's unlawful and prolonged detention presumably had adverse consequences on his mother's social and psychological condition. Accordingly, the Court granted the Applicant's prayers for reparation for his mother as an indirect victim and awarded her Tanzanian Shillings Five Million (TZS 5,000,000) as moral damages.

**viii. Undue and excessive detention as a consequence of breach of nationality, and liberty constitutes "exceptional circumstances" which requires no proof and warrants immediate release**

Citing the unlawful nature of his detention, the Applicant prayed the Court to order his release. The Respondent State submitted that the Applicant's detention was in accordance with the law as it was based on a Court Order and an expulsion Order issued by the competent authority.

The Court indicated that a measure such as the release of the Applicant may be ordered only in exceptional or compelling circumstances. In the instant case, the Court noted that the fact that the Applicant was still in detention more than six (6) years after the end of his prison term is not disputed by the Respondent State. For the Court, this unlawful detention constituted proof of the existence of compelling circumstances. As a result, it granted the Applicant's request and ordered the Respondent State to immediately release him from prison.

This position of the Court builds on its precedent in the case of *Alex Thomas v. Tanzania*<sup>40</sup>. The Court developed its precedent further as it is applied in circumstances where due to the breach of the right to nationality, and liberty are the constitutive elements of "exceptional circumstances" and detention could be remedied only by immediately releasing the Applicant from prison. In this regard, it underlined that the existence of such circumstances must be determined on a case-by-case basis, taking into account mainly the proportionality between the reparation sought and the extent of the violation established.

## **Right to be tried by an impartial tribunal, Article 7(1)(d) of the Charter**

### ***Alfred Agbesi Woyome v. Republic of Ghana***

Application No. 001/2017

Judgment of 28 June 2019 (Merits and Reparations)

#### **1. Facts**

The Applicant, Alfred Agbesi Woyome, is a national of the Republic of Ghana. He is also a business man, a Board chairman and Director in three (3) companies, namely, Waterville Holding (BVI) company, Austro-Investment Company and M-Powapak Gmb Company.

The Application arose arising from engineering financial services the Applicant alleged to have provided to the

<sup>40</sup> *Thomas* (merits) op. cit., § 157; *Mgosi Mwita Makungu v. United Republic of Tanzania* (merits) (2018) 2 AfCLR 550, § 84.

Respondent State pursuant to an agreement for securing funds for the rehabilitation of the Accra and Kumasi Sports Stadia for the Confederation of the African Cup of Nations Tournament of 2008. According to the Applicant, the Respondent State did not abide by the terms of the agreement regarding the services to be provided and his attempts to have his rights upheld in domestic courts led the latter to further allege violations his rights guaranteed in the Charter.

## **2. Alleged violations**

The Applicant alleged that the Review Bench of the Supreme Court of the Respondent State, violated his rights protected by the Charter namely: the Right to non-discrimination, guaranteed under Article 2, the right to equality before the law and equal protection of the law, guaranteed under Article 3; and the right to have one's cause heard, guaranteed under Article 7.

With respect in particular to the right to be tried by a competent tribunal, the Applicant alleged the violation of the right to be heard by a competent tribunal occasioned by the Review Bench of the Supreme Court not referring the matter back to High Court as ordered by the Ordinary Bench of the Supreme Court. The Applicant further alleged the violation of his right to be tried by an impartial tribunal on two grounds namely: a) Whether the participation of eight Judges at both the Ordinary and Review Benches cast doubt on the impartiality of the Supreme Court and; b) Whether some remarks made by a Judge (Justice Samuel Dotse) in a Concurring Opinion to a decision delivered by the Ordinary Bench and his subsequent participation in a Review Bench that considered the matter called into question the impartiality of the whole Review Bench of the Supreme Court. Finally, he alleged that his rights to non-discrimination and to equality before the law and equal protection of the law were violated as a result of Justice Dotse's remarks and by the Supreme Court truncating the proceedings and not referring the matter to the High Court.

This judgment is important since it is the first time the Court was explicitly considering the issue of the impartiality regarding judicial officers and judicial bodies within the meaning of Article 7(1)(d) of the Charter.

## **3. Submissions of the Parties and findings of the Court**

### **i. Composition of the Bench, taken alone, does not cast reasonable doubt on impartiality of the Supreme Court, Article 7(1) of the Charter**

The Court dealt with the novel issue of right to be tried by a competent tribunal and the right to be heard by an impartial tribunal as provided under Article 7 of the Charter.

The Court determined whether the Applicant's right to be heard by a competent tribunal was violated as a result of the decision of the Review Bench of the Supreme Court hearing the matter rather than referring it to the High Court and held that the Applicant's right to be heard by a competent tribunal, guaranteed under Article 7(1) of the Charter was not violated by the Respondent State. On the latter, the Court examined two aspects of the right to be tried by an impartial Court namely:

- i. Whether the participation of eight judges at both the Ordinary and Review Benches cast doubt on the impartiality of the Supreme Court and;
- ii. Whether the remarks made by Justice Dotse called into question the impartiality of the Review Bench of the Supreme Court.

The Court determined whether the composition of the Review Bench, the majority members who were also part of the Ordinary Bench, cast doubt on the impartiality of the Review Bench to the extent that one could not reasonably expect a fair decision. It held that the mere fact that a judge or some of the judges participated in the

proceedings at the Ordinary Bench did not necessarily imply the absence of impartiality even if this may give rise to an apprehension on the side of one of the parties.

The Court noted the provisions of the Constitution of Ghana, together with the practice and jurisprudence, on the composition of a Bench for a review process and observed that judges of the Supreme Court who were part of the Ordinary Bench may form part of the Review Bench as long as the criteria for the minimum number of Judges for a Review Bench is observed. The Court further held that there is a presumption of impartiality of judges and of courts and he who alleges that a Judge or a Court is not impartial bears the onus of proof and must provide evidence in that regard. After examining the composition of the Review Bench, the Court found that there was no irregularity or a breach of law in so far as the composition of the Review Bench was concerned. The Court held that the fact that a number of Judges were empanelled on the Ordinary Bench and subsequently on the Review Bench of the Supreme Court to hear the matter did not raise any reasonable doubt *per se* as to the impartiality of the Review Bench.

On the personal bias of judges, the Court noted that there was no evidence on record showing that the judges on the Review Bench were predisposed or had preconceived bias against the Applicant, which would lead to a reasonable conclusion that they would not render a fair decision. In fact, the Ordinary Bench unanimously rendered the decision, which was interpreted by the Applicant to be in his favour, that his matter should be examined by the High Court. These same Judges subsequently sat on the Review Bench. Therefore, the Applicant's contention that the Review Bench was partial is based on a misapprehension that was neither justified nor objective.

The Court concluded that the composition of the Review Bench of the Supreme Court by judges who were part of the Ordinary Bench does not call into question the impartiality of the Review Bench.

In the matter of *Ingabire Victoire Uhumoya v. Republic of Rwanda*<sup>41</sup>, the Court examined the Applicants allegation that her right to be tried by a neutral and impartial court under Article 7 of the right to a fair trial was violated. The Applicant contended that the fact that the Judges of the Supreme Court and the High Court did not react to the national prosecution authorities' intimidation of a defence witness, in the person of one Habimana Michel, and also that the Court considered the said acts of intimidation as having had no impact on the content of the witness's testimony, is proof of their partiality. The Applicant further argued that, at the Supreme Court, her counsel mounted a strong protest denouncing the abuses and excesses of the prosecution authorities vis-à-vis a defence witness. The Respondent State submitted that this allegation was unfounded, since all the guarantees provided by law had been observed. The Court dismissed this allegation on the ground that, the Applicant had not adduced sufficient evidence to support the claim<sup>42</sup>.

The difference between the *Woyome* and *Ingabire* cases is that in *Woyome*, the Court was able to assess the Applicant's allegations on the right to be heard by a competent tribunal based on the evidence adduced. The Court considered whether the remarks of a single judge made in a concurring opinion called into question his impartiality and whether this action marred the impartiality of the entire review bench at which the judge also sat. In doing so the Court was able to develop its jurisprudence for the first time on this issue.

**ii. Public statement (remarks) by a sitting Judge alone cannot call into question the impartiality of the entire bench, unless proven beyond objective assessment of facts, or by the Applicant**

On the remarks made by Justice Dotse allegedly calling into question the impartiality of the entire Review Bench, the Court held that although the statement were unfortunate, and went beyond what can be considered as an appropriate judicial comment it however did not give an impression of the judge's preconceived opinions and

<sup>41</sup> (merits) (2017) 2 AfCLR 165.

<sup>42</sup> *Alfred Agbesi Woyome v. Republic of Ghana*, AfCHPR, Application No. 001/2017, Judgment of 28 June 2019 (merits and reparations), § 100-105

did not reveal bias.<sup>43</sup> The Court found that the remarks were made by the judge based on his assessment of the facts of the matter. The Court was also of the opinion that a single judge's remarks cannot be considered sufficient to taint the entire Bench. Furthermore, the Applicant did not illustrate how the judge's statements later influenced the decision of the Review Bench. The Court concluded that the Respondent State has not violated the Applicant's right to be heard by an impartial tribunal guaranteed under Article 7(1) (d) of the Charter.

Judges Gérard Niyungeko dissented on this position. Justice Niyungeko was of the opinion that the Court should have found that there has been a violation in this respect, not only because of the perception of the judge's partiality in the circumstances but also because of the perceived partiality on the whole Review Bench of which he was a member. In any event, what is at stake is not the actual partiality of the Judge - which is not established in this case - but the perception of bias that his words may have generated in the eyes not only of the party concerned, but also of any reasonable observer<sup>44</sup>. He concluded that the court should have found a violation of the Applicant's right to be heard by an impartial court within the meaning of Article 7(1) (d) of the Charter.

With regard to the issue of the impartiality of the Supreme Court sitting as the Review Bench, Justice Niyungeko argued that what is at issue is not the impartiality of all the other Judges, rather the perception of impartiality of the Bench of the Court arising from the perception of partiality of one of its members. It is generally accepted that the perception of partiality of a member of a court will also affect indirectly the perception of impartiality of the Bench in its entirety. He argued that it follows from this principle that, where a judge has expressed an opinion that might influence decision-making by the judicial body, this poses a problem of impartiality, not just of the judge concerned, but of the judicial body as a whole.

He concluded that the Court should have found that the Applicant's right to be tried by an impartial tribunal within the meaning of Article 7(1) (d) of the Charter had been violated and the Applicant should have been awarded reparations in connection to the violations established.

## **Freedom of movement, Article 12 of the Charter – Right to political participation, Article 13 of the Charter – in relation to the arbitrary revocation of passport**

### ***Kennedy Gihana & Others v. Republic of Rwanda***

Application No. 017/2015

Judgment of 28 November 2019

#### **1. Facts**

Messrs Kennedy Alfred Nurudiin Gihana (First Applicant), Kayumba Nyamwasa (Second Applicant), Bamporiki Abdallah Seif (Third Applicant), Frank Ntwali (Fourth Applicant), Safari Stanley (Fifth Applicant), Dr. Etienne Mutabazi (Sixth Applicant) and Epimaque Ntamushobora (Seventh Applicant), all of Rwandese origin were residing in the Republic of South Africa when they filed the Application against the Respondent State. They had learnt of the invalidation, by the Respondent State, of their passports and those of other Rwandan nationals when one of them was informed upon applying for a visa to travel to the United States of America, that his name appeared on a list of 14 May 2012, indicating the invalidity of the passports held by all persons included on the said list. The Applicants were neither officially notified of the invalidation of their passports by the Respondent state nor given the opportunity to appeal against the decision on the invalidation<sup>45</sup>.

<sup>43</sup> *Ibid*, § 129.

<sup>44</sup> Dissenting Opinion of Judge Gérard Niyungeko in the Woyome Judgment on the merits and reparations, §§ 7-13.

<sup>45</sup> *Kennedy Gihana & Others v. Republic of Rwanda*, AfCHPR, Application No. 017/2015, Judgment of 28 November 2019 (merits and reparations), §§ 1-4.

## 2. Alleged violations

The Applicants alleged that the invalidation of their passports was an arbitrary deprivation of their nationality, it had rendered them stateless and had a significant impact on the enjoyment of a number of universally accepted fundamental human rights specifically, the right to: (i) participation in political life; (ii) freedom of movement; (iii) citizenship; (iv) liberty; (v) family life; and (vi) work<sup>46</sup>.

## 3. Submissions of Parties and findings of the Court

This judgment builds on the jurisprudence of the Court on the rights not to be arbitrarily deprived of one's nationality in the matters of *Anudo Ochieng Anudo v. United Republic of Tanzania*<sup>47</sup> and *Robert John Penessis v. United Republic of Tanzania*<sup>48</sup>; and the right to political participation in the cases of *Rev. Christopher R. Mtikila and Tanganyika Law Society and Legal and Human Rights Centre v. United Republic of Tanzania*<sup>49</sup> and *APDH v. Republic of Côte d'Ivoire*<sup>50</sup>.

### i. Personal jurisdiction of the Court is not ousted by alleged criminal status of the Applicants – genocide convicts – as long as rights in the Charter are invoked, Article 3 of the Protocol

The Respondent State raised an objection that the Court lacked personal jurisdiction with regard to Kayumba Nyamwasa (Second Applicant) and Safari Stanley (Fifth Applicant) because they were convicted in Rwanda for genocide-related crimes and crimes of threatening state security, respectively.

The Applicants claimed that their convictions had no relevance to the Application and that any person “even if a convict in a proper court of justice has right of standing to petition”.

The Court developed its jurisprudence as regards personal jurisdiction, by determining that so long as the State has deposited the Declaration accepting the jurisdiction of the Court to consider applications by individuals, and it did so without reservation, individuals will have standing before the Court regardless of their status and the nature of the crimes they are alleged to have committed or to have been convicted of<sup>51</sup>. The Court therefore, found that it had personal jurisdiction to deal with the claims by all seven (7) Applicants.

### ii. Reference to other unidentified persons in the Application does not render the Application inadmissible in respect identified Applicants, Article 56(1) of the Charter

The Respondent State argued that the Application should be declared inadmissible because it did not meet the requirement of Article 56(1) of the Charter and Rule 40(1) of the Rules on the identification of the Applicants. It also argued that the Application is inadmissible because the Applicants state that the passports of other “unidentified” Rwandans were also invalidated.

The Court noted that the Application had been filed by seven (7) Applicants, Kennedy Alfred Nurudiin Gihana, Kayumba Nyamwasa, Bamporiki Abdallah Seif, Frank Ntwali, Safari Stanley, Dr. Etienne Mutabazi and Epimaque Ntamushobora, who are clearly identifiable. And that any reference to ‘other Rwandans’ does not negate this fact as they are not before this Court and are not part of this Application. The Court therefore found that the seven (7) Applicants were properly identified in accordance with Article 56(1) of the Charter and Rule 40(1) of the Rules.

<sup>46</sup> *Idem*, § 5.

<sup>47</sup> *Anudo Ochieng Anudo v. United Republic of Tanzania* (merits) (2018) 2 AfCLR 248.

<sup>48</sup> AfCHPR, Application No. 013/2015, Judgment of 28 November 2019 (merits).

<sup>49</sup> (merits) (2013) 1 AfCLR 34.

<sup>50</sup> (merits) (2016) 1 AfCLR 668.

<sup>51</sup> *Gihana* (merits and reparations), § 28

**iii. The alleged criminal status – genocide convict – of the Applicants does not form ground for determination of “compatibility with the Constitutive Act of the African Union” as it is not the subject matter of the Application, Article 56(2) of the Charter**

The Respondent State averred that the allegations raised in the Application were not compatible with the Constitutive Act of the African Union because two Applicants were convicted of crimes that are contrary to the principles set out in Article 4(o) of the Constitutive Act as required under Article 56(2) of the Charter and should therefore be dismissed.

The Court noted that even though, according to the Respondent State the First and Fifth Applicants were alleged to have been convicted of crimes which touch on some of the principles in Article 4(o) of the Constitutive Act as aforementioned, the Court is not called upon to decide on the legality or otherwise of such conviction.

The Court considered that the provision in Article 56(2) of the Charter addresses the nature of an application and not the applicant’s status. The prayer for reinstatement of passports does not require the Court to make a decision that would undermine the principles laid down in Article 4(o) of the Constitutive Act or any part thereof. On the contrary, this would be in accordance with the Court’s obligation to protect the rights allegedly violated as it required to do, in accordance with Article 3(h) of the Constitutive Act.

**iv. Fear for one’s life, and material impossibility to seek legal representation due to non-voluntary exile form justifiable exemption to exhaust local remedies, Article 56(5) of the Charter**

The Respondent State contended that the Application should be dismissed because the Applicants had not exhausted local remedies. It also argued that Rwandan law does oblige not personal presence in civil matters and that the Applicants could have mandated a counsel or any other person to file a claim in the domestic courts on their behalf.

The Court reiterated its holding in the *Lohé Issa Konaté v. Burkina* case, that “a remedy can be considered to be available or accessible when it may be used by the Applicant without impediment”<sup>52</sup>.

The Court noted that, the Second and Fifth Applicants faced charges of serious crimes and fled from the Respondent State’s territory. They had indicated that they feared for their security. Furthermore, since all the Applicants were outside the Respondent State’s territory and their travel documents having been invalidated without formal notification, it is reasonable, in view of the manner in which the Applicants learnt of the invalidation of their passports, it was reasonable for them to have been apprehensive about their security and fear for their lives. The serious nature of the crimes relating to the two Applicants may also have resulted in difficulties in all the Applicants designating Counsel to file a claim on their behalf before the domestic courts regarding the invalidation of their passports. In the circumstances of the Applicants’ case the Court therefore finds that the local remedies were not available for the Applicants to utilize.

**v. Revocation of passport does not amount to deprivation of nationality, but may impede full enjoyment of civic and citizenship rights**

On the Applicants’ allegation that the arbitrary revocation of their passports was an arbitrary deprivation of their nationality,<sup>53</sup> after finding that the Respondent State had arbitrarily revoked the Applicants’ passports<sup>54</sup>, the Court made a distinction between nationality, which is a status, and a passport; which is one of the forms of proof of

<sup>52</sup> *Ghana* (merits and reparations), § 96.

<sup>53</sup> *Ibid.*, § 79.

<sup>54</sup> *Ibid.*, § 92.

nationality.

The Court found that the Respondent State arbitrarily deprived the Applicants of their passports since it did not offer them an opportunity to be heard before the State's action in this regard. The Court then determined that irrespective of the arbitrariness of the revocation of their passports, this cannot be tantamount to revocation, invalidation or deprivation of their nationality. Such an action may however have a direct consequence in the exercise of certain rights and freedoms but in itself it does not deprive an individual of the status of being a national of a particular country nor render him stateless. The Court concluded therefore that the revocation of a passport was not tantamount to a revocation of nationality, rather it impedes the full and effective enjoyment of some civic and citizenship rights<sup>55</sup>.

**vi. Arbitrary revocation of passport led to breach of freedom of movement, Article 12(2) of the Charter and right to political participation, Article 13(1) of the Charter**

Having already determined that the revocation of a passport was not tantamount to a revocation of nationality but rather impeded the full and effective enjoyment of some civic and citizenship rights<sup>56</sup>, the Court concluded that the Allegation relating to the Applicants being rendered stateless was moot and consequently dismissed it.

On the Applicants' allegation relating to violation of the right to freedom of movement,<sup>57</sup> the Court determined that by arbitrarily revoking the Applicants' passports, the Respondent State deprived them of their traveling documents and consequently prevented them from returning to their country and traveling from their country of residence to other countries. The Applicants could therefore not exercise their right to freedom of movement<sup>58</sup>.

The Applicants' alleged that the arbitrary revocation of their passports consequently violated their right to freely participate in the government of their country or their right to political participation<sup>59</sup>. The Court noted that the rights set out in Article 13(1) of the Charter are optimally exercised when a State's citizens are in the territory of that State and in some instances, they can be exercised outside the territory of that state<sup>60</sup>. The Court determined that the arbitrary revocation of the Applicants' passports prevented them from returning to the Respondent State thus severely restricting their right to freely participate in the government of their country. This therefore resulted in a violation of the Applicants' rights to freely participate in the government of their country or their right to political participation.

**vii. Principle of consequential violation applies where both the main and derived violations are established**

Regarding the allegations of violations of the rights to liberty, work and family life protected under Articles 6, 15 and 18(1) of the Charter respectively, as a consequence of the arbitrary revocation of the Applicants' passports, the Court held that the claims were not established and thus dismissed them<sup>61</sup>.

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55 *Ibid.*, §§ 97-98.

56 *Ibid.*, §§ 97-98

57 *Ibid.*, § 103

58 *Ibid.*, §§ 108 and 109.

59 *Ibid.*, § 110.

60 *Ibid.*, §§ 114-115.

61 *Ibid.*, §§ 116-132.

viii. **Moral prejudice is established where the violations affected the Applicants' connection with their country of origin, Article 27(1) of the Protocol**

The Court noted that in line with Article 27(1) of the Protocol which provides that “If the Court finds that there has been a violation of a human and peoples’ rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation”, and having found that the Respondent State violated the Applicants’ rights to freedom of movement and to freely participate in the government of their country and that these violations had adversely affected the connections that the Applicants had with their country of origin and thus caused them emotional anguish and despair, occasioning them moral prejudice, the Court determined that the Applicants were entitled to reparation.

Consequently, the Court ordered the Respondent State to reinstate the Applicants’ passports within three (3) months of the notification of the judgment, as a measure of restitution and awarded each Applicant, Rwandan Francs four hundred and sixty five thousand (RWF 465, 000) as fair compensation for the moral prejudice suffered.

## **Right to reparation and loss of future opportunity, general principle of law, articles 1 and 7 of the African Charter; Article 27 of the Court Protocol**

### ***Sébastien Germain Ajavon v. Republic of Benin***

Application No.034 /2017

Judgements on merits (28 March 2019) and reparations (28 November 2019)

#### **1. Facts**

The matter brought before the Court by Sébastien Germain Ajavon against the Republic of Benin arose as a result of legal proceedings brought against the Applicant by the Respondent State for international drug trafficking in cocaine. He was tried and released on the benefit of the doubt by the Court of First Instance of Cotonou in November 2016, and was tried again in October 2018 for the same offence by the *Cour de répression des infractions économiques et du terrorisme* (CRIET) - Court for the suppression of economic offences and terrorism - and sentenced to twenty (20) years’ imprisonment and a fine.

#### **2. Alleged violations**

The Applicant alleged that the judicial proceedings against him caused damage to his property, his honour and reputation as a businessman and politician. He claimed that all these proceedings violated his right to a fair trial, in this case the right to be presumed innocent, the right to have his cause heard by a competent court and the right not to be tried twice in the same matter.

#### **3. Submissions of the Parties and findings of the Court**

- i. **The political environment and circumstances surrounding the case may render existing local remedies ineffective or exempt the Applicant from pursuing the remedies, Article 56(5) of the Charter**

As regards the Respondent State’s objection to the admissibility of the application for non-exhaustion of local remedies, the Court first noted that, at the domestic level, “there were several remedies available (appeal to the Constitutional Court, the remedy provided for in Article 206 of the Criminal Procedure Code and the remedy

before the administrative courts) which the Applicant could have exhausted”<sup>62</sup> before submitting the application. However, the Court noted that in the context of this case there were several obstacles to the exercise of these local remedies.

First, the Court considered that the appeal lodged by the Public Prosecutor against the judgement of the Court of First Instance, which was never notified to the Applicant, had placed him “in a situation of confusion which did not allow him to exercise the remedy provided for in Article 206 of the Beninese Criminal Procedure Code, which had consequently become unavailable”<sup>63</sup>. The Court went on to note that the administrative appeals brought by the complainant “have not given rise to any judicial decision”. Lastly, it noted that the appeal against the judgement handed down by CRIET “has never been lodged”. The Court therefore concluded that these particular facts rendered the local remedies inaccessible and ineffective for the Applicant, who was thus exempted from the requirement to exhaust them.

Considered as its ability to redress a situation presented by victim, the effectiveness of a remedy has already been examined by the Court in the *Norbert Zongo* case. In the latter case, the Court relied on a presumption of effectiveness (... “no one can doubt a priori ...” the Court said)<sup>64</sup>. In the *Ajavon* case, the Court held that the presumption of effectiveness was not applicable to the situation in question of the Republic of Benin. On the other hand, the ineffectiveness of the remedies, although existing and available, has been proven and justified through the three concrete obstacles mentioned above that have prevented the Applicant from exercising domestic remedies as required by Article 56(5) of the Charter and Rule 40(5) of the Rules of Court.

Similarly, in *Lohé Issa Konaté*, the Court held that while “the five (5) day period available to the Applicant to make his statement of appeal, however brief, did not constitute an obstacle to the lodging of the appeal”<sup>65</sup>, the Applicant could not expect anything from it “in the case of an application for annulment of the laws ... under which he had been convicted”<sup>66</sup>, since the appeal only allowed for the annulment of the judgment for misapplication or misinterpretation of the law, but not for the annulment of the law itself.

Following the case law in *Lohé Issa Konaté*, the *Ajavon* judgment of 29 March 2019 is a restatement of the Court’s case law that the effectiveness of a remedy cannot be presumed, rather it must be based on a textual (*Lohé Issa Konaté*) or factual (*Ajavon*) analysis.

## **ii. The principle of “non bis in idem” is implied under Article 7(1) of the Charter based on a comparative interpretation using Article 14(7) of the ICCPR, and Article 3 of the Protocol**

In its judgment on the merits of the *Ajavon* case, the Court ruled on the alleged violation of the principle of non bis in idem, which is not enshrined in the African Charter. In such circumstances and when the alleged right is not within the scope of the Charter, the Court applies Articles 3 and 7 of the Protocol, which extend its jurisdiction to the interpretation and application of any other human rights instrument ratified by the state concerned.

As in several previous cases,<sup>67</sup> the Court found, on the one hand, that the proceedings before the CRIET involved the same parties as those who appeared before the Court of First Instance of Cotonou and, on the other hand, that the CRIET essentially judged the facts and grievances before the said Court of First Instance, before overturning “the judgment in its entirety”. However, the Court went further and held that the term *idem* of the *non bis in idem*

62 *Sébastien Germain Ajavon v. Republic of Benin*, AfCHPR, Application No. 013/2017, Judgment of 29 March 2019 (merits), § 106.

63 *Ibid.*, § 113.

64 *Norbert Zongo v. Burkina Faso* (merits) (2014) 1 AfCLR 219, §§ 68 and 69.

65 *Lohé Issa Konaté v. Burkina Faso* (merits) (2014) 1 AfCLR 314, § 107.

66 *Ibid.*, § 111.

67 *Guehi* (merits and reparations), § 38. See also *Nganyi & 9 Others* (merits), §§ 164-167.

*principle* “relates not only to the identity of the parties and the facts<sup>68</sup>, but also to the authority of *res judicata*”<sup>69</sup>. It is on the basis of this assessment that the Court concluded that the proceedings before CRIET failed to respect the prohibition of being tried twice for the same facts, guaranteed in Article 14(7) of the International Covenant on Civil and Political Rights to which the Respondent is also a party.

**iii. Media propaganda on accusation of drug trafficking tarnished the image and reputation of the Applicant, causing economic loss, Article 27 of the Protocol**

The Court also found that “*the media propaganda on the drug trafficking case and the resumption of the trial by CRIET*” which “was not competent to hear the case”<sup>70</sup> had damaged the image and reputation of the Applicant. The Applicant having lost the confidence of his business partners, the Applicant’s company’s shares were devalued, the turnover of his numerous companies declined and he lost the opportunity to continue ongoing business projects.

**iv. Reparation is warranted for economic loss assessed on the basis of “reasonable probability” that Applicant incurred future loss, Article 27(1) of the Protocol**

In *Sébastien Germain Ajavon* case (reparations), the Court first defined loss of opportunity as “the deprivation of a potentiality having the character of reasonable probability”<sup>71</sup> and that it is not necessary for the probability to have a “certain character”. On the basis of this definition, the Court held that even if, at the time of the facts in question, no sale of petroleum products had commenced, there was a real likelihood that the investment in the oil sector would be made and the Applicant who had “a reasonable expectation of realizing the expected profits”<sup>72</sup> was entitled to a “lump-sum” monetary award “which cannot be equal to the benefit that would have been derived if the missed event had occurred”<sup>73</sup> and therefore “cannot be equal to the entire expected gain”<sup>74</sup>.

The Court also decided that the assessment of the lump sum to be awarded to the Applicant as compensation for the loss of business opportunity must take into account the circumstances of the case, *inter alia*, the “financial capacity of the Applicant to acquire and sell the volumes estimated in the business plan, his knowledge of the business world, his experience as a businessman having enabled him to develop commercial strategies within the framework of the companies that made his reputation, the uncertainties inherent in any commercial activity, fairness and reasonable proportionality”<sup>75</sup>.

**v. Reparation for breach of non bis in idem principle demands status quo ante, annulment of the Applicant’s sentencing with full effects**

In the *Sébastien Germain Ajavon* (reparations), the Court concluded that the direct consequence of the violation of the principle of *non bis in idem* and/or the lack of jurisdiction of the CRIET was the annulment of the decision rendered by the CRIET.<sup>76</sup> On the basis of this conclusion, the Court ordered the Respondent State to take all necessary measures to set aside the CRIET’s judgment so as to erase all its consequences. This is the first time that the Court has expressly ordered the Respondent State to set aside a decision delivered by its national court<sup>77</sup>.

68 *Ajavon* (merits), § 182.

69 *Idem*.

70 *Ajavon* (merits), § 134

71 *Sébastien Germain Ajavon v. Republic of Benin*, CAFDHP, Application No. 013/2017, Judgment of 29 November 2019 (reparations), § 56.

72 *Ibid.*, § 58.

73 *Ibid.*, § 63.

74 *Ibid.*, § 63.

75 *Ibid.*, §§ 64-66.

76 *Ibid.*, §§ 104 and 105.

77 *Ibid.*, §§ 64-66.

## Reasonable time to file an Application (article 56(6) of the Charter)

### *Livinus Daudi Manyuka v. United Republic of Tanzania*

Application No. 020/2015

Ruling (jurisdiction and admissibility) of 28 November 2019

#### **1. Facts of the matter**

The Applicant was convicted and sentenced to twenty (20) years in prison for the offence of robbery and violence. He appealed, first to the High Court and second, to the Court of Appeal, against both his conviction and sentence but his appeals were dismissed. In the course of his appeal to the High Court, his sentence of twenty (20) years imprisonment was enhanced to thirty (30) years.

#### **2. Alleged violations**

The Applicant alleged that he had been unlawfully imprisoned since the offence for which he was convicted was non-existent at the time. This, he averred, was contrary to article 2 of the the Charter. The Applicant also alleged that he had suffered a violation of his freedom of movement and association as a result of his imprisonment.

#### **3. Submissions of the Parties and findings of the Court**

As a preliminary matter, the Respondent State argued that the period of five (5) years and six (6) months that the Applicant took to file his Application before the African Court, after the Court of Appeal dismissed his appeal, was unreasonable within the meaning of Rule 40(6) of the Rules (Article 56(6) of the Charter). The Applicant, for his part, argued that the Application should be admissible given the circumstances of the matter and his situation as a lay, indigent and incarcerated person.

In dealing with the Respondent State's preliminary objection, the Court recalled that Article 56(6) of the Charter does not set a time limit for filing cases before the Court and that it simply requires that an Application be filed within a "reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter..."

