INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF PALACIO URRUTIA ET AL. V. ECUADOR

JUDGMENT OF NOVEMBER 24, 2021

(Merits, Reparations and Costs)

In the case of Palacio Urrutia et al. v. Ecuador,

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), composed of the following judges:

Elizabeth Odio Benito, President
Eduardo Vio Grossi, Judge
Humberto Antonio Sierra Porto, Judge
Eduardo Ferrer Mac-Gregor Poisot, Judge
Eugenio Raúl Zaffaroni, Judge, and
Ricardo Pérez Manrique, Judge

also present,

Pablo Saavedra Alessandri, Secretary, and
Romina I. Sijniensky, Deputy Secretary,

pursuant to Article 62(3) and 63(1) of the American Convention on Human Rights (hereinafter also "the American Convention" or "the Convention") and Articles 31, 32, 42, 65 and 67 of the Court's Rules of Procedure (hereinafter "the Rules of Procedure" or "the Court's Rules of Procedure"), delivers this judgment, structured as follows:

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I
INTRODUCTION TO THE CASE AND PURPOSE OF THE DISPUTE

1. Proceedings before the Court. On October 16, 2019, the Inter-American Commission on Human Rights (hereinafter also "the Inter-American Commission" or "the Commission") submitted the case of "Emilio Palacio Urrutia et al." against the Republic of Ecuador (in hereinafter also "the State" or "Ecuador") to the Court's jurisdiction. According to the Commission, the case is related to a series of human rights violations arising from the criminal proceedings brought by the then President of Ecuador, Rafael Vicente Correa Delgado (hereinafter, also "the then President" or "the former President") which led to the conviction of the journalist Emilio Palacio Urrutia and the directors of the El Universo newspaper, Nicolás Pérez Lapentti, César Enrique Pérez Barriga and Carlos Eduardo Pérez Barriga, "due to the publication of a opinion article on a matter of high public interest regarding the events surrounding a political crisis that occurred in Ecuador in September 2010, and the actions of former President Rafael Correa and other authorities in the context of said crisis." The Commission concluded that the State violated the right to freedom of thought and expression and the principle of legality and retroactivity, the rights to judicial guarantees and judicial protection, in relation to the general obligations provided in articles 1(1) and 2 of the Convention, to the detriment of Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga and César Enrique Pérez Barriga (hereinafter, also "the alleged victims").

1. Proceedings before the Commission. The proceedings before the Commission were as follows:
2.

a) Petition. On October 24, 2011, Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga, César Enrique Pérez Barriga, Hernán Pérez Loose and Jorge Alvear Macías presented the initial petition before the Commission.

b) Admissibility Report. On October 27, 2015, the Commission approved Admissibility Report No. 66/15, in which it notified the parties of admissibility and made itself available to reach a friendly settlement.

c) Merits Report. On March 19, 2019, the Commission approved Merits Report No. 29/19 (hereinafter also "Merits Report"), in which it reached a series of conclusions and made several recommendations to the State.

d) Notification to the State. The Commission notified the State of the Merits Report in a communication dated April 16, 2019. The Commission granted Ecuador a period of two months to report on compliance with the recommendations. On June 16, 2019, the State presented its report on compliance with recommendations and requested an additional extension. On July 15, 2019, the Commission granted a new extension to the State, expiring on October 16, 2019. On October 3, 2019, the State presented a new report on compliance with recommendations. In its report of October 3, 2019, the State did not request a new extension to comply with the recommendations of the Merits Report.

3. Submission to the Court. – On October 16, 2019, the Commission submitted to the Court all the facts and human rights violations in the case. It did so, as indicated,

due to the need to obtain justice and reparation for the victims.[1] This Court notes that, more than 8 years elapsed between the presentation of the initial petition before the Commission and the submission of the case to the Court.

4. Requests of the Commission. –The Commission asked this Court to conclude and declare Ecuador's international responsibility for the violations contained in the Merits Report and to order the State, as reparation measures, to comply with those measures included in the Report.

II
PROCEEDINGS BEFORE THE COURT

5. Notification to the State and the representatives. – The submission of the case was notified to the alleged victims' representation (hereinafter "the representatives") and to the State on February 18, 2020.[2]

6. Brief of pleadings, motions and evidence. In response to the decisions in Court Agreements 1/20 of March 17, 2020 and 2/20 of April 16, 2020, the Court ordered the suspension of the calculation of all deadlines due to the emergency caused by the COVID-19 pandemic. Therefore, on June 20, 2020, the representatives submitted their brief with pleadings, motions, and evidence (hereinafter "pleadings and motions brief"), in accordance with Articles 25 and 40 of the Rules of Procedure. The representatives were in substantial agreement with the Commission's arguments and made additional arguments on the merits. They also requested that Ecuador be ordered to adopt various measures of reparation and to reimburse costs and expenses.

7. Answering brief. On November 22, 2020, the State submitted its brief answering the submission of the case and Merits Report and the pleadings and motions brief (hereinafter "answering brief"), under the terms of Article 41 of the Court's Rules of Procedure.[3] In said brief, the State made a partial acknowledgment of responsibility for the facts and the human rights violations alleged in the Merits Report and made additional arguments on the merits and reparations.[4]

8. Observations on the partial acknowledgement. On February 1 and 18, 2021, the representatives and the Commission presented, respectively, their observations on the partial acknowledgment of State responsibility.

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[1] The Commission appointed as its delegates before the Court, Commissioner Esmeralda Arosemena de Troitiño, and the then Executive Secretary Paulo Abrão, and as legal advisers the then Special Rapporteur for Freedom of Expression, Edison Lanza, as its delegates. Similarly, it appointed as legal advisors Jorge Huberto Meza Flores, Christian González Chacón and Cecilia La Hoz Barrera, lawyers of the Commission's Executive Secretariat.

[2] The alleged victims were represented by Carlos Ayala Corao, Hernán Pérez Loose, Jorge Alvear Macías, María Daniela Rivero, Edward Jesús Pérez and Leonardo Veronico Osorio.

[3] The State appointed María Fernanda Álvarez, as its principal agent, and Carlos Espín Arias and Amparo Esparza Paula, as alternate agents.

[4] The State indicated that it partially recognizes "solely and exclusively the facts related to the criminal proceeding for the crime of libel that was brought against Emilio Palacio Urrutia, Carlos Eduardo Pérez Barriga, César Enrique Pérez Barriga and Carlos Nicolás Pérez Lapentti, as well as the facts related to the constitutional action for precautionary measures filed before the Eleventh Court for Children and Adolescents of Guayas in August 2011, as it is directly linked to the former."

9. Public hearing. – On April 12, 2021, the President of the Court issued an order in which she summoned the parties and the Commission to a public hearing on possible merits, reparations and costs, and to hear the arguments and final oral observations of the parties and of the Commission, respectively.[5] Due to the exceptional circumstances caused by the COVID-19 pandemic, the public hearing was held by videoconference, in accordance with the provisions of the Court's Rules of Procedure, on June 14 and 15, 2021 during the Court's 142nd regular session.[6]

10. Request to appear. On June 18, 2021, Mr. Rafael Vicente Correa Delgado submitted a brief in which he requested to appear before the Court as a witness, to present his version of the facts in this case, or to be allowed to "incorporate [his] written considerations regarding the case into the process." On June 23, 2021, the Plenary Session of the Court decided not to accept said request, since it does not have jurisdiction to address evidence offered by individuals or organizations other than the Inter-American Commission, the alleged victims, or defendant States, who participate in the proceedings before the Court. Notwithstanding the foregoing, former President Correa was informed that, in accordance with Articles 2(3) and 44 of the Court's Rules of Procedure, any person may present their reasoning regarding the facts of the case, and the legal considerations involved in it, through an amicus curiae brief[7]. In this regard, the Court received an amicus curiae brief from Mr. Correa Delgado on June 29, 2021, which was admitted on July 2, 2021. The Court notes that the considerations expressed in said brief will be taken into account, as appropriate, in this judgment.

11. This Court considers it relevant to point out that the aforementioned amicus curiae brief was intended to clarify issues alleged during the public hearing of June 14 and 15, 2021 in this case. Specifically, said brief referred to the following: (1) the alleged systematic and generalized political persecution of Rafael Correa and those who are said to be "correistas" and its legal corollary: defenselessness, (2) the statements and affirmations of the Inter-American Commission on Human Rights in this case, (3) the testimonies of the alleged victims Emilio Palacio Urrutia and César Pérez Barriga, (4) the testimonies of experts Juan Pablo Albán and Toby Mendel, (5) the "political raid" by the State and (6) the alleged intention to cause damage to the honor, image, good name and reputation of the person appearing. In the analysis presented, former President Correa expressed, regarding the State's acknowledgment of responsibility (infra, par. 18 to 20), que "that "the raid by itself cannot constitute proof of the charge or evidence that is assessed by [the] Court as a form of responsibility or that infers some type of state responsibility, since there are no facts or elements that have been produced by the Eminent Commission, nor by the State Attorney General's Office, which are related to a raid."[8]

12. Amicus curiae. In addition to the aforementioned (supra, par. 11), the Court received amicus curiae briefs from: (i) High Level Panel of Legal Experts on Media

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[5] *Cf. Case of Palacio Urrutia et al. v. Ecuador. Call to hearing.* Order of the President of the Inter-American Court of Human Rights, of April 12, 2021.
Available at: http://www.corteidh.or.cr/docs/asuntos/palacio_urrutia_y_otros_12_04_21.pdf

[6] The following appeared at this hearing: a) for the Inter-American Commission: Pedro Vaca Villareal, Marisol Blanchard, Erick Acuña and Cecilia La Hoz; b) for the representatives: Carlos Ayala Corao, Hernán Pérez Loose, Jorge Alvear Macías and María Daniela Rivero, c) for the State: María Fernanda Álvarez, Carlos Espín Arias, Amparo Esparza, Alfonso Fonseca and Magda Aspirot.

[7] Letter of the Secretariat of June 23, 2021 (merits file, folio 2051).

[8] *Cf. Amicus curiae* of Rafael Correa Delgado (merits file, folios 2484 to 2672).

Freedom[9], (ii) Law Firm Vera Abogados [10], (iii) Xavier Burbano Espinazo[11], (iv) Freedom of the Press Foundation and El Veinte[12], (v) Hernán Duarte, FESPAD and Factum Magazine[13], (vi) Boston College Law School[14], (vii) Sandra Russo[15], (viii) Pompeu Fabra University Legal Clinic[16], (ix) Latin American Association of Communication Researchers[17], (x) Faculty of Journalism and Social Communication of the National University of La Plata[18], (xi) Platform for Access to Justice [19], (xii) Baltasar Garzón Real[20], (xiii) Media Defense[21] and (xiv) Rights Center of the Andrés Bello Catholic University and the Regional Alliance for Free Expression and Information[22].

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[9] The document, signed by Can Yeginsu, Dario Milo and Steven Budlender SC, presents an analysis of the legality of legal provisions in Ecuador that criminalize defamation and the application of these provisions to people who have received custodial sentences and fines for activities of journalism in the public interest.

[10] The document, signed by Gutemberh Vera Páez, Alembert Vera Rivera, Lyonel Calderón Tello, and María del Carmen Vera Rivera, deals with allegations related to the nature of Mr. Palacio Urrutia's article; the lack of effects of the conviction against him; the objective of the criminal process, which was to achieve respect for the honor, privacy of the then President; the limits of freedom of expression; and the absence of interference by the then President or his lawyers in justice.

[11] The document, signed by Xavier Burbano Espinoza, deals with the inclusion of the figure or role of "procedural party" or "third party adherent" for the exclusive exercise of the right of defense, as a guarantee of application of the universal principle of presumption of innocence, in the access to international justice, specifically in the Inter-American System.

[12] The document, signed by Jonathan Carl Bock Ruiz, Ana Bejarano Ricaurte, Raissa Carrillo Villamizar, Emmanuel Vargas Penagos, Natalia Beltrán Orjuela and Vanessa López Ochoa, consists of an analysis related to the obligations of respect, guarantee and adaptation pursuant to the convention regarding journalism, as well as the special protection standards for expressions of public interest.

[13] The document, signed by Herman Duarte and César Castro Fagoaga, refers to the regulation of freedom of expression in the inter-American human rights system and the European human rights system.

[14] The document, signed by Daniela Urosa M., María Massimo and Yuan Zhao, deals with the right to freedom of expression and the limits of criminal and civil sanctions against journalists, as well as the possible conventionality control that the Court can exercise to urge the State to reform its normative provision on the crime of slander.

[15] The document, signed by Sandra Russo, deals with the article she published on the back cover of the Argentine newspaper Page 12, *Two types of Libertas*, of September 8, 2012. In said article, facts discussed in this case are divulged, which are reproduced in the *amicus curiae* brief

[16] The document, signed by Rocío Nalda Palomer, Rodrigo Nazzal Morgues, Vicente Aylwin Fernández, Alexandre Venezia and Javier Martínez Morales, deals with the establishment of the updated international standard regarding the scope and restrictions of the right to freedom of expression.

[17] The document, signed by Fernando Oliveira Paulino and Gabriel Kaplún, deals with the right to freedom of expression set out in two dimensions: individual and collective, which translates into social responsibility and accountability of the media.

[18] The document, signed by Héctor Ángel Bernardo and Andrea Mariana Varela, comprises an analysis of the link between concentrated communication media and the right to information of any democratic society, in the framework of coups and ruptures of the institutional order.

[19] The document, signed by Mónica Eulalia Banegas, Carla Patricia Luzuriaga Salinas, María Gabriela Paz and María Victoria Ramón, analyzes the constitutional, legal and political framework in Ecuador for the years 2010 and 2011. It also analyzes the context in the issuance of the Communication Law, the right to honor of public authorities and the social dimension of the right to freedom of expression and subsequent liability of journalists.

[20] The document, signed by Baltasar Garzón Real, constitutes an analysis of the right to freedom of expression versus the right to honor.

[21] The document, signed by Carlos Gaio and Padraig Hughes, deals with the right to freedom of expression related to matters of public interest, particularly State affairs and the actions of public officials.

[22] The document, signed by Ezequiel Santagada and Carlos Correa, analyzes the present case in relation to the relevant normative standards and the Venezuelan case, as well as presents a proposal to protect freedom of expression from arbitrary civil proceedings.

13. Final written arguments and observations. On July 16, 2021, the State, the Commission, and the representatives presented their final written arguments, with annexed documentation.

14. Observations on the annexures to final arguments. On August 2, 2021, the representatives forwarded their observations on the annexes forwarded with the final written arguments of the State. On August 3, 2021, the Commission reported that it had no observations to make regarding the documents added by the State. The State did not present observations.

15. Alleged supervening facts. On August 5, 2021, the representatives reported on a communication from a state media outlet, in which it "officially and publicly issued an 'apology' regarding the attacks on the media that took place from 2008 to 2021," requesting its inclusion in the case file. On August 17, 2021, the Commission presented its observations regarding the information presented by the representatives, and the State requested that the video presented by the representatives be excluded from the body of evidence in the case.