Reiterating its earlier jurisprudence, the Court noted that the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case by case basis. The Court also pointed out that a non-exhaustive list of circumstances that the it considers in determining the reasonableness of time, before the filing of an application, includes the following: imprisonment, being lay without the benefit of legal assistance, indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisals and the use of extraordinary remedies.

##### **i. Evidentiary standards in relation to determination of reasonableness of time to file an application after exhaustion local remedies, Article 56(6) of the Charter**

In the present case, the Court noted that the Applicant had indicated that he was "an indigent incarcerated person operating without legal assistance or legal representation ..." The Applicant had also stated that he is a peasant. The Court observed, however, that aside from the blanket assertion of indigence the Applicant did not attempted to adduce evidence explaining why it took him five (5) years and Six (6) months to file his Application.

**ii. Requirement to exhaust local remedies imposes onus to justify delay beyond mere factual status of Applicant, Article 56(6) of the Charter**

The Court noted that the Applicant had legal representation in pursuing his appeals both before the High Court and the Court of Appeal. According to the Court, in the absence of any clear and compelling justification for the lapse of five (5) years and Six (6) months before the filing of the Application, the period it took the Applicant to file his case before the Court was unreasonable within meaning of Article 56(6) of the Charter.

In this ruling, the Court took the position that an applicant cannot simply plead the fact of being lay, indigent and incarcerated as justifying the delay in filing an application without leading evidence in support of the same.

In the end, the Court held that the Application was not filed within a reasonable time within the meaning of Article 56(6) of the Charter. The Application was thus found inadmissible and dismissed. This ruling further develops the jurisprudence of the Court in relation to the factors that must be considered in determining whether an application has been filed within reasonable time after the exhaustion of domestic remedies. It builds on prior determinations by the Court and represents the most recent development in a line of authorities including *Godfred Anthony and Ifunda Kisite v. United Republic of Tanzania*<sup>78</sup>, *Amiri Ramadhani v. United Republic of Tanzania*<sup>79</sup>, *Christopher Jonas v. United Republic of Tanzania*<sup>80</sup> and *Werema Wangoko v. United Republic of Tanzania*<sup>81</sup>.

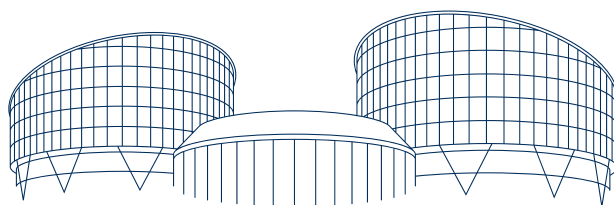
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78 AfCHPR, Application No. 015/2015, Ruling of 26 September 2019 (jurisdiction and admissibility).

79 (merits) (2018) 2 AfCLR 344.

80 (merits) (2017) 2 AfCLR 101.

81 (merits) (2018) 2 AfCLR 520.



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

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**DEVELOPMENTS IN THE CASE LAW OF THE  
EUROPEAN COURT OF HUMAN RIGHTS**

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# Developments in the case-law of the European Court of Human Rights<sup>1</sup>

## Presentation

In 2019 the European Court of Human Rights (“the Court”) heard and determined roughly 40,000 cases. The following chapter summarises the most important developments in the Court’s case-law including fourteen Grand Chamber judgments and its first Advisory Opinion pursuant to Protocol No. 16, as well as other important leading judgments decided by one of its Chambers.

I would like to highlight three important developments for the purposes of this foreword.

One of the main events for the Court in 2019 was the first advisory opinion issued under Protocol No. 16, in response to a request from the French Court of Cassation. The case concerned the situation of a child born abroad by gestational surrogacy, conceived from the biological father’s gametes. The father’s parentage was recognised under French law following an earlier judgment delivered by the Court. Question marks remained over the status of the intended mother. The advisory opinion stated that the right to respect for the child’s private life required domestic law to provide for the possibility of recognizing the legal parent-child relationship with the intended mother. Such recognition could be achieved by means of adoption. A few months after the advisory opinion, the Court of Cassation, sitting as a full court, finally opted for allowing foreign birth certificates to be registered in France in order to establish the parent-child relationship between such children and their intended mothers. It thus went even further than the opinion. This is an excellent example of the dialogue-based approach established under Protocol No. 16. It is also worth noting that the request was received on 12 October 2018 and the opinion delivered on 10 April 2019, an indication of the Court’s determination to deal with such requests as expeditiously as possible.

The second major legal development in 2019 concerned the execution of judgments. The success of the Convention system relies on the complete enforcement of the Court’s judgments. The role of the Committee of Ministers, which is enshrined in the Convention in order to guarantee the effectiveness of the execution process, is therefore vital. Put simply, the Court’s authority and the credibility of the whole Convention system is undermined when a judgment is not executed. Awareness of the crucial importance of the execution of judgments led to the introduction by Protocol No. 14 of infringement proceedings under Article 46 § 4 of the Convention. That provision was applied for the first time in 2019, where the Court was invited to determine whether Azerbaijan had refused to comply with a judgment delivered in 2014. The case concerned an imprisoned political opponent, Ilgar Mammadov. The question was whether the respondent State had failed in its obligations by refusing to release that political opponent following the Court’s finding of a violation of Article 18 in conjunction with Article 5 § 3. The Court considered that the State in question had indeed failed in its obligation to comply with a judgment previously delivered by the Court.

The Court took up another of the challenges currently facing Council of Europe Member States in 2019. Over the last few years it has received many applications concerning the situation of migrants in Europe. Three major judgments were delivered in 2019 concerning different aspects of this difficult issue: first of all, the confinement of

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<sup>1</sup> This contribution is largely based on the Jurisconsult’s overview of the most interesting cases adjudicated in 2019 which forms part of the Court’s Annual Report and can be downloaded in full (in English and French) at: [www.echr.coe.int](http://www.echr.coe.int) (Case-Law/Case- Law Analysis/Overview of the Court’s case-law in 2019).

The complete Annual Report is available at: [www.echr.coe.int](http://www.echr.coe.int) (The Court/Annual reports).

The Court’s judgments, decisions and advisory opinions are available in multiple languages at: <https://hudoc.echr.coe.int/>

For publication updates follow the Court’s Twitter account at [https://twitter.com/ECHR\\_CEDH](https://twitter.com/ECHR_CEDH)

migrants in an airport transit zone (Z.A. v. Russia); secondly, “chain refoulements” in the case of Ilias and Ahmed v. Hungary; and lastly, the situation of unaccompanied children, in the case of H.A. v. Greece. In these different cases the Court was careful, firstly, to protect the case-law acquis in the sphere of refugee law, and secondly, to map the way forward for the States’ migration policy.

I am delighted that the Court is participating in this first annual case-law review of the three regional human rights courts.

Marialena Tsirli  
Registrar of the European Court of Human Rights

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## I. Summary

In 2019, the Grand Chamber delivered fourteen judgments and its first advisory opinion under Protocol No. 16 to the Convention. It defined the States' obligations under the Convention with regard to traffic accidents (*Nicolae Virgiliu Tănase v. Romania* [GC]), the monitoring of psychiatric inpatients at risk of suicide (*Fernandes de Oliveira v. Portugal* [GC]) and the therapeutic treatment of detainees placed in a psychiatric institution (*Rooman v. Belgium* [GC]).

It ruled on the specific case of criminal investigations with a transnational dimension, entailing an obligation on States to cooperate (*Güzelyurtlu and Others v. Cyprus and Turkey* [GC]).

The Grand Chamber developed the case-law on asylum-seekers with regard to two scenarios: where such individuals were in a transit zone located at the land border between two member States of the Council of Europe and subsequently expelled to a State that was not their country of origin (*Ilias and Ahmed v. Hungary* [GC]), and where they were confined in an airport transit zone (*Z.A. and Others v. Russia* [GC]).

It reiterated the case-law principles governing video-surveillance in the workplace and employees' right to respect for their private life (*López Ribalda and Others v. Spain* [GC]). Having examined the placement of a vulnerable child in a foster family and subsequent adoption, it pointed out the procedural guarantees and respective interests that the national authorities are required to take into consideration in order to be able to take decisions in line with Convention standards (*Strand Lobben and Others v. Norway* [GC]).

In its first advisory opinion, the Court examined the questions raised with regard to the private life of a child who was born as the result of a surrogacy agreement performed abroad and the recognition of a legal relationship between that child and the intended mother, with whom there was no genetic link (request no. P16-2018-001).

The Grand Chamber also clarified the interpretation of essential concepts governing the right not to be tried or punished twice, as defined in Article 4 §§ 1 and 2 of Protocol No. 7 (*Mihalache v. Romania* [GC]).

Lastly, in an inter-State case, the Grand Chamber ruled on the issue of granting just satisfaction (*Georgia v. Russia* (I)). For the first time, it was also called upon to determine whether a State had respected its obligation under Article 46 of the Convention to abide by a final judgment against it (*Ilgar Mammadov v. Azerbaijan* [GC]).

This year the Court delivered other important leading judgments: with regard to admissibility, it ruled on the calculation of the six-month time-limit (*Akif Hasanov v. Azerbaijan*), the loss of victim status (*Porchet v. Switzerland* (dec.)) and its jurisdiction *ratione loci* (*Romeo Castaño v. Belgium*, applying the principles set out in the *Güzelyurtlu and Others v. Cyprus and Turkey* judgment).

With regard to the rights and freedoms guaranteed by the Convention, the Court emphasised the national authorities' obligations to ensure protection of the life of a victim of abduction (*Olewnik- Cieplińska and Olewnik v. Poland*); this obligation also applied where a European arrest warrant had been issued against a person suspected of terrorist offences (*Romeo Castaño v. Belgium*).

The Court also ruled on the scope of the right to speedy judicial review of the lawfulness of detention, safeguarded by Article 5 § 4 (*Aboya Boa Jean v. Malta*), and on whether a reduction of sentence is capable of affording "compensation" within the meaning of Article 5 § 5.

The case-law was also developed with regard to oral communication, in person and in police premises, between a lawyer and his detained client (*Altay v. Turkey* (no. 2)).

Other judgments of jurisprudential interest concerned the principle that punishment should only be applied to the offender, in the context of one company's merger into another (*Carrefour France v. France* (dec.)), defence access to voluminous data gathered by the prosecution during a criminal investigation (*Sigurður Einarsson and Others v. Iceland*) and the Article 7 compatibility of the national judicial interpretation of criminal-law provisions (*Parmak and Bakır v. Turkey*).

With regard to respect for private life, the Court also gave judgment on the scope of the right to one's image, reputation or honour (*Vučina v. Croatia* (dec.)) and the obligation to submit to a paternity test (*Mifsud v. Malta*). The Court also addressed, in the context of anti-terrorism, the powers granted to the authorities to stop, search and question passengers at border checks (*Beghal v. the United Kingdom*) and requests for escorted prison leave to attend a relative's funeral (*Guimon v. France*).

The Court ruled on the impact of housing-benefit reform on vulnerable social-housing tenants (*J.D. and A v. the United Kingdom*).

The Court's case-law also had regard to the interaction between the Convention and European Union law. In particular, the Court ruled in cases concerning the European arrest warrant (*Güzelyurtlu and Others v. Cyprus and Turkey* [GC] and *Romeo Castaño v. Belgium*) and referred to the European Union's positive law in the field of competition (*Carrefour France v. France* (dec.)).

In several cases the Court also took into account the interaction between the Convention and international law. In particular, it referred to the Council of Europe's European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters (*Güzelyurtlu and Others v. Cyprus and Turkey* [GC]) and to the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and of the UN Human Rights Committee (*Romeo Castaño v. Belgium*). In addition, it consolidated its case-law in the light of the UN Convention on the Rights of Persons with Disabilities and the United Nations' work in this area, and also in the light of Recommendation Rec (2004)10 of the Committee of Ministers of the Council of Europe concerning the protection of the human rights and dignity of persons with mental disorder (*Fernandes de Oliveira v. Portugal* [GC], *Rooman v. Belgium* [GC]). It also relied on the work of the UN International Law Commission (*Ilgar Mammadov v. Azerbaijan* [GC]) and took account of the findings of international organisations with regard to the situation of migrants (*Khan v. France*).

The Court further developed its case-law on States' positive obligations under the Convention, particularly with regard to protection of the right to life (*Fernandes de Oliveira v. Portugal* [GC], *Nicolae Virgiliu Tănase v. Romania* [GC] and *Olewnik-Cieplińska and Olewnik v. Poland*) and to respect for private life in the workplace (*López Ribalda and Others v. Spain* [GC]).

Finally, the Court ruled on the scope of the margin of appreciation to be granted to the States Parties to the Convention (request no. P16-2018-001, *López Ribalda and Others v. Spain* [GC], *Beghal v. the United Kingdom* and *J.D. and A v. the United Kingdom*).

## II. ADMISSIBILITY<sup>2</sup>

### 1. Six-month period (Article 35 § 1 of the Convention<sup>3</sup>)

In *Akif Hasanov v. Azerbaijan*<sup>4</sup>, the Court established that the six-month rule for filing an application could require an additional obligation of diligence from an applicant.

The applicant was convicted in administrative proceedings for minor hooliganism and lodged an appeal in November 2007. The time-limit for deciding that appeal was three days and the appeal court adopted the appeal decision in December 2007. However, the appeal court sent the decision in August 2009. In January 2010 the applicant applied to the Court. The Court found that the applicant's unexplained inactivity for more than two years breached the six-month time-limit and declared the application inadmissible.

This case is noteworthy for the examination of when the six-month time-limit begins to run, in circumstances where an applicant, being entitled in domestic law to wait to be served with a copy of the final domestic decision, remains passively awaiting that decision for an evidently excessive period of time before introducing his application to the Court.

According to the Court's well-established case-law, the six-month time-limit starts running from the date of service of the copy of the decision when an applicant is entitled by domestic law to be served automatically with a copy of the final domestic decision<sup>5</sup>.

In the present case, the applicant was entitled to be served with the final decision. However, given the evident and excessive delay in its service, the Court held that the applicant could not be relieved of his own, individual obligation to undertake basic steps and to seek information from the relevant authorities about the outcome of his appeal. Thus, the Court considered that the applicant's unexplained inactivity for more than two years fell foul of a major purpose of the six-month rule under Article 35 § 1.

The Court therefore introduced a certain duty of diligence in the case of an evidently excessive delay of delivery, although it is worth noting the particular circumstances of the case: the final decision was due to be delivered within a short period of time (three days); the delay in delivery was comparably lengthy (over eighteen months); and the applicant had not shown that he had, in the meantime, made any relevant enquiries about it, with the result that he introduced his application to the Court more than two years after the final domestic decision.

<sup>2</sup> See also, under Article 2 (Right to life – effective investigation) below, *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, and *Romeo Castaño v. Belgium*, no. 8351/17, July 2019, and, under Article 5 § 5 (Right to compensation), *Porchet v. Switzerland* (dec.), no. 36391/16, 8 October 2019.

<sup>3</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Treaty Series No. 005); a.k.a. the European Convention on Human Rights; hereinafter “the Convention”.

<sup>4</sup> *Akif Hasanov v. Azerbaijan*, no. 7268/10, 19 September 2019.

<sup>5</sup> See, for instance, *Worm v. Austria*, 29 August 1997, § 33, Reports of Judgments and Decisions 1997-V.

### III. “CORE” RIGHTS

#### 1. Right to life (Article 2)

##### a. Obligation to protect life

*Fernandes de Oliveira v. Portugal* [GC]<sup>6</sup> concerned substantive obligations under Article 2 owed to a voluntary psychiatric patient as well as the length of proceedings (procedural limb).

The applicant's adult son, A.J., had a history of serious mental illness and of addiction to alcohol and prescription drugs. On several occasions he was hospitalized on a voluntary basis in a psychiatric hospital (“the HSC”). During his last stay, following a suicide attempt with prescription drugs, his initial restrictive regime was relaxed; he was then allowed home, only to be subsequently readmitted due to excessive alcohol intake. Two days later, A.J. left the HSC without permission, jumped in front of a train and died. The applicant complained under Article 2 of a failure to protect her son and under Article 6 of the length of her civil action against the HSC. The Court found no violation of Article 2 as regards the substantive aspect and a violation as regards the procedural aspect.

1. The judgment clarified the content of the State's positive obligations as regards the care of psychiatric patients at risk of suicide in hospital.

The State has a positive obligation to put in place an effective regulatory framework compelling hospitals to adopt appropriate measures to protect their patients' lives. Moreover, there is a positive obligation to take preventive operational measures to protect individuals from criminal acts of others and from themselves (*Osman v. the United Kingdom*<sup>7</sup>), an obligation already held applicable to detainees<sup>8</sup> and involuntary psychiatric patients<sup>9</sup>.

The relevant factors to assess the suicide risk of a detainee which could trigger the need to take preventive measures were a history of mental-health problems, the gravity of the mental illness, previous attempts to commit suicide or self-harm, suicidal thoughts or threats and signs of physical or mental distress.

The Court considered that both obligations were applicable to the case in question and, further, that both had been complied with. It noted in particular as follows:

- a. The manner in which the regulatory framework had been implemented did not violate Article 2. The Court agreed that the approach of the HSC – restricting patients' rights as little as possible due to a therapeutic desire to create an open regime – was in line with international standards<sup>10</sup> developed in recent years, and it endorsed the view expressed in *Hiller*<sup>11</sup> that a more intrusive regime could have violated Articles 3, 5 or 8. It also found the three surveillance measures (a regular daily timetable with monitoring of presence at key times; a more restrictive regime if

6 *Fernandes de Oliveira v. Portugal* [GC], no. 78103/14, 31 January 2019.

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

8 *Keenan v. the United Kingdom*, no. 27229/95, ECHR 2001-III; and *Renolde v. France*, no. 5608/05, ECHR 2008 (extracts).

9 *Hiller v. Austria*, no. 1967/14, 22 November 2016.

10 UN General Assembly Resolution 46/119 on the protection of persons with mental illness and the improvement of mental health care, 17 December 1991, UN Doc. A/RES/46/119; the Convention on the Rights of Persons with Disabilities (CRPD), 2515 UNTS 3, as well as CRPD Committee Guidelines and statement of the OHCHR on Article 14 of the CRPD; UN Human Rights Committee General Comment No. 35 on Article 9 of the ICCPR; and Report of 2 April 2015 of the UN Special Rapporteur on the right to the enjoyment of the highest attainable standard of physical and mental health.

11 *Hiller*, cited above, §§ 54-55.

required; an emergency procedure if necessary) in the HSC for voluntary patients to be adequate. Finally, the applicant had been able to have recourse to a judicial system.

b. As regards the application of the *Osman* operational obligation in this context, two aspects are worth noting. Firstly, the Court confirmed for the first time that the positive obligation to take preventive operational measures extends to *voluntary* patients. The Court reached this finding by noting that all psychiatric patients are vulnerable, with any form of hospitalisation involving a certain level of necessary restraint, and nuanced its findings by adding that “the Court, in its own assessment, may apply a stricter standard of scrutiny” in the case of involuntary patients. Secondly, the Court applied the *Osman* test by measuring the care and decisions of the HSC against the five factors noted above. The Court found that it had not been established that the HSC knew or ought to have known that there was an immediate risk to A.J.’s life in the days before his death. In particular, the Court accepted that, while a risk of suicide could not be excluded in patients such as A.J., whose psychopathological conditions were based on a multiplicity of diagnoses, the immediacy of the risk could vary and the Court endorsed the approach of the HSC, which was to vary the monitoring regime in place in accordance with these changes based on a philosophy which optimised patient freedom, patient responsibility and thus their chances of discharge. There being therefore no established “real and immediate risk”, it was not necessary to examine the second limb of the *Osman* test, namely whether or not preventive measures had been required.

2. The applicant also complained, originally under Article 6 § 1, that her civil action against the hospital was excessively long. The Court recharacterised this complaint under the procedural limb of Article 2, finding a violation on the basis of the excessive length of the proceedings alone. As to whether it must be shown that that delay impacted on the effectiveness of the proceedings before it can constitute a violation of the procedural limb of Article 2<sup>12</sup>, the Court relied on paragraph 219 of *Lopes de Sousa Fernandes* [GC]<sup>13</sup>. The Court found that the applicant’s civil action was excessively long – a strong indicator of defective proceedings – and that the Government had not provided “convincing and plausible” reasons to justify the delay. The Court also stressed the importance of avoiding delay (the passage of time affecting witness memory and the importance of ensuring deficiencies are remedied quickly and thereby avoided in the future).

In *Olewnik-Cieplińska and Olewnik v. Poland*<sup>14</sup> the Court applied the principles developed in *Osman v. the United Kingdom*<sup>15</sup> in the context of a kidnapping.

Mr. Olewnik was brutally kidnapped in 2001. He was detained and ill-treated for over two years and subsequently murdered, probably in September 2003, following the handover of a ransom. His body was discovered in 2006. A number of gang members were ultimately convicted in 2010. The investigation into the crime, including allegations against certain investigating police officers, was still continuing. The applicants, the father and brother of the deceased, mainly complained under the substantive limb of Article 2 that Mr. Olewnik’s death had resulted from the authorities’ failure to investigate effectively his kidnapping and thus to protect his life.

The Court found a violation of the substantive limb (failure to investigate adequately the kidnapping and protect his life) of Article 2 as well as of its procedural limb (failure to investigate after his death).

<sup>12</sup> See *Mustafa Tunç and Fecire Tunç v. Turkey* [GC] no. 24014/05, § 31, 14 April 2015; and, for example, *Sarbyanova-Pashaliyska and Pashaliyska v. Bulgaria*, no. 3524/14, §§ 41-44, 12 January 2017.

<sup>13</sup> *Lopes de Sousa Fernandes* [GC], no. 56080/13, 19 December 2017.

<sup>14</sup> *Olewnik-Cieplińska and Olewnik v. Poland*, no. 20147/15, 5 September 2019.

<sup>15</sup> *Osman v. the United Kingdom*, 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII.

In this judgment the Court applied for the first time the principles of the *Osman* judgment to the circumstances surrounding the death of an individual following his or her kidnapping.

The *Osman* principles identify the actual and constructive knowledge (“that the authorities knew or ought to have known at the time, of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party”) that can give rise to a positive obligation on the State “to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk” (*Osman*, § 116). The two issues to be resolved in the present case were therefore whether the kidnapping and prolonged abduction gave rise to a “real and immediate risk” and, if so, whether the authorities demonstrated the commitment necessary to find Mr. Olewnik and to identify the perpetrators as swiftly as possible to safeguard his life.

a. The Court noted that, in cases of kidnapping for ransom, it had to be assumed that the life and health of the victim was at risk. Statistics showed the serious nature of kidnappings in Poland, and abundant blood samples had been found in Mr. Olewnik’s home. In addition, that risk assessment was not necessarily dependent on whether or not the kidnappers had communicated their intention to harm the person held. Moreover, the immediacy of the risk to the victim, to be understood as referring mainly to the gravity of the situation and the particular vulnerability of the victim of kidnapping, did not diminish with time: on the contrary, it endured for years and thereby increased the victim’s torment and the risk to his health and life, therefore the risk had remained imminent throughout the entire period of imprisonment.

The authorities therefore knew or should have known of the existence of a real and immediate risk to the health and life of Mr. Olewnik from the moment of his disappearance and throughout his abduction.

b. When examining whether the authorities fulfilled the positive obligation under Article 2 to protect Mr. Olewnik’s life by doing all that could reasonably be expected of them, the Court was assisted by extensive evidence regarding the investigations and by the fact that investigative errors had been well documented. In particular, the Parliamentary Inquiry Committee had conducted an “impressive investigation” into the actions of the police, prosecutors and other public authorities, concluding that “visible sluggishness, errors, recklessness and a lack of professionalism” resulted in the failure to discover the perpetrators and ultimately in Mr. Olewnik’s death. Such was the scale of the deficiencies that the Committee explored the hypothesis that public officials had cooperated with the kidnapping gang and some policing mistakes were the subject of criminal prosecution. The Court found that the facts clearly indicated that the domestic authorities failed to respond with the level of commitment required in a case of kidnapping and prolonged abduction and that there had clearly been a link between the long list of omissions and errors perpetuated over the years and the failure to advance the investigation while Mr. Olewnik had still been alive.

The State had therefore breached the obligation to safeguard the life of the victim and thus violated Article 2 under its substantive limb.

c. The Court’s finding in the applicants’ favour was facilitated by the particularly serious facts of the present case. Indeed, the Court reiterated that its conclusions had taken into account the “particularly high risk factors” in the case and the “particularly large” extent to which the domestic system had malfunctioned.

## b. Effective investigation<sup>16</sup>

*Güzelyurtlu and Others v. Cyprus and Turkey* [GC]<sup>17</sup> dealt with the investigation into the murder of three Cypriot nationals of Turkish Cypriot origin in the part of Cyprus controlled by the Cypriot government in January 2005. The suspects fled to the “Turkish Republic of Northern Cyprus” (the “TRNC”). Parallel investigations were conducted by Cypriot and “TRNC” authorities. The Cypriot authorities identified eight suspects, issued domestic and European arrest warrants and sent Red Notice requests to Interpol. The “TRNC” authorities arrested all suspects by the end of January 2005 but released them weeks later.

The Cypriot authorities refused to surrender the case file to the “TRNC” authorities, seeking rather to obtain the suspects’ surrender from the “TRNC” through mediation (United Nations Peacekeeping Force in Cyprus – UNFICYP) and then through extradition requests (to the Turkish embassy in Athens), which were returned without reply. Since then both investigations were at an impasse. The applicants, the victims’ relatives, complained under Articles 2 and 13 of the failure of both Turkey and Cyprus to cooperate in the investigation.

The Court found that Cyprus had not breached Article 2 (procedural limb) because it had used all means reasonably available to obtain the suspects’ surrender/extradition from Turkey and it had not been under an obligation to submit its case file or to transfer the proceedings to the “TRNC” or to Turkey. However, it found that Turkey had violated Article 2 (procedural limb) due to its failure to cooperate with Cyprus and, in particular, for not providing a reasoned reply to the extradition requests submitted by its authorities.

In this judgment, the Court developed novel principles concerning the duty of Contracting States to cooperate in the context of transnational criminal investigations.

1. The Court clarified its case-law on the issue of jurisdiction (Article 1) and compatibility *ratione loci* of an Article 2 complaint (procedural limb) where the death occurs outside the jurisdiction of the respondent State. Although the deaths occurred in territory controlled by and under the jurisdiction of Cyprus, the Court found that there was a jurisdictional link to Turkey, on two grounds:

a. The Court established that the institution of investigation/proceedings concerning a death which occurred outside the jurisdiction of that State is sufficient to establish a jurisdictional link for the purposes of Article 1 between that State and the victim’s relatives who later brought Convention proceedings. The Court interestingly drew in this connection on Article 2 cases in which it had already followed a similar approach<sup>18</sup>. The Court also relied *mutatis mutandis* on the approach previously followed in an Article 6 case concerning a civil action<sup>19</sup>, emphasising the separate and detachable nature of the procedural obligation arising out of Article 2, capable of binding a State even when the death had occurred outside its jurisdiction.

b. The Court also clarified that, if no investigation or proceedings were instituted in respect of a death outside a respondent State’s jurisdiction, the Court would have to determine whether a jurisdictional link could in any event be established. Although the procedural obligation under Article 2 would in principle only be triggered for the State under whose jurisdiction the deceased was to be found, “special features” in a given case would justify a departure from this approach, according to the principles laid down in *Rantsev v. Cyprus and Russia*<sup>20</sup>.

16 See also, under Article 2 (Right to life – Obligation to protect life) above, *Fernandes de Oliveira v. Portugal* [GC], no. 78103/14, 31 January 2019, and *Olewnik-Cieplińska and Olewnik v. Poland*, no. 20147/15, 5 September 2019.

17 *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, 29 January 2019.

18 *Aliyeva and Aliyev v. Azerbaijan*, no. 35587/08, §§ 56-57, 31 July 2014; and *Gray v. Germany*, no. 49278/09, 22 May 2014.

19 *Markovic and Others v. Italy* [GC], no. 1398/03, §§ 54-56, ECHR 2006-XIV.

20 *Rantsev v. Cyprus and Russia*, no. 25965/04, §§ 243-44, ECHR 2010 (extracts).

Each of these two grounds was sufficient for the Court to establish a jurisdictional link to Turkey, engaging therefore its procedural obligation to investigate: the “TRNC” authorities had instituted a criminal investigation under its domestic law; and “special features” existed related to the situation in Cyprus, based on the fact that the murder suspects were known to have fled to the part of Cypriot territory which was under the effective control of Turkey, namely the “TRNC”, thus preventing Cyprus from fulfilling its Convention obligations.

2. In this judgment, the Court found for the first time a violation of Article 2 under its procedural limb on the sole basis of a failure to cooperate with another State. The Court found that, where an effective investigation requires the involvement of more than one Contracting State, the Convention’s special character as collective enforcement treaty entailed an obligation on the States to cooperate effectively with each other to elucidate the circumstances of the killing and to bring perpetrators to justice. The Court also stated that Article 2 may require from both States a two-way obligation to cooperate, implying at the same time an obligation to seek assistance and an obligation to afford assistance. This obligation to cooperate could only be one of means, not of result, meaning that the States concerned must take whatever reasonable steps they can to cooperate with each other, exhausting in good faith the possibilities available to them under the applicable international instruments on mutual legal assistance and cooperation in criminal matters. Article 2 will only be breached in respect of a State required to seek cooperation if it has failed to trigger the proper mechanisms for cooperation under the relevant international treaties; and in respect of the requested State, if it has failed to respond properly or has not been able to invoke a legitimate ground for refusing the cooperation requested under those instruments.

Applying these principles to the specific context of extradition, the Court noted that the obligation to cooperate under Article 2 should be read in the light of the European Convention on Extradition<sup>21</sup> (in particular Article 18 thereof) and should therefore entail for a State an obligation to examine and provide a reasoned reply to any extradition request from another Contracting State regarding suspects wanted for murder or unlawful killings who are known to be present in its territory or within its jurisdiction.

3. Lastly, the Court took into account a special feature of the present case: the duty to cooperate involved a Contracting State and a *de facto* entity under the effective control of another Contracting State.

In such a situation, and in the absence of formal diplomatic relations between the two Contracting States involved, the Court might be required to examine the informal or *ad hoc* channels of cooperation used by the States concerned outside the cooperation mechanisms foreseen by the relevant international treaties, while at the same time being guided by the provisions of those treaties as an expression of the norms and principles applied in international law. Therefore the Court examined whether Cyprus and Turkey had taken all reasonable steps to cooperate with one another within the framework of the UNFICYP mediation, as well as in the light of the provisions of the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters<sup>22</sup>, irrespective of whether those treaties applied to the specific circumstances of the case.

As to the extent of the cooperation required under Article 2 with *de facto* entities, the Court considered that supplying the whole investigation file to the “TRNC” with the possibility that the evidence would be used for the purposes of trying the suspects there would go beyond mere cooperation between police or prosecuting authorities<sup>23</sup> and would amount in substance to the transfer of the criminal case by Cyprus to the “TRNC” courts. In such a situation, the duty to cooperate could not have required Cyprus to waive

21 European Convention on Extradition, ETS 24.

22 European Convention on Mutual Assistance in Criminal Matters, ETS 30.

23 Contrast *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 177 and 345, ECHR 2004-VII.

its criminal jurisdiction over a murder committed in its controlled area in favour of the courts of a *de facto* entity set up within its territory. However, the Court did not address in those findings the more general issue of cooperation in criminal matters with *de facto* or unrecognised entities and its lawfulness under international law, in particular with regard to the principle of non-recognition (as codified in Article 41 § 2 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts)<sup>24</sup>.

In *Nicolae Virgiliu Tănase v. Romania* [GC]<sup>25</sup>, the Court set out the procedural obligations in the context of a car accident causing life-threatening injuries.

The applicant had been in a car accident on a public road and sustained life-threatening injuries. A criminal investigation was initiated and discontinued three times, on the last occasion because it was time-barred. The applicant was a civil party to those criminal proceedings. In the Convention proceedings he mainly complained under Articles 3, 6 and 13 of the conduct of the criminal investigation and the manner in which the investigating authorities had treated him. The Court examined those complaints also under Articles 2 and 8.

Concerning the conduct of the investigation, the Court found that the complaints under Articles 3 and 8 were incompatible *ratione materiae* with the Convention and that Article 2 applied but had not been breached.

The judgment is noteworthy because it clarifies whether, in this context, the State's procedural obligations are to be drawn from Articles 2, 3 or 8. The Court's findings were informed by two key elements: the incident was unintentional and there was no suggestion of a failure by the State to adopt an adequate legal framework to ensure safety and reduce risk on the roads. The complaints under Articles 3 and 8 were therefore declared incompatible *ratione materiae*.

The Court explained that Article 2 would apply to a non-fatal road accident if "the activity involved was dangerous by its very nature and put the life of the applicant at real or imminent risk ... or if the injuries the applicant had suffered were seriously life-threatening". The injury was to be assessed in terms of the "the seriousness and after-effects" of the injuries. As to the risk assessment, the Court emphasised the importance of an adequate regulatory framework to ensure road safety. The less evident the risk from the activity, the more significant the level of injuries became. In the present case, irrespective of whether driving could be considered a particularly dangerous activity, the applicant's injuries were considered sufficiently severe as to amount to a serious danger to his life so that Article 2 applied.

As to the content of the procedural obligation under Article 2, the Court reiterated that, in circumstances of life-threatening injuries inflicted unintentionally, the obligation only required that the legal system afford a remedy in the civil courts, although domestic law could provide recourse to a criminal investigation in such circumstances. Where it was "not clearly established from the outset" that death resulted from an accident or other non-intentional act and where the hypothesis of unlawful killing was at least arguable on the facts, Article 2 required that a criminal investigation, attaining a minimum level of effectiveness, be conducted (as soon as the authorities become aware of the incident) to shed some light on the circumstances of death or the life-threatening injuries. Once it was established by that initial investigation that the death or

24 Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its 53rd Session (2001), UN Doc. A/56/10.

25 *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, 25 June 2019. See also under Article 3 (Applicability and Inhuman or degrading treatment), Article 6 § 1 (Reasonable time) and Article 8 (Right to respect for one's private and family life, home and correspondence) below.

life-threatening injury was not intentional, the civil remedy would be regarded as sufficient.

In the present case, a criminal investigation had been initiated and was found by the Court not to be deficient. Therefore, it could not be said that the legal system had failed to deal adequately with the applicant's case so that there had been no violation of Article 2.

In *Romeo Castaño v. Belgium*<sup>26</sup> the Court dealt with the scope of a State's procedural obligation to cooperate with another State investigating a murder committed within the latter's jurisdiction.

The applicants' father was killed in a terrorist attack carried out by ETA in Spain in 1981. Three persons were later convicted and sentenced. A fourth, N.J.E., escaped justice and was living in Belgium. The Belgian courts on two occasions refused to execute European arrest warrants (EAWs) issued by the Spanish authorities in respect of N.J.E. Relying on reports of the CPT (2012) and the UN Human Rights Committee (2015), the Belgian courts expressed doubts as to whether the requesting State's regime of *incommunicado* detention applied to persons suspected of terrorism-related offences was compatible with the protection of N.J.E.'s human rights. The applicants alleged in the Convention proceedings that Belgium was in breach of its obligations under Article 2 by preventing Spain from prosecuting N.J.E. The Court agreed.

The judgment is noteworthy for the following reasons:

Firstly, the Court decided whether the applicants came within the jurisdiction of Belgium *ratione loci*. The respondent State had argued that there was no jurisdictional link between it and the murder of their father. Belgium had never opened an investigation of its own motion into the murder, and the fact that N.J.E. had fled to Belgium and lived there was not sufficient to create such a link. The Court disagreed and observed that although the Article 2 procedural obligation attached in principle to the State within whose jurisdiction the death occurred, the existence of "special features" could create a procedural obligation for a third Contracting State, even if that State had not itself initiated an investigation into the death.<sup>27</sup> In the present case, the following special features were present: N.J.E. had fled to Belgium and lived there; Belgium and Spain had undertaken to cooperate with each other on criminal matters within the framework of the EAW; and Spain, acting within that framework, had requested Belgium to surrender N.J.E. For the Court, those "special features" meant that Belgium assumed a procedural obligation under Article 2 to cooperate with the Spanish authorities in the investigation of N.J.E.'s involvement in the murder of the applicants' father on their territory.

Secondly, as to the scope of Belgium's procedural obligation to cooperate, the Court drew heavily on *Güzelyurtlu and Others v. Cyprus and Turkey* [GC],<sup>28</sup> including the following principle: the procedural obligation to cooperate will only be breached in respect of a State required to seek cooperation if it has failed to trigger the proper mechanisms for cooperation under the relevant international treaties; and, in respect of the requested State, if it has failed to respond properly or has not been able to invoke a legitimate ground for refusing the cooperation requested under those instruments.

Thirdly, the Court addressed the two highlighted issues in the context of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – the relevant instrument of cooperation in the instant case. Examining each of the issues, it found

<sup>26</sup> *Romeo Castaño v. Belgium*, no. 8351/17, 9 July 2019.

<sup>27</sup> See *Rantsev v. Cyprus and Russia*, no. 25965/04, §§ 243-44, ECHR 2010 (extracts); as confirmed in *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, § 190, 29 January 2019.

<sup>28</sup> *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, §§ 232-236, 29 January 2019.

that Belgium had responded properly to Spain's request for cooperation. Importantly, it observed that the Belgian courts had not applied "automatically and mechanically" the mutual-trust principle underpinning the EAW system.<sup>29</sup> Those courts had reflected on the possible risk that N.J.E.'s Article 3 rights would be breached if she were to be held in *incommunicado* detention following her surrender to Spain, and had concluded that such a risk existed. Accepting that Article 3 considerations could constitute a "legitimate ground" for refusing a request for cooperation, the Court examined whether there was a sufficient factual basis to justify the domestic courts' perceived risk of ill-treatment. It observed that the Belgian courts failed to apprise themselves of the situation in Spain in 2016 regarding the placement of terrorist suspects in *incommunicado* detention. In its view, the courts should have used the most up-to-date information, rather than relying on the 2012 CPT and the 2015 UNHRC reports. Furthermore, it was significant that Belgium, like other countries, had in the past, and without hesitation, surrendered suspected ETA members to Spain within the framework of the EAW system. Importantly, Belgium had failed to seek further information from Spain regarding the conditions under which N.J.E. would be detained if surrendered. Such information would have allowed the Belgian authorities better to assess whether there was a real risk that N.J.E.'s Article 3 rights would be infringed in the event of her surrender.

## 2. Prohibition of torture and inhuman or degrading treatment and punishment (Article 3)

### a. Applicability

In *Nicolae Virgiliu Tănase v. Romania* [GC]<sup>30</sup> the applicant sustained life-threatening injuries following a car accident. The judgment clarified whether, in this context, the State's procedural obligations are to be drawn from Articles 2, 3 or 8.

The Court declared the complaints under Articles 3 and 8 incompatible *ratione materiae* because the incident was unintentional and there was no suggestion of a failure by the State to adopt an adequate legal framework to ensure safety and reduce risk on the roads.

The Court found that an injury following an accident which was the result of mere chance or negligence could not amount to "treatment" to which the individual had been "subjected". More particularly, Article 3 treatment is "in essence, albeit not exclusively, characterised by an intention to harm, humiliate or debase an individual, by a display of disrespect for or diminution of his or her human dignity, or by the creation of feelings of fear, anguish or inferiority capable of breaking his or her moral and physical resistance". No such elements featured in the applicant's case. Accordingly, while intention would generally be only one of the elements relevant to the assessment of the applicability of Article 3, a lack of intention in an accident context would render Article 3 inapplicable. Considering this approach to be the correct one, the Court distanced itself from previous cases where Article 3 had been applied to accidents due to the severity of the injury sustained.<sup>31</sup>

### b. Inhuman or degrading treatment

In *Nicolae Virgiliu Tănase v. Romania* [GC]<sup>32</sup>, the applicant complained of, *inter alia*, the manner in which the

<sup>29</sup> See, in this connection, *Avotiņš v. Latvia* [GC], no. 17502/07, § 116, 23 May 2016; and *Pirozzi v. Belgium*, no. 21055/11, § 62, 17 April 2018.

<sup>30</sup> *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, 25 June 2019. See also under Article 2 (Effective investigation) above, and Article 3 (Inhuman or degrading treatment), Article 6 § 1 (Reasonable time) and Article 8 (Right to respect for one's private and family life, home and correspondence) below.

<sup>31</sup> See *Kraulaidis v. Lithuania*, no. 76805/11, 8 November 2016; and *Mažukna v. Lithuania*, no. 72092/12, 11 April 2017.

<sup>32</sup> *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, 25 June 2019. See also under Article 2 (Effective investigation) and Article 3 (Applicability) above, and Article 6 § 1 (Reasonable time) and Article 8 (Right to respect for one's private and family life, home and correspondence) below.

investigating authorities had treated him during the criminal investigation in a car accident causing life-threatening injuries.

The Court rejected this complaint as manifestly ill-founded. In order to examine whether the investigation constituted inhuman treatment, the Court took into account the principles mainly developed in respect of relatives of disappeared persons<sup>33</sup>.

In *Tomov and Others v. Russia*<sup>34</sup>, the Court clarified the criteria to be met for a transport of prisoners to comply with Article 3.

The applicants complained of the inhuman and degrading conditions in which they had been transported by road and rail and of the lack of effective means of redress for their complaints. The Court had already found in more than fifty judgments against Russia that it had breached Article 3 as regards prisoners' transport conditions (acute lack of space, inadequate sleeping arrangements, lengthy journeys, restricted access to sanitary facilities, faulty heating and ventilation, etc.). In many of these cases the Court had also found a breach of Article 13 due to the absence of an effective remedy.

In the present case, the Court again found a violation of Articles 3 and 13. Referring to *Muršić v. Croatia* [GC]<sup>35</sup>, the Court outlined the approach it would take in its consideration of transport-of-prisoners cases, thereby sending a signal to Russia on how to bring its domestic law into line with Article 3 standards.

A strong presumption of a violation would arise when detainees were transported in conveyances offering less than 0.5 m<sup>2</sup> of space per person. In the case of overnight travel by rail, detainees had to have their own place to sleep. The Court also set out a number of aggravating considerations, including low ceiling height, restricted access to toilets and to drinking water or food during long trips, and sleep deprivation. It further set out a number of circumstances which, of themselves, would not give rise to a violation of Article 3. For example, a short or occasional transfer (for instance, one or two transfers, not exceeding thirty minutes each) may not reach the threshold of severity under Article 3 but more than one or two transfers would constitute a "continuing situation" and their overall effect had to be assessed.

### **c. Degrading treatment<sup>36</sup>**

*Rooman v. Belgium* [GC]<sup>37</sup> concerned a mentally ill person, who was sentenced to a term of imprisonment and detained in a psychiatric institution where the personnel could not communicate with him in his native language (namely German, the only one of Belgium's three official languages that he spoke). Relying on Articles 3 and 5, the applicant complained of not having received the appropriate psychiatric treatment due to the unavailability of German-speaking therapists.

The judgment contains a comprehensive review of the Court's case-law under Article 3 on the medical treatment of ill and vulnerable detainees. The Court also clarified the relationship between Articles 3 and 5 as regards the assessment of the adequacy of the medical treatment. As regards communicating with foreign detainees undergoing treatment for mental-health issues, the Court clarified its case-law on the linguistic element with a

33 *Kurt v. Turkey*, 25 May 1998, *Reports of Judgments and Decisions 1998-III*; *Çakıcı v. Turkey* [GC], no. 23657/94, ECHR 1999-IV; and *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, ECHR 2009.

34 *Tomov and Others v. Russia*, nos. 18255/10 and 5 others, 9 April 2019. See also Article 46 (Execution of judgments) below.

35 *Muršić v. Croatia* [GC], no. 7334/13, §§ 136-41, 20 October 2016. This case dealt with prison overcrowding.

36 See also, under Article 3 (Expulsion), *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, 21 November 2019, and, under Article 5 § 1 (Deprivation of liberty), *Z.A. and Others v. Russia* [GC], nos. 61411/15 and 3 others, 21 November 2019.

37 *Rooman v. Belgium* [GC], no. 18052/11, 31 January 2019. See also under Article 5 § 1 (e) (Right to liberty and security – Persons of unsound mind) below.

view to assessing whether the appropriate psychiatric care had been provided.

*Khan v. France*<sup>38</sup> concerned the obligation to protect unaccompanied foreign minors exposed to degrading living conditions.

The applicant, an unaccompanied Afghan aged between 11 and 12, spent almost seven months in conditions of squalor in the Calais region while hoping to reach England. During this period, he lived in makeshift huts in deplorable conditions alongside thousands of other migrants trying to cross the English Channel. These shanty towns in the Calais region lacked among other things adequate shelter, security, food, basic hygiene and access to healthcare. Non-governmental organisations made a successful application to a children's judge on behalf of the applicant (and other minors) to require the French authorities to take the applicant into care. According to the authorities, it proved impossible to enforce this measure since the applicant did not contact them and he could not be located. The applicant eventually succeeded in reaching England. In the Convention proceedings he contended that the authorities had not done everything that could reasonably be expected of them to ensure his welfare. The Court agreed and found a violation of Article 3.

The following aspects of the judgment are noteworthy:

The authorities were not aware of the applicant's plight prior to the decision of the children's judge because the applicant had not sought asylum and had not been in immigration detention awaiting expulsion. The applicant's situation therefore differed from that of the applicant in *Rahimi v. Greece*,<sup>39</sup> who was also an unaccompanied foreign minor.<sup>40</sup> In the instant case, the Court stressed the extreme vulnerability of the applicant, a child living for months in precarious conditions and at all times exposed to the threat of physical, including sexual, violence. The authorities had not made sufficient efforts to identify unaccompanied minors in the makeshift encampments, although their presence there was well documented. As in other cases concerning migrants the Court referred to the findings of domestic bodies (such as the Defender of Rights and the National Consultative Commission on Human Rights) and international bodies (such as the Special Representative of the Secretary General of the Council of Europe on Migration and Refugees and UNICEF)<sup>41</sup>.

Furthermore, the Court was not persuaded that the authorities had reacted decisively to the decision of the children's judge. It accepted the difficulties which faced them in identifying and locating the applicant and further accepted that those difficulties had been compounded by the applicant's lack of cooperation. However, the Court emphasised the fact that a vulnerable child had been exposed to degrading, dangerous and precarious living conditions over several months. Even if the respondent State had not created those conditions, it nevertheless had an obligation to protect the applicant from being subjected to them.

#### **d. Inhuman or degrading punishment**

*Marcello Viola v. Italy* (no. 2)<sup>42</sup> concerned a life prisoner required to cooperate with the authorities in their fight against Mafia crime to obtain a review of his sentence and a possibility of release.

The applicant was convicted for Mafia-related crimes, including active leadership of a Mafia clan, kidnapping

38 *Khan v. France*, no. 12267/16, 28 February 2019.

39 *Rahimi v. Greece*, no. 8687/08, 5 April 2011.

40 In that case, the Court found a breach of Article 3 because the authorities had released the applicant from immigration detention pending his expulsion from the territory, effectively leaving him to fend for himself on the streets.

41 See, for instance, *Muskhadzhiyeva and Others v. Belgium*, no. 41442/07, 19 January 2010; *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011; *Kanagaratnam v. Belgium*, no. 15297/09, 13 December 2011; and *Tarakhel v. Switzerland* [GC], no. 29217/12, ECHR 2014 (extracts).

42 *Marcello Viola v. Italy* (no. 2), no. 77633/16, 13 June 2019. See also under Article 46 (Execution of judgments) below.

and murder, and sentenced to life imprisonment. He alleged under Article 3 that his life sentence was neither *de jure* nor *de facto* reducible since the so-called “*ergastolo ostativo*” regime was applied to him on account of the offences of which he was convicted. He argued that other categories of life prisoners had the prospect of release when after serving twenty-six years of their sentence, and benefited from a possibility of release in advance of that term by demonstrating their suitability for reintegration into society. The applicant claimed that he could only enjoy a review of his sentence – and a prospect of release – if he succeeded in rebutting the statutory presumption that he no longer had any links with the Mafia and was therefore no longer to be considered dangerous. To do that, he contended, he had to cooperate with the authorities by becoming an informant, thereby putting his and his family’s lives at risk of reprisals.

The Court found a violation of Article 3 because the sentencing regime amounted to an excessive curtailment of the applicant’s right to a review of his life sentence with the possibility of release.

It had due regard to the reasons which led the legislator to place the onus on offenders such as the applicant to prove that they had broken their links with the Mafia. According to the Government, the very nature of Mafia membership justified the requirement that a prisoner cooperated with the authorities in the fight against Mafia-related crime to prove his or her rehabilitation, and the prisoner had a choice in the matter.

However, the Court was not persuaded that the choice between cooperating and refusing to cooperate could be considered voluntary. It referred to the applicant’s fears for his and his family’s security if he were to provide assistance to the authorities. In addition, prisoners’ decisions to collaborate could in reality be nothing more than an opportunistic move on their part to secure a sentence review, rather than signifying a genuine resolve to put an end to their ties with the Mafia. The Court was particularly concerned by the fact that the law did not afford prisoners such as the applicant other ways of proving that they had severed for good their links with the Mafia. It noted that the applicant had successfully followed the reintegration-into-society programme offered by the prison that, had he been an ordinary life prisoner, would have entitled him to a five-year reduction of his sentence. However, by refusing to cooperate with the authorities, the progress the applicant had made in prison could not be taken into consideration, with the result that he was denied the possibility of demonstrating that his continued imprisonment was no longer justified on legitimate penological grounds.

Importantly, the Court stressed that Article 3 required a prospect of release but not a right to be released if the prisoner was deemed at the close of the review to still be a danger to society.

#### **e. Expulsion**

*Ilias and Ahmed v. Hungary* [GC]<sup>43</sup> concerned the short-term confinement of asylum-seekers in a land border transit zone and their subsequent removal to a presumed-safe third country without examining their asylum claims on the merits.

The applicants, Bangladeshi nationals, arrived in the transit zone situated on the land border between Hungary and Serbia and applied for asylum. Although their expulsion was ordered on the same day, they spent twenty-three days in the transit zone pending examination of their asylum claims. The domestic authorities rejected their asylum requests as inadmissible because they considered Serbia to be a safe third country that could examine their asylum requests on the merits. The applicants were escorted out of the transit zone and crossed the border back to Serbia, without physical coercion. The Court found a violation of Article 3 as regards their expulsion to Serbia and no violation of this provision as regards their conditions of confinement in the transit zone.

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43 *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, 21 November 2019. See also under Article 5 § 1 (Deprivation of liberty) below.

The judgment is noteworthy because the Court, drawing on *M.S.S. v. Belgium and Greece* [GC]<sup>44</sup>, clarified the nature of the duty of the expelling State when removing an asylum-seeker to a third country without an examination on the merits of the asylum claim.

The Court observed that, where a Contracting State seeks to remove an asylum-seeker to a third country without examining the asylum request on the merits, the State's duty not to expose the individual to a real risk of treatment contrary to Article 3 differs from that in cases of return to the country of origin. In the latter situation the expelling authorities examine whether the asylum claim is well founded and, accordingly, the alleged risks in the country of origin. In the former situation, the main issue is the adequacy of the asylum procedure in the receiving third country.

A State removing asylum-seekers to a third country may legitimately choose not to deal with the merits of asylum requests; however, in that case, it cannot know whether those persons risk treatment contrary to Article 3 in the country of origin or are simply economic migrants not in need of protection. Therefore, in all such cases, regardless of whether the receiving third country is a member State of the European Union or a State Party to the Convention, it is the duty of the removing State to examine thoroughly whether or not there is a real risk of the asylum-seekers being denied access, in the receiving third country, to an adequate asylum procedure protecting them against *refoulement*, namely, against being removed to their country of origin without a proper evaluation of the risks they face from the standpoint of Article 3. If it is established that the existing guarantees in this regard are insufficient, Article 3 gives rise to a duty not to remove the asylum-seekers to the third country.

The Court clarified how to determine whether the removing State had fulfilled the procedural obligation to assess the asylum procedures of a receiving third State:

- (a) Whether the authorities of the removing State had taken into account the available general information about the receiving third country and its asylum system in an adequate manner and of their own initiative; and
- (b) whether the applicants had been given a sufficient opportunity to demonstrate that the receiving State was not a safe third country in their particular case. Any presumption that a particular country is "safe" must be sufficiently supported by the above analysis.

The Court specified that it does not assess whether there was an arguable claim about Article 3 risks in the country of origin. The Court thus distanced itself from its approach in certain previous cases where it had mentioned that the applicants' claim about risks in their countries of origin were arguable, even though the removing State in those cases had not examined them on the merits.

The Court found that Hungary had failed to discharge its procedural obligation under Article 3, having regard to the fact that there was an insufficient basis for the decision to establish a general presumption concerning Serbia as a safe third country; that the expulsion decisions disregarded the authoritative findings of the UNHCR as to a real risk of a denial of access to an effective asylum procedure in Serbia and of a summary removal from Serbia to North Macedonia and onward to Greece; and that the Hungarian authorities had exacerbated the risks facing the applicants by inducing them to enter Serbia illegally instead of negotiating an orderly return with relevant guarantees.

The Court also clarified an important issue concerning the scope of cases before it in referral proceedings by finding that complaints that had not been rejected as inadmissible or declared admissible by the Chamber were considered to fall within the scope of the case before the Grand Chamber.

<sup>44</sup> *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011.

### 3. Right to liberty and security (Article 5)

#### a. Deprivation of liberty (Article 5 § 1)

*Ilias and Ahmed v. Hungary* [GC]<sup>45</sup> concerned the short-term confinement of asylum-seekers in a land border transit zone before being removed to a third country<sup>46</sup>.

The applicants spent twenty-three days in the transit zone on the land border between Hungary and Serbia, pending examination of their asylum claims. The zone measured 110 m<sup>2</sup> and was fully guarded at all times. Inside it, the applicants could spend time outdoors, communicate with other asylum-seekers and receive visits.

The Court declared the applicants' complaints under Article 5 §§ 1 and 4 incompatible *ratione materiae* with the Convention.

The judgment is noteworthy because the Court examined for the first time the applicability of Article 5 to the confinement of asylum-seekers in a transit zone on the land border between two member States of the Council of Europe.

The Court examined whether the confinement of the applicants amounted to a restriction on liberty of movement or to a deprivation of liberty. It set down the factors to be taken into account: (a) the applicants' individual situation and their choices; (b) the applicable legal regime of the respective country and its purpose; (c) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by the applicants; and (d) the nature and degree of the actual restrictions imposed on or experienced by the applicants. The Court found that Article 5 did not apply because the applicants' confinement did not exceed the maximum duration set by domestic law or what was strictly necessary to verify whether their wish to enter Hungary to seek asylum could be granted. Furthermore, while their freedom of movement had been restricted significantly (similar to certain types of light-regime detention facilities), their liberty had not been limited unnecessarily or to an extent or in a manner unconnected to the examination of their asylum claims.

The Court distinguished cases concerning confinement in airport transit zones<sup>47</sup> from the present case where it was possible to walk to the border and cross into Serbia, a country bound by the Geneva Convention Relating to the Status of Refugees. The applicants' fears about deficiencies in Serbia's asylum procedures were not sufficient to render their stay involuntary. The Convention could not be read as linking the applicability of Article 5 to a separate issue concerning the authorities' compliance with Article 3. In sum, the relevant factors did not point to a *de facto* deprivation of liberty and it was possible for the applicants, without a direct threat to their life or health, to return to Serbia. Article 5 could not be seen applicable in a land border transit zone where individuals awaited the outcome of their asylum claims because the authorities had not complied with their separate duties under Article 3.

In *Z.A. and Others v. Russia* [GC]<sup>48</sup> the Court examined whether the confinement of asylum-seekers in an airport transit zone amounted to a deprivation of liberty.

Travelling independently from each other, the four applicants entered Moscow's Sheremetyevo Airport. While they did not arrive there because of a direct and immediate danger to their life or health, their arrival was nonetheless involuntary – either because they had been denied entry into a third country or because they had

<sup>45</sup> *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, 21 November 2019. See also under Article 3 (Expulsion) above.

<sup>46</sup> See a summary of the case under Article 3 (Expulsion) above.

<sup>47</sup> Notably, *Amuur v. France*, 25 June 1996, *Reports of Judgments and Decision 1996-III*.

<sup>48</sup> *Z.A. and Others v. Russia* [GC], nos. 61411/15 and 3 others, 21 November 2019.

been deported to Russia. After being denied entry into Russia, they unsuccessfully applied for refugee status. In the meantime, they were held in the international transit zone of the airport for periods ranging from five months to one year and ten months, even though domestic rules granted asylum-seekers the right to be placed in temporary accommodation facilities. Although the applicants were largely left to their own devices within the transit zone, the size of the area and the manner in which it was controlled by the border guards meant that their freedom of movement was significantly restricted.

The Court considered that, on account of the absence of a legal basis, the applicants' lengthy confinement in the airport transit area amounted to a *de facto* deprivation of liberty. It found a violation of Article 5 § 1 and of Article 3 on account of the authorities' failure to take care of their essential needs while so detained.

The judgment is noteworthy for the manner in which it addressed the applicability of, and compliance with, Article 5 § 1 in the context of confinement of foreigners in airport transit zones.

1. As a preliminary consideration, the Court stressed that the right to have one's liberty restricted only in accordance with the law and the right to humane conditions if detained under State control are minimum guarantees which should be available to those under the jurisdiction of all member States, despite the mounting "migration crisis" in Europe.
2. Drawing upon its case-law concerning confinement in airport transit zones<sup>49</sup>, the Court set out four factors to be taken into consideration when assessing whether a measure of confinement of asylum-seekers amounts to a restriction on liberty of movement or to a deprivation of liberty, whether in an airport transit zone or in reception centres for the identification and registration of migrants. These factors are as follows:
  - a. The applicants' individual situation and their choices (whether they had requested admission to the State voluntarily and whether they faced a direct and immediate danger to their life or health);
  - b. the applicable legal regime of the respective country and its purpose (absent other significant factors, the situation of individuals applying for entry and waiting for a short period for the verification of their right to enter cannot be described as a deprivation of liberty, since in such cases the State authorities have undertaken vis-à-vis the individuals no other steps than reacting to their wish to enter by carrying out the necessary verifications;)
  - c. the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by the applicants and
  - d. the nature and degree of the actual restrictions imposed on, or experienced by, the applicants.

The Court found that the applicants had been deprived of their liberty within the meaning of Article 5 having regard to the lack of any domestic legal provisions fixing the maximum duration of their stay; the largely irregular character of their stay in the airport transit zone; the excessive duration of such stay and considerable delays in the domestic examination of their asylum claims; the characteristics of the area in which they had been held; the control to which they had been subjected during the relevant period of time; and the fact that the applicants had had no practical possibility of leaving the zone.

3. As regards the merits of the complaint, the Court indicated how to comply with the lawfulness requirement of Article 5. This requirement may be considered generally satisfied by a domestic legal regime that provides, for example, for no more than the name of the authority competent to order deprivation of

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49 For instance, *Amuur v. France*, 25 June 1996, Reports of Judgments and Decisions 1996-III.

liberty in a transit zone, the form of the order, its possible grounds and limits, the maximum duration of confinement and, as required by Article 5 § 4, the applicable avenue of judicial appeal. The Court further specified that Article 5 § 1 (f) does not prevent States from enacting domestic law provisions formulating the grounds on which such confinement can be ordered with due regard to the practical realities of a massive influx of asylum-seekers. In particular, deprivation of liberty in a transit zone for a limited period is not prohibited if such a confinement is generally necessary to ensure the asylum-seekers' presence pending the examination of their asylum claims or, if there is a need to examine the admissibility of asylum applications speedily and if, to that end, a structure and adapted procedures have been put in place in the transit zone.

In the present case, the Court found a violation of Article 5 § 1 due to the absence of any legal basis for the applicants' lengthy confinement in the transit zone.

#### **b. Persons of unsound mind (Article 5 § 1 (e))**

*Rooman v. Belgium* [GC]<sup>50</sup> concerned the applicant's deprivation of liberty in a psychiatric institute. The applicant, a German-speaking Belgian national, was sentenced for serious sexual and other offences. While in prison, he committed further offences and his detention in a psychiatric institution was ordered. Since 2004 he had therefore been detained in a "social protection facility" ("EDS") in the French-speaking region of Belgium: medical reports attested to a psychotic and paranoid personality representing a danger to society. He complained, under Articles 3 and 5, of the failure to provide him with the necessary psychiatric treatment in the EDS. The Chamber found that the applicant's detention without appropriate treatment due to the unavailability of German-speaking therapists for thirteen years (apart from some short periods) violated Article 3. However, it also found that this lack of treatment did not sever the link with the aim of his detention or render his detention unlawful, thus finding no violation of Article 5.

Further to the delivery of the Chamber judgment, in August 2017 fresh efforts were made to provide the applicant with treatment in German. The Grand Chamber found a violation of Articles 3 and 5 given the lack of treatment prior to August 2017 and no violation of those Articles as regards the care proposed since then.

1. The principal issue was whether Article 5 § 1 (e) had, in addition to its social role of ensuring the protection of society, a therapeutic one which required appropriate treatment to ensure the detention remained lawful. In its earlier judgments<sup>51</sup>, the Court had found that a right to appropriate treatment could not be derived from Article 5 § 1 (e). Later, beginning with *Aerts v. Belgium*<sup>52</sup>, the case-law began to recognise a link between the lawfulness of a deprivation of liberty and the conditions of its execution<sup>53</sup>. This led to a series of judgments against Belgium<sup>54</sup> where the Court found the psychiatric wings of Belgian prisons inappropriate for the lengthy detention of mentally ill persons as they did not receive appropriate care and treatment for their conditions and were thus deprived of any realistic prospect of rehabilitation. That deficiency severed the necessary link with the purpose, and thus the lawfulness, of the detention, leading to a violation of Article 5 § 1.

50 *Rooman v. Belgium* [GC], no. 18052/11, 31 January 2019. See also under Article 3 (Degrading treatment) above.

51 *Winterwerp v. the Netherlands*, 24 October 1979, Series A no. 33; and *Ashingdane v. the United Kingdom*, 28 May 1985, Series A no. 93.

52 *Aerts v. Belgium*, 30 July 1998, § 49, *Reports of Judgments and Decisions* 1998-V.

53 *Hutchison Reid v. the United Kingdom*, no. 50272/99, §§ 52 and 55, ECHR 2003-IV, and *Ilseher v. Germany* [GC], nos. 10211/12 and 27505/14, §§ 139 and 141, 4 December 2018.