16. Deliberation of this case. The Court deliberated this Judgment in virtual sessions on November 22, 23 and 24, 2021.[23]

III
JURISDICTION

17. The Inter-American Court is competent to hear this case pursuant to Article 62(3) of the American Convention, given that Ecuador is a State Party of said instrument since December 28, 1977, and accepted the contentious jurisdiction of the Court on July 24, 1984.

IV
ACKNOWLEDGEMENT OF RESPONSIBILITY

A. The State's partial acknowledgment of responsibility and observations of the representatives and the Commission

18. The **State** declared, in its answering brief, that "it partially acknowledges the facts set forth in the submission brief of the Inter-American Commission, as well as the [pleadings and motions brief] of the representatives." It stated that the acknowledgment is partial because "it covers solely and exclusively the facts related to the criminal proceedings for the crime of libel that was brought against [the alleged victims], as well as the facts related to the constitutional action for precautionary measures filed before the Eleventh Court for Children and Adolescents of Guayas in August 2011, as it is directly linked to the former." In this way, the State indicated that "the acknowledgment excludes all the context and circumstances unrelated to said processes and time frame, referred to both in the submission of the case by the Inter-American Commission and in the [pleadings and motions brief] of the representatives."

[23] Due to the exceptional circumstances caused by the COVID-19 pandemic, this judgment was deliberated and approved during the 145th Regular Session, held using media communication technology, in accordance with the provisions of the Court's Rules of Procedure.

19. In view of the foregoing, the State acknowledged the following facts:

1. The Ecuadorian judicial bodies handed down a criminal judgment of three years imprisonment and a civil penalty of 30 million United States dollars for the commission of the crime of "serious slanderous insult against authority" against the journalist Emilio Palacio Urrutia and the directors of El Universo newspaper, Carlos Nicolás Pérez Lapentti, César Enrique Pérez Barriga and Carlos Eduardo Pérez Barriga (hereinafter "the directors of El Universo newspaper"), for the publication of an editorial article on a matter of public interest. Similarly, a civil judgment of 10 million United States dollars was established against the legal entity that published El Universo.

2. The Ecuadorian State recognizes that the criminal sanction imposed on Emilio Palacio Urrutia and the directors of El Universo newspaper, as well as the civil compensation ordered in the framework of the aforementioned criminal proceedings, were not justified by a social interest imperative, therefore they were unnecessary and disproportionate and, although they were not carried out, they could have had the effect of intimidating those involved in the case.

3. The ambiguity and scope of the Articles of the Criminal Code applied in this case implied a breach of the requirement of strict legality in the imposition of restrictions on the rights to freedom of expression of Emilio Palacio Urrutia and the directors of El Universo newspaper.

4. Articles 489, 490, 491 and 493 of the Ecuadorian Criminal Code, in force at the time of the events, "did not establish clear parameters that could conceptualize the prohibited conduct and its elements," a situation that caused the judges who heard the case to make an interpretation, qualifying the actions of Emilio Palacio Urrutia under the criminal category of serious slanderous insult against public authorities.

5. The framework of the criminal process revealed actions by the Ecuadorian State contradictory to the guarantee of the victims' right to be judged by an independent and impartial judge or court and their right to defense within the framework of an effective judicial process. Therefore:

- The public statements made by then President Rafael Correa Delgado, through state media, placed "the parties in an unequal position, seriously affecting the guarantees of independence and impartiality of the judicial body."

  "(…) The then President Correa had at his disposal ample space in the media, in official acts and even repeatedly relied on the national network, to defend his positions and even to answer journalists and the media."

- The first instance judgment did not clearly specify the configuration of the elements of the criminal offense for which the victims in the case were sentenced.

  "From the evidence provided, there is no participation of the media outlet's directors in the preparation of the column, (...) the courts acted arbitrarily by extending criminal liability to those who did not participate, under the criminal code that was (...) in force."

- The possibility of criminally prosecuting a legal entity was not clearly and precisely established in the law. Accordingly, the fact that criminal

proceedings had also been filed against El Universo newspaper constituted a breach of the principle of jurisdiction and legality.

- The participation of several temporary judges, mainly in the first instance of the criminal process, violated the principle of jurisdiction.

- The reinstatement of the hearing in the appeal phase, which had initially been set for September 22, 2011, and which later, by order of September 17, 2011, notified on the 19th of the same month and year, was again postponed to September 20, 2011, generated a state of defenselessness and violated the defendants' right to defense, as they had the legitimate expectation that said hearing would be held on the originally scheduled date.

- Although the defendants were able to file appeals to challenge the first instance and appeal judgments, as well as challenge judges, the effectiveness of these procedural actions was doubtful, since, as judicial independence was affected in this case, the possibility that these appeals were resolved impartially was also remote.

- The authorship of the first instance judgment was questioned, which motivated the victims of the case to file a constitutional action for precautionary measures, in which resolution it was determined that "the judgment of first instance was not created in the computer equipment of the relevant court but came from an external team."

20. Based on the accepted facts, the State acknowledged its international responsibility for the violation of Articles 8(1), 8(2)(c), 8(2)(f), 9, 13 and 25(1) of the American Convention, in relation to Articles 1(1) and 2 of the same instrument. The State did not acknowledge its international responsibility in relation to Articles 7, 21, 22, and 26 of the American Convention, for which it stated that it would refer to the aforementioned articles in the relevant part of its answering brief.

21. The ***representatives*** expressed that the State's recognition is partial, ambiguous, imprecise and sometimes contradictory. In particular, they expressed that the State, contradictorily, has not recognized the context of the violations within which the facts of this case occurred: the attacks on freedom of expression and the deficiencies of judicial independence. The representatives declared that they do not accept the terms of the acknowledgment of responsibility, which is why the controversy persists. Thus, they stated that the Court must resolve the controversy in the terms proposed by the Commission and the representatives. In this regard, the representatives made various statements related to the existence of the context in which the facts of the case occurred and indicated that the State's request seeks to ensure that a judicial truth is not reached and seeks to strip the judgment of symbolic value. For this reason, they indicated that the Court must exercise its jurisdiction by correcting the ambiguity of state recognition.

22. The ***Commission*** assessed positively the partial acknowledgment made by the State. However, it pointed out that the acknowledgment of responsibility has a certain ambiguity, and therefore requires clarification in terms of its scope and legal effects. The Commission referred to the lack of clarity of the State's position regarding whether it agreed with the conclusions of the Merits Report on issues such as the need to analyze the requirements established by the doctrine of actual malice or the legal consequences of some relevant facts that violated judicial guarantees and judicial protection. Similarly, the Commission indicated that, although the State referred to reparations in its brief, it did not specifically identify the scope of its partial acknowledgment in terms of reparations. Finally, it highlighted that the State did not recognize the context in which

the violations in the case occurred, violations which are related to the attacks by the Executive Branch against El Universo newspaper, and the lack of judicial independence, which are issues that must be analyzed together in this case.

B. Considerations of the Court

23. Pursuant to Articles 62 and 64 of the Rules of Procedure, and in the exercise of its powers of international judicial protection of human rights, a matter of international public order, it is incumbent on this Court to ensure that the acts of acknowledgment of responsibility are acceptable for the purposes that seeks to comply with the inter-American system.[24] The Court will analyze below the situation in this specific case.

B.1 Regarding the facts

24. In this case, this Court considers that it must be understood that the State accepted "solely and exclusively" the facts contained in the Merits Report and the motions and pleadings brief "related to the criminal proceedings for the crime of libel that was brought against [the alleged victims], as well as the facts related to the constitutional action for precautionary measures filed before the Eleventh Court for Children and Adolescents of Guayas in August 2011, because it is directly linked to the former." Thus, the Court understands that the State has recognized the following facts set forth in the Merits Report: all those specifically related to a) the criminal proceedings for the crime of libel brought against the presumed victims of the case; b) the constitutional action brought before the Eleventh Court for Children and Adolescents of Guayas in August 2011, and c) the public statements made by the then President through state media, which can be found in section "D. Facts of the case", in paragraphs 18 to 52 and 54 to 56 of the aforementioned Report, insofar as they refer to events that occurred in the time frame of the criminal proceedings against the alleged victims or the precautionary measures filed before the Eleventh Court of Children and Adolescents of Guayas. Additionally, this Court considers that the supplementary facts established in the motions and pleadings brief, which refer to said factual issues, are also covered by the acknowledgment of the State.

25. The State expressly maintained that it did not accept the facts related to the context and the "circumstances unrelated to said proceedings and time frame", which this Court notes are found in paragraphs 12 to 17, and 53 of the Merits Report. This Court observes that the aforementioned paragraphs are found in section IV of the Report entitled "A. Context"; "B. About el Universo Newspaper and the government of President Rafael Correa"; "C. Regarding the alleged victims"; and "D. Facts of the case", and more specifically in the section on "Facts related to the case", in which the Commission made a presentation of facts related to the enactment of Decree No. 872. Because of this, the Court considers that the controversy still remains regarding the facts referred to in the aforementioned paragraphs (12 to 17, and 53), as well as those that are related to them and have been presented by the representatives in the motions and pleadings brief.

B.2 Regarding the legal claims

26. Taking into account the violations acknowledged by the State, as well as the observations of the representatives and the Commission, the Court considers that the

[24] *Cf. Case of Kimel v. Argentina. Merits, Reparations and Costs.* Judgment of May 2, 2008. Series C No. 177, par. 24, and *Case of Garzón Guzmán et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of September 1, 2021. Series C No. 434, par. 19.

dispute has ceased with respect to the violation of the rights of Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti , César Enrique Pérez Barriga and Carlos Eduardo Pérez Barriga for: a) the criminal sanction imposed, and the civil compensation ordered in the criminal proceedings against them as a result of the publication of the article "NO to lies" on February 6, 2011, which constituted a violation of their rights to freedom of thought and expression and to the principle of legality, and b) the actions by the State during the criminal proceeding, which constituted a violation of the alleged victims' rights to their judicial guarantees and judicial protection. The Court notes that the State also recognized that the ambiguity and scope of the articles of the Criminal Code applied in the case constituted a breach of the principle of legality, which allowed the prosecution of the alleged victims under the criminal code for serious slanderous insult against public authorities.

27. Consequently, the State partially acknowledged its international responsibility for the violation of Articles 8(1), 8(2)(c), 8(2)(f), 9, 13 and 25(1) of the American Convention, in relation to Articles 1(1) and 2 thereof. Given the foregoing, the controversy remains regarding the alleged violations of the rights to personal liberty, property, movement, and work, recognized in articles 7, 21, 22 and 26 of the American Convention, in relation to article 1(1) of the same instrument.

B.3 Regarding reparations

28. The controversy remains regarding the admissibility of the specific measures of reparation requested by the Commission and the representatives, therefore it will be up to the Court to examine them.

B.4 Assessment of acknowledgement

29. The acknowledgment made by the State constitutes a partial acceptance of the facts and a partial acknowledgment of the alleged violations. This Court considers that the acknowledgment of international responsibility constitutes a positive contribution to the development of this process and to the validity of the principles that inspire the Convention, as well as to the reparation needs of the alleged victims.[25] The acknowledgment made by the State produces full legal effects in accordance with Articles 62 and 64 of the aforementioned Rules of Procedure of the Court. Additionally, the Court warns that the acknowledgment of detailed and specific facts and violations may have effects and consequences in the analysis that this Court makes of the other alleged facts and violations, to the extent that they all form part of the same set of circumstances.[26]

30. In the particular circumstances of this case, the Court will specify the scope of the effects of the acknowledgment of responsibility in the determination of the facts and the substantive examination of the alleged rights violations. As long as the controversies about them persist, the Court considers it appropriate to issue a judgment in which the facts that occurred are determined, according to the evidence collected during the process before this Court and the acceptance of facts, as well as their legal consequences and the corresponding reparations. In addition, in this case it is relevant to analyze the facts related to the violation

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[25] *Cf. Case of Benavides Cevallos v. Ecuador. Merits, Reparations and Costs.* Judgment of June 19, 1998. Series C No. 38, par. 57, and *Case of Garzón Guzmán et al. v. Ecuador, supra*, par. 26.

[26] *Cf. Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 14, 2014. Series C No. 287, par. 27, and *Case of Bedoya Lima et al. v. Colombia. Merits, Reparations and Costs.* Judgment of August 26, 2021. Series C No. 431, par. 30.

of freedom of expression, and, since they were not recognized by the State, to the alleged violations of the rights to personal liberty, property, movement and to work. On the other hand, the Court does not consider it appropriate to rule, on this occasion, on the violations of the principle of legality and retroactivity, and of the rights to judicial guarantees and judicial protection, since these were expressly accepted by the State in its acknowledgment of international responsibility and have already been extensively developed in the case law of the Inter-American Court.

V
EVIDENCE

A. Admission of documentary evidence

31. The Court received various documents, submitted as evidence by the Commission, the representatives and the State, attached to their main briefs (supra par. 5, 6 and 7). As in other cases, this Court admits those documents presented at the appropriate time (Article 57 of the Rules of Procedure)[27] by the parties and the Commission, whose admissibility was neither disputed nor opposed, and whose authenticity was not questioned.[28]

32. In its answering brief, the State indicated that the representatives exceeded the term granted by the Court to correct defects found in the annexes 4(b)[29], 4(e)[30], 4(f)[31], 4(g)[32],

[27] Documentary evidence can be presented, in general, and pursuant to Article 57(2) of the Rules of Procedure, together with the briefs of submission, pleadings and motions or answering briefs, as appropriate. Submission of evidence outside these procedural opportunities is not admissible, apart from exceptions established in the aforementioned Article 57(2) of the Rules of Procedure (Force majeure or serious impediment) or when it relates to supervening facts, that is, occurring after the aforementioned procedural stage.

[28] *Cf.* Article 57 of the Rules of Procedure; also, *Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, par. 140, and *Case of Manuela et al. v. El Salvador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 2, 2021. Series C No. 441, par. 31.

[29] Press release "Camilo Samán invited to show the link between the and the standoff by micro entrepreneurs in Guayaquil", August 27, 2009.

[30] Appeal Emilio Palacio U. Conviction of the Second Court of Criminal Guarantees of Guayas, March 26, 2010, Trial Nº 2009-1968.

[31] Appeal and Request for Extension Camilo Samán. Sentence of E. Palacio. Conviction of the Second Court of Criminal Guarantees of Guayas, March 26, 2010, Trial Nº 2009-1968.

[32] Withdrawal proceedings of Camilo Samán Salem in the suit against Emilio Palacio Urrutia of June 4, 2010, and acceptance of June 21, 2010.

4(j)[33], 4(l)[34], 4(r)[35], 7[36], 10[37], 11[38], 16[39], 18[40], 31[41], 32[42], 37[43] and 39[44] forwarded by them in their motions and pleadings brief, therefore said documents should not be admitted. In this regard, the Court recalls that the representatives of the alleged victims forwarded their motions and pleadings brief on June 19, 2020, and its annexes on July 6 and 10, 2020. Subsequently, by letter dated August 25, 2020, after conducting an examination of said annexes, the Secretariat noted that the annexes 7, 10, 16, 18, 31, 32, 37 y 39, had not been presented, and annex 4, in its paragraphs 4(b), 4(e), 4(f), 4(g), 4(j), 4(l), 4(r) were faulty, so they were given a deadline until August 27, 2020, for the presentation of said documents.

33. The representatives forwarded annexes 4(b), 4(e), 4(f), 4(g), 4(j), 4(l), 4(r), 7, 10, 16, 18, 31, 32, 37 and 39 on August 28, 2020. As a result, the State, in a communication dated September 4, 2020, requested that the attachments forwarded by the representatives be taken as not presented, because they were sent outside the time limit. It also informed the Court that annex 11 of the motions and pleadings brief was not made known to the State, for which reason it asked the Court to require the representatives to send said annex, and that as soon as it was received, the calculation of the term for the presentation of the answering brief could begin. Given these requests, the Secretariat informed the State that the admissibility of the representatives' attachments would be resolved at the appropriate procedural moment, and informed it that, with respect to attachment 11, although it was identified by the representatives in their motions and pleadings brief, it had not been provided as an annex, so it was not appropriate to determine the calculation of a new term for the submission of the answer.

34. Based on the foregoing, the representatives, in a communication dated September 11, 2020, stated that all the attachments referred to in their motions and pleadings brief had been forwarded on July 6, 2020 in due time and form, therefore they requested their

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[33] Communication from the Attorney General of October 18, 2010, addressed to *El Universo* newspaper to request information on an article.

[34] Email sent by Emilio Palacio Urrutia rejecting a "release" made by Mr Palacio Urrutia.

[35] Program 'Enlace Sabatino' 387 of August 23, 2014, 4 Minute 6 – 51.

[36] Ruling of Fifteenth Court of Criminal Guarantees of Guayas of July 1, 2011. Acceptance of position by Temporary Judge Mónica Encalada and decision on setting hearing and admission of evidence.

[37] Request for brief of evidence by Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, Cesar Enrique Pérez Barriga, Carlos Eduardo Pérez Barriga and request for annulment of the El Universo Company proceedings.

[38] Notary proceedings on the content of the first instance judgment by the Thirty-eighth Notarial Office of Guayaquil.

[39] Ruling of the Second Criminal Chamber of the Provincial Court of Justice of Guayas District, September 14, 2011, on setting the appeal hearing and its respective notification of September 15, 2011.

[40] Personnel claim of the National Personnel Directorate No. 2412-UARHEGV of November 05, 2009, Personnel claim of the National Personnel Directorate No. 677-DNP of February 26, 2004, and Personnel claim of the Provincial Directorate of Guayas, No. 4390-UARG-KZF of August 16, 2011.

[41] Expert opinions presented to the National Court, that criticized the judgment of the Temporary Judge Juan Paredes.

[42] Victims register in the Automated System of Ecuadorian Legal Proceedings.

[43] Ruling Second Criminal Chamber of the National Court, by ruling of December 27, 2011, denied the Factual Legal Remedy of Emilio Palacio.

[44] Video transmission "informativo sobre acontecimientos de interés general de la ciudadanía caso Diario EL UNIVERSO", ("report on the events of general interest to the public in the Case of EL UNIVERSO newspaper") July 2011.

admission. To prove said assertion, the representatives forwarded a certification obtained from "Dropbox" in order to demonstrate that 113 files were downloaded by the Secretariat of the Court. Due to the representatives' request, the Secretariat of the Court proceeded to carry out an internal computer investigation, which confirmed that said files entered the Court's server, but they presented computer errors that did not allow them to be incorporated into the folder containing the evidence file of the case. This information was communicated to the parties and the Commission by letter dated September 17, 2020.

35. In relation to the above, this Court notes that the representatives, through the letter from the Secretariat of August 25, 2020, learned that annexes 7, 10, 16, 18, 31, 32, 37 and 39 had been considered as not presented, and that annex 4, in its paragraphs 4(b), 4(e), 4(f), 4(g), 4(j), 4(l), 4(r) were faulty, for which a period until August 27, 2020 was granted to correct the problems that could exist regarding said annexes. These annexes, however, were forwarded on August 28, 2020, by the representatives. In this regard, in accordance with Article 59 of the Rules of Procedure, the Court considers that their transfer was outside the time limit, and therefore they are inadmissible.

36. Additionally, the Court notes that annex 11 to the motions and pleadings brief was not included among those that were considered missing or faulty and were requested from the representatives in the letter of August 25, 2020. Furthermore, the Court notes that the representatives were also unable to be informed that said appendix had not entered the body of evidence because the information they had did not allow them to verify that it contained errors. In this sense, the remittance of said annex was requested by the Secretariat, initially, by means of a letter dated September 17, 2020. The Court notes that said annex was forwarded in accordance with the term granted to the representatives and, therefore, Pursuant to Article 59 of the Rules of Procedure, is admissible.

37. The State also forwarded three annexes to its final written arguments, which contain information related to the following: a) the migratory movements of Messrs. Pérez Lapentti and Pérez Barriga; b) the brief of February 27, 2012, by means of which Rafael Correa Delgado pardoned the sentence and the remission of the payment of damages in favor of the presumed victims; and c) the document in which the Criminal Chamber of the National Court of Justice accepted the request for a pardon of the sentence and the remission of the payment of damages. The representatives requested that said evidence be inadmissible because it was irrelevant and unnecessary. In this regard, the Court recalls that the final written arguments do not constitute a new procedural opportunity to offer evidence, except for the exceptions provided for in Article 57(2) of the Rules of Procedure, that is: force majeure, serious impediment or supervening facts. The presentation of the annexes is not justified with respect to any of the three assumptions mentioned above, and is therefore inadmissible.

38. Similarly, the representatives forwarded "information that was relevant to the analysis of this case." In particular, they referred to information published by the state media outlet "Televisión de Ecuador", which issued an apology regarding the attacks on media outlets carried out from 2008 to 2021, which includes a reference to the El Universo newspaper and the case of Mr. Palacio Urrutia. The State indicated that said evidence intends to incorporate issues that occurred prior to the public hearing, and that were not aired during the process. Based on the foregoing, it requested that said evidence be excluded from the body of evidence in the case. In this regard, the Court notes that the information presented by the representatives constitutes a supervening fact as the act of public apology carried out by the media outlet "Televisión de Ecuador", which refers to the specific situation of the facts that are object of analysis of the case,

occurred for the first time on August 3, 2021, that is, after the procedural moments established in article 40(2) of the Rules of Procedure. It is therefore admissible.

B. Admission of expert statements and evidence

39. This Court deems it pertinent to admit the statements made before notary public[45] and at a public hearing[46] to the extent that they adhere to the purpose that was defined by the Presidency in the Resolution through which it ordered their receipt and the purpose of this case.[47] The Court notes that the State made considerations in its final written arguments regarding the expert opinions of Fausto Ortiz, Juan José Fabre Plaza, Manuel García, and Toby Mendel, which refer to their evidential value, not to the admissibility of the evidence. Consequently, the Court will take into account the observations made by Ecuador in consideration of the assessment of the evidence.

VI
FACTS

40. Taking into consideration the scope of the State's acknowledgment of responsibility, the Court will present the facts of the case in the following order: a) context; b) regarding Emilio Palacio Urrutia, Nicolás Pérez Lapentti, César Enrique Pérez Barriga, and Carlos Eduardo Pérez Barriga; c) the article "NO to lies"; d) the judicial process for "serious slanderous insult against authority", and e) other facts related to the case.

A. Context

41. El Universo newspaper was founded on September 16, 1921, as a newspaper printed and published in Guayaquil. It currently has an average print run of 100,000 copies daily, and a readership of 23 million monthly visits, that is, an average of 1.4 million daily visits to its website.[48] The importance of this newspaper has been reflected in the various awards it has received for its journalism in Ecuador.[49]

42. During the government presided over by the then President, Rafael Correa Delgado, who held the presidency of Ecuador from January 15, 2007, to May 24, 2017, El Universo newspaper and its journalists were subjected to formal and verbal accusations by government officials, including the then President.[50] These accusations were made in the framework of what the then President described as a response to several years of a "systematic and organized attack by, among other economic groups, the El Universo limited company, which through its digital and written media initiated

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[45] Statements given by Carlos Nicolás Pérez Lapentti and Carlos Eduardo Pérez Barriga; witness statements given by Leonardo Terán Parral, Gustavo Cortéz Galecio, Sugey Hajjar Sánchez, and Mindy de Palacio; expert opinions given by Fausto Ortiz de la Cadena, Manuel García, Juan José Fabre Plaza, Mauricio Santiago Sosa Chiriboga, Gloria Paulina Serrano Ojeda, and Marina Brilman.

[46] Statements given by Emilio Palacio Urrutia and César Enrique Pérez Barriga at the public hearing held on June 14 and 15, 2020, and expert opinions given by Juan Pablo Albán and Toby Daniel Mendel at the same hearing.

[47] The purposes of the statements are established in the order of the President of the Court of April 12, 2021.

[48] *Cf.* Web page of *El Universo* newspaper, ¿Who are we? available at https://www.eluniverso.com/quienes-somos/historia/

[49] *Cf.* List of acknowledgements made to *El Universo* newspaper (evidence file, folios 4417 to 4423).

[50] *Cf.* Statements of the President of the Republic regarding *El Universo* newspaper and its journalists (evidence file, folios 4427 to 4478).

and carried out a campaign of slander and lies, misinforming citizens, inventing lies, taking information out of context, making inaccurate and defamatory statements with actual malice, a situation that continues even now".[51]

43. The formal accusations were made through lawsuits against the media outlet or its employees, and the verbal accusations were made mainly in the participation of the then President in the government radio and television called "Enlace Ciudadano".

44. In relation to the former, on April 28, 2008, the then President requested the Governor of Guayas to initiate criminal proceedings against El Universo newspaper for the publication of an editorial entitled "Official Vandalism" ("Vandalismo oficial").[52] In 2010, the journalist from El Universo, Tavra Franco, was sentenced to six months in prison, and ordered to pay compensation of three thousand dollars, based on the publication of a journalism piece in which he questioned a person in a case of human trafficking.[53] In 2014, El Universo newspaper had to pay a fine of USD $90,000 (ninety thousand United States dollars) for the publication of a cartoon that was considered by the government to be false, defamatory and inaccurate.[54]

45. Regarding the verbal accusations, on different occasions, the then President made critical statements of various media outlets, and in particular of El Universo, its directors, and Emilio Palacio.[55] In this regard, on July 12, 2008, the then President made the following statement in "Enlace Ciudadano":

> And here comes this poor sick man, Emilio Palacio, he even has a photo of me, believe me I already think that the poor man has a hormonal disorder. He even goes around with a photo of me raising hell on Teleamazonas, Wednesday morning, with Jorge Ortiz: "And here is President Correa, if he wants freedom of expression and that the media do not lie, he should not lie [...] ". Don't be ridiculous. How ridiculous they are. But so that you can see how far the human misery of these people reaches, and how this press, certain press, above all EL UNIVERSO newspaper, is in a terrible position, of wanting to discredit the President of the Republic by any means, but it is poisoned, the Pérez's, well those Pérez Barriga, poor things, they don't even show up in the newspaper, it's this little man here, tiny in body, soul and spirit, and mind, Emilio Palacio, who only exudes hatred. He lives to prove how bad the president is. In psychology that's called projective psychology, it seems to me: when you hate homosexuals so much it's because deep down you want to be homosexual, when you hate the president so much, it's because this poor dwarf wants to be president, but he's never going to even become president of the parents' committee at his son's school, because everyone detests him. He has managed to unite the country: everyone detests him.[56]

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51 A*micus curiae* brief submitted by Rafael Correa Delgado (merits file, folio 2486).

52 *Cf.* IACHR. Report by the Special Rapporteur for Freedom of Expression 2008, OEA/Ser.L/V/II.134, February 25, 2009, par. 106.

53 *Cf.* IACHR. Report by the Special Rapporteur for Freedom of Expression 2010, OEA/Ser.L/V/II. Doc. 5, March 7, 2011, par. 212.

54 *Cf.* IACHR. Preliminary Observations of the Special Rapporteur for Freedom of Expression following a visit to Ecuador, August 24, 2018, p. 5.

55 *Cf.* Statements of the President of the Republic regarding *El Universo* newspaper or its journalists (evidence file, folios 4427 to 4478).

56 Statements of the then President of the Republic regarding El Universo newspaper or its journalists (evidence file, folio 4434), and video of the program 'Enlace Ciudadano' of July 12, 2008 (evidence file, audiovisual material folder, minutes 1:36 to 3:16).

46. Furthermore, in 2009, in the Presidential Broadcast "Enlace Presidencial", the then President referred to El Universo, and its directors, in the following terms:

> So that you can see the moral stature of these media outlets that supposedly inform us […] Do you really know who owns EL UNIVERSO? Everyone in Ecuador knows. Who are the owners of EL UNIVERSO? The Pérez, the Pérez family, supposedly, but go see in the Superintendency of Companies who the owners are [...] Of the 14 million dollars that EL UNIVERSO newspaper supposedly has, more than 90% is owned by three ghost companies of the Grand Cayman Islands, and this is the tabloid that wants to inform the Ecuadorian people. So you can see what kind of people we have to deal with. The true owner of the newspaper EL UNIVERSO, this Mr. Carlos Eduardo Pérez Barriga, do you know how much he pays in taxes? 3,986 dollars […] And this is the kind of people and the kind of tabloids that expect to inform the Ecuadorian people. Don't be fooled, students, don't be fooled, compatriots, here are the enemies of change and we have to fight them head-on [...] We are going to face this kind of press, it is a necessary fight, we are not fools, we know the monsters we are facing, but it is an unavoidable fight if we want to move the country forward, ladies and gentlemen […] The traditional political parties have been defeated at the polls, but don't be fooled, the new political parties of that right, of that bourgeoisie, of those omnipotent powers that have crushed our country, are now in the media.[57]

47. The Inter-American Commission, through its Office of the Special Rapporteur for Freedom of Expression, found that the then President had made multiple stigmatizing statements against the press, which included calling them "corrupt" press and "ignorant", and accused them of "bad faith" and causing "embarrassment", after publishing articles and opinions on the country's economic management.[58]. He expressed his concern about state acts and measures that, in the opinion of the Commission, stigmatized journalists and media outlets that maintained a critical editorial line with respect to the government.[59] It verified that, during the same period, several journalists were the subject of legal proceedings under the laws of contempt, defamation and libel, through civil proceedings for damages, and laws were adopted that affected the media.[60]

48. The United Nations Special Rapporteur on Freedom of Expression affirmed, in his Preliminary Observations, following his visit to Ecuador from October 5 to 11, 2018, that for 10 years the government had stigmatized and persecuted journalists, weakened civil society organizations, and limited access to information, "treating freedom of expression as a privilege instead of an individual right guaranteed under the Constitution and in international treaties".[61] In that regard, he warned of the existence of legal provisions that constitute significant interference to freedom of expression, including those that

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[57] Statements of the then President of the Republic regarding El Universo newspaper or its journalists (evidence file, folio 4442), and video of the program 'Enlace Ciudadano' of January 10, 2009 (evidence file, audiovisual material folder, minutes 6:23 to 9:22).