54 The four leading judgments: *L.B. v. Belgium*, no. 22831/08, 2 October 2012; *Claes v. Belgium*, no. 43418/09, 10 January 2013; *Dufoort v. Belgium*, no. 43653/09, 10 January 2013; and *Swennen v. Belgium*, no. 53448/10, 10 January 2013; eight judgments of 9 January 2014: *Van Meroye v. Belgium*, no. 330/09; *Oukili v. Belgium*, no. 43663/09; *Caryn v. Belgium*, no. 43687/09; *Moreels v. Belgium*, no. 43717/09; *Gelaude v. Belgium*, no. 43733/09; *Saadouni v. Belgium*, no. 50658/09; *Plaisier v. Belgium*, no. 28785/11; and *Lankester v. Belgium*, no. 22283/10; as well as, more recently, the pilot judgment in *W.D. v. Belgium*, no. 73548/13, 6 September 2016.

The Court confirmed in the present case that, in the light of these case-law developments and current international standards<sup>55</sup>, the deprivation of liberty contemplated by Article 5 § 1 (e) can be considered to have a dual function: as well as the social function of protection it also has a therapeutic one so that the administration of “appropriate and individualised treatment” to such a detainee has become a condition of the lawfulness of that detention. The presence of “appropriate and individualised treatment” is therefore the “essential part” of a decision as to whether a detaining facility is an appropriate one for such detention.

2. The Court also clarified the relationship between Articles 3 and 5 as regards the assessment of the adequacy of medical treatment for mentally ill detainees. The question of a continued link between the purpose of detention and the conditions in which it is carried out (Article 5 § 1 (e)) and the question of whether those conditions attain a particular threshold of gravity (Article 3) were considered by the Court to be of “differing intensity”. Accordingly, a finding of no violation of Article 3 does not automatically lead to no violation of Article 5 § 1.

3. The applicant had not been receptive to the treatment plan offered since August 2017 and domestic law prohibited its imposition. Drawing on Recommendation Rec (2004)10<sup>56</sup>, the Court confirmed that this did not imply that treatment was to be imposed. Rather, treatment was to be proposed, providing the applicant with a choice of treatment. Considering the significant efforts made by the authorities to provide the applicant with coherent and adapted treatment, the short period during which they had an opportunity to implement these treatment measures and the fact that the applicant had not always been receptive to them, the Court concluded that the treatment available since August 2017 corresponded to the therapeutic aim of the applicant’s compulsory confinement.

4. Finally, it was accepted that the applicant had not received treatment because it was not available in German. The Court emphasised that the Convention did not guarantee detainees the right to treatment in their own language. As regards Article 3, the question was whether, “in parallel with other factors, necessary and reasonable steps were taken to guarantee communication that would facilitate the effective administration of appropriate treatment”. However, it was accepted that as regards psychiatric treatment “the purely linguistic element could prove to be decisive as to the availability or the administration of appropriate treatment, but only where other factors [did] not make it possible to offset the lack of communication”. In the context of Article 5, the Social Protection Board (which had committed the applicant to compulsory confinement) had confirmed his right to speak, be understood and to receive treatment in German, a national language in Belgium, so the finding of a violation of Article 5 in the present case could be confined to those very particular facts.

### **c. Speediness of review (Article 5 § 4)**

*Aboya Boa Jean v. Malta*<sup>57</sup> provided an answer to the question whether procedural irregularities in the review of lawfulness automatically result in a violation of Article 5 § 4.

The applicant was in immigration detention awaiting examination of his asylum application<sup>58</sup>. Under Maltese law an automatic review of the lawfulness of immigration detention had to take place within seven working days of an individual’s placement in detention, and the review period could be extended by a further seven working days. In the applicant’s case, and contrary to domestic-law requirements, the automatic review was only carried out after twenty-five calendar days because of difficulties in convening the Immigration Appeals Board within the first

<sup>55</sup> Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, and Recommendation Rec(2004)10 of the Committee of Ministers to member States concerning the protection of the human rights and dignity of persons with mental disorder.

<sup>56</sup> Recommendation Rec(2004)10, cited above.

<sup>57</sup> *Aboya Boa Jean v. Malta*, no. 62676/16, 2 April 2019.

<sup>58</sup> The Court found the detention to be justified under Article 5 § 1 (f).

seven working days and also because of the applicant's request for an adjournment on the twentieth calendar day following his detention, which was within the maximum domestic time-limit of seven plus seven working days.

The applicant complained that the Article 5 § 4 procedure had not been speedy because of the breach of the statutory deadline obliging the Board to carry out an automatic review of the lawfulness of his detention. The Court disagreed and found no violation of Article 5 § 4.

The judgment is noteworthy as regards the treatment of the nature and scope of Article 5 § 4 proceedings. The Court observed that the forms of judicial review which satisfy the requirements of Article 5 § 4 may vary from one domain to another "and will depend on the type of deprivation of liberty in issue". Importantly, it pointed out that a system of automatic periodic review of the lawfulness of detention by a court may ensure compliance with the requirements of Article 5 § 4.

One such requirement was that a review must be speedy. The question whether the periods of time which elapse between automatic periodic reviews complied with the speediness requirement had to be determined in the light of the circumstances of each case, bearing in mind the nature of the detention<sup>59</sup>.

The Court then addressed the impact of the procedural irregularities on the Article 5 § 4 proceedings. It stressed that although a deprivation of liberty may be unlawful under Article 5 § 1 because it was not "in accordance with a procedure prescribed by law", breaches of mandatory procedural requirements did not of themselves give rise to a breach of Article 5 § 4. The decisive question in the applicant's case was whether the review satisfied the speediness test. The Court observed that while detention which is not compliant with domestic law induces a violation of Article 5 § 1, a breach of time-limits for automatic reviews does not necessarily amount to a violation of Article 5 § 4, if the proceedings were nonetheless decided speedily. The Court considered that (despite certain irregularities) the time which elapsed until the first review, i.e. twenty running days – which due to a postponement became twenty-five running days – was not unreasonable.

#### **d. Right to compensation (Article 5 § 5)**

In *Porchet v. Switzerland* (dec.)<sup>60</sup> the Court clarified its case-law on the concept of compensation ("réparation") within the meaning of Article 5 § 5 and whether a reduction in sentence can be regarded as "compensation".

The applicant was arrested for endangering life and driving a vehicle without a licence. He was placed in pre-trial detention in premises intended for police custody and was held there for eighteen days instead of the forty-eight hours authorised by law. The applicant was subsequently sentenced to thirty-five months' imprisonment, part of which was suspended. In order to compensate for the sixteen days of detention in a police custody cell, the Criminal Court granted him a reduction in sentence of eight days. The applicant claimed that he had a right under Article 5 § 5 to monetary compensation for his detention, which had been in breach of Article 5 § 1 of the Convention.

The Court declared the application incompatible *ratione personae* with the Convention.

This decision is noteworthy because the Court made clear that the concept of "compensation" within the meaning of Article 5 § 5 is not to be understood solely in financial terms.

While the existing case-law was relatively sparse, some aspects were of relevance to this case:

<sup>59</sup> Examples for different natures of detention are detention after conviction, detention of persons of unsound mind, detention pending expulsion or, as in the instant case, detention pending the determination of an asylum request.

<sup>60</sup> *Porchet v. Switzerland* (dec.), no. 36391/16, 8 October 2019.

The Commission had previously found that, although the right to compensation under Article 5 § 5 was primarily financial, it could be broader in scope.<sup>61</sup> Moreover, Article 5 § 5 did not guarantee a right to a certain amount of compensation<sup>62</sup>.

Applying, by analogy, its case-law concerning compliance with the reasonable-time requirement from the standpoint of Article 6 § 1<sup>63</sup> and Article 5 § 3<sup>64</sup> and the case-law concerning conditions of detention contrary to Article 3<sup>65</sup>, the Court noted that a reduction in sentence could constitute compensation within the meaning of Article 5 § 5 if it was explicitly granted to afford redress for the violation in question and had a measurable and proportionate impact on the sentence served by the person concerned<sup>66</sup>.

Accordingly, the Court held that the applicant could no longer claim to be a victim of a violation of Article 5 § 5 because the national authorities had acknowledged the violation and had afforded redress comparable to just satisfaction as provided for under Article 41.

## IV. PROCEDURAL RIGHTS

### 1. Right to a fair hearing in civil proceedings (Article 6 § 1)

#### a. Applicability

In *Altay v. Turkey* (no. 2)<sup>67</sup> the Court ruled that oral communication between lawyers and their clients falls within the notion of “private life” and is a “civil” right.

The applicant was serving a life sentence. Since September 2005 he had had to conduct his consultations with his lawyer in the presence of a prison officer. The measure was imposed by a court when it was discovered that the lawyer had acted in a manner incompatible with the standards of her profession by trying to send the applicant reading material which did not relate to his defence rights. The applicant alleged that the restriction of the privacy of his consultations with his lawyer was incompatible with his rights under Article 8 and that the domestic proceedings in which he had attempted to challenge this measure had not complied with the fairness requirements of Article 6 § 1 since, among other things, he had not been afforded an oral hearing. The Court agreed on both counts.

The judgment is noteworthy because the Court ruled for the first time that oral communication between individuals and their lawyers in the context of legal assistance falls within the scope of private life since the purpose of such interaction is to allow individuals to make informed decisions about their lives.

It is also noteworthy that the Court’s view of the nature of the lawyer-client relationship weighed heavily in its assessment of whether the applicant could rely on the civil limb of Article 6 to complain of the fairness of the proceedings which he brought to challenge the restriction. The Government argued that the restriction on the consultation with his lawyer was a preventive measure imposed in the interests of maintaining order and security

61 See *Bozano v. France*, no. 9990/82, Commission decision of 15 May 1984, Decisions and Reports 34, pp. 119, 131.

62 See, for instance, *Jeronovičs v. Latvia* (dec.), no 547/02, 10 February 2009.

63 *Chraidi v. Germany*, no. 65655/01, § 24, ECHR 2006-XII.

64 *Ščensnovičius v. Lithuania*, no. 62663/13, § 92, 10 July 2018; and *Chraidi v. Germany*, no. 65655/01, § 24, ECHR 2006-XII.

65 *Stella and Others v. Italy* (dec.), no. 49169/09, §§ 59-60, 16 September 2014.

66 *Ibid.*, and, conversely, *Włoch v. Poland* (no. 2), no. 33475/08, § 32, 10 May 2011.

67 *Altay v. Turkey* (no. 2), no. 11236/09, 9 April 2019. See also under Article 8 (Private life) below.

within the prison and was therefore of a public-law nature. However, the Court found that the substance of the right in question, concerning the applicant's ability to converse in private with his lawyer, is of a predominately personal and individual character, bringing the present dispute closer to the civil sphere. Since a restriction on either party's ability to confer in full confidentiality with each other would frustrate much of the usefulness of the exercise of this right, the Court concluded that private-law aspects of the dispute predominate over public-law ones.

This conclusion on the applicability of the civil limb of Article 6 can be viewed as complementary to the case-law in which the Court has held in respect of proceedings instituted in the prison context that some restrictions on prisoners' rights fall within the sphere of "civil rights"<sup>68</sup>.

The Court's reasoning on the merits of the Article 6 complaint contains a review of the case-law on the right to an oral hearing in the context of civil proceedings. In the present case, it found that there were no exceptional circumstances which justified dispensing with an oral hearing in the impugned proceedings.

### **b. Reasonable time**

In *Nicolae Virgiliu Tănase v. Romania* [GC]<sup>69</sup> the Court set out the procedural obligations on a State following a car accident which caused life-threatening injuries<sup>70</sup>.

The Court ruled, *inter alia*, that the length of the investigation did not exceed the reasonable-time requirement under Article 6.

The Court found that the criminal investigation had not been deficient. Therefore, it could not be said that the legal system failed to deal adequately with the applicant's case, thus not violating Article 2. Interestingly, and having found that the length of the investigation (over eight years) had not affected its effectiveness<sup>71</sup>, the Court examined this length issue separately under Article 6<sup>72</sup>, finding that it did not give rise to a violation of the reasonable-time requirement contained therein.

## **2. Presumption of innocence (Article 6 § 2)**

In *Carrefour v. France* (dec.)<sup>73</sup>, the Court ruled on the principle that punishment should only be applied to the offender in relation to the merger of one company into another.

Proceedings were brought against a subsidiary of the applicant company for anti-competitive practices. While the proceedings were under way, the applicant company took over its subsidiary as a going concern with all assets and liabilities, without liquidating the business before. The applicant company thus replaced the merged company in respect of all its pending contracts and became the employer of its staff. Subsequently, in the competition proceedings, the applicant company was ordered to pay a civil fine of 60,000 euros in respect of acts imputable to its former subsidiary, whose business it had continued. The applicant company appealed, arguing that this fine breached the principle that punishment should only be applied to the offender. The Court of

68 *De Tommaso v. Italy* [GC], no. 43395/09, § 147, 23 February 2017; *Enea v. Italy* [GC], no. 74912/01, § 119, ECHR 2009; and *Ganci v. Italy*, no. 41576/98, §§ 20-26, ECHR 2003-XI.

69 *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, 25 June 2019. See also under Article 2 (Effective investigation) and Article 3 (Applicability and Inhuman or degrading treatment) above, and Article 8 (Right to respect for one's private and family life, home and correspondence) below.

70 See also the summary of the case under Article 2 (Effective investigation).

71 See also *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 225, 14 April 2015.

72 See also *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII.

73 *Carrefour France v. France* (dec.), no. 37858/14, 1 October 2019.

Cassation dismissed its appeal, because, as the merger had resulted in the economic and functional continuity of the former company, a judgment against the surviving company in respect of infringements committed in the context of the merged company's activity was not incompatible with that principle. The Court dismissed the application as manifestly ill-founded.

The decision is noteworthy as it was the first time that the Court had examined, in the light of the principle that punishment should only be applied to the offender, the specific situation of a merger of one company into the other, with the economic and functional continuity of the merged company.

The Court had previously dealt with this principle when examining the compatibility with Article 6 § 2 of a judgment against heirs who had been given fines of a criminal nature for acts of tax fraud that had been imputed to the deceased.<sup>74</sup> Under Article 7, refusing to pierce the corporate veil of legal personality, the Court has relied on that principle to find against the confiscation of the applicant companies' property for acts engaging the criminal liability of their directors<sup>75</sup>.

In the present case, the Court found that the imposition of a civil fine on the applicant company had not breached the principle that punishment should only be applied to the offender.

The Court observed that in the event of the merger of one company into another, the business of the merged company passed to the surviving company and its shareholders became shareholders of the latter. The economic activity that had formerly been carried on by the merged company, and which had constituted its core business, was thus continued by the company benefiting from the operation. As a result of the continuity from one company to another, the merged company was not really "another" in relation to the surviving company.

Therefore, the situation brought about by the merger of one company into the other, entailing the economic and functional continuity of the merged company, constitutes an exception to the principle that punishment should only be applied to the offender.

The Court emphasised that an unconditional application of the principle in this context could render nugatory the economic liability of legal entities, which would be able to evade any pecuniary sanctions merely through operations such as mergers. The choice made in French law was therefore driven by the imperative of ensuring the effectiveness of pecuniary sanctions, which would be negated by the systematic application to legal entities of the principle that punishment should only be applied to the offender. The Court further noted that the approach of EU law in the field of competition law was similar, being driven by the same concerns: to avoid companies evading the Commission's sanctions by the mere fact that they had taken on a new identity following legal or organisational changes; and to ensure the effective implementation of the competition rules.

### 3. Defence rights (Article 6 § 3)

In *Sigurður Einarsson and Others v. Iceland*<sup>76</sup> the defence had been denied access to a mass of data and involvement in its electronic sifting by the prosecution when the latter was gathering relevant information for investigation.

The applicants occupied senior positions in a bank that collapsed due to the 2008 banking crisis in Iceland. They

<sup>74</sup> *E.L., R.L. and J.O.-L. v. Switzerland*, 29 August 1997, *Reports of Judgments and Decisions* 1997-V; *A.P., M.P. and T.P. v. Switzerland*, 29 August 1997, *Reports of Judgments and Decisions* 1997-V; see also, for similar questions, *Estate of Nitschke v. Sweden*, no. 6301/05, § 52, 27 September 2007; *Silickienė v. Lithuania*, no. 20496/02, § 51, 10 April 2012; and *Lagardère v. France*, no. 18851/07, § 77, 12 April 2012.

<sup>75</sup> *G.I.E.M. S.r.l. and Others v. Italy* [GC], nos. 1828/06 and 2 others, 28 June 2018.

<sup>76</sup> *Sigurður Einarsson and Others v. Iceland*, no. 39757/15, 4 June 2019.

were convicted for breach of trust or market manipulation. Their defence was given access to the documents included in the investigation file, as well as to the material selected from that file and presented to the trial court. However, the defence had not been given access to the vast amount of data collected indiscriminately by the prosecution and not included in the investigation file, comprising the particular category of data “tagged” as a result of searches using the Clearwell e-Discovery system. Furthermore, the defence had been unable to have a say in the prosecution’s electronic sifting of that data and had been denied the possibility of carrying out a Clearwell search in order to identify evidence that could potentially be exculpatory.

The judgment is noteworthy in three respects:

- Firstly, it clarifies the content of the right to have adequate facilities for the preparation of the defence with regard to a vast volume of unprocessed material collected indiscriminately by the prosecution and a priori not relevant to the case. For the Court, the data in question were more akin to any other evidence which might have existed but had not been collected by the prosecution at all than to evidence of which the prosecution had knowledge but which it refused to disclose to the defence. Since the prosecution had not been aware of the content of the mass of data, and to that extent it had not held any advantage over the defence, the denial of access to such raw data was not a situation of withholding evidence or “non-disclosure” in the classic sense.
- Secondly, regarding the processing or sifting of such raw material by the prosecution, the Court specified the nature of the procedural safeguards which should guard against the concealment of information of relevance to the defence. The Court stressed that a possibility of a review by a court was an important safeguard in determining whether access to data should be ensured. Also, an important safeguard in a sifting process would be to ensure that the defence was provided with an opportunity to be involved in the laying-down of the criteria for determining what might be relevant to the case. In particular, concerning access to the intermediate results of such sifting, for instance to the “tagged” data in question in the instant case, it would have been appropriate for the defence to have been afforded the possibility of conducting a search for potentially exculpatory evidence and any refusal to allow the defence to have further searches of the “tagged” documents carried out would in principle raise an issue under Article 6 § 3 (b).
- Finally, the Court took into account the following factors when assessing the overall fairness of the proceedings in issue:

whether the applicants had pointed to any specific issue which could have been clarified by further searches;

whether the applicants had formally sought a court order for access to the mass of data collected by the prosecution or for further searches to be carried out and

whether they had suggested further investigative measures – such as a fresh search using specific keywords.

#### 4. Other rights in criminal proceedings

##### a. No punishment without law (Article 7)

*Parmak and Bakır v. Turkey*<sup>77</sup> concerned the retroactive application of more lenient changes to substantive criminal law and whether a broad interpretation of domestic law was “reasonably foreseeable”.

<sup>77</sup> *Parmak and Bakır v. Turkey*, nos. 22429/07 and 25195/07, 3 December 2019

In 2006 the applicants were convicted of membership of a terrorist organisation (they had met each other, disseminated flyers and possessed illegal periodicals and a manifesto). They were convicted under the Prevention of Terrorism Act (Law no. 3713), which was in force at the time of the impugned activities in 2002. This Law described “terrorism” as any act committed by means of pressure, force and violence, terror, intimidation, oppression or threat, with one or more of the listed political or ideological aims. The domestic courts also took into account the amended 2003 version of the Law, which narrowed the definition of “terrorism” by including the use of force and violence as well as other cumulative conditions. The domestic courts found that “force and violence” should be interpreted broadly and include situations where violence, although not used in the ordinary physical sense, was adopted as the goal of an organisation, as in the applicants’ case. This requirement of “force and violence” was therefore found to be satisfied in their case because the texts which they had disseminated/possessed were so objectionable as to amount to “moral coercion” of the public. The Court found a violation of Article 7.

The judgment is noteworthy because the Court has, for the first time, indicated that the principle recognised in *Scoppola v. Italy* (no. 2) [GC]<sup>78</sup> – the need to apply retroactively an intervening and more lenient criminal penalty – extends to intervening favourable changes to substantive law. In the present case, the Turkish courts had taken into account the new 2003 Law, in conjunction with its original version from 2002, so the Court mainly assessed the compatibility with Article 7 of the domestic courts’ interpretation of those provisions.

This assessment is interesting because of the manner in which the Court examined whether the domestic courts’ broad interpretation of domestic law was “reasonably foreseeable” for the purposes of Article 7 § 1. The Court applied a two-tier test.

Firstly, the Court examined whether the interpretation was the “resultant development of a perceptible line of case-law”. There had been no comparable case in which an association had been deemed to be a terrorist organisation on the sole basis of the nature of its written declarations and in the absence of violent acts. Nor were there any examples of domestic case-law that used the concept of “moral coercion” in the context of terrorist offences.

Secondly, it assessed whether the “application of the law in broader circumstances was nevertheless consistent with the essence of the offence” of membership of a terrorist organisation and whether the text reasonably implied the concept of “moral coercion”. That the use of violence as a necessary element of terrorism in the 2003 version of the Law was singled out supported the conclusion that actual violence or the intent to use such violence was central to the definition of the offence. Moreover, the Turkish Court of Cassation had clarified that, when assessing whether an organisation could be classified as terrorist, the domestic courts should examine thoroughly the nature of the organisation, its purpose, whether it had adopted an action plan or similar operational measures and whether it had resorted to violence, or there was a credible threat to use violence, in pursuing that action plan. However, while the domestic courts had held that the organisation in question had not engaged in any violent acts or armed attacks, they had not examined whether it had adopted an action plan or any concrete preparatory steps for such a purpose. They had therefore failed to demonstrate that the cumulative elements of the offence of membership of a terrorist organisation were present in the applicants’ cases. The applicants had been convicted because of the political ideas expressed in some of the documents found to be the product of their organisation.

#### ***b. Right not to be tried or punished twice (Article 4 of Protocol No. 7 to the Convention)***

In *Mihalache v. Romania* [GC]<sup>79</sup> the Court set out the criteria for determining whether a decision constitutes an

<sup>78</sup> *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, § 109, 17 September 2009.

<sup>79</sup> *Mihalache v. Romania* [GC], no. 54012/10, 8 July 2019.

“acquittal” or a “conviction” and whether it is “final”.

The prosecution discontinued the criminal proceedings against the applicant for refusal to undergo biological testing to determine his blood alcohol level and imposed an administrative fine instead. The applicant did not contest that decision within the twenty-day time-limit laid down in domestic law and paid the fine. A few months later, considering that the administrative fine had been inappropriate, the higher-ranking prosecutor’s office set aside the decision. The applicant was then sentenced to a suspended term of one year’s imprisonment. In the Convention proceedings he complained that he had been tried and convicted twice for the same offence, in breach of Article 4 § 1 of Protocol No. 7. He also submitted that the reopening of the proceedings against him had not been in conformity with the criteria set out in Article 4 § 2. The Court found a breach of Article 4 of Protocol No. 7.

The judgment is noteworthy in four respects:

1. The Court has, for the first time, defined the scope of the expression “acquitted or convicted” and laid down general criteria in this regard.

Firstly, judicial intervention is unnecessary for a decision to be regarded as an “acquittal” or a “conviction”. Whereas the French version of Article 4 of Protocol No. 7 provides that the person must have been “*acquitté ou condamné par un jugement*”, the English version requires the person to have been “finally acquitted or convicted”. The Court observed that it matters whether the decision has been given by an authority participating in the administration of justice in the national legal system concerned, and whether that authority is competent under domestic law to establish and punish the unlawful behaviour of which an individual has been accused. The fact that the decision does not take the form of a judgment cannot call into question the accused’s acquittal or conviction, since such a procedural and formal aspect cannot have a bearing on the effects of the decision.

Secondly, to determine whether a decision constitutes an “acquittal” or a “conviction”, the Court will consider the actual content of the decision and assess its effects on the applicant’s situation, in particular, whether his or her “criminal” responsibility has been established following an assessment of the circumstances of the case by an authority vested by domestic law with decision-making power, enabling it to examine the merits of a case. The finding that there has been a determination as to the merits of a case will depend on the progress of the proceedings. In this respect, the Court may take into account these factors:

Whether a criminal investigation has been initiated after an accusation has been brought against the person in question;

whether the victim has been interviewed;

whether the evidence has been gathered and examined by the competent authority;

whether a reasoned decision has been given on the basis of that evidence; and

whether a penalty has been ordered as a result of the behaviour attributed to the person concerned.

2. The Court also clarified the criteria to determine whether a decision is “final”. It must be ascertained whether the decision is subject to an “ordinary remedy”, meaning a remedy with a clear scope and procedure, available to the parties within a specified time-limit and thus satisfying the principle of legal certainty.

In the instant case, the Court did not question the possibility for a higher-ranking prosecutor's office to examine of its own motion the merits of decisions taken by a lower-level prosecutor's office. However, a possibility to reopen the proceedings and reconsider the merits of a decision without being bound by any time-limit did not constitute an "ordinary remedy". Only the remedy allowing the applicant to challenge the fine within twenty days was an "ordinary" one. Since the applicant did not avail himself of that remedy, the decision imposing a fine on him had become "final" on the expiry of the twenty-day time-limit, well before the higher-ranking prosecutor's office exercised its discretion to reopen the criminal proceedings.

3. The Court also clarified that the conditions, which permit the reopening of a case as set out in Article 4 § 2 of Protocol No. 7, are alternative and not cumulative.

4. Finally, the Court fleshed out the concept of "fundamental defect" within the meaning of Article 4 § 2 of Protocol No. 7. Only a serious violation of a procedural rule severely undermining the integrity of the previous proceedings can serve as the basis for reopening them to the detriment of the accused. Consequently, in such cases, a mere reassessment of the evidence on file by the public prosecutor or the higher-level court would not fulfil that criterion. However, in situations where a reopening of proceedings might work to the advantage of the accused, the nature of the defect must be assessed primarily to ascertain whether there has been a violation of the defence rights and therefore an impediment to the proper administration of justice.

### *c. Right to an effective remedy (Article 13)<sup>80</sup>*

*Ulemek v. Croatia*<sup>81</sup> concerned the relationship between preventive and compensatory remedies for conditions of detention that breach Article 3.

The applicant served his prison sentence in Zagreb Prison and Glina State Prison. The circumstances of detention in each facility differed in terms of the prison regime applicable and the conditions of detention. As to the conditions of detention in Zagreb Prison, the applicant did not avail himself of the preventive remedy before the prison administration and/or the sentence-execution judge (which the Court had already found to be effective). As to the conditions in Glina State Prison, the applicant did use that remedy but, once his complaints were dismissed, he failed to complain to the Constitutional Court, which remedy the Court had already found to be an additional required step in the process of exhausting the preventive remedy for conditions of detention in Croatia. However, after his release from Glina State Prison, the applicant began a civil action for damages for allegedly inadequate conditions in both facilities. When that action was unsuccessful, he complained to the Constitutional Court which examined the overall period of his confinement in the two detention facilities and dismissed his complaint on the merits. The applicant mainly complained under Articles 3 and 13 of the inadequate conditions of his detention in both prisons and of a lack of an effective remedy in that regard.

The Court examined the relationship between preventive and compensatory remedies for inadequate conditions and explored whether using the preventive remedy could or should condition access to the compensatory one. In so doing, the judgment provided a useful overview of the Court's case-law on remedies for conditions of detention.

1. When examining the exhaustion of domestic remedies as well as the complaint under Article 13, the Court distinguished between cases where the domestic system provided for an effective preventive remedy (where the use of a compensatory remedy after release was sufficient) and cases where both

<sup>80</sup> See also under Article 3 (Inhuman or degrading treatment) *Tomov and Others v. Russia*, nos. 18255/10 and 5 others, 9 April 2019.

<sup>81</sup> *Ulemek v. Croatia*, no. 21613/16, 31 October 2019.

remedies existed. In this latter respect, the Court reasoned as follows:

86. [F]rom the perspective of the State's duty under Article 13, the prospect of future redress cannot legitimise particularly severe suffering in breach of Article 3 and unacceptably weaken the legal obligation on the State to bring its standards of detention into line with the Convention requirements ... Thus, given the close affinity of Articles 13 and 35 § 1 of the Convention, it would be unreasonable to accept that once a preventive remedy has been established from the perspective of Article 13 – as a remedy found by the Court to be the most appropriate avenue to address the complaints of inadequate conditions of detention – an applicant could be dispensed from the obligation to use that remedy before bringing his or her complaint to the Court...

85. Thus, normally, before bringing their complaints to the Court concerning the conditions of their detention, applicants are first required to use properly the available and effective preventive remedy and then, if appropriate, the relevant compensatory remedy.

The Court accepted that there might be instances in which an otherwise effective preventive remedy would be futile in view of the brevity of the detention in inadequate conditions so that the only viable option would be a compensatory remedy, although the compensatory remedy should normally be used within six months of the end of the allegedly inadequate conditions of detention.

In the present case, and given that the Constitutional Court (the highest court in the State), had examined the merits of the applicant's complaints of inadequate conditions of detention for the overall period of his confinement, the Court did not consider that his complaints could be dismissed for a failure to exhaust domestic remedies. It also found his complaint under Article 13 to be manifestly ill-founded, confirming its case-law as to the existence of effective preventive and compensatory remedies for inadequate conditions of detention in Croatia.

2. As to the extent to which the above principles indicate the manner in which preventive and compensatory remedies for inadequate prison conditions could or should be organised within the meaning of Article 13, and are to be exhausted for the purposes of Article 35 § 1, the Court observed that the above-noted findings were without prejudice to the possibility for domestic legal systems to provide for different arrangements as regards the use of remedies (namely, a State might not condition the compensatory remedy on exhaustion of the preventive one) and to provide for a longer statutory time-limit for the use of the compensatory remedy, in which case the remedy is assessed according to the relevant domestic arrangements and time-limits.

## V. OTHER RIGHTS AND FREEDOMS

### 1. Right to respect for one's private and family life, home and correspondence (Article 8)

#### a. Applicability

*Nicolae Virgiliu Tănase v. Romania* [GC]<sup>82</sup> clarified whether, in the context of a car accident causing life-threatening injuries, the State's procedural obligations are to be drawn from Articles 2, 3 or 8. The Court's findings were informed by two key elements: the incident was unintentional and there was no suggestion of a failure by the State to adopt an adequate legal framework to ensure safety and reduce risk on the roads.

<sup>82</sup> *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, 25 June 2019. See also under Article 2 (Effective investigation), Article 3 (Applicability and Inhuman or degrading treatment) and Article 6 § 1 (Reasonable time) above.

As to Article 8, the Court reiterated that the positive obligations on a State to protect the physical and psychological integrity of an individual in the sphere of relations between private individuals were subject to a threshold requirement (*Denisov v. Ukraine* [GC]<sup>83</sup>) and, further, that private life did not extend to activities which are of an essentially public nature (*Friend and Others v. the United Kingdom* (dec.)<sup>84</sup>). It outlined the particular elements of this case which rendered Article 8 inapplicable: driving was an essentially public activity; any risk was minimised by traffic regulations ensuring safety; and it did not concern a situation (such as violent acts or healthcare) where the State's positive obligation to protect physical or psychological integrity had been previously engaged. There was therefore no "particular aspect of human interaction or contact" which could attract the application of Article 8. The complaint under Article 8 was thus declared incompatible *ratione materiae* with the Convention.

### **b. Private life**

The first request for an advisory opinion under Protocol No. 16 to the Convention concerned the private life of a child born of surrogacy abroad and the recognition of the legal relationship between that child and the intended mother who has no genetic link to the child<sup>85</sup>.