[58] *Cf.* IACHR. Report by the Special Rapporteur for Freedom of Expression 2017, OEA/Ser.L/V/II.210/17, December 31, 2017, par. 452-461.

[59] *Cf.* IACHR. Press Release No. R51/09 of July 21, 2009; No. R40/10 of March 31, 2010; No. R104/11 of September 21, 2011; No. R34/11 of December 27, 2011, and No. R32/11 of April 15, 2011.

[60] *Cf.* IACHR. Report by the Special Rapporteur for Freedom of Expression 2008, OEA/Ser.L/V/II.134, February 25, 2009, par. 106, and Report by the Special Rapporteur for Freedom of Expression 2010, OEA/Ser.L/V/II. Doc. 5 of March 7, 2011, par. 212-215.

[61] Preliminary Observations of the UN Special Rapporteur on freedom of expression following his visit to Ecuador, October 5 – 11 2018.

allow criminal sanctions against statements targeting the honor and good name of another person.[62]

49. Based on the foregoing, the Court notes that, at the time of the facts analyzed in this case, which include the criminal proceedings against the alleged victims, and other relevant events that occurred after said proceedings, there was a context of confrontation and conflict between the then President and the press critical of his government, in particular with El Universo newspaper and its journalists, such as Mr. Palacio Urrutia. The Court also notes that, during the same period, several journalists faced criminal or civil proceedings, and some were sentenced, under the laws of contempt, defamation and insults for statements that affected the honor of public officials.

B. On Emilio Palacio Urrutia, Nicolás Pérez Lapentti, César Enrique Pérez Barriga, and Carlos Eduardo Pérez Barriga

50. Mr. Emilio Palacio Urrutia worked as a journalist, columnist and "Opinion Editor" at El Universo newspaper from February 1, 1999, to July 7, 2011.[63] During this period of time, various events related to his work as a journalist occurred that are relevant in this case:

a) On July 17, 2005, Mr. Palacio Urrutia published an article called "Bocazas" ('Big mouth'), in which he criticized the statements made by Rafael Correa Delgado, then Minister of Finance, during the government of Alfredo Palacio González[64]. Mr. Palacio Urrutia declared that Mr. Correa had complained to then-President Palacio González about the publication of the article.[65]

b) On May 19, 2007, Mr. Palacio Urrutia participated in a televised news debate on freedom of expression, from which he was expelled by the then President, who considered that he was interrupting him.[66] Subsequently, in relation to this incident, the then president stated the following: "here no one is against questioning (the government), but against the fact that fools like this man do not tell the truth. You have seen the quality of journalists we have." He also stated that "so freedom of expression is allowing him to continue offending me? If I weren't president, I would have responded in a different way a while ago. Be thankful that I'm president."[67]

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62 *Cf.* Preliminary Observations of the UN Special Rapporteur on freedom of expression following his visit to Ecuador, October 5 – 11 2018.

63 *Cf.* Human Resources Certificate from El Universo newspaper of October 19, 2011 (evidence file, folio 4483), and statement of Emilio Palacio Urrutia in the public hearing.

64 *Cf.* "Bocazas" ("Big Mouth"). Article published in "El Universo" newspaper on July 17, 2005.

65 *Cf.* Statement of Emilio Palacio Urrutia in the public hearing.

66 *Cf. 'Cadena* Radial' Network, Discussion with the President 2, May 19, 2007.

67 *Cf.* Statements of the President of the Republic regarding *El Universo* newspaper, its directors or its journalists (evidence file, folio 4427), and 'Cadena Radial' Network Discussion with the President 2, May 19, 2007 (minutes 7:27 to 7:46).

c) On May 13, 2009, due to his criticism of the then President, Mr. Palacio Urrutia was threatened over email by third parties. In view of this fact, he was granted police protection.[68]

d) On March 26, 2010, Mr. Palacio Urrutia was sentenced to three years in prison for having committed the crime of "slanderous libel", as a result of a complaint filed by Mr. Camilo Samán, President of the National Financial Corporation, a State institution, after the publication of a critical article. Said complaint was withdrawn on June 4, 2010, with which the legal effects ended and the execution of the sentence was avoided.[69]

e) On June 20, 2011, Mr. Palacio Urrutia was sentenced to three years in prison and the payment of 30 million dollars in damages for having committed the crime of "serious slanderous insult against authority" for the publication of the article "NO to lies", in which he criticized the actions of the then President (infra, par. 62). This judgment was confirmed on September 22, 2011. On February 27, 2012, the then President granted a pardon (infra, par. 75 and 76).

51. Following the trial, and due to the conviction against him on June 20, 2011, on July 7, 2011 Mr. Palacio Urrutia decided to resign from El Universo newspaper. Subsequently, on August 20, 2012, he obtained political asylum in the United States of America.[70] Mr. Palacio Urrutia currently resides with his family in that country and continues to work as a journalist.[71]

52. Furthermore, at the time the aforementioned events occurred, Mr. Carlos Nicolás Pérez Lapentti was serving as president and legal representative of El Universo, and as deputy director of "Nuevos Medios" (New Media) in the same company. Mr. Carlos Eduardo Pérez Barriga served as executive vice president and legal representative of El Universo, and was the newspaper's director of news. Mr. César Enrique Pérez Barriga served as general vice president and legal representative of El Universo.[72]

53. Mr. Pérez Lapentti and Messrs. Pérez Barriga were declared responsible as contributing authors of the crime of "serious slanderous insult against authority" for the publication of the article "NO to lies" by Mr. Palacio Urrutia, and sentenced to three years in prison through the sentence of June 20, 2011. They were also sentenced to the binding payment of 30 million dollars in damages. The limited company El Universo was ordered to pay an additional 10 million dollars (infra, par. 62).

C. The article "NO to lies"

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[68] *Cf.* IACHR. Report by the Special Rapporteur for Freedom of Expression 2009, OEA/Ser.L/V/II.134, Doc. 51, December 30, 2009, par. 201.

[69] *Cf.* Report by the Special Rapporteur for Freedom of Expression 2010, OEA/Ser.L/V/II. Doc. March 5 to 7, 2011, par. 213.

[70] *Cf.* United States of America Citizen and Immigration Service. Asylum Approval of Emilio Palacio Urrutia of August 20, 2012 (evidence file, folio 7438).

[71] *Cf.* Statement of Emilio Palacio Urrutia in the public hearing.

[72] *Cf.* Human Resources Certificates from El Universo newspaper of October 19, 2011 (evidence file, folios 4484 to 4486); Minutes of Extraordinary Session and General Assembly of El Universo of January 21, 2008 (evidence file, folio 4551), and documents detailing the position descriptions of *El Universo* newspaper (evidence file, folios 4487 to 4491).

54. On September 30, 2010, members of the Ecuadorian National Police began a protest in their barracks, suspending their working day, blocking highways and preventing access to the Quito Parliament. In this context, the then President went to the Quito Regiment, but when he was about to leave the regiment, the policemen did not allow him to leave, so he was taken by his security team to the Police Hospital, where he was surrounded by policemen who prevented him from leaving. After a confrontation between the police and the army's special forces, the then President was transported from the Hospital. During these events two police officers, two soldiers, and a university student died.

55. As a result of this event, Ecuador was immersed in a political crisis that was described as a "clear attempt to alter democratic institutions" by the then representative of the government of Ecuador before the Organization of American States.[73] At the time, the Inter-American Commission condemned "any attempt to alter the constitutional and democratic order in Ecuador".[74]

56. The events that occurred on September 30, 2010 generated notorious public interest, causing various interpretations and reactions of public opinion in Ecuador. In this context, on February 6, 2011, Emilio Palacio Urrutia published an article entitled "NO to lies", in which he spoke about the aforementioned facts, in the following terms:

> This week, for the second time, the Dictatorship reported through one of its spokespersons that the Dictator is considering the possibility of pardoning the criminals who rose up on September 30, for which he is considering a pardon.
> I don't know if the proposal includes me (according to the dictatorial networks, I was one of the instigators of the coup); but if so, I reject it.
> I understand that the Dictator (devout Christian, man of peace) does not miss an opportunity to pardon criminals. He pardoned the drug mules, took pity on the murderers imprisoned in the Litoral Penitentiary, asked the citizens to let themselves be robbed so that there would be no victims, cultivated a great friendship with the land invaders and turned them into legislators, until they betrayed him.
> But Ecuador is a secular state that does not allow the use faith as a legal basis to exempt criminals from paying their debts. If I committed a crime, I demand that they prove it to me: otherwise, I do not expect any judicial pardon, but due apologies.
>
> What is really happening is that the Dictator has finally understood (or his lawyers made him understand) that he has no way of proving the alleged crime of September 30, since everything was the product of an improvised script, on the run, to hide the Dictator's irresponsibility on going into a rebel barracks, opening his shirt and shouting out for them to kill him, like a 'cachacascán' wrestler straining in his show in a circus tent in some forgotten town.
> At this point, all the "evidence" to accuse the "coup plotters" has been unraveled. The Dictator acknowledges that the terrible idea of going to the Quito Regiment and forcing his way in was his. But in that case no one could have been ready to assassinate him since no one expected him.
>
> The Dictator swears that the former director of the Police Hospital closed the doors to prevent him from entering. But then there was no plot there either, because they didn't even want to see his face.

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[73] *Cf.* Permanent Council of the OAS. *Permanent Council of the OAS repudiates events in Ecuador and supports the government of President Correa*, September 30, 2010.

[74] *Cf.* Press Release NQ 99/10. IACHR condemns any attempt to alter the democratic order in Ecuador.

The bullets that killed the police officers disappeared, but not in the offices of Fidel Araujo but in a compound guarded by forces loyal to the Dictatorship.
To show that on September 30 he was not wearing an armored vest, Araujo donned one in front of his Judges and then put on the same shirt he was wearing that day. His accusers had to blush at the obvious demonstration that armored vests simply cannot be hidden.
I could go on but we're short on space. However, since the Dictator understood that he must go back on his ghost story, I offer him a way out: it is not a pardon that he must process but an amnesty in the National Assembly. Amnesty is not a pardon, it is legal oblivion. It would imply, if it is resolved, that society came to the conclusion that too many stupidities were committed on September 30, on both sides, and that it would be unfair to condemn some and reward others. Why was the Dictator able to propose an amnesty for the "bigwigs" Gustavo Noboa and Alberto Dahik, but instead he wants to pardon the "cholos" ("mestizo") police?
The Dictator should remember, finally, and this is very important, that with a pardon, in the future, a new president, perhaps his enemy, could bring him before a criminal court for having given the order to fire at will and without warning against a hospital full of civilians and innocent people.
Crimes against humanity, don't forget, have no statute of limitations.[75]

D. The legal proceedings for "serious slanderous insult against authority"

57. On March 21, 2011, the then President filed a complaint, which fell to the Fifteenth Court of Criminal Guarantees of Guayas (hereinafter "Fifteenth Court"), against Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, César Enrique Pérez Barriga and Carlos Eduardo Pérez Barriga, for the criminal offense of "serious slanderous insult against authority", provided for in Articles 489[76] and 490[77] of the Criminal Code, in accordance with Articles 491[78] and 493[79] of the same Code, as well as against El Universo Limited

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75 Article "NO to lies" ("NO a las mentiras") published in the *El Universo* newspaper on February 6, 2011 (evidence file, folios 4555 and 4556).

76 Art. 489. Insult is: slanderous, when it comprises the false imputation of a crime; and, not slanderous, when it comprises any other expression uttered in discredit, dishonor, or disparagement of another person, or in any action executed for the same purpose.

77 Art. 490. Non-slanderous insults are serious or minor: serious are: 1. The imputation of a vice or lack of morality whose consequences can considerably harm the fame, credit, or interests of the aggrieved party; 2. The accusations that, due to their nature, occasion or circumstance, were held in the public concept as outrageous; 3. imputations that rationally deserve the classification of serious, given the state, dignity, and circumstances of the victim and the offender and 4. Slaps, kicks, or other insults of act. Those that consist of attributing to another, facts, nicknames or physical or moral defects that do not compromise the honor of the injured party are minor.

78 Art. 491. the convicted offender of slanderous insult shall be punished with imprisonment from six months to two years and a fine of six to twenty-five United States dollars, when the accusations have been made: In meetings of public places; In the presence of ten or more individuals; by means of written texts, printed or not, images or emblems fixed, distributed, or sold, offered for sale, or exposed to the eyes of the public; or, by means of unpublished written text, but directed to or communicated to other persons, including letters among these.

79 Art. 493. They shall be punished with one to three years of imprisonment and a fine of six to twenty-five United States dollars, those that have addressed to the authority accusations that constitute slanderous insult. If the accusations made to the authority constitute non-slanderous but serious insults, the penalties shall be imprisonment from six months to two years and a fine of six to nineteen United States dollars.

Company (hereinafter "El Universo").[80] On May 3, 5, 9 and 26, 2011, the defendants answered, and alleged nullity and lack of jurisdiction of the court.[81]

58. On May 13, 2011, the secretariat of the Fifteenth Court notified the parties of an order the content of which mentions that the court officials received ill-treatment by the lawyers of the then President, who stated that they deserved special treatment as the representatives of Rafael Correa.[82] The lawyers of the then President denied the facts and filed a criminal complaint against Judge Oswaldo Sierra Ayora, on May 30, 2011, before the Guayas Provincial Prosecutor's Office, for the alleged commission of the crime of "distort[ion] [of] substance" foreseen in Article 338[83] of the Criminal Code.[84]

59. On May 17, 2011, the then head of the Fifteenth Court, Oswaldo Sierra, was notified of a decision of suspension from office for a term of 90 days as a result of a disciplinary sanction in relation to another case that was under his charge. Consequently, Juan Paredes Fernández heard the case as Temporary Judge, as of May 19, 2011.[85] In addition to the aforementioned Temporary Judge, Judges Sucre Garcés Soriano, Mónica Encalada Villamagua and Carmen Alicia Argüello Cifuentes heard the case in the same temporary capacity, at different times.

60. On June 10 and 29, 2011, and then on July 4 of the same year, respectively, the defendants challenged judges Juan Paredes Fernández, Sucre Garcés Soriano and Mónica Encalada, who temporarily heard the case on different dates. These challenges were not admitted, so Juan Paredes Fernández resumed as judge of the case[86] and issued the judgment of first instance.

61. On July 9, 2011, the then President publicly stated that he would withdraw the application if the defendants admitted that they had lied and if they "corrected the lie."[87] However, on July 19, 2011, during a trial hearing, the then president rejected the possibility of conciliation in response to the alleged victims' offer to make the required rectification, alleging that "given the seriousness of the insults […] it is impossible to reach any type of conciliation in this process".[88]

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80 *Cf.* Application presented by Rafael Vicente Correa Delgado on March 21, 2011 (evidence file, folios 4560 to 4711).