*López Ribalda and Others v. Spain* [GC]<sup>86</sup> concerned employees' right to respect for their private life in the workplace and the limits of the employer's right to conduct video-surveillance.

The applicants worked as cashiers and sales assistants in a supermarket. After having noted certain stock losses, their employer installed surveillance cameras. Some of the cameras, positioned to film the shop's entrances and exits, were in plain sight, while others, directed towards the tills and the checkout areas, were hidden. Domestic law provided a formal and explicit statutory framework which obliged a person responsible for a video-surveillance system, even in a public place, to give prior information to the persons being monitored by the system. However, the applicants were only notified about the cameras that were visible and not about those that were hidden; some of the applicants could potentially have been filmed throughout their working day. The video-surveillance lasted for ten days and ceased when video-footage showed that the applicants had been stealing items. They were dismissed on the basis of the video-recordings.

The judgment transposed the principles set down in *Bărbulescu v. Romania*<sup>87</sup> to an employer's video-surveillance in the workplace, some of those principles having been drawn from the decision in *Köpke v. Germany*<sup>88</sup>, a factually similar case to the present one.

The Court listed the following factors to be taken into account when assessing the competing interests and proportionality of such video-surveillance measures:

- a. Whether the employee has been notified of video-surveillance measures adopted by the employer and of the implementation of such measures.
- b. The extent of the monitoring by the employer and the degree of intrusion into the employee's privacy – any limitations in time and space and the number of people who have access to the results should be taken into account, as well as the level of privacy in the area being monitored.

83 *Denisov v. Ukraine* [GC], no. 76639/11, 25 September 2018.

84 *Friend and Others v. the United Kingdom* (dec.), nos. 16072/06 and 27809/08, 24 November 2009.

85 For more details see Chapter V (Advisory opinions) further below.

86 *López Ribalda and Others v. Spain* [GC], nos. 1874/13 and 8567/13, 17 October 2019.

87 *Bărbulescu v. Romania*, no. 61496/08, 5 September 2017 (extracts).

88 *Köpke v. Germany* (dec.), no 420/07, 5 October 2010.

c. Whether the employer has provided legitimate reasons to justify monitoring and the extent thereof – the more intrusive the monitoring, the “weightier” the justification required.

d. Whether it would have been possible to set up a monitoring system based on less intrusive methods and measures (whether the aim pursued by the employer could have been achieved through a lesser degree of interference with the employee’s privacy).

e. The consequences of the monitoring for the employees – account should be taken, in particular, of the use made by the employer, of the results of the monitoring and whether such results had been used to achieve the stated aim of the measure.

f. Whether the employee has been provided with appropriate safeguards, especially where the employer’s monitoring operations are of an intrusive nature – such safeguards may include the provision of information regarding the installation and extent of the monitoring to the employees concerned or staff representatives, a declaration of such a measure to an independent body or the possibility of making a complaint.

The Court found that the intrusion into the applicants’ privacy had not attained a high degree of seriousness and that the considerations justifying the video-surveillance had been weighty. Having regard also to the significant safeguards provided by the Spanish legal framework, including other remedies that the applicants had not used, the Court concluded that the national authorities had not failed to fulfil their positive obligations under Article 8 such as would overstep their margin of appreciation.

In *Mifsud v. Malta*<sup>89</sup>, the Court examined the obligation to provide a genetic sample in paternity proceedings.

The applicant was approximately 88 years old, when a woman, approximately 55 years old, began a civil action to obtain an order for a paternity test for moral and financial reasons. The civil courts transferred the matter to the constitutional courts. Despite the mandatory nature of the domestic provision in question, those courts carried out a detailed review of the facts and of the competing interests involved before deciding to order the test.

The applicant then took the test, which confirmed he was the father, and the court ordered the amendment of the woman’s birth certificate. The applicant complained under Article 8 of being required to undergo the paternity test. The Court found no violation.

In the present case, the Court dealt for the first time with a complaint by a defendant in domestic proceedings on whom a paternity test was imposed. The Court accepted that one can be compelled to give a genetic sample in disputed paternity proceedings.

The Court found that the domestic courts struck a fair balance between the competing interests involved (the bodily integrity and privacy of the father versus the moral and financial interest of the child in knowing her biological reality).

Given the existence in Maltese law of a mandatory requirement, the judgment did not address the question of any positive obligation on States to put in place mandatory tests<sup>90</sup>. Nevertheless, the Court observed that Article 8 did not “as such prohibit recourse to a medical procedure in defiance of the will of a suspect, or in defiance of

<sup>89</sup> *Mifsud v. Malta*, no. 62257/15, 29 January 2019.

<sup>90</sup> See, however, *Mikulić v. Croatia*, no. 53176/99, ECHR 2002-I, where the Court found that the protection of third parties may preclude their being compelled to undergo medical testing of any kind and a system with no means to compel an alleged father to undergo a DNA test could be considered compatible with Article 8.

the will of a witness, in order to obtain evidence” and that such methods – including in the civil sphere – were “not in themselves contrary to the rule of law and natural justice”. The Court also pointed out the “particular importance” in such cases of the legitimate aim of fulfilling the State’s positive obligations arising under Article 8 vis-à-vis a child (seeking to discover the biological reality of his or her birth).

In *Beghal v. the United Kingdom*<sup>91</sup> the Court ruled on the authorities’ stop, search and questioning powers at border controls pursuant to terrorism legislation.

The applicant, a French national, resided in the United Kingdom. She visited her French husband in a prison in Paris where he was awaiting trial on terrorism charges. On her return to the United Kingdom she was stopped by border officials at the airport. Acting pursuant to powers granted under Schedule 7 of the Terrorism Act 2000, exercisable in respect of persons passing through United Kingdom ports of entry and exit, the officials informed the applicant that they needed to speak to her to establish if she might be “a person concerned in the commission, preparation or instigation of acts of terrorism”. She was further informed that she was not suspected of being a terrorist and that she was not under arrest. The applicant and her luggage were searched. The applicant refused to answer most of the questions put to her. After two hours, she was told that she was “free to go”. The applicant was subsequently charged with wilfully failing to comply with a duty under Schedule 7 by refusing to answer questions. The Supreme Court ultimately rejected the applicant’s challenge to the measures applied to her.<sup>92</sup>

The applicant complained, *inter alia*, that the exercise of the above-mentioned Schedule 7 powers violated Article 8. The Court agreed, finding that, in the absence of adequate safeguards, the interference with her rights was not “in accordance with the law”.

The following points are noteworthy:

- Firstly, the Court accepted that there had been an interference with the applicant’s right to respect for her private life, distinguishing the applicant’s situation from “the search to which passengers uncomplainingly submit at airports”<sup>93</sup> because the Schedule 7 powers exercised in the applicant’s case were clearly wider than the immigration powers to which travellers might reasonably expect to be subjected.
- Secondly, the Court reiterated, in the context of the need of States to combat international terrorism, that States enjoy a wide margin of appreciation as regards matter of national security.
- Thirdly, it found that the safeguards provided by domestic law were insufficient to curtail the Schedule 7 powers so as to offer adequate protection against arbitrary interference with the right to respect for private life. It highlighted the very broad discretion afforded to the authorities in deciding if and when to exercise the powers. Significantly, the Court did not consider that the absence of a requirement of reasonable suspicion that a person was in some way involved in terrorism by itself rendered the exercise of the powers in the applicant’s case unlawful within the meaning of Article 8 § 2.

Nevertheless, the Court found that the Schedule 7 scheme could not be considered Convention-compliant for the following reasons:

1. Persons could be examined for up to a maximum of nine hours and were compelled to answer questions put to them without the right to have a lawyer present;

91 *Beghal v. the United Kingdom*, no. 4755/16, 28 February 2019.

92 Schedule 7 had been amended before the Supreme Court’s examination of the applicant’s appeal. The amending legislation, adopted in 2014, provided for more stringent safeguards. The Supreme Court considered the applicant’s complaints in the light of the amended Schedule 7 power.

93 *Gillan and Quinton v. the United Kingdom*, no. 4158/05, § 64, ECHR 2010 (extracts).

2. the absence of any obligation on the part of the examining officer to show “reasonable suspicion” would appear to have made it difficult for persons to have the lawfulness of the decision to exercise the Schedule 7 power judicially reviewed and
3. although the use of the powers was subject to independent oversight by the Independent Reviewer of Terrorism Legislation, such oversight was not capable of compensating for the otherwise insufficient safeguards applicable to the operation of the Schedule 7 regime.

### ***Altay v. Turkey* (no. 2)**

In *Altay v. Turkey* (no. 2)<sup>94</sup> the Court ruled that oral communication between lawyers and their clients falls within the notion of “private life”<sup>95</sup>.

The Court found that the restriction of the privacy of the applicant’s consultations with his lawyer breached Article 8. It ruled for the first time that an individual’s oral communications with his or her lawyer in the context of legal assistance falls within the scope of private life since the purpose of such interaction is to allow that individual to make informed decisions about his or her life.

The Court referred to its earlier case-law under Article 8, in particular regarding the privileged nature of the lawyer-client relationship in the context of correspondence between prisoners and their lawyers. Having regard to *Campbell v. the United Kingdom*<sup>96</sup>, the Court observed that the principle not to distinguish between different categories of correspondence with lawyers applied a fortiori to oral, face-to-face communication with a lawyer. Therefore both oral communication and correspondence between a lawyer and an individual were privileged under Article 8.

In the present case, the Court found that the impugned restriction failed to satisfy the “in accordance with the law” test. It noted that the domestic court had imposed the restriction in response to the lawyer’s attempt to send reading material to the applicant that was not related to the rights of the defence. However, the interception of correspondence on the grounds that it did not relate to the rights of the defence was not provided for in the domestic law. For the Court, the manner of interpretation and application of the relevant law to the circumstances of the applicant’s case was manifestly unreasonable and thus not foreseeable within the meaning of Article 8 § 2.

*Vučina v. Croatia* (dec.)<sup>97</sup> concerned the protection of private life in the case of misidentification of a person shown in a photograph.

A lifestyle magazine with nationwide distribution published a photograph of the applicant attending a popular music concert. The caption to the picture wrongly identified the applicant as the wife of the then mayor of the city where the concert was taking place. The applicant brought a civil action against the publisher of the magazine, seeking damages in respect of the erroneous labelling of her photograph. She argued, *inter alia*, that, given the controversial public profile of the mayor, she had experienced a series of small but unpleasant incidents after the publication. The domestic courts ultimately dismissed her claim, stating that the facts of the case were not such as to warrant awarding pecuniary compensation. In particular, since the name of the mayor’s wife had not been mentioned in a negative context, and since she was not perceived by the public as a controversial figure, the impugned error in the caption to the photograph did not amount to a breach of the applicant’s personality rights.

94 *Altay v. Turkey* (no. 2), no. 11236/09, 9 April 2019. See also under Article 6 § 1 (Right to a fair hearing in civil proceedings – Applicability) above.

95 See the summary of the case above under Article 6 § 1 (Applicability).

96 *Campbell v. the United Kingdom*, 25 March 1992, § 46, Series A no. 233.

97 *Vučina v. Croatia* (dec.), no. 58955/13, 31 October 2019.

The case is noteworthy in two respects:

1. It is the first case where the alleged violation of the positive obligations under Article 8 concerned the misidentification of a person shown in a photograph published, rather than from the publication of the picture itself<sup>98</sup>.
2. In addition, the Court applied the threshold-of-seriousness test to the question of the applicability of Article 8 *ratione materiae* and, notably, to the question of the consequences for the applicant's privacy and honour and reputation, an approach set down in *Denisov v. Ukraine* [GC]<sup>99</sup>. The Court listed the factors to determine the effect on the present applicant: the manner in which the photograph was obtained; the nature of the publication; the purpose for which the photograph was used and how it could be used subsequently; and the consequences of publication of the photograph for the applicant. Then the Court concluded that, while the erroneous misidentification might have caused some distress to the applicant, the level of seriousness associated with the erroneous labelling of her photograph and the inconvenience that she had suffered did not give rise to an issue under Article 8, whether in the context of the protection of her image or her honour and reputation. Consequently, Article 8 did not apply and the application was incompatible *ratione materiae* with the Convention.

### c. Family life

*Strand Lobben and Others v. Norway* [GC]<sup>100</sup> concerned shortcomings in the decision-making process that resulted in the adoption of a vulnerable child by foster parents.

The applicants were a mother and her son. Four days after the son was born, both moved to a parent-child institution. Three weeks later the mother withdrew her agreement to stay in the institution and, as a result of serious concerns expressed by the institution as to her ability to provide basic care to her son, he was placed in foster care as an emergency measure. When making a full care order, the courts limited the mother's access to her son to six two-hour visits every year, which was subsequently reduced to four two-hour visits. Approximately three years later, and contrary to her wishes, the mother was deprived of her parental responsibility and the foster parents were authorised to adopt her son. The domestic courts found that particularly weighty reasons existed for consenting to the proposed adoption. While the mother's general situation had improved (she had married and had a baby daughter for whom she appeared to be able to care), she would not be sufficiently able to understand the special-care needs of her son, whom several experts had described as a vulnerable child who needed a lot of quiet, security and support, and adoption would give the son, who was attached to his foster parents, a sense of security.

The Court found a violation of Article 8.

The Court ruled that the decision-making process, leading to the withdrawal of parental responsibility and to adoption, had not ensured that all views and interests of the applicants were taken into account.

Firstly, the domestic authorities had not performed a genuine balancing exercise between the interests of the child and those of his biological family, but rather focused on the child's interests without seriously contemplating any possibility of the child's reunification with his biological family. For example, the contact sessions had been intended as a means of keeping the child familiar with his roots rather than facilitating his future return to the care

<sup>98</sup> For a recent outline of the general principles concerning an individual's right to the protection of his or her image, see *López Ribalda and Others v. Spain* [GC], nos. 1874/13 and 8567/13, § 89, 17 October 2019.

<sup>99</sup> *Denisov v. Ukraine* [GC], no. 76639/11, § 92, 25 September 2018.

<sup>100</sup> *Strand Lobben and Others v. Norway* [GC], no. 37283/13, 10 September 2019.

of his biological mother and the manner in which those contact arrangements had been organised was found not to have been particularly conducive to allowing the applicants to bond freely with one another.

Secondly, the assessment of the mother's caring skills was considered to have been flawed. The relevant expert reports dated from two years previously when the impugned decision had been taken. Only one of those reports had actually been based on observations of the interplay between the applicants, and then on only two occasions. In any event, only limited evidence could be drawn from the sparse contact that had taken place between the applicants during the child's placement in foster care. In addition, the authorities had not considered the potential significance of the mother's new family situation (her marriage and the birth of her second child).

Thirdly, the domestic courts' reasoning in respect of the child's special needs and vulnerability had been insufficient. In particular, it had not been explained how the son's vulnerability still persisted although he had lived in foster care since the age of three weeks. Moreover, there had been barely any analysis of the nature of his vulnerability, beyond a brief description that he was easily stressed and needed a lot of quiet, security and support.

*Guimon v. France*<sup>101</sup> concerned the refusal to allow a prisoner convicted of terrorist offences to leave prison under escort to attend her father's funeral.

The applicant, a member of the terrorist organisation ETA, had been in detention for eleven years for serious terrorist offences when she requested escorted leave to travel to a funeral home to pay her respects to her recently deceased father. She had not seen him for five years, since the prison was very far away and he had not been able to visit her due to his ill health. The applicant had submitted her request for prison leave promptly, leaving the authorities six days in which to organise an escort. Her request was refused for logistical reasons, as were all her appeals.

The Court found no violation of Article 8. It noted that, according to the judicial authorities, the escort arrangements needed to be particularly robust, given the applicant's criminal profile; the context in which the leave would have to be organised (returning a convicted Basque activist to the Basque Country, where she had much support); and factual considerations such as the geographical distance of almost 650 km.

The Court saw no reason to question the Government's assertion that the time available had been insufficient to arrange an escort comprising officers specially trained in the transfer and supervision of a prisoner convicted of terrorist offences and to organise the prior inspection of the premises. Thus, the refusal had not been disproportionate to the legitimate aims pursued.

## **2. Right to respect for one's private and family life, home and correspondence (Article 8)**

### **a. Article 14 taken in conjunction with Article 1 of Protocol No. 1 to the Convention**

*J.D. and A v. the United Kingdom*<sup>102</sup> concerned the test to be applied as regards the justification for a measure of social and economic policy ("very weighty reasons" or "manifestly without reasonable foundation").

The two applicants were social-housing tenants. Following a change to the statutory scheme in 2012, the housing benefit to which they were previously entitled to subsidise their rental costs was reduced because the amended scheme categorised the two applicants as having an extra bedroom. The purpose of the change was to save public funds by incentivising those with "extra" bedrooms in social housing to move to smaller homes.

<sup>101</sup> *Guimon v. France*, no. 48798/14, 11 April 2019.

<sup>102</sup> *J.D. and A v. the United Kingdom*, nos. 32949/17 and 34614/17, 24 October 2019.

The applicants complained mainly under Article 14 in conjunction with Article 1 of Protocol No. 1 that these changes put them in a more precarious position than others affected by the reduction because of their personal circumstances which meant they had a particular need to remain in their homes: the first applicant cared for her disabled child full time, and the second was housed under a “sanctuary scheme” to protect those who had experienced and remained at risk of serious domestic violence.

The Court found no violation as regards the first applicant: while it would be undesirable for her to move, the measure was proportionate as she could move to smaller, appropriately adapted accommodation, and a discretionary housing benefit was available.

As regards the second applicant, the Court found a violation: the aim of reducing the housing benefit (incentivising her to move to a smaller house) conflicted with the aim of the “sanctuary scheme” (to enable her to remain in her home for her own safety), no weighty reasons had been given to justify the prioritisation of one legitimate aim over the other and the availability of the discretionary benefit would not render the scheme proportionate.

In this judgment, the Court clarified the appropriate test to be applied for the justification of a measure of social and economic policy in the context of Article 14 in conjunction with Article 1 of Protocol No. 1.

1. This issue had been a key one before the domestic courts, which had disagreed on the test for justification to be applied in the present cases, in particular:

whether it had to be shown that the measure was “manifestly without reasonable foundation”, a test drawn from Article 1 of Protocol No. 1 and according a broad margin of appreciation to the State; or

whether “weighty reasons” were required to justify the measure, a test drawn from Article 14 of the Convention and according less of a margin of appreciation to the State.

2. The Court noted that, while the margin of appreciation in the context of general measures of an economic or social policy was wide, such measures had nevertheless to be implemented in a manner that did not violate the prohibition of discrimination and had to comply with the requirement of proportionality. Consequently, even the wide margin in the sphere of economic or social policy would not justify laws or practices that would violate the prohibition of discrimination, so that the following tests would be applied:

In the context of Article 14 in conjunction with Article 1 of Protocol No. 1, the Court confirmed that it had applied the “manifestly without reasonable foundation” test only to circumstances where an alleged difference in treatment resulted from a transitional measure designed to correct a historic inequality<sup>103</sup>.

Outside that context, and where the alleged discrimination was on the basis of disability and gender, “very weighty reasons” would be required to justify the impugned measure. The Court explained that, given the need to prevent discrimination against people with disabilities and foster their full participation and integration in society, the margin of appreciation enjoyed by the States was considerably reduced and

<sup>103</sup> See *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, §§ 61-66, ECHR 2006-VI; *Runkee and White v. the United Kingdom*, nos. 42949/98 and 53134/99, §§ 40-41, 10 May 2007; and *British Gurkha Welfare Society and Others v. the United Kingdom*, no. 44818/11, § 81, 15 September 2016.

such treatment would require “very weighty reasons” to be justified<sup>104</sup>. In addition, the advancement of gender equality being a major goal in the member States of the Council of Europe, “very weighty reasons” would have to be put forward before a difference in treatment based on gender could be compatible with the Convention<sup>105</sup>. This test was expressed in terms of the facts of the present case (alleged discrimination on grounds of disability and gender) although the judgment did not expressly limit the application of the test thereto.

## VI. ADVISORY OPINIONS

The first request for an advisory opinion under Protocol No. 16 to the Convention, from the French Court of Cassation, dealt with the private life of a child born of surrogacy abroad and the recognition of the legal relationship between that child and the intended genetic mother who had no genetic link to the child<sup>106</sup>.

The judgment in *Mennesson v. France*<sup>107</sup> concerned children born in the United States of America through a legal gestational surrogacy arrangement. Their biological father and intended mother, who were married, were unable to obtain recognition in France of the parent-child relationship. In this case, the Court found a violation of the children’s right to respect for their private life under Article 8 because France prevented both the recognition and establishment under domestic law of their legal relationship with their biological father. In the wake of that judgment, domestic law changed: registration of the details of the birth certificate of a child born through surrogacy abroad became possible for the intended father where he was the biological father, and where the intended mother was married to the biological father, it became possible to adopt the child. It was during the re-examination of the later appeal of the Mennessons that the Court of Cassation requested this Court to give an advisory opinion under Protocol No. 16 on two questions concerning the intended mother:

1. By refusing to enter in the register of births, marriages and deaths the details of the birth certificate of a child born abroad as the result of a gestational surrogacy arrangement, in so far as the certificate designates the “intended mother” as the “legal mother”, while accepting registration in so far as the certificate designates the “intended father”, who is the child’s biological father, is a State Party overstepping its margin of appreciation under Article 8 of the [Convention]? In this connection should a distinction be drawn according to whether or not the child was conceived using the eggs of the “intended mother”?
2. In the event of an answer in the affirmative to either of the two questions above, would the possibility for the intended mother to adopt the child of her spouse, the biological father, this being a means of establishing the legal mother-child relationship, ensure compliance with the requirements of Article 8 of the Convention?

a. The Court defined the boundaries of advisory-opinion requests under Protocol No. 16 and of the requests made in the present case. It confirmed that the Court had no jurisdiction either to assess the facts of a case or to evaluate the merits of the parties’ views on the interpretation of domestic law in the light of Convention law, or to rule on the outcome of the domestic proceedings. Its role was limited to furnishing an opinion on the questions submitted and the requesting court

104 See *Guberina v. Croatia*, no. 23682/13, § 73, 22 March 2016.

105 See *Konstantin Markin v. Russia [GC]*, no. 30078/06, § 127, ECHR 2012 (extracts).

106 *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.

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

had to draw the conclusions for the relevant provisions of national law and for the outcome of the case. Moreover, the opinion of the Court was to be confined to the issues directly connected to the pending domestic proceedings.

The Court received several submissions, including from the Mennessons and their children, the French and other Governments, as well as from certain organisations. The Court made it clear that its role was not to reply to all the grounds and arguments submitted, or to set out in detail the basis for its response or to rule in adversarial proceedings on contentious applications by means of a binding judgment. Rather, its role was “to provide the requesting court or tribunal with guidance enabling it to ensure respect for Convention rights when determining the case before it”.

b. In the present case, the Court developed its case-law under Article 8. The Mennesson line of case-law<sup>108</sup> required domestic law to provide for a possibility of recognising the legal relationship between children born of surrogacy abroad and their intended and biological father. The present opinion extended that requirement to the intended mother who has no genetic link with the child, but to a more limited extent: Domestic law should provide a possibility of recognition of a legal parent-child relationship with the intended mother, but this recognition does not have to take the form of entry in the register of births, marriages and deaths. Another means, such as adoption of the child by the intended mother, may be used, provided that the procedure laid down by domestic law is prompt and effective.

Two factors were of key importance in reaching these conclusions. The best interests of the child being paramount, the impact of not recognising a parent-child relationship on the private life of the child was a key factor in the affirmative response to the first question and it also allowed the Court, in response to the second question, to require that any alternative means of recognition had to be prompt and effective. The scope of the margin of appreciation was also central, as was the existence of any common ground between the laws of Contracting States. While the Court noted “a certain trend towards the possibility of legal recognition of the relationship between children conceived through surrogacy abroad and the intended parents, there [was] no consensus in Europe on this issue” and, where such recognition was possible, there was no consensus on the procedure used.

While the Court confirmed that opinions under Protocol No. 16 are to be confined to the scenario raised by the requesting court, the present opinion may contain elements of broader application. Firstly, the Court noted that it had placed some emphasis in its case-law on the biological link with at least one intended parent and that that was the factual scenario before it: the Court made clear that “it may be called upon in the future to further develop its case-law in this field, in particular in view of the evolution of the issue of surrogacy”. In addition, the Court also confirmed that the necessity to provide the possibility of recognising a mother-child relationship would apply with even greater force where the child was conceived using the eggs of the intended mother. Finally, and although the couple in the present case were married, the Court observed that adoption was only available under French law when the intended parents were married and that it was for the French courts to decide whether domestic adoption law would satisfy Convention requirements, taking into account the vulnerable position of the children concerned while adoption proceedings were pending.

## VII. JUST SATISFACTION (ARTICLE 41)

*Georgia v. Russia (I)* (just satisfaction) [GC]<sup>109</sup> concerned the award of just satisfaction in an inter-State case.

<sup>108</sup> *Labassee v. France*, no. 65941/11, 26 June 2014; *Foulon and Bouvet v. France*, nos. 9063/14 and 10410/14, 21 July 2016; and *Laborie v. France*, no. 44024/13, 19 January 2017.

<sup>109</sup> *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, 31 January 2019.

In its principal judgment<sup>110</sup> of 3 July 2014 in the above-mentioned case, the Court held that in the autumn of 2006 a coordinated policy of arresting, detaining and expelling Georgian nationals had been put in place in the Russian Federation which amounted to an administrative practice for the purposes of Convention case-law. It also found a violation of, *inter alia*, Article 4 of Protocol No. 4 to the Convention, Article 5 §§ 1 and 4 and Article 3, and Article 13 taken in conjunction with Article 5 § 1 and Article 3. The Court assumed in its judgment that “more than 4,600 expulsion orders were issued against Georgian nationals, of whom approximately 2,380 were detained or expelled” (paragraph 135).

The application of Article 41 was reserved. The Court adopted the instant judgment after examining the parties’ written submissions on that question, notably on the number of Georgian nationals alleged by the applicant Government to be victims of the violations established. Within the framework of an adversarial procedure, the applicant Government submitted a list of 1,795 alleged and identifiable victims, the accuracy of which was challenged by the respondent Government.

The judgment is interesting because this was the first time since the just-satisfaction judgment in *Cyprus v. Turkey* [GC]<sup>111</sup> that the Court examined the just satisfaction in an inter-State case. In *Cyprus v. Turkey*, the Court concluded that Article 41 applied to inter-State cases, and set out three criteria for establishing whether awarding just satisfaction was justified in an inter-State case, namely: (i) the type of complaint made by the applicant Government, which had to concern the violation of basic human rights of its nationals (or other victims); (ii) whether the victims could be identified; and (iii) the main purpose of bringing the proceedings.

The Court found that the criteria established in *Cyprus v. Turkey* [GC] had been satisfied. Therefore, the applicant Government were entitled to submit a claim for just satisfaction. The key issue for the Court was to determine the “sufficiently precise and objectively identifiable” group of people which it would use as the basis for the purposes of making an award of just satisfaction. The Court rejected the applicant Government’s argument that it should take the figure referred to in paragraph 135 of the principal judgment as a basis to award just satisfaction because, among other matters, the Court stated that it had only assumed the number of victims in the former judgment and had not established the identity of individual victims.

In contrast to *Cyprus v. Turkey* [GC]<sup>112</sup> (multiple violations of the Convention following a military operation by the respondent Government), the Court observed that in the instant case the existence of an administrative practice contrary to the Convention was based on *individual expulsion decisions*, meaning that the parties must be able to identify the Georgian nationals concerned. It had initiated an adversarial procedure to that end, underpinned by the duty of both parties to cooperate with the Court<sup>113</sup>. In this procedure the applicant Government submitted a list of 1,795 individual victims.

The Court’s treatment of the information supplied by the parties was noteworthy for the following reasons:

- Firstly, it rejected the respondent Government’s submission that the Court itself should identify each of the individual victims of the violations. It observed in this connection “that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of specific facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions”.

110 *Georgia v. Russia* (I) [GC], no. 13255/07, ECHR 2014 (extracts).

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

112 *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV.

113 See, in this connection, Article 38 of the Convention and Rule 44A of the Rules of Court.

- Secondly, the Court carried out a preliminary examination of the list of 1,795 alleged victims submitted by the applicant Government. It proceeded on the assumption that the individuals named in the applicant Government's list could be considered victims of violations and the burden of proof rested with the respondent Government to rebut this. This enabled the Court to conclude that, for the purposes of awarding just satisfaction, it could use as a basis a "sufficiently precise and objectively identifiable" group of at least 1,500 Georgian nationals who were victims of a violation of Article 4 of Protocol No. 4, a certain number of whom were also victims of a violation of Articles 5 § 1 and 3.

Ruling on an equitable basis, the Court deemed it reasonable to award the applicant Government a lump sum of 10 million euros in respect of non-pecuniary damage sustained by this group of at least 1,500 Georgian nationals, to be distributed to each of them in accordance with a number of criteria indicated in the judgment.

## VIII. BINDING FORCE AND EXECUTION OF JUDGMENTS (ARTICLE 46)

### 1. Execution of judgments

*Tomov and Others v. Russia*<sup>114</sup> concerned a structural problem relating to the inhuman conditions of transport of prisoners and the Court found a violation of Articles 3 and 13<sup>115</sup>.

Having regard to the respondent State's modest progress in the execution of its earlier judgments, the Court engaged with the respondent State on the urgent need for remedial action to deal with what it found to be a structural problem. It noted in its reasoning under Article 46 (paragraph 182) as follows:

Taking into account the recurrent and persistent nature of the problem, the large number of people it has affected or is capable of affecting, and the urgent need to grant them speedy and appropriate redress at domestic level, the Court considers that repeating its findings in similar individual cases would not be the best way to achieve the Convention's purpose. It thus feels compelled to address the underlying structural problems in greater depth, to examine the source of those problems and to provide further assistance to the respondent State in finding appropriate solutions and to the Committee of Ministers [of the Council of Europe] in supervising the execution of the judgments (...)

In line with its previous judgments on inhuman conditions of detention<sup>116</sup>, the Court outlined the measures that might help solve the structural problem, including the placement of prisoners as close to their home as possible and the replacement or refitting of prison vans and railway carriages in order to bring, for example, seating space into line with Article 3 requirements.

The Court also stressed the need for preventive and compensatory remedies to be put in place that would allow all prisoners in the applicants' position to complain of their transport conditions. Significantly, the Court ruled that such remedies needed to take effect in the domestic legal system without undue delay, and not later than eighteen months after the judgment became final.

In *Marcello Viola v. Italy* (no. 2)<sup>117</sup> the Court indicated under Article 46 that Italy should provide for the possibility

<sup>114</sup> *Tomov and Others v. Russia*, nos. 18255/10 and 5 others, 9 April 2019. See also under Article 3 (Inhuman or degrading treatment) above.

<sup>115</sup> For a summary of the case, see under Article 3 (Inhuman or degrading treatment) above.

<sup>116</sup> See, for example, *Varga and Others v. Hungary*, nos. 14097/12 and 5 others, § 102, 10 March 2015.

<sup>117</sup> *Marcello Viola v. Italy* (no. 2), no. 77633/16, 13 June 2019. See also under Article 3 (Inhuman or degrading punishment) above, including a summary of the case.

of introducing a review of the life sentence imposed on individuals sentenced under the same regime as the applicant. Such review should take account of the progress prisoners have made towards their rehabilitation. The domestic authorities should assess whether or not a particular prisoner has severed his or her links with the Mafia, rather than automatically equating a failure to cooperate with continuing dangerousness.

## 2. Infringement proceedings

In *Ilgar Mammadov v. Azerbaijan* [GC]<sup>118</sup> the Court examined for the first time an application in the context of infringement proceedings. In this procedure under Article 46 § 4 the Court determines whether a State has fulfilled its obligation under Article 46 § 1 to abide by a final judgment of the Court.

In 2014 the Court delivered its first judgment in *Ilgar Mammadov v. Azerbaijan*<sup>119</sup>. It found a violation of, *inter alia*, Article 18 in conjunction with Article 5, considering that the purpose of the charges against Mr Mammadov and of his pre-trial detention had been to silence and punish him for his stance against the Government.<sup>120</sup>

From the outset of the process of execution of the first *Ilgar Mammadov* judgment, the Committee of Ministers (“the CM”) considered that the above-described violation cast doubt on the later criminal proceedings and called for Mr Mammadov’s release. Since he was not released, on 5 December 2017 the CM referred a question to the Court under Article 46 § 4: whether the State had failed to abide by its obligations under Article 46 § 1. Later, in August 2018, Mr Mammadov was released on probation for good behaviour by the court of appeal, having served two-thirds of his sentence. In March 2019 the Supreme Court deemed the terms of his probation to have been fulfilled and thus his sentence served in full.

The Court found that the respondent State did not fulfil its obligation under Article 46 § 1 to abide by the first *Ilgar Mammadov* judgment.

The question of the institutional balance between the Court and the CM has been central to many cases before the Court<sup>121</sup> and the Court’s position is that a State’s compliance with a judgment falls outside of its jurisdiction, unless it is raised in the infringement procedure under Article 46 § 4.<sup>122</sup> As this is the first time the Court examined a request under this infringement procedure, the first novel aspect of this case lies in how the Court frames its role under this provision.

Firstly, the Court examined the extent to which it is to be guided by the findings of the CM in the prior execution process. It confirmed that the infringement proceedings were not intended to upset the fundamental balance between the CM and the Court. While the Court was required by Article 46 § 4 to make *a de novo* and definitive legal assessment of compliance, it acknowledged the value of the extensive *acquis* of the CM in carrying out its tasks under Article 46 § 2 and concluded that in infringement proceedings it would “take into consideration all aspects of the procedure” before the CM, including the measures indicated by it and the CM’s conclusions in the supervision process.

Secondly, the Court ruled on the point in time at which the infringement had occurred: it was found to be the date on which the CM referred the question under Article 46 § 4 because the execution procedure was a process and on that date the CM had considered that the State’s actions had not been “timely, adequate and sufficient”.

118 *Ilgar Mammadov v. Azerbaijan* [GC], no. 15172/13, 29 May 2019.

119 *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, 22 May 2014.

120 He was later convicted and proceedings were later found to violate Article 6 in *Ilgar Mammadov v. Azerbaijan* (no. 2), no. 919/15, 16 November 2017.

121 For example, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) [GC], no. 32772/02, ECHR 2009; and *Burmych and Others v. Ukraine* (striking out) [GC], nos. 46852/13 et al., 12 October 2017 (extracts).

122 *Moreira Ferreira v. Portugal* (no. 2) [GC], no. 19867/12, § 102, 11 July 2017.

The Court outlined and applied its existing case-law as regards the content of the obligations to implement a judgment contained in Article 46 § 1. In particular, the Court reaffirmed the obligation on the State to make restitution to the individual, provided it is not “materially impossible” and does not “involve a burden out of all proportion to the benefit deriving from restitution instead of compensation”. These principles are reflected in the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts<sup>123</sup>, in the practice of the CM, and in Rule 6 of the CM Rules for the supervision of the execution of judgments and of the terms of friendly settlements.

The Court applied those principles to determine the key issue, namely the individual measures required to abide by the first *Ilgar Mammadov* judgment. The Court observed that this violation had occurred because the authorities were driven by improper reasons, namely, to silence or punish Mr. Mammadov. Consequently, it considered that this violation of Article 18 in conjunction with Article 5 vitiated any later action resulting from the pursuit of the abusive criminal charges (his conviction and imprisonment). Accordingly, the Court found that to achieve restitution, the State had to eliminate the negative consequences of the abusive charges, including ensuring Mr. Mammadov’s release. Such restitution was considered achievable.

Finally, the Court rejected the argument that any of the domestic proceedings, including those which eventually led to Mr. Mammadov’s unconditional release, constituted restitution. The domestic courts had rejected the findings of this Court in the first *Ilgar Mammadov* judgment and upheld his conviction based on the abusive charges. As such, they did not eliminate the negative consequences of the imposition of the abusive charges: Mr. Mammadov had served his prison sentence and remained convicted on the basis of those charges. In any event, his release occurred after he had been detained for nearly four years and, importantly, after the CM had referred the case to the Court under Article 46 § 4, that latter date being the relevant one for the Court’s examination. The limited steps taken by the State did not permit it to find that the State Party had acted in “good faith”, in a manner compatible with the “conclusions and spirit” of the first *Ilgar Mammadov* judgment, or in a way that would make practical and effective the protection of the Convention rights which the Court had found to have been violated.

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<sup>123</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its 53rd Session (2001), UN Doc. A/56/10.



# **I/A Court H.R.**

## Protecting Rights

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**DEVELOPMENTS IN THE CASE LAW OF THE  
INTER-AMERICAN COURT OF HUMAN RIGHTS**

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# Developments in the case law of Inter-American Court of Human Rights

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## Presentation

This chapter highlights some of the innovative developments in the Inter-American Court's jurisprudence during 2019, as well as some of the criteria that reaffirms the jurisprudence already established by the Court. This evolution of jurisprudence establishes important standards for domestic judicial organs and officials when they carry out the control of conventionality within their respective spheres of competence.

In this regard, the Court recalls its awareness that domestic authorities are subject to the rule of law and, consequently, obliged to apply the provisions in force under domestic law. However, when a State is a party to an international treaty such as the American Convention, all its organs, including its judges, are also subject to this legal instrument. This obliges States Parties to ensure that the effects of the provisions of the Convention are not impaired by the application of norms that are contrary to its object and purpose. Thus, the Court has established that all State authorities are obliged to exercise a "control of conventionality" ex officio to ensure conformity between domestic law and the American Convention, evidently within their respective spheres of competence and the corresponding procedural regulations. This relates to the analysis that the State's organs and agents must make (in particular, judges and other agents of justice) of the compatibility of domestic norms and practices with the American Convention. In their specific decisions and actions, these organs and agents must comply with the general obligation to safeguard the rights and freedoms protected by the American Convention, ensuring that they do not apply domestic legal provisions that violate this treaty, and also that they apply the treaty correctly, together with the jurisprudential standards developed by the Inter-American Court, ultimate interpreter of the American Convention.

The year 2019 has been a busy year for the Inter-American Court, and this has been reflected in the fact that this year has seen the greatest jurisdictional production in the history of the Court. We are referring to the 21 judgments on merits, and 4 on interpretation, as well as the record 51 orders on monitoring compliance with judgment and 18 orders on provisional measures. The Inter-American Court has been able to reaffirm our jurisprudence on several topics, such as limitations to the imposition of the death penalty and the guarantees of due process. The Inter-American Court has also expanded the standards with regard to preventive detention, as well as the guarantees of due process in cases relating to judges, and also the meaning and scope of the principles of judicial independence and impartiality. It has also developed new and very important standards in the area of freedom of expression and the protection of statements made by journalists when denouncing irregularities in the public sphere. Inter-American also continued developing the economic, social, cultural and environmental rights. In this regard, the Court had the occasion to rule on the right to social security; in particular, the right to a pension as an autonomous and justiciable right, its specific content, and the specific violations it could potentially suffer. The Court also reaffirmed its jurisprudence concerning the autonomy and justiciability of the right to health, developing the content of this right, as well as its applicability to situations in which individuals are deprived of their liberty.

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## Right to life (article 4 of the American Convention)

### The death penalty

#### Pro-abolition trend

In the *Cases of Martínez Coronado, Ruiz Fuentes et al. and Girón et al.*, all against Guatemala, the Court emphasized that Article 4 of the American Convention incorporates an inclination to abolish the death penalty in its second paragraph, which prohibits imposing it on “crimes to which it does not presently apply,” and according to paragraph 3, “[t]he death penalty shall not be reestablished in States that have abolished it”<sup>1</sup>. The Court recalls that “the goal pursued is to advance towards a definitive prohibition of this type of criminal punishment, by a gradual and irreversible process in States that have signed the American Convention,” so that the decision of a State Party to the American Convention, whenever this was taken, to abolish the death penalty, “becomes, ipso jure, a final and irrevocable decision. Furthermore, the Court observed that, to date, 13 States have signed the Protocol to the American Convention on Human Rights to Abolish the Death Penalty and urged the States that have not yet signed the Protocol to do so, and to proscribe this type of punishment”<sup>2</sup>.

#### Expansion of the list of crimes punished by the death penalty

In the *Case of Ruiz Fuentes et al. v. Guatemala*, the Court observed that, when Guatemala ratified the American Convention, Decree No. 17/73 (Criminal Code) was in force, and its article 201 imposed the death penalty on kidnapping followed by the death of the person kidnapped. This provision was amended on several occasions, and finally the victim in the case was applied the provisions established in Legislative Decree No. 81/96 of September 25, 1996, which established the imposition of the death penalty for the masterminds and perpetrators of the crime of abduction or kidnapping, eliminating the requirement of the subsequent death of the person kidnapped. The Court indicated that, although the nomen iuris of abduction or kidnapping remained unaltered from the time that Guatemala ratified the Convention, the factual assumptions contained in the corresponding definitions of the crime changed substantially, making it possible to apply the death penalty for actions that had not received this punishment previously. This signified the violation of Article 4(2) of the American Convention, because, if the contrary interpretation were accepted, this would mean that a crime could be substituted or altered with the inclusion of new factual assumptions, despite the express prohibition to extend capital punishment contained in the said Article 4(2)<sup>3</sup>.

#### Automatic and compulsory imposition of the death penalty

Furthermore, the Court noted in the *Case of Ruiz Fuentes et al. v. Guatemala* that the regulation for the crime of abduction or kidnapping in the Guatemalan Criminal Code ordered the application of the death penalty automatically and, in general, to the authors of this wrongful act. As in the *Case of Raxcacó Reyes v. Guatemala*, the Court observed that article 201 of the Criminal Code, as it was drafted, had the effect of subjecting those accused of the crime of abduction or kidnapping to criminal proceedings in which no consideration was ever given to the specific circumstances of the crime and of the accused, such as the criminal record of the accused and of the victim, the motive, the extent and intensity of the harm caused, the possible mitigating or aggravating

1 *Case of Martínez Coronado v. Guatemala*. Merits, Reparations and Costs. Judgment of May 10, 2019. Series C No. 376, para. 63, *Case of Ruiz Fuentes et al. v. Guatemala*. Preliminary Objection, Merits, reparations and costs. Judgment of October 10, 2019. Series C No. 385, para. 80.

2 *Case of Martínez Coronado v. Guatemala*. Merits, Reparations and Costs. Judgment of May 10, 2019. Series C No. 376, para. 65, *Case of Ruiz Fuentes et al. v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 10, 2019. Series C No. 385, para. 80.

3 *Case of Ruiz Fuentes et al. v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 10, 2019. Series C No. 385, para. 86.

circumstances, among other considerations regarding the perpetrator and the crime. The Court concluded that when certain laws impose the obligation to apply the death penalty automatically, this does not allow differentiating between the different degrees of severity or the particular circumstances of the specific crime, which is incompatible with the limitation of the death penalty to the most egregious crimes, as established in Article 4(2) of the Convention.<sup>4</sup> The same reasoning was applied in the judgment in the *Case of Girón et al. v. Guatemala*, in which the Court analyzed article 175 of the Criminal Code (regulating the crime of statutory rape), which imposed the death penalty without taking into consideration the possible mitigating or aggravating circumstances of the case<sup>5</sup>.

### **Use of the “future dangerousness” standard**

The Court again ruled on the application of Article 132 of the Guatemalan Criminal Code and the concept of “future dangerousness” under which the death penalty was applied “if the circumstances of the act, and of the occasion, the way in which it was committed, and the determinant motives revealed a greater and particular dangerousness of the agent.” The Court observed that the use of the standard of the dangerousness of the agent, both in the definition of the facts of the wrongful act and in the determination of the corresponding punishment was incompatible with the principle of legality established in the American Convention. The examination of the dangerousness of the agent involved an assessment by the judge of a fact that had not occurred and, therefore, involved a punishment based on an opinion about the offender’s personality and not about the criminal acts he was accused of based on the definition of the crime<sup>6</sup>. Consequently, the Court found that the State was responsible for the violation of Articles 4(2) and 9 of the American Convention, in relation to Articles 1(1) and 2 of the Convention.

### **Principle of subsidiarity, reparation of the violation and control of conventionality**

The Court recalled that, under the Inter-American System, there is a dynamic and complementary control of the State’s treaty-based obligations to respect and to ensure human rights, that is exercised jointly by the domestic authorities (those primarily obliged) and the international instances (in a complementary manner), so that the decision criteria and the protection mechanisms, both national and international, may be brought into conformity and adapted to each other<sup>7</sup>. In this regard, State responsibility under the Convention can only be required at the international level after the State has had the opportunity to acknowledge a violation of a right, if applicable, and to repair the harm caused by its own means<sup>8</sup>. The Court observed, in particular, in the *Case of Rodríguez Revolorio et al. v. Guatemala* that the alleged violations that eventually resulted in the imposition of the death penalty on Messrs. Rodríguez Revolorio and López Calo were acknowledged and redressed on July 2, 2012, the date on which the Supreme Court partially annulled the sentence imposed on them commuting the death penalty for imprisonment. In particular, the Court noted that, on the said July 2, 2012, the Supreme Court declared admissible the appeal for review filed by Messrs. Rodríguez Revolorio and López Calo and decided to partially annul the sentence of capital punishment, and imposed the next most severe punishment which was 30 years’ imprisonment non-commutable. The Court also noted that the Supreme Court had argued, *inter*

4 *Case of Ruiz Fuentes et al. v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 10, 2019. Series C No. 385, para. 88.

5 *Case of Girón et al. v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. . Judgment of October 15, 2019. Series C No. 390, para. 70.

6 *Case of Martínez Coronado v. Guatemala*. Merits, Reparations and Costs. Judgment of May 10, 2019. Series C No. 376, para. 70, *Case of Rodríguez Revolorio et al. v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 14, 2019. Series C No. 387, para. 64, and *Case of Valenzuela Ávila v. Guatemala*. Merits, reparations and costs. Judgment of October 11, 2019. Series C No. 386, para. 154.

7 *Case of Rodríguez Revolorio et al. v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 14, 2019. Series C No. 387, para. 59.

8 *Case of Rodríguez Revolorio et al. v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 14, 2019. Series C No. 387, para. 59.

*alia*, that, following the judgment of the Inter-American Court in the *Case of Fermín Ramírez v. Guatemala*, it was obliged “by mandate of the Constitution of the Republic and of the American Convention of Human Rights” to admit the appeal that had been filed. Therefore, the Court noted that, owing to the said judgment of July 2, 2012, the violations caused by imposing the death penalty were acknowledged and the harm was repaired adequately because the punishment was amended, which constituted an opportune and adequate control of conventionality<sup>9</sup>. Consequently, and pursuant to the principle of complementarity, the Court concluded that the State was not responsible for the alleged violations of the Convention that would have resulted from imposing the death penalty on these victims.

## Right to personal integrity (article 5 of the American Convention)

### Right to personal integrity and deprivation of liberty

#### Right to personal integrity and the objective of the rehabilitation of those convicted

In the *Case of López et al. v. Argentina*, the Court indicated that, in addition to the right to personal liberty, an unavoidable consequence of the deprivation of liberty was often the infringement of the enjoyment of other human rights; for example, the rights to privacy and family life might also be restricted. However, this restriction of rights, which results from the deprivation of liberty or is a collateral effect, must be rigorously limited because any restriction of a human right can only be justified under international law when it is necessary in a democratic society.<sup>10</sup>

Regarding Article 5 of the American Convention, the Court has affirmed that, among other guarantees, the State must guarantee visiting rights in prison. Confinement with a restricted visiting regime may be contrary to personal integrity, depending on the circumstances. Also, the restriction of visits may have effects on the personal integrity of the individual deprived of liberty and on the members of his family. The purpose of Article 5(3) is precisely to ensure that the effects of the deprivation of liberty do not needlessly extend to anyone other than the convicted man, other than strictly necessary.<sup>11</sup>

Furthermore, regarding Article 5(6) of the Convention, in the *Case of Mendoza et al. v. Argentina*, the Court established that “[s]entences to deprivation of liberty shall have the essential purpose of the reform and social rehabilitation of those convicted.” Thus, the punishments imposed on children for committing offenses should pursue the child’s reintegration into society. In addition, the European Court of Human Rights has understood that maintaining family ties has an impact on the social rehabilitation of those in prison<sup>12</sup>.

Also, the Court recalled that in the *Case of Pacheco Teruel v. Honduras*, the Court accepted the State’s acknowledgement of responsibility with regard to the violation of Article 5(6) of the Convention because it had not allowed some inmates to carry out productive activities. In this regard, the Court established that measures such as permitting those deprived of liberty to work in prison is a form of guaranteeing Article 5(6), and that unjustified or disproportionate restrictions to this could possibly result in a violation of the said article<sup>13</sup>.

9 *Case of Rodríguez Revolorio et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 14, 2019. Series C No. 387, para. 60.

10 *Case of López et al. v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2019. Series C No. 396, para. 92.

11 *Case of López et al. v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2019. Series C No. 396, para. 94.

12 *Case of López et al. v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2019. Series C No. 396, para. 94.

13 *Case of López et al. v. Argentina*. Preliminary Objections, Merits, Reparations and Costs.. Judgment of November 25, 2019. Series C No. 396, para. 95.

## Right to integrity and the death penalty

In the *Case of Girón et al. v. Guatemala* the Court reiterated that Article 5(1) of the American Convention establishes, in general terms, the right to physical, mental and moral personal integrity<sup>14</sup>. Meanwhile, Article 5(2) establishes, specifically, the absolute prohibition of subjecting someone to torture or to cruel, inhuman or degrading punishment or treatment. The Court understood that any violation of Article 5(2) of the American Convention necessarily resulted in the violation of Article 5(1) thereof<sup>15</sup>. The violation of the right to physical and mental integrity of the individual has different connotations of degree that range from torture to other types of ill-treatment or cruel, inhuman or degrading treatment, the physical and mental effects of which vary in intensity based on endogenous and exogenous factors (such as duration of the treatment, age, sex, health status, context and vulnerability) which must be analyzed in each specific situation<sup>16</sup>.

The Court recalled that it had had occasion to rule on the so-called “phenomenon of death row” in the *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* and in the *Case of Raxcacó Reyes v. Guatemala*. In both these cases, the Court assessed the expert opinions provided concerning the specific detention conditions of those condemned to death and victims in these cases, as well as the particular impact on them, which resulted in a violation of Articles 5(1) and 5(2) of the American Convention in relation to Article 1(1) of this instrument<sup>17</sup>. In addition, the European Court of Human Rights, the universal system of human rights and some domestic courts note that the so-called “death row” violates the right to personal integrity owing to the anguish suffered by those condemned to death, a situation that results in psychological trauma owing to the ever-present and increasing presence of the implementation of the maximum punishment; consequently, it is considered cruel, inhuman and degrading treatment. Therefore, to determine the existence of a violation of personal integrity as a result of the “death row,” it is necessary to analyze the personal and particular circumstances of the case in order to be able to assess whether remaining on death row achieves the level of severity to qualify as cruel, inhuman or degrading treatment<sup>18</sup>.

In addition, regarding the method used to carry out the death penalty, the Court notes that various specialized bodies, as well as the criteria of the universal system and other regional systems for the protection of human rights expressly prohibit the methods of carrying out capital punishment that cause the most pain and suffering. In this regard, it is important to note that any method may inflict “pain” or “intense suffering” and, therefore, if a State carries out the death penalty, it must do so in a way that causes the least suffering possible, because whatever the method, the extinction of life entails physical pain.

Furthermore, various international bodies have indicated that methods of execution such as “stoning, injection of untested lethal drugs, gas chambers, burning and burying alive, and public executions [together with ...] other painful and humiliating methods of execution”, constitute cruel, inhuman and degrading treatment that violates the right to personal integrity.

In addition, the Special Rapporteur on extrajudicial, summary or arbitrary executions has indicated that public

14 *Case of Girón et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 15, 2019, para. 78.

15 *Cf. Case of Yvon Neptune v. Haiti, Merits, Reparations and Costs. Judgment of May 6, 2008. Series C No. 180, para. 129, and Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 28, 2018. Series C No. 371, para. 177.*

16 *Cf. Case of Loayza Tamayo v. Peru. Merits. Judgment of September 17, 1997. Series C No. 33, paras. 57 and 58, and Case of Women Victims of Sexual Torture in Atenco v. Mexico, supra, para. 177.*

17 *Cf. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, supra, paras. 167 to 172, and Case of Raxcacó Reyes v. Guatemala supra, paras. 97 to 102.*

18 *Cf. Case of Caso Girón et al. v. Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 15, 2019, para. 78.*

executions constitute non-compliance with the prohibition of cruel, inhuman and degrading treatment. Meanwhile, the Commission on Human Rights Committee has indicated that “where capital punishment occurs, it shall [...] not be carried out in public or in any other degrading manner.” In this regard, the Human Rights Council has urged States to refrain from carrying out public executions, because “public executions are [...] incompatible with human dignity”.

## **Forced disappearances (Right to personal liberty: Article 7, Personal integrity: Article 5, right to life: Article 4, and the right to recognition of juridical personality: Article 3)**

In the *Case of Arrom Suhurt et al. v. Paraguay*, the Inter-American Court considered that, to constitute a violation of the American Convention, the acts or omissions that resulted in that violation must be attributable to the respondent State. Such acts or omissions may have been by any of the State’s powers or organs, irrespective of their rank. Taking into account the dispute that existed in this case, the Court analyzed whether the facts that were alleged could be attributed to the State and, then, where necessary, determined whether they constituted violations of the American Convention and the other international treaties mentioned<sup>19</sup>.

In the *Case of Arrom Suhurt et al.*, where there was no direct evidence of the State’s action, the Court emphasized that it was legitimate to use circumstantial evidence, indications and presumptions to substantiate a judgment, provided that consistent conclusions about the facts could be inferred from them. In this regard, the Court has indicated that, in principle, the plaintiff has the burden of proving the facts on which his allegations are based; however, it has also underlined that, in proceedings on human rights violations, the State’s defense cannot rest on the impossibility of the plaintiff presenting evidence when it is the State that controls the means to clarify facts that occurred in its territory<sup>20</sup>.

The Court noted that in this case, contrary to other cases heard by this Court, the events did not take place in a context of a systematic and generalized practice of forced disappearances, political persecution or other human rights violations, so that it was not possible to use this to corroborate other elements of proof. In addition, there was no evidence in this case that proved that the presumed victims were in the hands of State agents before the alleged facts occurred. Therefore, a presumption that the State was involved in what happened is not applicable. In this regard, contrary to the consideration of the Inter-American Commission, the State did not have the obligation to present an alternative thesis about what happened to the presumed victims<sup>21</sup>.

## **The right to personal liberty (article 7 of the American Convention)**

### **Preventive detentions**

In the *Case of Romero Feris v. Argentina*, the Court recalled its case law on personal liberty and precautionary measures involving deprivation of liberty. The Court recalled that, for a precautionary measure that restricts a person’s freedom not to be arbitrary, it is necessary that: (i) substantive presumptions are presented regarding the existence of a wrongful act and the connection to this act of the persons accused; (ii) the measures comply with the four elements of the “proportionality test”; namely, that the purpose of the measures must be legitimate (compatible with the American Convention), appropriate to comply with the purpose sought, necessary, and strictly proportionate, and (iii) the decision taken contains sufficient reasoning to allow an evaluation of whether it is in keeping with the said conditions<sup>22</sup>.

<sup>19</sup> Cf. *Case of Arrom Suhurt et al. v. Paraguay. Merits. Judgment of May 13, 2019, para. 94.*

<sup>20</sup> Cf. *Case of Arrom Suhurt et al. v. Paraguay. Merits. Judgment of May 13, 2019, para. 95.*

<sup>21</sup> Cf. *Case of Arrom Suhurt et al. v. Paraguay. Merits. Judgment of May 13, 2019, para. 96.*

<sup>22</sup> Cf. *Case of Romero Feris v. Argentina. Merits, Reparations and Costs. Judgment of October 15, 2019. Series C No. 391, para. 92.*

Regarding the substantive presumptions regarding the existence of the wrongful act and the connection of the person accused, the Court clarified that, in order to comply with the requirements to restrict the right to personal liberty by a precautionary measure, such as preventive detention, there must be sufficient evidence that allowed it to be reasonably supposed that a wrongful act had occurred and that the person accused and prosecuted could have participated in that act<sup>23</sup>. On this point, the Court emphasized that the said presumption did not, in itself, constitute a legitimate purpose for applying a precautionary measure that restricted freedom, nor could it contravene the principle of the presumption of innocence contained in Article 8(2) of the Convention. Moreover, as indicated in the comparative law of several countries, and as is the practice of international courts, the presumption is additional to the other requirement concerning the legitimate purpose, appropriateness, necessity and proportionality, and functions as a supplementary guarantee when proceeding to apply a precautionary measure that restricts a person's freedom<sup>24</sup>.

In addition, the Court underlined that this should be understood taking into account that, in principle and in general, the decision should not have any effect for the judge as regards the responsibility of the accused, because it is usually taken by different judge or judicial authority to the one who finally decides on the merits of the case<sup>25</sup>.

Furthermore, regarding such presumptions, the Court has considered that the suspicion or sufficient indications, which leads to a reasonable supposition that the person prosecuted could have participated in the wrongful act that is investigated, must be founded and communicated based on specific facts; in other words, not on mere conjectures or abstract intuitions. This means that the State should not detain someone and then investigate them; to the contrary, it is only authorized to deprive a person of liberty when it has amassed sufficient information to be able to commit them to trial. In this regard, the European Court has considered that the terms "suspicion or reasonable indication" presupposes the existence of facts or information that an objective observer would consider provided sufficient indication that the person accused could have committed the crime<sup>26</sup>.

### **Verification of the legitimate purposes for ordering and maintaining the precautionary measure**

The Court reiterated its consistent case law according to which the legitimate purposes for preventive detention are only those that are directly linked to the efficient implementation of the proceedings; in other words, that are related to the risk that the accused might abscond, as directly established in Article 7(5) of the American Convention, or that seek to avoid the accused obstructing the course of justice<sup>27</sup>. In addition, the Court has asserted that the gravity of the offense involved is not, in itself, sufficient justification for preventive detention<sup>28</sup>.

The Court added that, based on the principle of the presumption of innocence, the elements that reveal the existence of the legitimate purposes cannot be presumed; rather the judge must base his decision on well-founded and objective circumstances of the specific case, and these must be proved by the person instituting the criminal prosecution and not the accused, who must be allowed to exercise the right of defense and be duly

23 Cf. *Case of Romero Feris v. Argentina. Merits, Reparations and Costs. Judgment of October 15, 2019. Series C No. 391, para. 93.*

24 Cf. *Case of Romero Feris v. Argentina. Merits, Reparations and Costs. Judgment of October 15, 2019. Series C No. 391, para. 94.*

25 Cf. *Case of Romero Feris v. Argentina. Merits, Reparations and Costs. Judgment of October 15, 2019. Series C No. 391, para. 95.*

26 Cf. *Case of Romero Feris v. Argentina. Merits, Reparations and Costs. Judgment of October 15, 2019. Series C No. 391, para. 96.*

27 Cf. *Case of Romero Feris v. Argentina. Merits, Reparations and Costs. Judgment of October 15, 2019. Series C No. 391, para. 102.*

28 Cf. *Case of Romero Feris v. Argentina. Merits, Reparations and Costs. Judgment of October 15, 2019. Series C No. 391, para. 101.*

assisted by a lawyer<sup>29</sup>.

Citing the European Court of Human Rights, the Court also referred to the way in which the elements that constitute legitimate purposes must be assessed. In particular it asserted that the risk that an accused might abscond cannot be assessed taking into consideration only the gravity of the possible punishment. It must also be evaluated in relation to a series of other relevant factors that may confirm the existence of a risk of flight, such as those related to the home, occupation, possessions, family ties, and other kinds of ties with the country in which the accused is being prosecuted. It has also indicated that the risk of the accused obstructing the course of justice cannot be inferred in abstracto, and must be supported by objective evidence<sup>30</sup>.

In addition, the Court recalled that the analysis of the use of force necessarily entails a determination of whether this has a legitimate purpose. On this point, the Court recalled that the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials clearly state that law enforcement officials shall not use firearms against persons except (a) in self-defense or defence of other against the imminent threat of death or serious injury, or (b) to prevent the perpetration of a particularly serious crime involving grave threat to life, (c) to arrest a person presenting such a danger and resisting their authority, or (d) to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives<sup>31</sup>.

The Court also indicated that, in order to analyze the legitimacy of the use of force, it was irrelevant to determine where the action of the police occurred in a situation of in flagrante delicto in order to arrest the author of the offense, which, at that time, did not represent a serious threat for someone's life. The only relevant aspect consisted in determining whether or not that use of force took place during a confrontation and, if applicable, whether it was in keeping with the principles of necessity and strict proportionality<sup>32</sup>.

## Right to judicial guarantees (Article 8 of the American Convention)

### Judicial independence and autonomy

#### Due process in cases that entail the removal from office of judges

In the *Case of Colindres Schonenberg v. El Salvador* the Court reiterated that Article 8 of the Convention establishes the guidelines for due process of law, which consist of a series of requirements that must be observed by the procedural instances to ensure that individuals are able to defend their rights adequately vis-à-vis any act of the State that may affect them<sup>33</sup>.

According to Article 8(1) of the Convention, every person has the right to a hearing, "with due guarantees", for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature, that ensure the right to due process of law whatever the procedure involved. Non-compliance with those guarantees results in a violation of this article of the Convention<sup>34</sup>.

29 Cf. *Case of Romero Feris v. Argentina. Merits, Reparations and Costs. Judgment of October 15, 2019. Series C No. 391, para. 101.*

30 Cf. *Case of Romero Feris v. Argentina. Merits, Reparations and Costs. Judgment of October 15, 2019. Series C No. 391, para. 105.*

31 Cf. *Case of Díaz Loreto et al. v. Venezuela. Preliminary objections, merits, reparations and costs, Judgment of November 19, 2019, Series C No. 392, para. 70.*

32 Cf. *Case of Díaz Loreto et al. v. Venezuela. Preliminary Objections, Merits, Reparations and Costs, Judgment of November 19, 2019, Series C No. 392, para. 71.*

33 *Case of Colindres Schonenberg v. El Salvador. Merits, Reparations and Costs. Judgment of February 4, 2019, para. 64. Cf. Case of Claude Reyes et al. v. Chile. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, para. 119, and Case of Barbani Duarte et al. v. Uruguay. Merits, Reparations and Costs. Judgment of October 13, 2011. Series C No. 234, para. 117.*

34 *Case of Colindres Schonenberg v. El Salvador. Merits, Reparations and Costs. Judgment of February 4, 2019, para. 64. Cf.*

In this regard, the Court has indicated that the guarantees established in Article 8(1) of the Convention are also applicable to the situation in which a non-judicial authority adopts decisions that affect the determination of an individual's rights, bearing in mind that the guarantees required of a jurisdictional organ cannot be required of such authorities; however, they must comply with those guarantees aimed at ensuring that their decisions are not arbitrary<sup>35</sup>.