81 *Cf.* Answer to the application by Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga, and César Enrique Pérez Barriga (evidence file, folios 4713 to 4776).

82 *Cf.* Ruling of the Fifteenth Court of Criminal Guarantees of Guayas of May 12, 2011 (evidence file, folio 4777).

83 Art. 337. Public officials who, in the exercise of their duties, have committed a falsehood consisting of: false signatures, alteration of minutes, deeds or signatures, assumption about persons, deeds made or inserted in records or other public documents, in writings or other legal actions after their formation or closure will be punished with extraordinary minor imprisonment from nine to twelve years. Art. 338. The same penalty will be given in punishment to the public official who, when drafting pieces relating to his employment, has distorted their substance or the details: whether by writing stipulations different from those that the parties have agreed or dictated, or by establishing as true, facts that were not.

84 *Cf.* Application presented by Gutemberg Vera Páez and Alembert Vera Rivera of May 30, 2011 (evidence file, folio 4778 to 4784).

85 *Cf.* Judicial Role Guayas District. Appointment Judge Paredes, Judicial Role Guayas district, May 19, 2011 (evidence file, folio 6290).

86 *Cf.* Application to challenge, proceedings and rejection of challenge (evidence file, folio 4948 to 4977).

87 *Cf.* Program "Enlace Sabatino" of July 9, 2011.

88 *Cf.* Documents on the judgment hearing (evidence file, folios 4979 to 5071).

D.1. The judgment of first instance

62. On July 20, 2011, the Fifteenth Court issued a conviction against the alleged victims and El Universo.[89] The judgment concluded the existence of the crime typified in article 489 of the Criminal Code, sentencing Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, César Enrique Pérez Barriga, and Carlos Eduardo Pérez Barriga, to three years in prison and a fine of twelve dollars. It was also determined that they should pay the complainant a sum of USD $30,000,000 (thirty million United States dollars) jointly and severally. For its part, El Universo had to pay the sum of USD $10,000,000 (ten million United States dollars). Additionally, it was determined that the contributing authors and El Universo had to pay the legal costs, including the lawyers' professional fees.[90]

63. In the judgment, the Judge made the following considerations in respect of the assessment of the article written by Mr. Palacio Urrutia:

> When reading the aforementioned article, from its beginning, it prepares and leads the reader against "the Dictator" with a series of minor insults that seek to place in the reader's mind a marked disaffection with the economist Rafael Vicente Correa Delgado, that reaches its zenith with an ending that accuses him of being the author of crimes against humanity. Insult is an intentional crime and the different forms of criminal intent are suitable for constituting this crime, the malice consists in the fact the actor is conscious that their conduct (word, act, gesture) is capable of offending, notwithstanding which, they act all the same. In order for there to be insult, the existence of the "animus injuriandi" is necessary, that is, the intension [sic] or spirit to insult, offend, dishonor or discredit the victim. It is enough for "animus injuriandi" to exist for there to be insult. Following this reasoning, there is no doubt that this "animus injuriandi" was present when Emilio Palacio Urrutia wrote in a social media, read nationally and worldwide, knowing that said statements that accuse the commission of a serious crime against humanity, perhaps the worst that exists in the world, such as "having ordered to fire at will on a hospital full of civilians", and it is not a value judgment as the defendant alleges, because although the word "could" suggests an event that may or may not occur, but immediately afterwards he makes the affirmation [...] in no way alters the core meaning of the verb governing the insult.
>
> Freedom of expression has a limit. For those people who are not clear, making comments, opinions, etc. that cross this limit is called insult in Ecuadorian law and it is a crime that, as such, is judged by criminal law. This is how the Ecuadorian courts have expressed it by establishing that "the insult is constituted by a subjective element, the design, the intension [sic], the aim of dishonoring or discrediting the person. Absent this intention to insult there is no crime. Thus, the allegations put forward by the defendants lack legal basis, since it has been proven that the constant expressions in the article "No to lies" [...] are authored by the defendant Emilio Palacio Urrutia, with Carlos Eduardo Pérez Barriga, César Enrique Pérez Barriga and Carlos Nicolás Lapentti as contributing authors, in addition to the fact that in the process it has been shown that they have used the Limited Company El Universo to carry out the crime, and how they form the

[89] *Cf.* Judgment of July 20, 2011, of the Fifteenth Court of Criminal Guarantees of Guayas (evidence file, folios 5075 to 5230).

[90] *Cf.* Judgment of July 20, 2011, of the Fifteenth Court of Criminal Guarantees of Guayas (evidence file, folios 5075 and 5230).

"will of the corporation" can well be to say that they answer to it as its legal representatives.[91]

64. Regarding the assessment of the damage to the then President, the judgment considered the following:

> [I]n this process, with the documentary evidence that has been provided, it has been determined that the plaintiff, Econ. Rafael Vicente Correa Delgado, is a professional who has a family, has been distinguished with multiple academic titles, thanks to his studies inside and outside the country, who has been Minister of Finance and is currently the Constitutional President of the Republic, who has been in charge of the General State Budget […]; administration that has been entrusted to him by the sovereign people of Ecuador given his impeccable conduct, resume and activities in the public and private sphere, in addition to being a teacher, prominent speaker in world forums, etc. To insult a person of the complainant's characteristics as appears in the aforementioned article "No to lies" that has had national and worldwide dissemination, which slanders him regarding the events of September 30, 2010 deserving of rejection locally and globally, causes serious damage and harm. It produces both consequential damage, because it undermines the trust that people have in him, and loss of earnings, due to the future trajectory that a statesman derives from his activities, both public and private (...) whereby the claim for damages made by the complaint, at no time has the intention [sic] of enrichment, but of a fair assessment of the consequential loss of profits and damage caused to his honor and good reputation.[92]

D.2. Remedy for annulment and appeal

65. The alleged victims and the representatives of El Universo filed a remedy of annulment and appeal against the judgment,[93] . The then President filed an appeal against the judgment, which was later withdrawn.[94] The Second Criminal Chamber of the Guayas Provincial Court of Justice (hereinafter "the Provincial Court") heard the appeals made.[95]

66. On August 16, 2011, it was determined that August 25, 2011 would be the date for the public hearing where the remedy for annulment and appeal should be

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91 *Cf.* Judgment of July 20, 2011, of the Fifteenth Court of Criminal Guarantees of Guayas (evidence file, folios 5075 to 5230).

92 *Cf.* Judgment of July 20, 2011, of the Fifteenth Court of Criminal Guarantees of Guayas (evidence file, folios 5075 to 5230).

93 *Cf.* Remedy for annulment and appeal filed by the lawyers of El Universo Limited Company on July 22, 2011 (evidence file, folios 5281 to 5282); Remedy for annulment and appeal filed by the lawyers of Carlos Eduardo Pérez Barriga and Carlos Nicolás Lapentti on July 22, 2011 (evidence file, folios 5283 to 5297); Additional information brief of remedy for annulment and appeal filed by the lawyers of Carlos Eduardo Pérez Barriga, César Enrique Pérez Barriga and Carlos Nicolás Pérez Lapentti on July 26, 2011 (evidence file, folios 5300 to 5325); Remedy for annulment and appeal filed by Emilio Palacio Urrutia on July 26, 2011 (evidence file, folios 5326 to 5349).

94 *Cf.* Appeal brief presented by the lawyers for Rafael Correa Delgado against the judgment of July 20, 2011 (evidence file, folios 5233 to 5242). The then President requested an increase of the sum of the compensation to no less than USD $50,000,000 (fifty million United States dollars).

95 *Cf.* Ruling of the Second Criminal Chamber of the Provincial Court of Justice of the District of Guayas of August 9, 2011 (evidence file, folio 5351).

substantiated.[96] However, said hearing was postponed.[97] The hearing was set for September 16, 2011, through an order issued on September 14, 2011, and notified on September 15, 2011. As the hearing was suspended the day it began, the date of 22 September was set for continuation.[98] Emilio Palacio Urrutia and his lawyers did not participate in the hearing.[99] The final hearing was held on September 20, 2011.[100]

67. On September 22, 2011, the Provincial Court issued its judgment and ruled on the remedies for annulment and appeal filed by the parties. Regarding the motion for annulment filed by the defendants, it decided to reject it considering that "as there were no grounds for annulment, according to the Code of Criminal Procedure and other applicable legal regulations, nor omissions of formalities that affect or may influence the validity of the process, and that the competence of the judges who have acted has not been affected in any way, including in this second instance […] all proceedings are declared valid".[101]

68. Regarding the appeals, it decided that it would not analyze the arguments presented by the then President because he himself withdrew said appeal. Thus, it confirmed the decision of the judge of first instance regarding the amount established for consequential damages and loss of earnings.[102] The appeal filed by the alleged victims was rejected, so the judgment of first instance was confirmed in all its parts.[103] Among its considerations, the Provincial Court concluded that the reading of the articles presented as evidence in the process "effectively influences the "deep conviction" of the undersigned judges in the sense that there is malice on the part of the defendants, establishing that the purpose or intention [sic] of the defendants, has effectively resulted in attacking the honor and reputation of the economist Rafael Vicente Correa Delgado".[104]

69. Regarding the considerations relating to the right to honor and good name, the Provincial Court stated that "[t]he abuse of a right, on many occasions, brings with it unimaginable consequences, for peaceful coexistence in a civilized society , and can even generate mass hysteria the result of which can be disastrous".[105] In this sense, it indicated that "[t]he right to freedom of expression is safe; the subsequent liability is the one that applies in case of violation of the right to honor and the judges are under an unrestricted obligation to guarantee those violated rights whose holder or offended party makes a claim, in addition to effective judicial protection".[106]

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96 *Cf.* Ruling of the Second Criminal Chamber of the Provincial Court of Justice of the District of Guayas of August 16, 2011 (evidence file, folio 5352).

97 *Cf.* Ruling of the Second Criminal Chamber of the Provincial Court of Justice of the District of Guayas of August 22, 2011 (evidence file, folio 5353 to 5356).

98 *Cf.* Record of annulment and appeal hearing (evidence file, folio 5574).

99 *Cf.* Record of annulment and appeal hearing (evidence file, folio 5413 to 5574).

100 *Cf.* Record of continuation and conclusion of annulment and appeal hearing (evidence file, folio 5578).

101 *Cf.* Judgment of September 22, 2011, Provisional Court of Justice of Guayas (evidence file, folio 5248).

102 *Cf.* Judgment of September 22, 2011, Provisional Court of Justice of Guayas (evidence file, folio 5254).

103 *Cf.* Judgment of September 22, 2011, Provisional Court of Justice of Guayas (evidence file, folio 5254).

104 *Cf.* Judgment of September 22, 2011, Provisional Court of Justice of Guayas (evidence file, folio 5253).

105 *Cf.* Judgment of September 22, 2011, Provisional Court of Justice of Guayas (evidence file, folio 5254).

106 *Cf.* Judgment of September 22, 2011, Provisional Court of Justice of Guayas (evidence file, folio 5254).

70. On September 23, 2011, the then President asked the Provincial Court to clarify and extend the judgment of September 22, 2011 regarding the "declaration of abandonment of the remedies imposed" regarding those convicted.[107] The Provincial Court concluded that, since neither Mr. Palacio Urrutia nor his attorneys were present at the hearing on September 16, 2011, the motions for annulment and appeal were declared abandoned. Regarding the rest of the convicted persons, said Court rejected the request because they were present at the hearing.[108]

D.3. Cassation appeal

71. On September 27, 28 and 30, 2011, Emilio Palacio Urrutia, the representatives of El Universo, and César Pérez Barriga, Carlos Eduardo Pérez Barriga and Carlos Nicolás Pérez Lapentti, respectively, filed a cassation appeal.[109] On September 30, 2011, through a brief filed with the Provincial Court, the then President indicated that the appeals filed were illegal and therefore inadmissible, "because at this procedural moment the judgment issued against them is executed for express abandonment due to non-appearance at the hearing".[110]

72. On October 4, 2011, the Provincial Court decided to refer the proceeding to the National Court of Justice (hereinafter, "National Court") so that it could rule on the cassation appeal filed by César Enrique Pérez Barriga, Carlos Eduardo Pérez Barriga and Carlos Nicolás Pérez Lapentti, and by the lawyers of El Universo. Similarly, it declared the cassation appeal filed by Mr. Palacio Urrutia inadmissible on the grounds that neither he nor his lawyer were present at the oral appeal hearing. Thus, the judgment of first instance "passed to the state of enforcement, preventing the filing the extraordinary cassation appeal" with respect to Mr. Palacio Urrutia.[111]

73. On February 17, 2012, the National Court resolved the cassation appeals filed by César Enrique Pérez Barriga, Carlos Eduardo Pérez Barriga and Carlos Nicolás Pérez Lapentti, and by the representatives of El Universo, making the criminal convictions final. In its decision, it established that the "[c]ourt of appeals, by issuing a conviction against the appellants imposing the penalties and compensation described therein, have not violated the principles, international precedents, the laws applicable to the case, the existence of animus injuriandi, and the participation of the defendants has been valued and determined according to law".[112] Consequently, it concluded that "the cassation appeals filed by the defendants are inadmissible. It is therefore arranged to return the process to the inferior court for the relevant legal purposes".[113]

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[107] *Cf.* Brief presented by Rafael Correa Delgado to the Second Criminal Chamber on September 23, 2011 (evidence file, folios 5622 and 5623).

[108] *Cf.* Judgment of September 26, 2011, Second Criminal Chamber Provisional Court of Justice of Guayas (evidence file, folios 5624 to 5626).

[109] *Cf.* Cassation appeal by Emilio Palacio Urrutia, El Universo Limited Company, and Carlos Eduardo Pérez Barriga, César Enrique Pérez Barriga and Carlos Nicolás Lapentti (evidence file, folios 5640 to 5667).

[110] Brief presented by Rafael Correa Delgado to the Provisional Court of Justice of Guayas (evidence file, folios 5629 to 5630).

[111] *Cf.* Judgment of October 4, 2011, Provisional Court of Justice of Guayas (evidence file, folio 5670).

[112] *Cf.* Judgment of the Criminal Chamber of the National Court of Justice of February 27, 2012 (evidence file, folios 6935 to 6999).

[113] *Cf.* Judgment of the Criminal Chamber of the National Court of Justice of February 27, 2012 (evidence file, folios 6935 to 6999).