In the *Case of Colindres Schonenberg v. El Salvador*, the Court considered that the dismissal of the victim in this specific case involved a determination of his rights, because it resulted in his immediate removal from his office as a justice. Therefore, the Court examined whether the proceedings held by the Legislative Assembly conformed to the guarantees of due process established in Article 8(1) of the American Convention<sup>36</sup>.

According to the Court's case law, in proceedings against judges, the scope of the judicial guarantees and effective judicial protection of judges must be analyzed in relation to the standards on judicial independence. The Court has stipulated that judges have specific guarantees owing to the necessary independence of the Judiciary, which the Court has understood as "essential for the exercise of the judicial function"<sup>37</sup>. The following guarantees arise from the need for judicial independence: an adequate appointment procedure, tenure, and the guarantee against external pressure<sup>38</sup>.

Specifically, regarding the guarantee of the stability or tenure of judges, the Court has established that this means that: (i) removal from office is the result, exclusively, of the permitted causes, through either a procedure that complies with judicial guarantees, or because the mandate has terminated; (ii) judges may only be dismissed owing to serious disciplinary offenses or incompetence, and (iii) any procedure against a judge must be decided pursuant to the established standards of judicial conduct and by fair proceedings that ensure objectivity and impartiality pursuant to the Constitution or the law<sup>39</sup>.

## **Right of judges to remain in office under general conditions of equality (article 23 of the American Convention)**

In the *Case of Colindres Schonenberg v. El Salvador*, the Court reiterated that Article 23(1)(c) of the Convention established the right to have access, under general conditions of equality, to public service. The Court has interpreted that this access, under conditions of equality, would constitute an insufficient guarantee unless it was accompanied by the effective protection of stability or tenure in office<sup>40</sup>.

In cases of the arbitrary removal of judges, the Court has considered that this right relates to the judge's guarantee of stability or tenure. The respect and guarantee of this right is complied with when the criteria and procedures for

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*Case of Claude Reyes et al. v. Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, para. 119, and *Case of Barbani Duarte et al. v. Uruguay*. Merits, Reparations and Costs. Judgment of October 13, 2011. Series C No. 234, para. 117.

35 *Case of Colindres Schonenberg v. El Salvador*. Merits, Reparations and Costs. Judgment of February 4, 2019, para. 65. Cf. *Case of Claude Reyes et al. v. Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, para. 119, and *Case of Flor Freire v. Ecuador*. Preliminary objection, merits, reparations and costs. Judgment of 31 August de 2016. Series C No. 315, para. 165.

36 *Case of Colindres Schonenberg v. El Salvador*. Merits, Reparations and Costs. Judgment of February 4, 2019, para. 66.

37 Cf. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 67, and *Case of López Lone et al. v. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, para. 190.

38 *Case of Colindres Schonenberg v. El Salvador*. Merits, Reparations and Costs Judgment of February 4, 2019, para. 67. Cf. *Case of the Constitutional Court v. Peru*. Merits, Reparations and Costs. Judgment of January 31, 2001, para. 75, and *Case of López Lone et al. v. Honduras*. Preliminary Objection, Merits, Reparations and Costs Judgment of October 5, 2015. Series C No. 302, para. 191.

39 *Case of Colindres Schonenberg v. El Salvador*. Merits, Reparations and Costs Judgment of February 4, 2019, para. 68.

40 *Case of Colindres Schonenberg v. El Salvador*. Merits, Reparations and Costs. Judgment of February 4, 2019, para. 93.

the appointment, promotion, suspension and dismissal are reasonable and objective, and when judges are not discriminated against when exercising this right. In this regard, the Court has indicated that equal opportunities in access to, and stability in, office guarantee freedom from any political pressure or interference<sup>41</sup>.

In the Case of Colindres Schonenberg v. El Salvador, the Court considered that the victim's dismissal constituted an arbitrary removal because it was decided by an incompetent body and by a procedure that was not established by law. Therefore, this arbitrary removal unduly affected the right to tenure, under conditions of equality, in violation of Article 23(1)(c) of the American Convention<sup>42</sup>.

### Guarantee of judicial independence against external pressure

In the Case of Villaseñor Velarde et al. v. Guatemala, the Court indicated that "the guarantee of judicial independence includes the guarantee against external pressure. Thus, the State must refrain from any undue interference with the Judiciary or its members and adopt actions to avoid such interference being committed by persons or organs external to the Judiciary"<sup>43</sup>.

Based on the circumstances, the repetition and continuation of different acts, even when, individually, not all of them need to be investigated, may reveal an "intimidating or related continuity of acts" that cause the authorities to consider "the need to exhaust efforts to individualize the sources and motivation". In this regard, States must prevent external pressures on judicial activities and investigate and punish those who exert them<sup>44</sup>. This is true even if the acts in question were presumably committed by private individuals. Conducting investigations and providing security may be pertinent to guarantee a judge's rights in cases of external pressure that could affect judicial independence<sup>45</sup>. Regarding the link between the obligation to guarantee rights and the obligation to investigate, "in the circumstances of the case, in which a series of acts indicated a situation of risk that continued over time, the opportune implementation of the obligation to investigate could result in determining the circumstances of the alleged risk or, eventually, to its decrease or cessation"<sup>46</sup>.

In cases such as the Case of Villaseñor Velarde et al. v. Guatemala in which, presumably, there were a series of intimidating acts against a judge in relation to his function, the obligation to investigate was related not only to the rights to judicial guarantees and protection of the judge who was the victim of the acts, but was relevant to guarantee substantive rights and judicial independence, a matter that exceeded individual interests<sup>47</sup>.

Regarding the way in which the investigation should be conducted, "since the acts probably related to the judge's activity, the State must take into account this activity to identify the interests that might be affected in the exercise of the judge's work, conducting a thorough search for all relevant information, and designing and executing an investigation that leads to the correct analysis of the theories of authorship, by act or omission, at different levels, exploring all pertinent lines of investigation to identify the authors"<sup>48</sup>.

41 Case of Colindres Schonenberg v. El Salvador. Merits, Reparations and Costs. Judgment of February 4, 2019, para. 94.

42 Case of Colindres Schonenberg v. El Salvador. Merits, Reparations and Costs. Judgment of February 4, 2019, para. 95.

43 Case of Villaseñor Velarde et al. v. Guatemala. Merits, Reparations and Costs. Judgment of February 5, 2019. Series C No. 374, para. 84.

44 Case of Villaseñor Velarde et al. v. Guatemala. Merits, Reparations and Costs. Judgment of February 5, 2019. Series C No. 374, para. 91.

45 Case of Villaseñor Velarde et al. v. Guatemala. Merits, Reparations and Costs. Judgment of February 5, 2019. Series C No. 374, para. 102.

46 Case of Villaseñor Velarde et al. v. Guatemala. Merits, Reparations and Costs. Judgment of February 5, 2019. Series C No. 374, para. 129.

47 Case of Villaseñor Velarde et al. v. Guatemala. Merits, Reparations and Costs. Judgment of February 5, 2019. Series C No. 374, para. 130.

48 Case of Villaseñor Velarde et al. v. Guatemala. Merits, Reparations and Costs. Judgment of February 5, 2019. Series C No. 374, para. 115.

## Political trials

### Political trials and judicial guarantees

The Court recalled that it was not possible to affirm, in the abstract, that the mechanism for the removal of judges by a political trial was contrary to the American Convention and, in particular, to the principle of judicial independence. It was necessary to analyze to what extent the factual circumstances constituted violations of the guarantees of due process. In this regard, the Court indicated that political trials in which the removal of members of the Judiciary were examined were not contrary to the Convention, *per se*, provided they complied with the guarantees of Article 8 and respected criteria limiting the discretionality of the adjudicator so as to protect the guarantee of independence<sup>49</sup>.

In the *Case of Rico v. Argentina* the Court found that it was not possible to affirm that the proceeding before a Trial Jury did not provide procedural mechanisms to ensure the guarantees of due process, owing to the composition of the jury. To the contrary, in the Court's opinion, it could be maintained that the functions of the jury were not exercised subjectively or based on political discretionality because the law and the provincial Constitution contained prior, clear and objective criteria that limited the activity of the jury and strengthened the control exercised<sup>50</sup>.

### Reasoning of jurisdictional decisions and trials by jury

In the *Case of Rico v. Argentina*, the Court reiterated the case law developed in the *Case of V.R.P., V.P.C. et al. v. Nicaragua* that the verdict of the jury, in the classic sense, did not require a reasoning or articulation of the grounds. The Court considered that the absence of the articulation of the grounds for the verdict did not, in itself, violate the guarantee of a reasoned decision, because any verdict has a reason even if, as in the case of a jury, this was not expressed<sup>51</sup>.

The Court also indicated that the system of a decision taken by firm belief or conviction did not, in itself, violate the right to a fair trial, provided that, based on all the actions executed during the proceedings, the interested party could understand the reasons for the decision. It also recalled that firm belief is not an arbitrary standard. The free assessment of the facts made by the jury is not substantially different from the assessment that the professional judicial authority could make, only it is not expressed<sup>52</sup>.

## Freedom of expression (Article 13)

### The incompatibility of the use of criminal law against the dissemination of a note of public interest regarding a public official

In the *Case of Álvarez Ramos v. Venezuela*, the Inter-American Court reiterated its consistent case law that the right to freedom of thought and expression is established in Article 13 of the Convention. Also, Article 4 of the Inter-American Democratic Charter, an instrument that interprets the OAS Charter and the Convention itself, considers this a fundamental component of democracy<sup>53</sup>.

The Court has indicated previously, with regard to the content of freedom of thought and expression, that those

49 Cf. *Case of Rico v. Argentina*. Preliminary Objection and Merits. Judgment of September 2, 2019. Series C No. 383, para. 57.

50 Cf. *Case of Rico v. Argentina*. Preliminary Objection and Merits. Judgment of September 2, 2019. Series C No. 383, para. 66.

51 Cf. *Case of Rico v. Argentina*. Preliminary Objection and Merits. Judgment of September 2, 2019. Series C No. 383, para. 76.

52 Cf. *Case of Rico v. Argentina*. Preliminary Objection and Merits. Judgment of September 2, 2019. Series C No. 383, para. 77.

53 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 91.

who are protected by the Convention have the right to seek, receive and impart ideas and information of all kinds, as well as to receive and learn about the information and ideas of others. Consequently, freedom of expression has both an individual and a social dimension:

- It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the opinions expressed by others<sup>54</sup>.

In addition, the Court reiterated that:

- The different regional systems for the protection of human rights and the universal system agree on the essential role played by freedom of expression in the consolidation and dynamics of a democratic society. Without effective freedom of expression, exercised in all its forms, democracy is enervated, pluralism and tolerance start to deteriorate, the mechanisms for control and complaint by the individual become ineffectual and, above all, a fertile ground is created for authoritarian systems to take root in society<sup>55</sup>.

- In this regard, the Court has indicated that the first dimension of freedom of expression “is not exhausted with the theoretical recognition of the right to speak or write, but also includes, inseparably, the right to use any appropriate medium to impart ideas so that they reach the greatest possible number of recipients”<sup>56</sup>. Thus, the expression and dissemination of thought and ideas are indivisible, so that a restriction of the possibilities of dissemination represents directly, and to the same extent, a limit on the right to express oneself freely<sup>57</sup>.

- Regarding the second dimension of the right to freedom of expression; that is, the social dimension, it should be pointed out that freedom of expression is a means of exchanging ideas and information between individuals; it includes the right to try and communicate one’s own opinions to others, but also involves the right of everyone to know the opinions, information and news disseminated by others. For the man on the street it is as important to know the opinion of others or the information they have as the right to impart his own<sup>58</sup>.

- The American Convention guarantees this right to everyone, regardless of any other consideration, so that it cannot be considered that it is restricted to a specific profession or group of individuals. Freedom of expression is an essential component of freedom of the press, without their being synonymous or the exercise of the former being conditional on the latter<sup>59</sup>.

- Given the importance of freedom of expression in a democratic society, the State should not only minimize the restrictions to the circulation of information, but should also balance, insofar as possible, the

54 Cf. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A, No. 5, para. 30; and *Case of Carvajal Carvajal et al. v. Colombia*. Merits, Reparations and Costs. Judgment of March 13, 2018, Series C, No. 352, para. 172.

55 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 93 Cf. *Case of Herrera Ulloa v. Costa Rica*, Judgment of July 2, 2004, Series C, No. 107, para. 116.

56 Cf. *Case of “The Last Temptation of Christ” (Olmedo Bustos et al.) v. Chile*, Judgment of February 5, 2001, Series C, No. 73, para. 65; *Case of Carvajal Carvajal et al. v. Colombia*, para. 172.

57 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 95. Cf. *Case of “The Last Temptation of Christ” (Olmedo Bustos et al.) v. Chile*, para. 66; *Case of Carvajal Carvajal et al. v. Colombia*, para. 172.

58 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 95. Cf. *Case of “The Last Temptation of Christ” (Olmedo Bustos et al.) v. Chile*, para. 66; *Case of Carvajal Carvajal et al. v. Colombia*, para. 172.

59 *Case of Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 96. Cf. *Case of Tristán Donoso v. Panama*, para. 114

participation of the different sources of information circulating in public discussions, promoting the pluralism of information. Consequently, fairness should govern the flow of information<sup>60</sup>.

- The Court has also understood that both dimensions possess equal importance and should be guaranteed simultaneously to ensure the total effectiveness of the right to freedom of thought and expression as established in Article 13 of the Convention<sup>61</sup>.

### **The permitted restrictions to freedom of expression and subsequent imposition of liability**

The Court has reiterated that freedom of expression is not an absolute right. Article 13(2) of the Convention, which prohibits prior censorship, also establishes the possibility of the subsequent imposition of liability due to the abusive exercise of this right, to the extent necessary to ensure “respect for the rights or reputation of others” (Article 13(2) (a)). Such restrictions are exceptional and should not limit the full exercise of freedom of expression more than strictly necessary and become a direct or indirect mechanism of prior censorship. In this regard, the Court has established that such subsequent liabilities can be imposed, if the right to honor and reputation has been violated<sup>62</sup>.

Indeed, Article 11 of the Convention establishes that everyone has the right to have his honor respected and his dignity recognized. The Court has indicated that the right to honor “recognizes that everyone has the right to respect for his honor, prohibits any unlawful attack on honor or reputation, and imposes on States the duty to provide legal protection against such attacks. In general, the Court has indicated that the right to honor is related to self-esteem and self-worth, while reputation refers to the opinion that other have of a person”<sup>63</sup>.

In this regard, the Court has affirmed that “both freedom of expression and the right to honor – rights protected by the Convention – are extremely important and it is therefore necessary to guarantee both these rights so that they coexist harmoniously.” Each fundamental right must be exercised respecting and safeguarding the other fundamental rights. Consequently, the Court has indicated that “the solution of a conflict between these two rights requires weighing the merits of each one, and to this end, each case must be examined based on its characteristics and circumstances in order to appreciate the existence and intensity of the elements on which a decision is taken”<sup>64</sup>.

In this regard, the Court has reiterated in its case law that Article 13(2) of the American Convention establishes that subsequent liability for the exercise of freedom of expression must comply with the following requirements concurrently: (i) it shall be previously established by law, formally and substantively; (ii) respond to a purpose permitted by the American Convention (“respect for the rights or reputations of others” or the protection of national security, public order, or public health or morals), and (iii) be necessary in a democratic society (and to

60 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 97. The Court has indicated that “the plurality of the media is essential, and also the prohibition of any monopoly in this area, whatever form it takes.” Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, para. 34. See also, *mutatis mutandi Case of Kimel v. Argentina*, para. 57.

61 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 98. Cf. *Case of “The Last Temptation of Christ” (Olmedo Bustos et al.) v. Chile*, para. 89

62 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 99. *Case of Mémoli v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 22, 2013, Series C, No. 265, para. 123.

63 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 100. Cf. *Case of Tristán Donoso v. Panama*, para. 57; and *Case of the Santo Domingo Massacre v. Colombia*, Series C, No. 259, para. 286.

64 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 100. Cf. *Case of Kimel v. Argentina*, para. 51, and *Case of Granier et al. v. Venezuela*, para. 144.

this end it must comply with the requirements of appropriateness, necessity and proportionality)<sup>65</sup>.

In the case of the first requirement, strict legality, the Court has established that any restrictions must be previously established by law as a way to ensure that they are not imposed at the discretion of the public powers. To this end, the definition of the conduct in law must be clear and precise, especially in the case of criminal rather than civil offenses<sup>66</sup>.

Regarding the second factor, that is, permitted or legitimate purposes, these are set out in Article 13(2) of the Convention. Since the *Case of Álvarez Ramos v. Venezuela* dealt with the limitation of the right to freedom of expression based on an accusation made by a private individual, the Court only developed the purpose found in paragraph (a) of the said article; namely, respects for the rights or reputations of others<sup>67</sup>.

The Court has found that when this legitimate purpose is sought, the State must weigh the right to freedom of expression of the communicator and the right to honor of the person affected. To this is added the State's obligation to provide judicial remedies so that anyone whose honor has been affected may claim its protection<sup>68</sup>.

Finally, in relation to the proportionality and necessity of the measure, the Court has understood that restrictions imposed on the right to freedom of expression must be proportionate to the interest that justify them and closely adapted to the achievement of this objective, interfering as little as possible in the effective enjoyment of the right. Thus, it is not sufficient that it has a legitimate purpose, but the measure in question must respect proportionality and necessity when affecting freedom of expression. In other words, "in this last stage of the analysis, it is necessary to consider whether the restriction is strictly proportionate, so that the sacrifice inherent in it is not exaggerated or disproportionate in relation to the advantages obtained by this limitation"<sup>69</sup>.

That said, having determined the content of the right to freedom of thought and expression, the Court stressed the importance of freedom of expression in a democratic society, and established the requirements to ensure that any restrictions that may be imposed on this right are compatible with the American Convention, the Court analyzed the facts of the case<sup>70</sup>.

In this case, criminal proceedings were filed against Mr. Álvarez to protect the honor and reputation of a public official who had resorted to the courts to defend himself. The Court has ruled on this situation in previous cases, indicating that the fact that freedom of expression has a greater margin of appreciation in relation to issues that are part of the public debate does not mean in any way that the honor of public officials or public persons should not be legally protected<sup>71</sup>.

Article 13(2) of the American Convention indicates that the exercise of the right to freedom of expression cannot

65 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 102. Cf. *Case of Tristán Donoso v. Panama*, para. 56; and *Case of Lagos del Campo v. Peru*, para. 102.

66 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 103. *Mutatis mutandis*, Cf. *Case of Fontevecchia and D'Amico v. Argentina*. Merits, reparations and costs. Judgment of November 29, 2011, Series C, No. 238, para. 89.

67 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 104.

68 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 105. Cf. *Case of Mémoli v. Argentina*, para. 125.

69 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 106. Cf. *Case of Kimel v. Argentina*, para. 83.

70 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 107.

71 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 108. Cf. *Case of Herrera Ulloa v. Costa Rica*, para. 128, and *Case of Palamara Iribarne v. Chile*.

be subject to prior censorship, but shall be subject to subsequent imposition of liability. That said, this precept does not establish the nature of the liability that can be required, but this Court's case law has indicated that criminal prosecution is the most restrictive measure for freedom of expression; therefore, its use in a democratic society should be exceptional and reserved for those eventualities in which it is strictly necessary to protect fundamental rights from attacks that harm them or endanger them, because, to the contrary, this would suppose an abusive use of the State's punitive powers<sup>72</sup>.

In other words, of the range of possible measures to claim subsequent liability for the possible abusive exercise of the right to freedom of expression, criminal prosecution will only be admissible in those exceptional cases when it is strictly necessary to protect an essential social need<sup>73</sup>.

It is understood that, in the case of a statement that is protected owing to its public interest, such as one that relates to conducts of public officials in the exercise of their functions, the State's punitive response to protect the honor of the official by means of criminal law is not admissible under the Convention<sup>74</sup>.

Indeed, the use of criminal law to respond to the dissemination of information of this nature would produce, directly or indirectly, an intimidating effect that, definitively, would limit freedom of expression and, also, prevent conducts that infringe the legal order, such as corruption, abuse of authority etc., from being held up to public scrutiny. Ultimately, this would weaken the public's control over the powers of the State, with evident prejudice for democratic pluralism. In other words, the protection of honor by criminal law, which might be legitimate in other cases, does not conform to the Convention in the situation described above<sup>75</sup>.

In this regard, the Court understood that, in the case of accusations against journalists, offenses of crimes against honor call for careful interpretation. Thus, it is necessary to emphasize that the definition of every offense stipulates a prohibitive norm, which logically determines a prohibited social sphere. However, the simple norm inferred from the definition of the offense is not sufficient to establish this sphere, because the prohibitive norms form part of a legal order or, at least, they must be understood in this way by the judges.

A basic principle of interpretive rationale stipulate that one norm cannot prohibit what another norm orders because, in that case, the individual would have no legal guidance. However, it cannot be ignored that numerous norms exist that promote conducts – for example, regarding sporting activities or the practice of medicine – that can potentially conflict with other norms that prohibit activities that are harmful to safety or health. In that situation, it would be irrational to understand that those norms prohibit what other norms promote. The activities that are promoted include the exercise of freedom of expression because this is an essential activity in a pluralistic society for public control over the acts of the Government and the administration. Consequently, in cases such as *Álvarez Ramos v. Venezuela*, involving criticism of the public conduct of officials, the control of which is of public interest, this relates to the exercise of an activity expressly protected by the American Convention and, consequently, it cannot be considered that it conforms to conduct defined by criminal law<sup>76</sup>.

This does not mean that, eventually, the actions of journalists cannot lead to liability in another legal sphere, such as under civil law, or rectification or a public apology, for example, in cases of possible abuses or excesses

72 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 109 Cf. *Case of Kimel v. Argentina*, para. 76; *Case of Mémoli v. Argentina*, para. 139.

73 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 110.

74 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 111.

75 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 112.

76 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 112.

in bad faith. In any case, since this is an activity protected by the Convention, its definition under criminal law is excluded and, consequently, the possibility that it be considered a crime and the subject of punishment. In this regard, it should be made clear that this does not refer to an exclusion of the prohibition based on justification or a special permission, but rather to the free exercise of an activity that the Convention protects because it is essential to safeguard democracy<sup>77</sup>.

In addition, the Court considered that it was not admissible that a public official whose honor was supposedly affected by the exercise of freedom of expression by a journalist, file a lawsuit as a private citizen in order to avoid the provisions of the Convention and the Court's case law. What was at issue in this case was not the application of Article 11 of the Convention, concerning the protection of honor and dignity, but the contents of its Article 13 concerning freedom of thought and expression<sup>78</sup>.

## The Right to Property (article 21 of the American Convention)

In its case law<sup>79</sup>, the Court has developed a wide-ranging concept of private property that encompasses, among other matters, the use and enjoyment of property, defined as material possessions or intangible objects, as well as any right that may form part of a person's patrimony<sup>80</sup>. The Court ruled on the concept of property in the *Case of Ivcher Bronstein v. Peru*, in which it defined this as "material possessions, as well as any right that may form part of the a person's patrimony" and considered that "this concept includes all the movable and immovable assets, the tangible and intangible elements, and any other intangible object that has a value<sup>81</sup>".

In the *Cases of the "Five Pensioners" v. Peru* and *Acevedo Buendía et al. ("Dismissed and Retired Employees of the Office of the Comptroller) v. Peru*, the Court declared the violation of the right to property owing to patrimonial effects resulting from non-compliance with judgments that were aimed at protecting the right to a pension, which the victims had acquired pursuant to domestic law. In the *Case of the "Five Pensioners,"* the Court indicated that, from the moment that a pensioner has paid his contributions to a pension fund and ceases to work for the institution concerned in order to accede to the legally-established pension regime, he acquires the right to his pension being regulated under the terms and conditions established in that law. In addition, in the *Case of Acevedo Buendía et al. ("Dismissed and Retired Employees of the Office of the Comptroller) v. Peru*<sup>82</sup>, it declared that the right to a pension acquired by this person had "patrimonial effects," which were protected by Article 21 of the Convention<sup>83</sup>.

Also, in the *Case of Muelle Flores v. Peru*, the Court underscored and agreed with the expert opinion provided by Christian Courtis that "[t]he benefits derived from social security, including the right to an old age pension, form part of the right to property and, therefore, must be protected against the arbitrary interference of the State. The right to property may even encompass the legitimate expectations of the holder of the right, in particular when he has paid the quotas of a contributive system. With even more reason, it encompasses acquired rights once the

77 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019, para. 113.

78 *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. . Judgment of August 30, 2019, para. 116.

79 *Cf. Case of the "Five Pensioners" v. Peru*. Merits, Reparations and Costs. Judgment of February 28, 2003. Series C No. 98, para. 173.

80 *Cf. Case of Ivcher Bronstein v. Peru*. Reparations and costs. Judgment of February 6, 2001. Series C No. 74, paras. 120-122. *Cf. Case of Salvador Chiriboga v. Ecuador*. Preliminary Objection and Merits. Judgment of May 6, 2008. Series C No. 179, para. 55.

81 *Case of Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 212.

82 *Cf. Case of Acevedo Buendía et al. ("Dismissed and Retired Employees of the Office of the Comptroller") v. Peru*, *supra*, para. 85.

83 *Case of Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 213.

conditions have been met to obtain a benefit such as an old age pension, especially when that right has been recognized by a court judgment. Furthermore, among the range of interests protected by the right to property, the benefits of social security are particularly important owing to their nature as a substitute for the wage and to provide alimentation”<sup>84</sup>.

## Economic, Social, Cultural, and Environmental Rights (article 26 of the American Convention)

### The right to social Security

In the *Case of Muelle Flores v. Peru*<sup>85</sup> the Court considered that the legal problem related to the scope of the right to social security understood as an autonomous right derived from Article 26 of the American Convention. In this case, the Court followed the approach it had taken starting with the *Case of Lagos del Campo v. Peru*, and continued in sub<sup>86</sup> sequent decisions<sup>87</sup>. In this regard, the Court recalled that, already, in the *Case of Poblete Vilches et al. v. Chile* it had indicated the following:

- Thus, it should clearly be interpreted that the American Convention incorporated the so-called economic, social, cultural and environmental rights (ESCER) into the list of rights it protects, derived from the norms recognized in the Charter of the Organization of American States (OAS), as well as from the rules of interpretation established in Article 29 of the Convention. And, particularly, that they prevent limiting or excluding the enjoyment of the rights established in the American Declaration and even those recognized domestically. Also, based on a systematic, teleological and evolutive interpretation, the Court has had recourse to the national and international corpus iuris in this area to give specific content to the scope of the rights protected by the Convention in order to derive the scope of the specific obligations relating to each right<sup>88</sup>.

- In the *Case of Muelle Flores v. Peru*, the Court ruled, for the first time, on the right to social security and, in particular, on the right to a pension, autonomously, as an integral part of the ESCER and, to this end, made the following analysis: (a) the right to social security as an autonomous and justiciable right; (b) the content of the right to security, and (c) the violation of the right to social security in this case<sup>89</sup>.

### Right to social security as an autonomous and justiciable right

To identify those rights that may be derived, by interpretation, from Article 26, it should be considered that this article refers directly to the economic, social, educational, scientific and cultural norms contained in the OAS Charter. From examining that instrument, the Court notes that it recognizes social security in its Article 3(j)<sup>90</sup>

84 *Case of Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 214.

85 *Case of Muelle Flores v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 170.

86 *Case of Muelle Flores v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 170.

87 Cf. Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: interpretation and scope of Articles 4(1) and 5(1), in relation to Articles 1(1) and 2 of the American Convention on Human Rights). Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 57; *Case of Dismissed Employees of Petro Peru et al. v. Peru*, *supra*, para. 192; *Case of San Miguel Sosa et al. v. Venezuela*, *supra*, para. 220; *Case of Poblete Vilches et al. v. Chile*, *supra*, para. 100, and *Case of Cuscul Pivaral et al. v. Guatemala*, *supra*, para. 73.

88 Cf. *Case of Poblete Vilches et al. v. Chile*, *supra*, para. 103, and *Case of Cuscul Pivaral et al. v. Guatemala*, *supra*, para. 73.

89 *Case of Muelle Flores v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 171.

90 Article 3(j) of the OAS Charter establishes: “The American States reaffirm the following principles: (j) social justice and social security are bases of lasting peace.”

when it indicates that “[s]ocial justice and social security are bases of lasting peace”. In addition, Article 45(b)<sup>91</sup> of the OAS Charter establishes that “[w]ork is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working,” and Article 45(h)<sup>92</sup> of the Charter establishes that “[t]he Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: (h) Development of an efficient social security policy.” Meanwhile, in Article 46 of the Charter, the States recognize that “in order to facilitate the process of Latin American regional integration, it is necessary to harmonize the social legislation of the developing countries, especially in the labor and social security fields, so that the rights of the workers shall be equally protected, and they agree to make the greatest efforts possible to achieve this goal”<sup>93</sup>.

In this way, the Court considered that the references to the right to social security were sufficiently specific to derive its existence and implicit recognition in the OAS Charter. In particular, from the different references, it can be inferred that the purpose of the right to social security is to ensure life, health, and a decent standard of living for people in their old age, or in the case of events that deprive them of the possibility of working; that is, in relation to future events that could affect the conditions and quality of their lives. Consequently, the Court considered that the right to social security was a right protected by Article 26 of the Convention<sup>94</sup>.

The Court also determined the scope of the right to social security, in particular the right to a pension in the context of the facts of the *Case of Muelle Flores v. Peru*, in light of the international *corpus iuris* in this area.

The Court recalled that the obligations contained in Articles 1(1) and 2 of the American Convention are the definitive grounds for determining the international responsibility of a State for violations of the rights recognized in the Convention<sup>95</sup>, including those recognized pursuant to Article 26. However, the Convention itself refers expressly to the general provisions of international law for its interpretation and application, specifically in Article 29, which establishes the *pro persona* principle<sup>96</sup>. Thus, as has been the Court’s consistent practice<sup>97</sup>, when determining the compatibility of the acts and omissions of the State, or of its norms with the Convention or other treaties for which it has jurisdiction, the Court is able to interpret the obligations and rights they contain in light of other pertinent treaties and provisions<sup>98</sup>.

91 Article 45(b) of the OAS Charter establishes: “[t]he Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: (b) [w]ork is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working.”

92 Article 45(h) of the OAS Charter establishes: “[t]he Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: (h) [d]evelopment of an efficient social security policy.”

93 *Case of Muelle Flores v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 172.

94 *Case of Muelle Flores v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 173.

95 Cf. *Case of the Mapiripán Massacre v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 107, and *Case of Cuscul Pivaral et al. v. Guatemala*, *supra*, para. 100.

96 Cf. *Case of the Pacheco Tineo Family v. Bolivia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 25, 2013. Series C No. 272, para. 143, and *Case of Cuscul Pivaral et al. v. Guatemala*, *supra*, para. 100.

97 Cf. *Case of Poblete Vilches et al. v. Chile*, *supra*, para. 103; *Case of Lagos del Campo v. Peru*, *supra*, para. 145; *Case of I.V. v. Bolivia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 30, 2016. Series C No. 329, para. 168; *Case of the Pacheco Tineo Family v. Bolivia*, *supra*, para. 129; *Case of Atala Rifo and daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 4, 2012. Series C No. 239, para. 83; *Case of Gelman v. Uruguay*. Merit and reparations. Judgment of February 24, 2011. Series C No. 221, para. 78 and 121, and *Case of Cuscul Pivaral et al. v. Guatemala*, *supra*, para. 100.

98 *Case of Muelle Flores v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No.

In this way, the Court used the sources, principles and criteria of the international corpus iuris as special law applicable to determine the content of the right to social security. The Court indicated that this special law to determine the right in question should be used as a complement to the provisions of the Convention. In this regard, the Court affirmed that it was not assuming jurisdiction over treaties for which it did not have jurisdiction, or granting an equal rank to the provisions of the Convention to provisions contained in other national or international instruments in the area of the ESCER<sup>99</sup>. To the contrary, the Court made an interpretation pursuant to the standards established by Article 29, and to its jurisprudential practice, which has updated the meaning of the rights derived from the OAS Charter that are recognized in Article 26 of the Convention. To determine the right to social security the Court gave special emphasis to the American Declaration, because as this Court has established:

[...] The States Members have understood that the Declaration contains and defines those essential human rights referred to in the Charter; thus, it is not possible to interpret and apply the Charter of the Organization in relation to human rights without integrating its pertinent provisions with the corresponding provisions of the Declaration, as a result of the practice followed by the OAS organs<sup>100</sup>.

The Court has also indicated on other occasions that human rights treaties are living instruments, and their interpretation must evolve with the times and actual living conditions. This evolutive interpretation is consequent with the general rules of interpretation established in Article 29 of the American Convention and in the Vienna Convention<sup>101</sup>. In addition, Article 31(3) of the Vienna Convention authorizes the use of means of interpretation such as agreements or practice or relevant rules of international law applicable in the relations between the parties, which are some of the methods related to an evolutive perspective of the treaty. Thus, in order to determine the scope of the right to social security and, in particular, the right to a pension in the context of a system of State contributive pensions, as derived from the economic, social, educational, scientific and cultural rights of the OAS Charter, the Court referred to the relevant instruments of the international *corpus iuris*<sup>102</sup>.

### The content of the right to social security

As indicated above, Article 45(b) of the OAS Charter expressly indicates that work should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working<sup>103</sup>.

Furthermore, Article XVI of the American Declaration identifies the right to social security when establishing that "[e]very person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living"<sup>104</sup>.

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375, para. 174.

99 Cf. *Case of the Pacheco Tineo family v. Bolivia*, *supra*, para.143 and *Case of Cuscul Pivaral et al. v. Guatemala*, *supra*, para. 101.

100 *Case of Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 174.

101 Cf. The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 114, and The Institution of Asylum and its Recognition as a Human Right in the Inter-America Protection System (Interpretation and scope of Articles 5, 22.7 and 22(8), in relation to Article 1(1) of the American Convention on Human Rights). Advisory Opinion OC-25/18 of May30, 2018. Series A No. 25, para. 137.

102 *Case of Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 175.

103 *Case of Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 176.

104 *Case of Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No.

Similarly, Article 9 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador" establishes that: "(1) Everyone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence. In the event of the death of a beneficiary, social security benefits shall be applied to his dependents. (2) In the case of persons who are employed, the right to social security shall cover at least medical care and an allowance or retirement benefit in the case of work accidents or occupational disease and, in the case of women, paid maternity leave before and after childbirth"<sup>105</sup>.

In the universal sphere, Article 22 of the Universal Declaration of Human Rights establishes that: "[e]veryone, as a member of society has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." While, Article 25 emphasizes that "[e]very one has the right to a standard of living adequate for the health and well-being of himself and his family [...] and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control". And, Article 9 of the International Covenant on Economic, Social and Cultural Rights also recognizes "the right of everyone to social security, including social insurance"<sup>106</sup>.

That said, from Article 45 of the OAS Charter, interpreted in light of the American Declaration and the other previously mentioned instruments, it is possible to derive elements that constitute the right to social security, such as that it is a right that seeks to protect the individual from future events which, if they occur, would have harmful consequences for that person, so that measures to protect him must be taken. In particular, and in the case in hand, the right to social security seeks to protect the individual from situations that occur when he reaches a certain age and is unable, either physically or mentally, to obtain the necessary means of subsistence to have adequate living conditions, which could also deprive him of his ability to exercise his other rights fully. This also reflects one of the elements of the right, because social security must be exercised so that it guarantees conditions that ensure life, health and a decent standard of living<sup>107</sup>.

Although the right to social security is widely recognized in the international *corpus iuris*, both the International Labour Organization (ILO) and the United Nations Committee on Economic, Social and Cultural Rights (CESCR), following the main instruments adopted by the ILO, have developed the content of the right to social security more clearly and this allowed the Court to interpret the content of the right and the State obligations based on the facts of the *Case of Muelle Flores v. Peru*.<sup>108</sup>

In general, the ILO has referred to the right to social security as "the protection that a society provides to individuals and households to ensure access to health care and to guarantee income security, particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner"<sup>109</sup>. In the specific case of the retirement pension derived from a system of contributions or quotas, it is a component of

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375, para. 177.

105 *Case of Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 178.

106 *Case of Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 179.

107 *Case of Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 181.

108 *Case of Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 182.

109 ILO, "Facts on Social Security," a publication of the International Labour Organization, Geneva, Switzerland, June 6, 2003, available at: [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms\\_067592.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_067592.pdf) (Only in Spanish).

social security that seeks to meet the need for financial subsistence that persists for the person who stops working, for any of the above reasons, based on surviving beyond the prescribed age. In those cases, the old age pension is a type of deferred wage for the worker, an acquired right after having paid the quotas and worked for the required number of years<sup>110</sup>.

In its General Comment No. 19 on the right to social security, the CESCR established that this right encompassed the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, in different circumstances, in particular, due to the lack of work-related income owing to old age<sup>111</sup>.

Similarly, the CESCR General Comment No. 19 established the legal content of the right to social security and stressed that it includes the right not to be subjected to arbitrary and unreasonable restrictions of existing social security coverage, whether obtained publicly or privately, as well as the right to equal enjoyment of adequate protection from social risks and contingencies. Regarding its fundamental elements, it underscored the following:

- a) **Availability:** The right to social security requires, for its implementation, that a system, whether composed of a single scheme or variety of schemes, is available and in place to ensure that benefits are provided for the relevant social risks and contingencies. The system should be established under domestic law, and public authorities must take responsibility for the effective administration or supervision of the system. The schemes should also be sustainable, including those concerning provision of pensions, in order to ensure that the right can be realized for present and future generations.
- b) **Social risks and contingencies:** The social security system should provide for the coverage of the following nine principal branches: (a) health care; (b) sickness; (c) old age; (d) unemployment; (e) employment injury; (f) family and child support; (g) maternity; (h) disability, and (i) survivors and orphans. In the area of health care, States parties have an obligation to guarantee that health systems are established to provide adequate access to health services for all. And, with regard to old age, States parties should take appropriate measures to establish social security schemes that provide benefits to older persons, starting at a specific age, to be prescribed by national law.
- c) **Adequacy:** Benefits, whether in cash or in kind, must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care. States parties must also pay full respect to the principle of human dignity, and the principle of non-discrimination, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided. Methods applied should ensure the adequacy of benefits. The adequacy criteria should be monitored regularly to ensure that beneficiaries are able to afford the goods and services they require to realize their Covenant rights. When a person makes contributions to a social security scheme that provides benefits to cover lack of income, there should be a reasonable relationship between earnings, paid contributions, and the amount of relevant benefit.
- d) **Accessibility:** This includes: (i) **Coverage:** all persons should be covered by the social security system, without discrimination. In order to ensure universal coverage, non-contributory schemes will be necessary. (ii) **Eligibility:** Qualifying conditions for benefits must be reasonable, proportionate and transparent. (iii) **Affordability:** if a social security scheme requires contributions, those contributions

110 *Case of Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 183.

111 *Case of Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 186.

should be stipulated in advance. The direct and indirect costs and charges associated with making contributions must be affordable for all, and must not compromise the realization of other rights. (iv) Participation and information: beneficiaries of social security schemes must be able to participate in the administration of the social security system. The system should be established under national law and ensure the right of individuals and organizations to seek, receive and impart information on all social security entitlements in a clear and transparent manner, and (v) Physical access: benefits should be provided in a timely manner and beneficiaries should have physical access to the social security services in order to access benefits and information, and make contributions where relevant [...].

e) Relationship with other rights: The right to social security plays an important role in supporting the realization of many of the economic, social and cultural rights. In addition, General Comment No. 19 has established that the right of access to justice forms part of the right to social security, so any persons or groups who have experienced violations of their right to social security should have access to effective judicial or other appropriate remedies at both national and international levels, as well as to adequate reparation<sup>112</sup>.

Furthermore, States have the obligation to facilitate the exercise of the right to social security by adopting positive measures to assist individuals and communities to enjoy the right to social security. Not only must they facilitate the exercise of this right, but also guarantee that “before any action is carried out by the State party, or by any other third party, that interferes with the right of an individual to social security the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and include: (a) an opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies[...]”<sup>113</sup>.

That said, the Court considered that the nature and scope of the obligations derived from the protection of social security include aspects that are of immediate effect, as well as aspects that have a progressive nature<sup>114</sup>. In this regard, the Court recalls that, with regard to the former (immediate obligations), States must adopt effective measures to ensure access without discrimination to the benefits recognized for the right to social security, and that men and women have equal rights, among other matters. Regarding the latter (progressive obligations), progressive realization means that States Parties have the specific and constant obligation to advance as expeditiously and effectively as possible towards the full implementation of this right, to the extent of available resources, by legislative or other appropriate means. Also, there is an obligation of non-retrogressivity in relation to the rights achieved. Consequently, the treaty-based obligations of respect and guarantee, as well as to adopt domestic legal provisions (Article 1(1) and 2) are essential in order to achieve their effectiveness<sup>115</sup>.

Despite the foregoing, the Court noted that this case did not relate to the progressive obligations derived from Article 26 of the Convention, but referred to the failure to implement the right to a pension as an integral part of the right to social security of Mr. Muelle Flores, owing to failure to comply with and execute judgments delivered in his favor in the domestic sphere in the context of the privatization of a State company following his retirement. Mr. Muelle Flores acquired his right to a pension under a contributive regime administered by the State; thus,

112 *Case of Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 185.

113 *Case of Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 186.

114 *Cf. Case of Poblete Vilches et al. v. Chile*. Merits, Reparations and Costs. Judgment of March 8, 2018. Series C No. 349, para. 104 and *Case of Cuscul Pivaral et al. v. Guatemala*, *supra*, para. 98.

115 *Case of Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 186.

he acquired the right to receive a pension after making contributions during several years. The legality of his incorporation into this regime was confirmed at the domestic level<sup>116</sup>.

In this regard, based on the criteria and elements that constitute the right to social security, and taking into account the facts and particularities of this case, the State obligations in relation to the right to a pension are:

(a) to ensure the right to a pension after attaining the legal age and meeting the requirements established in domestic law, which presumes that a functioning system of social security exists that guarantees the benefits. This system must be administered by the State or supervised and monitored by the State (if it is administered by the private sector); (b) it must ensure that the benefits are sufficient in amount and duration to allow the pensioner to enjoy adequate living conditions and sufficient access to health care services, without discrimination; (c) obtaining a pension should be accessible; that is, the State should provide reasonable, proportionate and transparent conditions to access it. Also, the amount of the contributions should be affordable and the beneficiaries should receive clear and transparent information on the right, especially if a measure is taken that can affect it, such as the privatization of a company; (d) the benefits of a retirement pension should be guaranteed opportunely and without delays, taking into consideration the importance of this aspect for elderly people, and (e) the State must provide effective complaint mechanisms in cases of a violation of the right to social security, in order to ensure access to justice and effective judicial protection, which also encompasses the materialization of the right by the effective execution of favorable decisions delivered in the domestic sphere<sup>117</sup>.

### Violation of social security and the right to a decent life

In the *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*, the Court reiterated that those persons or groups who have been victims of a violation of their right to social security should have access to judicial or other effective remedies, as well as to the corresponding reparation. In the *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT)*, the Inter-American Court recognized that the simple acknowledgement of the victims' right to receive their linked pensions and the corresponding reimbursements did not mean that their right had been realized or implemented. To make it effective, it was essential that the domestic judgments handed down in their favor be executed and the pending amounts paid. Consequently, the Court concluded that the State had violated the right to social security<sup>118</sup>.

The Court also reiterated that, in this particular case, almost 18 years had elapsed since the Constitutional Court's judgment of August 9, 2011, before the State established, finally and as *res judicata*, the employment regime and remuneration to which the victim's pensions would be linked. This meant that, during all that time, the material content of the right to a linked pension was uncertain, because the State had not determined the mechanism to be used and, subsequently, what this represented financially. The failure to determine the method to implement the linking, resulted in the failure to determine the amount of the victim's pensions. These facts constituted a violation of the victims' right to social security because the Court considered that one of the State's immediate obligations for the full exercise of this right was that people must be able to know the financial resources they can count on to have a dignified life in their old age<sup>119</sup>.

116 *Case of Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 187.

117 *Case of Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 188.

118 *Case of the National Association of Discharged and Retired Employees of the National Tax Administration (ANCEJUB-SUNAT) v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 21, 2019. Series C No. 394, para. 179.

119 *Case of the National Association of Discharged and Retired Employees of the National Tax Administration (ANCEJUB-SUNAT) Superintendence v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2019. Series C No. 394,

The Court also noted that one of the elements that forms part of social security is accessibility, which includes ‘the right of individuals and organizations to seek, receive and impart information on all social security entitlements in a clear and transparent manner’<sup>120</sup>.

Third, the Court underlined that another of the fundamental elements of social security was its relationship to the guarantee of other rights because, “to a great extent, it contributes to reinforce the exercise of many of the economic, social and cultural rights”<sup>121</sup>. In this regard, the Court has indicated that the pension derived from a system of contributions or quotas is a component of social security. Furthermore, States must provide special services for older persons because the retirement pension is the only salary substitute they receive to supply their basic necessities. Ultimately, the pension and, in general, social security, constitutes a measure of protection to enjoy a decent life<sup>122</sup>.

Accordingly, the Court considered that, in the *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*, the rights to social security and to a decent life were interrelated, a situation that was increased in the case of older persons. The Court has indicated that the absence of economic resources resulting from the failure to pay the monthly pension amounts directly impairs the dignity of older persons, because at that stage of their life, the pension constitutes the main source of financial resources to pay for their primary and basic necessities as human beings. The same could be said of other concepts that are directly related to the pension, such as the payment of the reimbursement owed. In this way, the violation of the right to social security owing to the failure to pay those reimbursement creates anguish, insecurity and uncertainty about the future for older persons owing to the possible lack of financial resources for their subsistence, because the deprivation of an income evidently leads to the deprivation of the development and improvement of their quality of life and personal integrity<sup>123</sup>.

The Court recalled that the right to life is fundamental in the American Convention because the realization of the other rights depends on its safeguard. If this right is not respected, all the other rights disappear because the person entitled to rights is no longer. Owing to its fundamental nature, the Court has affirmed that strategies that restrict the right to life are not admissible and that this right includes not only the right of every human being not to be deprived of life arbitrarily, but also the right that conditions will not be imposed that prevent or obstruct access to a dignified existence. Hence, one of the obligations that the State must assume to protect and ensure the right to life, in its capacity as guarantor, is to create basic living conditions that are compatible with the dignity of the individual and not to establish conditions that obstruct or impede this. Consequently, the State has the obligation to adopt positive measures aimed at satisfying the right to a decent life, especially in the case of persons in a situation of vulnerability and risk, who require priority attention<sup>124</sup>, such as older persons<sup>125</sup>.

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para. 181.

120 *Case of the National Association of Discharged and Retired Employees of the National Tax Administration (ANCEJUB-SUNAT) Superintendence v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2019. Series C No. 394, para. 182. Cf. *Case of Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 187, and UN, Committee on Economic, Social and Cultural Rights. General Comment No. 19. The right to social security (Article 9), February 4, 2008, paras. 9 to 28.

121 *Caso Muelle Flores v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of March 6, 2019. Series C No. 375, para. 187.

122 *Case of the National Association of Discharged and Retired Employees of the National Tax Administration (ANCEJUB-SUNAT) Superintendence v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2019. Series C No. 394, para. 184.

123 *Case of the National Association of Discharged and Retired Employees of the National Tax Administration (ANCEJUB-SUNAT) Superintendence v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2019. Series C No. 394, para. 185.

124 Cf. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, reparations and costs. Judgment of June 17, 2005. Series C No. 125, para. 162.

125 *Case of the National Association of Discharged and Retired Employees of the National Tax Administration (ANCEJUB-SUNAT) Superintendence v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2019. Series C No. 394,

The Court also considered that the scope of the positive obligations of the State in relation to the protection of the right to a decent life of the older person should be understood in light of the relevant international corpus juris. In this way, the content of those obligations consisted of the contents of Article 4 of the American Convention, in relation to the general obligation of guarantee contained in Article 1(1) and to the obligation of progressive development contained in Article 26 of this instrument, and of Articles 9 (Right to Social Security), 10 (Right to Health), and 13 (Right to Education) of the Protocol of San Salvador. In addition, Article 11 of the International Covenant on Economic, Social and Cultural Rights recognizes the right of everyone to “an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”<sup>126</sup>. In keeping with this, the Court noted that the United Nations Principles for Older Persons have established that States must incorporate into their national programmes principles that guarantee “[o]lder persons [...] access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help”<sup>127</sup>.

### The right to health

In the Case of *Hernández v. Argentina*, the Court addressed the issue of the right to health as an autonomous right derived from Article 26 of the American Convention. In this regard, the Court took the same approach as the one adopted in the *Case of Lagos del Campo v. Peru*<sup>128</sup>, and continued in subsequent decisions.<sup>129</sup> Thus, the Court recalled that, already in the *Case of Poblete Vilches et al. v. Chile* it had indicated the following:

Hence, it is evident to interpret that the American Convention incorporated in its list of protected rights the so-called economic, social, cultural and environmental rights, by derivation from the standards recognized in the Charter of the Organization of American States (OAS), as well as from the rules of interpretation established in Article 29 of the Convention; in particular, those that prevent limiting or excluding the enjoyment of the rights established in the American Declaration and even those recognized in domestic law. In addition, based on a systematic, teleological and evolutive interpretation, the Court has had recourse to the national and international *corpus iuris* in this matter to provide specific content to the scope of the rights protected by the Convention in order to derive the scope of the specific obligations that relate to each right.

- **The right to health as an autonomous and justiciable right**

To identify those rights that may be derived by interpretation from Article 26, it is necessary to consider that this article remits directly to the economic, social, educational, scientific and cultural standards contained in the OAS

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para. 186.

126 International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of December 16, 1966. Entry into force: January 3, 1976. Ratified by Peru on April 28, 1978, Article 11.

127 *Case of the National Association of Discharged and Retired Employees of the National Tax Administration (ANCEJUB-SUNAT) Superintendence v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2019. Series C No. 394, para. 187.

128 *Cf. Case of Lagos del Campo v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 340, paras. 141–150 and 154.

129 *Cf. Case of the Dismissed Employees of Petroperú et al. v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 23, 2017. Series C No. 344, para. 192; *Case of San Miguel Sosa et al. v. Venezuela*. Merits, Reparations and Costs. Judgment of February 8, 2018. Series C No. 348, para. 220; *Case of Poblete Vilches et al. v. Chile*. Merits, Reparations and Costs. Judgment of March 8, 2018. Series C No. 349, para. 100, *Case of Cuscul Pivaral et al. v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs Judgment of August 23, 2018. Series C No. 359, para. 73, *Case of Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375, para. 175.

Charter. From a reading of the latter, the Court notes that it recognizes health in Article 34(i)<sup>130</sup> and 34(i)<sup>131</sup> and establishes, among other basic objectives of integral development, that of the “[p]rotection of man’s potential through the extension and application of modern medical science” and also “conditions that offer the opportunity for a healthful, productive, and full life”. Meanwhile, Article 45(h)<sup>132</sup> emphasizes that “man can only achieve the full realization of his aspirations within a just social order,” so that the States “agree to dedicate every effort to the application of these principles, including: (h) [d]evelopment of an efficient social security policy”. Accordingly, the Court reiterated that this reference had the sufficient degree of specificity to derive the existence of the right to health recognized by the OAS Charter. Consequently, the Court considered that the right to health was a right protected by Article 26 of the Convention.

The Court reiterated the scope of the right to health; in particular the right to health of persons deprived of liberty in the context of the facts of this case, in light of the international *corpus iuris* on this matter. The Court recalled that, ultimately, the obligations contained in Articles 1(1) and 2 of the American Convention constitute the basis for determining the State’s international responsibility for violations of the rights recognized in the Convention, including those recognized pursuant to Article 26. However, the Convention itself explicitly mentions “the generally recognized principles of international law” for its interpretation and application, specifically in Article 29 which establishes the *pro persona* principle. Hence, as has been the consistent practice of the Court when determining the compatibility of the State’s acts and omissions, or its laws, with the Convention or other treaties for which it has jurisdiction, the Court is able to interpret the obligations and rights contained in them in light of other pertinent treaties and norms<sup>133</sup>.

In this way, the Court reiterated the sources, principles and criteria of the international *corpus iuris* as special law applicable in the determination of the content of the right to health. The Court indicated that it was using this law to determine the right in question to supplement the provisions of the Convention. In this regard, the Court affirmed that it was not assuming jurisdiction over treaties for which it did not have competence, or granting the principles contained in other national and international instruments relating to the ESCER equal rank to the Convention. To the contrary, the Court made an interpretation pursuant to the standards established in Article 29, and in conformity with its case law, that updated the meaning of the rights derived from the OAS Charter that are recognized in Article 26 of the Convention. The determination of the right to health gave special emphasis to the American Declaration, because as the Court has established<sup>134</sup>:

[...] the member states of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.

130 Article 34(l) of the OAS Charter establishes: “[t]he Member States agree that equality of opportunity, the elimination of extreme poverty, equi- table distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: [...] (l) Urban conditions that offer the opportunity for a healthful, productive, and full life.”

131 Article 34(l) of the OAS Charter establishes: “[t]he Member States agree that equality of opportunity, the elimination of extreme poverty, equi- table distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: [...] (l) Urban conditions that offer the opportunity for a healthful, productive, and full life.”

132 Article 45(h) of the OAS Charter establishes: “[t]he Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: (h) Development of an efficient social security policy.”

133 *Case of Hernández v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 22, 2019. Series C No. 395, para. 65.

134 *Case of Hernández v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 22, 2019. Series C No. 395, para. 66.

Likewise, on other occasions, the Court has indicated that human rights treaties are living instruments and their interpretation must evolve with the times and current living conditions. This evolutive interpretation is consequent with the general rules of interpretation established in Article 29 of the American Convention, and also in the Vienna Convention on the Law of Treaties. Furthermore, Article 31(3) of the Vienna Convention authorizes the use of means of interpretation such as agreements or practice or relevant rules of international law that the States have agreed to regarding the application of the provisions of a treaty, which are some of the methods related to an evolutive vision of the treaty. Thus, in order to determine the scope of the right to health, in particular the right to health of persons deprived of liberty, as derived from the economic, social, educational, scientific and cultural standards of the OAS Charter, the Court referred to the relevant instruments of the international *corpus iuris*<sup>135</sup>.

- **The content of the right to health**

As previously indicated, Article 34(i) and 34(l) of the OAS Charter establish, among the basic objectives of integral development, that of the “[p]rotection of man’s potential through the extension and application of modern medical science,” as well as “conditions that offer the opportunity for a healthful, productive, and full life.” Also, Article 45(h) underlines that “man can only achieve the full realization of his aspirations within a just social order,” so that the States agree to dedicate every effort to the application of principles including: (h) Development of an efficient social security policy”<sup>136</sup>.

In addition, Article XI of the American Declaration allows the right to health to be identified when it establishes that “every persons has the right to the preservation of his health through sanitary and social measures relating to [...] medical care, to the extent permitted by public and community resources”<sup>137</sup>.

Similarly, Article 10 of the Protocol of San Salvador establishes that everyone has the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being, and indicates that health is a public good.<sup>138</sup> The same article establishes that the measures States must adopt to ensure the right to health include: “[u]niversal immunization against the principal infectious diseases,” “[p]revention and treatment of endemic, occupational and other diseases,” and “[s]atisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable”<sup>139</sup>.

In the universal sphere, Article 25 of the Universal Declaration of Human Rights establishes that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” Meanwhile, Article 12 of the International Covenant on Economic, Social and Cultural Rights recognizes the right of everyone to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances

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135 *Case of Hernández v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 22, 2019. Series C No. 395, para. 69.

136 *Case of Hernández v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 22, 2019. Series C No. 395, para. 69.

137 *Case of Hernández v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 22, 2019. Series C No. 395, para. 70.

138 Article 10(1) of the Protocol of San Salvador establishes: “[e]veryone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being. 2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right: (a) Primary health care, that is, essential health care made available to all individuals and families in the community; and (b) Extension of the benefits of health services to all individuals subject to the State’s jurisdiction.”

139 *Case of Hernández v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 22, 2019. Series C No. 395, para. 71.

beyond his control.<sup>140</sup>

Additionally, the right to health is recognized in Article 5(e) of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 12(1) of the Convention on the Elimination of All Forms of Discrimination against Women; Article 24(1) of the Convention on the Rights of the Child; Article 28 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and Article 25 of the Convention on the Rights of Persons with Disabilities. This right is also established in several regional human rights instruments, such as in Article 17 of the Social Charter of the Americas; Article 11 of the revised edition of the 1961 European Social Charter; Article 16 of the African Charter of Human and Peoples' Rights and, recently, in the Inter-American Convention on Protecting the Human Rights of Older Persons. In addition, the right to health has been recognized in Section II, paragraph 41 of the Vienna Declaration and Programme of Action, and in other international instruments and decisions<sup>141</sup>.

Furthermore, the right to health is recognized at the constitutional level in Argentina (in article 42 of its Constitution), and the Court has observed a broad regional consensus to consolidate the right to health, which is explicitly recognized in different Constitutions and the domestic law of the States of the region, including: Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela<sup>142</sup>.

- **Standards for the right to health**

The Court has already recognized that health is a fundamental and essential human right for the adequate exercise of the other human rights and that everyone has the right to enjoy the highest possible level of health that allows him to have a decent life, understanding health not only as the absence of disease or infirmity, but as a state of complete physical, mental and social well-being, derived from a lifestyle that enables everyone to achieve overall balance. The Court has clarified that the general obligation to protect health results in the duty of the State to ensure that everyone has access to essential health services, guaranteeing the quality and efficiency of medical services, and to facilitate the improvement of the health of the whole population<sup>143</sup>.

Similarly, the Court has established that the implementation of this obligation begins with the duty to regulate it, and has indicated that States are responsible for establishing a permanent regulation of health services (both public and private) and executing national programs to achieve quality health services. The Court has taken into account General Comment No. 14 of the Committee on Economic, Social and Cultural Rights on the right to the highest attainable standard of health. In particular, this Comment emphasized that this right includes opportune and appropriate health care, as well as the following interrelated and essential elements of availability, accessibility acceptability and quality, the precise application of which will depend on the conditions prevailing in each State<sup>144</sup>:

- a) **Availability.** Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party. The precise nature of the facilities, goods and services will vary depending on numerous factors, including the State party's

140 *Case of Hernández v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 22, 2019. Series C No. 395, para. 72.

141 *Case of Hernández v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 22, 2019. Series C No. 395, para. 73.

142 *Case of Hernández v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 22, 2019. Series C No. 395, para. 74.

143 *Case of Hernández v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 22, 2019. Series C No. 395, para. 76.

144 *Case of Hernández v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 22, 2019. Series C No. 395, para. 77.

developmental level. They will include, however, the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs.

b) Accessibility. Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:

i) Non-discrimination: health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.

ii) Physical accessibility: health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas. Accessibility further includes adequate access to buildings for persons with disabilities.

iii) Economic accessibility (affordability): health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.

iv) Information accessibility: accessibility includes the right to seek, receive and impart information and ideas concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality.

c) Acceptability. All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.

d) Quality. As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, *inter alia*, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.

In this regard, the Court concluded that the right to health referred to the right of everyone to enjoy the highest attainable level of physical, mental and social well-being. This right includes opportune and appropriate health care, provided in keeping with the principles of availability, accessibility, acceptability and quality. When complying with the obligation to respect and ensure this right, the State must pay special attention to vulnerable and

marginalized groups, and care must be provided progressively based on available resources and the applicable domestic law. Referring to the specific obligations that arise in the case of individuals suffering from tuberculosis, the Court noted that the concepts mentioned had been taken from diverse responsible sources, but that medical science is continually advancing in this regard and, consequently, the citations included as examples did not contradict or call into question more recent findings. Moreover, the Court does not take a stand in matters and discussions in the field of medical and biological sciences<sup>145</sup>.

Thus, regarding the medical care that should be guaranteed to those with tuberculosis, the Court considered that the International Standards for Tuberculosis Care published by the Tuberculosis Coalition for Technical Assistance (hereinafter “TCTA”) constituted an authoritative reference to clarify some of the State’s international obligations in this regard. In general, these standards establish that the basic principles of care for persons with tuberculosis are the same worldwide: (a) a diagnosis should be established promptly and accurately; (b) standardized treatment regimens of proven efficacy should be used with appropriate treatment support and supervision; the response to treatment should be monitored; and the essential public health responsibilities must be carried out. In particular, the TCTA indicated that an effective response to tuberculosis called for a series of actions in the area of diagnosis, treatment and public health responsibilities<sup>146</sup>.

First, adequate diagnosis requires that all persons with otherwise unexplained productive cough lasting two–three weeks or more should be evaluated for tuberculosis. Second, the treatment of tuberculosis required that all patients (including those with HIV infection) who have not been treated previously should receive an internationally accepted first-line treatment regimen using drugs of known bioavailability. The doses of antituberculosis drugs used should conform to international recommendations. All patients should be monitored for response to therapy. Third, regarding standards for public health responsibilities all providers of care for patients with tuberculosis should ensure that persons (especially children under 5 years of age and persons with HIV infection) who are in close contact with patients who have infectious tuberculosis are evaluated and managed in line with international recommendations<sup>147</sup>.

As it has reiterated in its recent case law, the Court considered that the nature and scope of the obligations derived from the protection of the right to health included aspects that must be enforced immediately, as well as aspects of a progressive nature. In this regard, the Court recalled that, regarding the former (obligations that are immediately enforceable), States must take effective measures to ensure access without discrimination to the services recognized by the right to health, guarantee that men and women have equal rights and in general, advance towards the full effectiveness of the ESCR. Regarding the latter (obligations of a progressive nature), progressive realization means that States Parties have the specific and constant obligation to move as rapidly and efficiently as possible towards the full effectiveness of the said right, based on available resources, and by legislative or other appropriate means. Furthermore, there is an obligation of non-retrogressivity with regard to the rights that have been realized. Consequently, the obligations to respect and ensure rights imposed by the Convention, as well as the adoption of measures under domestic law (Articles 1(1) and 2), are essential to achieve its effectiveness<sup>148</sup>.

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145 *Case of Hernández v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 22, 2019. Series C No. 395, para. 78.

146 *Case of Hernández v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. . Judgment of November 22, 2019. Series C No. 395, para. 79.

147 *Case of Hernández v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 22, 2019. Series C No. 395, para. 80.

148 *Case of Hernández v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 22, 2019. Series C No. 395, para. 81.



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