D.4. Factual Remedy filed by Emilio Palacio Urrutia

74. By virtue of the decision of the Provincial Court, which declared the cassation appeal inadmissible, on October 7, 2011, Emilio Palacio filed a factual appeal. On October 7, 2011, the Provincial Court decided to "admit" the factual appeal "so that the Superior, the Criminal Chamber of the National Court of Justice, who by lot hears this process, pronounces on the appropriateness or not of this remedy and on the cassation appeal filed by the other defendants". Consequently, it also decided to suspend the enforcement of the judgment ordered for Emilio Palacio Urrutia.[114] In December 2011, the Second Criminal Chamber of the National Court of Justice decided to deny the factual appeal filed by Emilio Palacio Urrutia.[115]

D.5. Correa's pardon

75. On February 21, 2012, the Inter-American Commission granted precautionary measures in favor of Emilio Palacio, Carlos Nicolás Pérez Lapentti, Carlos Pérez Barriga and César Pérez Barriga. The measures were granted by virtue of the judgment of the National Court that confirmed the judgment that sentenced the beneficiaries to three years in prison and the payment of 40 million dollars (USD $30,000,000 by Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, César Enrique Pérez Barriga, and Carlos Eduardo Pérez jointly and severally and USD $10,000,000 by El Universo). The Commission considered that the facts alleged could constitute irreparable damage to the right to freedom of expression of the alleged victims, for which it requested the Government of Ecuador to immediately suspend the effects of the judgment of February 15, 2012, in order to guarantee the right to freedom of expression.[116]

76. On February 27, 2012, the then President presented a brief before the National Court, by means of which he communicated his decision to grant the "pardon of the sentence in favor of Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga, César Enrique Pérez Barriga and the "El Universo" Limited Company."[117]. Similarly, he presented "the remission or lifting of the obligation to pay compensation and damages."[118] On February 28, 2012, the National Court of Justice accepted the request for pardon of the sentence and the remission of the payment of damages, losses and procedural costs, and ordered the case file to be archived.[119] By virtue of this, the Inter-American Commission lifted the precautionary measures and archived the file.

E. Additional facts related to the case

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114 *Cf.* Order of October 7, 2011, Provisional Court of Justice of Guayas (evidence file, folio 5679).

115 *Cf.* Fact affirmed by the State in its Observations on the Merits Brief presented to the I/A Court H. R. on October 13, 2016 (merits file, folio 20).

116 *Cf.* IACHR. MC 406/11 – Emilio Palacio, Carlos Nicolás Pérez Lapentti, Carlos Pérez Barriga and César Pérez Barriga, Ecuador.

117 *Cf.* Criminal Code (in force at the time of the events). Art. 113. The sentence terminates on forgiveness of the offended party for the infractions of adultery and slanderous and non-slanderous insult. If there are several participants, forgiveness in favor of one of them benefits the others.

118 *Cf.* Brief of February 27, 2012, presented by Rafael Correa before the National Court of Justice (evidence file, folios 5682 to 5684).

119 *Cf.* Order of February 28, 2012, Criminal Chamber of the National Court of Justice (evidence file, folio 5686 and 5687).

77. On August 24, 2011, the representatives of *El Universo* newspaper filed a constitutional action for precautionary measures before the Eleventh Court for Children and Adolescents of Guayas (hereinafter "the Eleventh Court"), in order to know the information that was in the computer equipment of the Fifteenth Court regarding the defendants. In particular, they considered that there were inaccuracies regarding the file that contained the text of the judgment of first instance, for which they requested an electronic copy of all the electronic files created between May 16, 2011, and July 20, 2011 in the computer used in the Fifteenth Court. For this reason, they requested the cloning of the hard drive of the head of the aforementioned Court.[120]

78. On August 25, 2011, the Eleventh Court admitted the measure against Judge Oswaldo Sierra Ayora, who at that time was head of the Fifteenth Court. In the precautionary measure, the full copy of the contents of the hard drive of "the computer used by the defendant and the information regarding the process" in question was ordered.[121] On August 26, 2011, an exact copy of the hard drive of the Secretariat of the Court was made in the presence of a Notary Public and Judge Oswaldo Sierra.[122] On September 2, 2011, the specialist technician Alex Rivera presented a report on the expertise carried out regarding the cloned hard drive. In his report, he concluded that the computer file that contained the text set forth in the first instance judgment was not created on the computer equipment of the corresponding court, but rather came from an external computer whose username was "Chucky -Seven".[123]

79. On September 7, 2011, the Temporary Provincial Director of the Council of the Judiciary instructed an ex officio prosecution against those who served as judge of the Eleventh Court of the Family, Women, Children and Adolescents of Guayas, Fifteenth Judge of Criminal Guarantees del Guayas, Twenty-Fifth Alternate Notary of the Guayaquil canton, and Assistant of the Information Technology Unit of the Provincial Directorate of the Guayas Judiciary Council, for having allowed the procedure to be carried out.[124] On September 12, 2011, said persons were suspended from their duties for 90 days, by the Council of the Transitional Judiciary, considering that disciplinary offenses had been established.[125]

80. The Court considers it pertinent to note that, in relation to the statements and affirmations of the Commission and the representatives, regarding the alleged violations of the alleged victims' human rights, and which have been indicated in this chapter on facts, Rafael Correa Delgado, in his amicus curiae brief submitted to this Court (supra par. 10 and 11) stated, inter alia, that there was no violation of the right to freedom of expression, since the article "NO to lies" contained a series of slanderous insults indicating that the then President "had ordered the open fire against a hospital full of civilians," which would have constituted "a crime against humanity committed by the former president." In this sense, he considered that he is not dealing with an opinion article of public interest, but rather an attack on his right to reputation, honor and

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120 *Cf.* Constitutional Action of August 24, 2011 (evidence file, folio 5691).

121 *Cf.* Order of the Eleventh Court of Children and Adolescents of Guayas of August 25, 2011 (evidence file, folios 5695 and 5696).

122 *Cf.* Notarial deed of August 26, 2011 (evidence file, folio 5701).

123 *Cf.* Technical report of September 2, 2011 (evidence file, folios 5703 to 5712).

124 *Cf.* Official document of the Provincial Director of Guayas of the Council of the Transitional Judiciary of September 7, 2011 (evidence file, folio 5714).

125 *Cf.* Decision of the President of the Council of the Transitional Judiciary of September 12, 2011 (merits file 5716 to 5721).

dignity. Furthermore, it pointed out that the principle of legality was never violated, since the offense for which the alleged victims were prosecuted was defined in the Criminal Code, and that there was no ambiguity or scope in the criminal definition, which has been included in the aforementioned Code since 1938, modified in 1977. Along the same lines, he stated that the complaint presented constituted a legal and legitimate exercise of the judicial apparatus, consequently obtaining a judgment that restored his honor and good name, for which the criminal and civil sanction imposed was justified.[126]

VII
MERITS

81. The Court recalls that the State acknowledged its international responsibility for the violation of the rights to freedom of expression, the principle of legality and non-retroactivity, and judicial guarantees and judicial protection, contained in Articles 8(1), 8(2)(c), 8(2)(f), 9, 13 and 25(1) of the American Convention, in relation to Articles 1(1) and 2 of the same instrument, to the detriment of Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, César Enrique Pérez Barriga and Carlos Eduardo Pérez Barriga. In particular, in relation to freedom of expression, the State recognized that the sanctions imposed on the victims did not respond to a social interest imperative that justified them, that they were unnecessary and disproportionate, and that they could have had an intimidating effect. Additionally, it recognized that the articles of the Criminal Code applied in the case implied a breach of the principle of legality that allowed the victims to be sanctioned under the criminal category of serious slanderous insult against authority.

82. Additionally, the Court recalls that the State recognized that, within the framework of the criminal proceedings brought against the victims, actions occurred contrary to the rights to judicial guarantees and judicial protection. In particular, that the public statements made by the then President placed the parties to the process in an unequal position and affected the guarantees of independence and impartiality of the judicial body. Similarly, the State recognized that the courts acted arbitrarily when applying the criminal offense for which the victims were tried, that the principle of jurisdiction and legality was violated when trying the legal entity El Universo, that the principle of jurisdiction was violated due to the participation of several temporary judges, that a situation of defenselessness was generated due to the changes in the dates of the hearings in the appeal phase, and that the victims did not have access to an effective judicial remedy because there was an affectation to the judicial independence in the specific case.

83. Due to the scope of the State's acknowledgment of responsibility, which does not include all the violations alleged in the proceeding (supra par. 30), the Court will analyze the merits of this case in a chapter that will address: a) the violation of the right to freedom of thought and expression, and the presumed violation of the rights to b) personal liberty, c) property, d) movement and residence, and e) to work.

VII-I

RIGHTS TO FREEDOM OF THOUGHT AND EXPRESSION, TO THE PRINCIPLE OF LEGALITY AND NON-RETROACTIVITY, TO PERSONAL FREEDOM, TO PROPERTY, TO WORK, AND OF MOVEMENT AND RESIDENCE, IN RELATION TO THE DUTY

126 *Cf. Amicus curiae* brief of Rafael Correa Delgado (merits file, folios 2484 to 2672).

TO RESPECT AND GUARANTEE RIGHTS AND TO ADOPT DOMESTIC LEGISLATION PROVISIONS

A. Right to freedom of thought and expression and the principle of legality

A.1. Arguments of the Commission and the parties

84. The ***Commission*** pointed out that the State used criminal law to sanction a statement protected in principle by the right to freedom of expression, this being the most restrictive and severe instrument available to it. It also maintained that the statements made by the journalist Emilio Palacio Urrutia were related to a matter of public interest linked to the actions of the then President of the Republic, acting as an elected official. Additionally, it stated that the article published in the *El Universo* newspaper, under the title "NO to lies" was an opinion article, which reflected value judgments and not facts. It therefore argued that the conviction of first instance, confirmed in higher instances, which sentenced the victims for serious slanderous insult against authority and a prison sentence of 3 years, and imposed a total compensation of 40 million dollars, constituted a violation of the rights to freedom of thought and expression, and to the principle of legality and non-retroactivity, contained in articles 9 and 13 of the Convention, in relation to articles 1(1) and 2 of the same instrument to the detriment of Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga, and César Enrique Pérez Barriga.

85. The ***representatives*** argued that the crime of slanderous insult against authority openly characterizes as a crime and punishes statements against public officials, and therefore is contrary to Articles 13 and 2 of the American Convention. Similarly, they argued that the criminal proceedings against the alleged victims is in itself a violation of Article 13 of the Convention, since it generated a physical and psychological burden, and constituted an act of censorship. Regarding the criminal and civil conviction, they highlighted that they constituted disproportionate restrictions on the alleged victims' right to freedom of expression. In this regard, they pointed out that the article "NO to lies" is an opinion piece by a journalist regarding a topic of public interest that should not be subject to criminal liability. In this regard, they argued that: a) the criminal proceeding is in itself a violation of Article 13 of the American Convention, and b) the criminal conviction violates the parameters related to "subsequent liability" established by the Inter-American System.

86. The ***State*** acknowledged its responsibility for the violation of Articles 9 and 13 of the American Convention (supra, par. 27).

A.2. Considerations of the Court

A.2.1. The importance of freedom of expression in a democratic society

87. The Court has established that freedom of expression, particularly in matters of public interest, "is a cornerstone upon which the very existence of a democratic society rests."[127] This right must not only be guaranteed with regard to the dissemination of information or ideas that are favorably received or considered harmless or indifferent,

[127] *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, par. 70, and *Case of Bedoya Lima et al. v. Colombia, supra*, par. 111.

but also with regard to those that are unpleasant for the State or any sector of the population.[128] Thus, any condition, restriction or sanction in this matter must be proportional to the legitimate aim pursued.[129] Without an effective guarantee of freedom of expression, the democratic system is weakened and pluralism and tolerance suffer, monitoring and citizen complaint mechanisms can become inoperative and, ultimately, a fertile field is created for authoritarian systems to take root.[130]

88. In this respect, the Court notes that Articles 3 and 4 of the Inter-American Democratic Charter highlight the importance of freedom of expression in a democratic society, establishing that " Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government." Similarly, it states "Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy."[131]

89. In relation to the foregoing, this Court recalls that, since its inception, it has highlighted the importance of pluralism in the framework of the exercise of the right to freedom of expression, by pointing out that it implies tolerance and a spirit of openness,[132] without which there is no democratic society. The relevance of pluralism has, in turn, been highlighted by the OAS General Assembly in various resolutions, in which it has reaffirmed that "free and independent media are fundamental for democracy, for the promotion of pluralism, tolerance and freedom of thought and expression, and for the facilitation of dialogue and debate, free and open to all segments of society, without discrimination of any kind".[133]

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128 *Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73*, par. 69, and *Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 31, 2017. Series C No. 340, par. 117.

129 *Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile, supra*, par. 69, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of June 22, 2015. Series C No. 293, par. 140.

130 *Cf. Case of Herrera Ulloa v. Costa Rica*. *Preliminary Objections, Merits, Reparations and Costs.* Judgment of July 2, 2004. Series C No. 107, par. 116, and *Case of Bedoya Lima et al. v. Colombia, supra,* par. 111.

131 OAS General Assembly, Inter-American Democratic Charter, Resolution AG/RES. 1 (XXVIII-E/01) of September 11, 2001, Articles 3 and 4.

132 *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile, supra*, par. 69, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela, supra*, par. 141.

133 *Cf., inter alia,* OAS General Assembly, Resolutions on the Right ot Freedom of Thought and Expression and the Importance of the Media AG/RES. 2679 (XLI-O/11) (Approved in the fourth plenary session, held on June 7, 2011), Operative Paragraph 5; AG/RES. 2523 (XXXIX-O/09) (Approved in the fourth plenary session, held on June 4, 2009), Operative Paragraph 5; AG/RES. 2434 (XXXVIII-O/08) (Approved in the fourth plenary session, held on June 3, 2008), par. 5; AG/RES. 2287 (XXXVII-O/07) (Approved in the fourth plenary session, held on June 5, 2007), Operative Paragraph 5; AG/RES. 2237 (XXXVI-O/06) (Approved in the fourth plenary session, held on June 6, 2006), Operative Paragraph 5; AG/RES. 2149 (XXXV-O/05) (Approved in the fourth plenary session, held on June 7, 2005), Operative Paragraph 4.

90. Additionally, the Court has indicated that the plurality of media or information[134] constitutes an effective guarantee of freedom of expression,[135] and there is a duty of the State to protect and guarantee this assumption, under Article 1(1) of the Convention, by means of both of the minimization of restrictions on information, such as by promoting a balance in participation,[136] by allowing the media to be open to all without discrimination[137], since it is sought that "no individuals or groups are, a priori, excluded".[138] The Court has also indicated that social communications media play an essential role as vehicles for the exercise of the social dimension of freedom of expression in a democratic society and must, therefore, reflect the most diverse information and opinions.[139] The media are legal entities that serve the exercise of the right to freedom of expression of those who use them as a means of imparting their ideas or information.[140]

91. In this sense, the Court has reiterated that freedom of expression can be affected by the existence of monopolies or oligopolies in ownership of the media,[141], situations in which the State must act to avoid concentration and promote pluralism of voices, opinions and visions. To this extent, the State must democratize access to the different media, guarantee diversity and pluralism, and promote the existence of commercial, public and community communication services. It is the duty of the State not only to implement adequate measures to prevent or limit the existence and formation of monopolies and oligopolies, but also to establish appropriate mechanisms for their control.[142]

92. The Court has recognized the importance of the media for the exercise of the right to freedom of expression, thought and information. In effect, the Court has characterized the social media as true instruments of freedom of expression,[143] and has also indicated that "[it] is the social media that facilitate the exercise of freedom of expression, in such a way that its operating conditions must be adapted to the requirements of that freedom. Essential for this, inter alia, are the plurality of media,

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134 *Cf.* Advisory Opinion OC-5/85, *supra*, par. 34, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela, supra*, par. 142.

135 *Cf. Case of Herrera Ulloa v. Costa Rica, supra*, par. 116, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela, supra*, par. 142.

136 *Cf. Caso Kimel Vs. Argentina, supra*, par. 57, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela, supra*, par. 142.

137 *Cf.* Advisory Opinion OC-5/85, *supra*, par. 34, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela, supra*, par. 142.

138 Advisory Opinion OC-5/85*, supra*, par. 34, y *Caso Granier et al. (Radio Caracas Televisión) Vs. Venezuela, supra*, par. 142.

139 *Cf. Case of Ivcher Bronstein v. Perú. Merits, Reparations and Costs.* Judgment of February 6, 2001. Series C No. 74, par. 149, and Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela, supra*, par. 142.

140 *Cf. Mutatis mutandis, Case of Granier et al. (Radio Caracas Televisión) v. Venezuela, supra*, par. 148.

141 *Cf.* Advisory Opinion OC-5/85*, supra*, par. 56, and Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela, supra*, par. 143.

142 *Cf. Case of Pueblos Indígenas Maya Kaqchikel de Sumpango et al. v. Guatemala. Merits, Reparations and Costs.* Judgment of October 6, 2021. Series C No. 440., par. 86.

143 *Cf. Case of Ivcher Bronstein v. Perú, supra,* par. 149, Case of *Granier et al. (Radio Caracas Televisión) Vs. Venezuela, supra*, par. 148.

the prohibition of any monopoly with respect to them, whatever form it takes, and the guarantee of protection of journalists' freedom and independence."[144]

93. In this sense, in view of the importance of media pluralism for the effective guarantee of the right to freedom of expression, and taking into account the provisions of Article 2 of the Convention, the Court considers that States are internationally obliged to establish laws and public policies that democratize access and guarantee the pluralism of media or information in the different areas of communication, such as, for example, the press, radio, and television.[145] This obligation includes the duty of States to establish adequate measures to prevent or limit the existence and formation of monopolies and oligopolies. However, the Court warns that the adoption of measures to guarantee pluralism in the media must be achieved on the basis of full respect for the American Convention, such that States must refrain from engaging in conduct that affects human rights, such as subjecting people to criminal proceedings without guarantees of due process, or carrying out direct or indirect acts that constitute undue restrictions on the freedom of expression for the media or their journalists.

94. Furthermore, the Court has highlighted that the professional exercise of journalism cannot be differentiated from freedom of expression, on the contrary, both are obviously intertwined, since the professional journalist is not, nor can be, anything other than a person who has decided to exercise freedom of expression in a continuous, stable and remunerated way.[146] In this regard, the Court has considered that, for the press to be able to develop its role of journalistic control, it must not only be free to impart information and ideas of public interest, but it must also be free to gather, collect and evaluate this information and ideas. This implies that any measure that interferes with the journalistic activities of people who are fulfilling their role will inevitably obstruct the right to freedom of expression in its individual and collective dimensions.[147]

95. In relation to the above, the Court considers that the recurrence of public officials resorting to judicial channels to file lawsuits for crimes of slander or insult, not with the objective of obtaining a rectification but to silence the criticisms made regarding their actions in the public sphere, constitutes a threat to freedom of expression. This type of process, known as "SLAPP" (strategic lawsuit against public participation), constitutes an abusive use of judicial mechanisms that must be regulated and controlled by the States, with the aim of allowing effective exercise of freedom of expression. In this regard, the Human Rights Council has expressed its concern in the face of the strategic recourse to justice, "by business entities and individuals using strategic lawsuits against public participation to exercise pressure on journalists and stop them from critical and/or investigative reporting".[148]

96. This Court also considers that media pluralism and diversity constitute substantial requirements for an open and free democratic debate in society. This requires the following: (A) on the part of the State, compliance with the duty to respect and adopt decisions and policies that guarantee the free exercise of freedom of expression and

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144 Advisory Opinion OC-5/85, *supra*, par. 34.

145 *Cf.* Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela, supra*, par. 145.

146 *Cf.* Advisory Opinion OC-5/85, *supra*, par. 72 to 74, and *Case of Bedoya Lima et al. v. Colombia, supra,* par. 107.

147 *Cf*. *Case of Bedoya Lima et al. v. Colombia, supra,* par. 107.

148 United Nations Human Rights Council. The safety of journalists. Resolution approved October 6, 2020, A/HRC/45/L.42/Rev.1, Preamble.

freedom of opinion of the media. Similarly, establish, for the protection of the honor of public officials, alternatives to the criminal process, for example, rectification or response, as well as the civil process. This includes renouncing the use of stigmatizing speeches or practices against those who speak publicly and all types of harassment, including judicial harassment, against journalists and people who exercise their freedom of expression, and (B) it is up to the media to contribute to the strengthening of the democratic and participatory system, respectful of human rights, in accordance with the principles of the Democratic Rule of Law (contained in the Democratic Charter), in a context of plural and diverse media without discrimination or exclusions, as the Court has stated from Advisory Opinion OC-5/85.[149] In short, the particular interests of its owners must not constitute an obstacle to the debate that implies indirect restrictions on the free circulation of ideas or opinions.

A.2.2. Content of the right to freedom of thought and expression

97. The Court's case law has given ample content to the right to freedom of expression, recognized in Article 13 of the Convention. The Court has indicated that said norm protects the right to seek, receive and disseminate ideas and information of all kinds, as well as the right to receive and know the information and ideas disseminated by others.[150] The Court has indicated that freedom of expression has an individual dimension and a social dimension, from which it has derived a series of rights that are protected in said article.[151] This Court has affirmed that both dimensions are of equal importance and must be fully guaranteed simultaneously to give full effect to the right to freedom of expression, in the terms provided for in Article 13 of the Convention.[152]

98. The first dimension of freedom of expression includes the right to use any appropriate means to disseminate opinions, ideas and information and to make it reach the greatest number of recipients. In this sense, expression and dissemination are indivisible, so that a restriction of the possibilities of dissemination directly represents, and to the same extent, a limit to the right to express oneself freely. With respect to the second dimension of the right to freedom of expression, that is, the social one, the Court has indicated that freedom of expression also implies the everyone's right to know opinions, stories and news expressed by third parties. For the common citizen, knowledge of the opinion of others or the information available to others is as important as the right to disseminate one's own. That is why, in light of both dimensions, freedom of expression requires, on the one hand, that no one be arbitrarily undermined or prevented from expressing their own thoughts and therefore represents a right of each individual. However it also implies, on the other hand, a collective right to receive any information and to know the expression of other's thoughts.[153]

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149 *Cf.* Advisory Opinion OC-5/85, *supra*, par. 34

150 *Cf.* Advisory Opinion OC-5/85, *supra*, par. 30, *Rights to freedom to organize, collective bargaining, and strike and their relation to other rights, with a gender perspective (interpretation and scope of Articles 13, 15, 16, 24, 25 and 26, in relation to Articles 1(1) and 2 of the American Convention on Human Rights , of Articles 3, 6, 7 y 8 of the Protocol of San Salvador, of Articles 2, 3, 4, 5 y 6 of the Convention of Belem do Pará, of Articles 34, 44 and 45 of the Charter of the Organization of American States, and Articles II, IV, XIV, XXI and XXII of the American Declaration on the Rights and Duties of Man).* Advisory Opinion OC-27/21 of May 5, 2021. Series A No. 27, par. 133.

151 *Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile, supra*, par. 64, and Advisory Opinion OC-27, *supra*, par. 133.

152 *Cf. Case of Ivcher Bronstein v. Peru, supra*, par. 149, and Advisory Opinion OC-27, *supra*, par. 133.

153 *Cf. Case of Ivcher Bronstein v. Peru, supra*, par. 146, and Case of *Carvajal Carvajal et al. v. Colombia. Merits, Reparations and Costs.* Judgment of March 13, 2018. Series C No. 352*,* par. 172.

99. Additionally, in the framework of freedom of information, the Court considers that there is a duty for journalists to verify in a reasonable manner, although not necessarily exhaustively, the facts on which they base their information.[154] In other words, it is valid to demand fairness and diligence in the verification of sources and the search for information. This implies the right not to receive a manipulated version of events. Therefore, journalists have a duty to keep a critical distance from their sources and check them against other relevant data.[155]

A.2.3. Permissible restrictions on freedom of expression and the application of subsequent liabilities

100. The Court has reiterated that freedom of expression is not an absolute right. Article 13(2) of the Convention, which prohibits prior censorship, also provides for the possibility of demanding subsequent liability for the abusive exercise of this right, including to ensure "respect for the rights or reputation of others" (paragraph (a) of Article 13(2)). These restrictions are of an exceptional nature and must not limit, beyond what is strictly necessary, the full exercise of freedom of expression and become a direct or indirect mechanism of prior censorship.[156] In this sense, the Court has established that such subsequent liabilities can be imposed, insofar as the right to honor and reputation could have been affected.[157]

101. Article 11 of the Convention establishes, in effect, that every person has the right to the protection of their honor and recognition of their dignity. The Court has indicated that the right to honor "recognizes that every person has the right to respect, prohibits any illegal attack against honor or reputation and imposes on the States the duty to provide the protection of the law against such attacks. In general terms, this Court has indicated that the right to honor is related to self-esteem and worth, while reputation refers to the opinion that others have of a person."[158]

102. In this sense, this Court has held that "both freedom of expression and the right to honor, both rights protected by the Convention, are extremely important, hence both rights must be guaranteed in a way that ensures they coexist harmoniously."[159] Every fundamental right must be exercised with respect and safeguarding of other fundamental rights.[160]. Therefore, the Court has indicated that "the solution to the conflict arising between some rights requires examining each case in accordance with its specific

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154 *Cf. Case of Kimel v. Argentina, supra*, par. 79, and *Case of Mémoli v. Argentina. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 22, 2013, Series C, No. 265, par. 122.

155 *Cf. Case of Kimel v. Argentina*, *supra*, par. 79, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela, supra*, par. 139.

156 *Cf. Case of Herrera Ulloa v. Costa Rica, supra*, par. 120. *Case of Álvarez Ramos v. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 30, 2019. Series C No. 380, par. 101.

157 *Case of Mémoli v. Argentina, supra*, par. 123, and *Case of Álvarez Ramos v. Venezuela, supra*, par. 101.

158 *Cf. Case of Tristán Donoso v. Panama. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of January* 27, 2009. Series C No. 193, par. 57, and *Case of Álvarez Ramos v. Venezuela, supra*, par. 102.

159 *Cf. Case of Kimel v. Argentina, supra,* par. 51, and *Case of Álvarez Ramos v. Venezuela, supra*, par. 103.

160 *Cf. Case of Kimel v. Argentina, supra,* par. 75, and *Case of Álvarez Ramos v. Venezuela, supra*, par. 103.

characteristics and circumstances, considering the existence of elements and the extent thereof on which the considerations regarding proportionality are to be based".[161]

103. To this effect, the right to rectification or response, provided for in Article 14 of the Convention, may be an appropriate means to protect the right to honor of a person who believes that he or she has been affected by inaccurate or offensive information. Accordingly, the Court held that "[t]he inescapable relationship between these articles can be deduced from the nature of the rights recognized therein since, in regulating the application of the right of reply or correction, the States Parties must respect the right of freedom of expression guaranteed by Article 13. They may not, however, interpret the right of freedom of expression so broadly as to negate the right of reply proclaimed by Article 14(1)."[162]

104. On this matter, this 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) be previously established by law, both formally and materially[163], (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 therefore comply with the requirements of appropriateness, necessity and proportionality).[164]

105. Regarding the first requirement, strict legality, the Court has established that the restrictions must be previously established in law as a means to ensure that they are not left to the will of public authorities. For this, the criminal definition of a conduct must be clear and accurate,[165] even more so if it is a case of convictions of the criminal law and not of the civil law.[166]

106. Article 13(2) of the Convention refers to the second aspect, that is, the permitted or legitimate purposes. Insofar as this case deals with the restriction of the right to freedom of expression due to a complaint filed by a private citizen, the Court will consider only the purpose found in subparagraph (a) of the aforementioned Article, namely, respect for the reputation or rights of others.[167]

107. The Court has found that when this legitimate purpose is pursued, it is necessary for the State to weigh up the right to freedom of expression of the person who

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[161] *Cf. Case of Kimel v. Argentina, supra*, par. 51, and *Case of Álvarez Ramos v. Venezuela, supra*, par. 103.

[162] *Cf. Demand for the Right of Reply (Arts. 14(1), 1(1) and 2 American Convention on Human Rights)*. Advisory Opinion OC-7/86 of August 29, 1986. Series A No. 7. par. 25.

[163] *Cf. The expression "Laws" in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86* of May 9, 1986. Series A, No. 6, par. 35 and 37, and *Case of Álvarez Ramos v. Venezuela, supra*, par. 104.

[164] *Cf. Case of Tristán Donoso v. Panama, supra,* par. 56, and *Case of Urrutia Laubreaux v. Chile. Preliminary Exceptions, Merits, Reparations and Costs*. Judgment of August 27, 2020. Series C No. 409, par. 85.

[165] *Cf. Case of Kimel v. Argentina, supra,* par. 77, and *Case of Álvarez Ramos v. Venezuela, supra*, par. 105.

[166] *Cf. Case of Kimel v. Argentina*, par. 77, and *Case of Álvarez Ramos v. Venezuela, supra*, par. 105.

[167] *Cf. Case of Álvarez Ramos v. Venezuela, supra*, par. 106.

communicates and the right to honor of the person affected.[168] Furthermore, the State has the obligation to provide a judicial remedy so that any person who considers that his honor has been harmed can demand protection.[169]

108. Finally, as regards the proportionality and necessity of the measure, the Court has understood that any restriction imposed on the right to freedom of expression must be proportionate to the interest that justifies it, and closely tailored to the accomplishment of that legitimate purpose, interfering as little as possible with the effective exercise of that right.[170] Thus, it is not sufficient to have a legitimate purpose, the measure in question must also respect the principles of proportionality and necessity in restricting freedom of expression. In other words, [in this] "this last step of the examination, it is discussed whether the restriction is strictly proportionate, in a manner such that the sacrifice inherent therein is not exaggerated or disproportionate in relation to the advantages obtained from the adoption of such limitation."[171]

109. It is important to note that the European Court of Human Rights, in interpreting Article 10 of the European Convention, concluded that "necessary," while not synonymous with "indispensable," implied "the existence of a 'pressing social need'" and that for a restriction to be "necessary" it is not enough to show that it is "useful," "reasonable" or "desirable."[172] This concept of "imperative social need" was endorsed by the Inter-American Court in its Advisory Opinion OC-5/85.[173]

110. Below, the Court will examine the compatibility with the American Convention of the subsequent liabilities established for the presumed victims, taking into account the aforementioned standards, and the State's acknowledgment of responsibility. To do this, the Court will refer to the nature of the statements published in the article "NO to lies", and then study whether the measure in this particular case is compatible with the American Convention.

A.2.4. Classification of the statements in the article "NO to lies"

111. The Court recalls that the State recognized that "the Ecuadorian bodies handed down a criminal sentence of three years of imprisonment and a civil penalty (…) due to the publication of an opinion article on a matter of public interest" (supra, par. 19). Accordingly, it acknowledged that "the criminal sanction imposed on Emilio Palacio Urrutia and the directors of *El Universo* newspaper, as well as the civil reparation ordered within the aforementioned criminal proceeding, did not respond to a social interest imperative justifying them, and were therefore unnecessary and disproportionate and, although they were not executed, they could have had an intimidating effect on the parties in the case" (supra, par. 19).

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168 *Cf. Case of Kimel v. Argentina*, *supra*, par. 51, and *Case of Álvarez Ramos v. Venezuela, supra*, par. 107.

169 *Cf. Case of Mémoli v. Argentina*, *supra*, par. 125, and *Case of Álvarez Ramos v. Venezuela, supra*, par. 107.

170 *Cf. Case of Herrera Ulloa v. Costa Rica*, *supra*, par. 123, and *Case of Álvarez Ramos v. Venezuela, supra*, par. 108.

171 *Cf. Case of Kimel v. Argentina, supra,* par. 83, and *Case of Álvarez Ramos v. Venezuela, supra*, par. 108.

172 *Cf.* ECHR. *Case of The Sunday Times v. The United Kingdom,* Judgment of April 26, 1979, par. 59.

173 *Cf.* Advisory Opinion OC-5/85, *supra,* par. 46.

112. In relation to the foregoing, in this case, the Court confirms the following regarding the content of the article "NO to lies", published on February 6, 2011 in El Universo newspaper: (a) it refers to opinions and assessments regarding the events that occurred on September 30, 2010 in Ecuador, and the subsequent acts carried out by the then President in response to the acts of the police; (b) particular reference is made to "the possibility of pardoning" the people who participated in said events based on "a pardon"; (c) it is stated that the reason for this action by the authority was that it had "no way to prove the alleged crime of September 30", and points out that "everything was the product of an improvised script" before the decision of the then President on "entering into a rebel barracks"; (d) it is stated that the "evidence" to accuse the "coup plotters" has "unraveled", and assessments are made regarding said evidence; (e) the article "proposes" a "way out": not to grant a pardon, but rather "amnesty in the National Assembly"; f) the article concludes by stating that "with a pardon, in the future, a new president, perhaps his enemy, could bring him before a criminal court for having given the order to fire at will and without warning against a hospital full of civilians and innocent people. Crimes against humanity, don't forget, have no statute of limitations." The Court also notes that the article refers to the then President with the adjectives of "Dictator", refers to him sarcastically as "devout Christian, man of peace", refers to his government as "the Dictatorship" , and refers to his manner of acting on September 30 as that of "a 'Chacascán' wrestler."

113. In the first instance, in regard to the subject of the article "NO to lies", the Court recalls that the concurrence of at least three elements is necessary for a certain note or information to be part of the public debate, namely: (a) a subjective element, that is, that the person is a public official of the complaint made by public media; (b) a functional element, that is, that the person has acted as an official in the related events, and (c) a material element, that is, that the subject matter is of public relevance.[174] The Court considers that, ultimately, the events of September 30, 2010 were an event of great importance in the political life of Ecuador. The then President occupied a central place in national politics, and, in particular, he was a central actor in the events referred to in the article, both in relation to his actions on September 30, and in subsequent actions related to the possibility of granting a pardon in favor of the police officers involved. Thus, there is no doubt that it referred to a matter of public interest that was protected by the right to freedom of expression.

114. Secondly, the Court highlights that the column was signed exclusively by the author and was found in the section corresponding to the contributions of "columnists", the article makes constant references in the first person, e.g. "[I] don't know if the proposal includes me", "[I] understand that the Dictator", "[I]f I committed a crime", etc. It also refers to the fact that the then President was a "Dictator", or that in the future an enemy of his " could bring him before a criminal court for having given the order to fire at will and without warning against a hospital full of civilians and innocent people.", and that "crimes against humanity, don't forget, have no statute of limitations". These constitute an assessment regarding the events that occurred and that were the subject of debate. The words used by Mr. Palacio Urrutia, although they constitute an exaggerated reality, can be considered as rhetorical emphasis on the point that the alleged victim stated that he wanted to highlight that, instead of pardon, he should grant an amnesty so that he too would be covered for the liabilities that could arise against him.[175] In view of this, the Court concludes that Mr. Palacio Urrutia's brief was an opinion

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174 *Cf. Case of Álvarez Ramos v. Venezuela, supra*, par. 113.

175 *Cf.* Statement by Emilio Palacio Urrutia during the Public Hearing.

column, expressing the author's critical position regarding the events that occurred on September 30, 2010.

115. In relation to the foregoing, the Court recalls that, in the context of the debate on issues of public interest, the right to freedom of expression not only protects the broadcast of statements that are harmless or well received by public opinion, but also the of those that shock, irritate or disturb public officials or any sector of the population.[176]. In this regard, the Court notes that article 19(1) of the International Covenant on Civil and Political Rights establishes that "Everyone shall have the right to hold opinions without interference." In this way, although Mr. Palacio Urrutia's statements were extremely critical of the actions of the then President regarding the events of September 30, 2010, and the possibility of granting a pardon to those involved, this does not imply that his speech is without protection from the perspective of freedom of expression. On the contrary, under the standards that this Court has established, an opinion article that refers to a matter of public interest enjoys special protection in view of the importance that this type of speech has in a democratic society. Therefore, in this case, the Court must study whether the possible subsequent liabilities that were applied in the case complied with the requirements set forth in Article 13(2) of the Convention.

A.2.5. The subsequent criminal liability imposed upon the alleged victims

116. The Court recalls that on July 20, 2011, the Fifteenth Court issued a judgment of three years imprisonment against the alleged victims for the crime of "serious slanderous insult against authority", sentencing them to three years in prison and the payment of USD $30,000,000 (thirty million United States dollars). Additionally, El Universo had to pay the sum of USD $10,000,000 (ten million United States dollars). In the judgment, the Temporary Judge who ruled on the case considered that the expressions used by the article had the intention of insulting the then President, and therefore that said statements crossed the limit of the protection of freedom of expression. Similarly, he concluded that said act caused consequential damage and loss of profits to his honor and good reputation (supra par. 64).

117. In this regard, the Court has indicated that criminal prosecution is the most restrictive measure to freedom of expression, therefore its use in a democratic society must be exceptional and reserved for those eventualities in which it is strictly necessary to protect the fundamental legal interests from attacks that damage or endanger them, since to do otherwise would mean an abusive exercise of the punitive power of the State.[177] In other words, from the array of possible measures to demand subsequent liability for potential abusive exercise of the right to freedom of expression, criminal prosecution will only be appropriate in those exceptional cases where it is strictly necessary to protect a pressing social need.[178]

118. In effect, the use of the criminal law against dissemination of information of this nature would directly or indirectly constitute intimidation which, ultimately, would limit freedom of expression and would impede public scrutiny of unlawful conduct, such as acts of corruption, abuse of authority, etc. Ultimately, this would weaken public control over the State's powers, causing grave damage to democratic pluralism. In other words, the

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176 *Cf. Case of Herrera Ulloa v. Costa Rica*, *supra*, par. 126, and *Case of Álvarez Ramos v. Venezuela, supra*, par. 114.

177 *Cf. Case of Kimel v. Argentina*, *supra*, par. 76, and *Caso Álvarez Ramos v. Venezuela, supra*, par. 119.

178 *Cf. Case of Álvarez Ramos v. Venezuela, supra*, par. 120.

protection of honor through criminal law, which may be legitimate in other cases, is not consistent with the Convention in the previously described scenario.[179]

119. This does not mean, as in the case indicated above, that a speech protected by public interest such as those referring to the conduct of public officials in the exercise of their duties, the honor of public officials or of public individuals, should not be legally protected.[180] Journalistic conduct can produce liability in another legal sphere, such as in civil law, or require correction or public apologies, for example, in cases of possible abuses or excesses of bad faith. However, this case involves the exercise of an activity protected by the Convention, which precludes its criminal characterization and, therefore, the possibility of being considered a crime and being subject to penalties. In this regard, it must be made clear that this is not a question of excluding a prohibition through justification or special permission, but rather of the free exercise of an activity that the Convention protects because it is indispensable for the preservation of democracy.[181]

120. In this regard, the Court recalls that in the case of Álvarez Ramos v. Venezuela, it held that, in the case of a speech protected by public interest, such as those referring to the conduct of public officials in the performance of their duties, the State's punitive response through criminal law is not appropriate, under the convention, to protect the honor of an official.[182] Thus, given that in the present case the alleged victims were criminally sanctioned for the publication of the article "NO to lies", which was an opinion piece criticizing the actions of the then President while carrying out his duties, and that it addressed a matter of public interest, the Court considers that the State is responsible for the violation of the right to freedom of expression under the terms of Article 13 of the American Convention.

121. Additionally, the Court considers that the amount of the compensation imposed in the case in itself constituted an evidently disproportionate sanction in relation to the protected legal interest. In this regard, the Court recalls that the imposition of this sanction was applied by the Fifteenth Court, considering that the article "NO to lies" caused "serious damages" because "it undermines the confidence that people have in him, and a loss of earnings, due to the future expectation that a statesman derives from his activities, both public and private." It is clear, in this sense, that there is no proportional relationship between the seriousness of the sanction applied and the protection of the damages that the then President would have suffered to his honor.

122. In addition, the Court notes that the judgment lacks substantiation regarding the causal relationship between the amount of the compensation, and the alleged "damages and losses" that the then President would have suffered. Similarly, the State recognized that "the fact that the criminal proceeding had been filed against El Universo newspaper constituted a breach of the principle of jurisdiction and legality" (supra, par. 19), in such a way that the sanction imposed on the newspaper became arbitrary.

123. The Court also confirms that the aforementioned facts affected work at El Universo, and generated fear about the possibility that the media outlet would be closed,

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179 *Cf. Case of Álvarez Ramos v. Venezuela, supra*, par. 122.

180 *Cf. Case of Herrera Ulloa v. Costa Rica, supra,* par. 128, and *Case of Álvarez Ramos v. Venezuela, supra*, par. 118.

181 *Cf. Case of Álvarez Ramos v. Venezuela, supra*, par. 124.

182 *Cf. Case of Álvarez Ramos v. Venezuela, supra*, par. 121.

or about the existence of future proceedings to follow, due to the content it published.[183] In this sense, César Enrique Pérez Barriga declared, during the public hearing, that for the duration of the trial, the morale of the company's workers was affected, generating insecurity over their future.[184]. Gustavo Alberto Cortez Galecio, who worked as Managing Editor at the time of the events, stated that the criminal proceedings "instilled self-censorship in the team," since there was a "panic" of being brought before the courts by the then President. He also stated that he suffered harassment for being an employee of the newspaper due to the atmosphere of hostility that existed against the media outlet.[185]

124. Thus, the Court considers that the sanction imposed on the directors of El Universo affected their ability to exercise their freedom of expression, also affecting the staff of the newspaper. In this regard, the statements of the alleged victims and witnesses show that the lawsuit and the conviction modified the content of the articles published by the newspaper, the editorial work, the work environment, generating fear in the face of the potential loss of jobs from the possible bankruptcy of the newspaper due to the amount of the imposed sanction.[186] In this sense, the Court also considers that the imposition of the sentence on the publisher El Universo, in which the article "NO to lies" was disseminated, on Mr. Palacio Urrutia and his directors, generated a chilling effect that inhibited the circulation of ideas, opinions and information by third parties, constituting an infringement of the right to freedom of expression.

125. The Court deems it appropriate to reiterate that the fear of a disproportionate civil sanction can clearly be as intimidating and inhibiting for the exercise of freedom of expression as a criminal sanction, as it has the potential to compromise the applicant's personal and family life or, as in this case, to publish information about a public official, with the obvious and discreditable result of self-censorship, both for the person affected and for other potential critics of a public official's actions.[187] In this regard, the expert Toby Mendel pointed out that the function of defamation remedies should be to repair the damage caused to the reputation of an applicant and not to punish the defendant, in accordance with the appeal of the special international mandates on freedom expression.[188]

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183 *Cf.* Statements by Carlos Nicolás Pérez Lapentti (Merits file, folio 1000), Carlos Eduardo Pérez Barriga (Merits file, folio 1011), Leonardo Terán Parral (Merits file, folio 1023), and Gustavo Alberto Cortez Galecio (Merits file, folios 1029 and 1031).

184 *Cf.* Statement by César Enrique Pérez Barriga during the public hearing.

185 *Cf.* Statement by Gustavo Alberto Cortez Galecio given before notary publico n May 26, 2021 (Evidence file, folios 1029 to 1031).

186 *Cf.* Statement by César Enrique Pérez Barriga (Merits file, folio 1011), and Statement by Gustavo Alberto Cortez Galecio (Merits file, folio 1030). The witness Gustavo Alberto Cortez Galecio stated that "[t]his news dropped like a bomb in the newsroom […] the newsroom was fully aware that the amount […] was much higher than the value of the company, which would be equivalent to the media being under his control, and continuing to be in his debt, and that the workers would be fired or be under his orders."

187 *Cf. Case of Tristán Donoso v. Panamá*, *supra*, par. 129, and *Case of Fontevecchia and D`Amico v. Argentina. Merits, Reparations and Costs*. Judgment of November 29, 2011. Series C No. 238, par. 74.

188 *Cf.* Written version of expert witness Toby Mendel of June 3, 2021 (Merits file, folio 1494). Similarly, The European Court of Human Rights, in its judgment in the *Case of Filipovic v. Serbia*, maintained that the amount of compensation awarded must 'bear a reasonable relationship of proportionality to the moral injury suffered' by the applicant in question. *Cf.* ECHR. *Case of Filipovic v. Serbia*, Judgment No. 27935/05 February 20, 2008, par. 56, and *Case of Steel and Morris v. The United Kingdom*, Judgment No. 68416/01 May 15, 2005, par. 96.

126. The Court also considers it relevant to emphasize that, in this case, the criminal proceedings, the consequent sentence imposed on the victims, as well as the pecuniary sanction, constituted an indirect means of restricting freedom of thought and expression.[189] In this regard, the Court notes that after being criminally convicted, Mr. Palacio Urrutia left his job at *El Universo*, and for a period he faced difficulties in working as a journalist (infra par. 157 and 158).

127. Given that, in light of the Convention, the dissemination of an opinion article on a matter of public interest referring to a public official cannot be considered criminally prohibited as a crime against honor, it can be concluded based on the foregoing and the acknowledgment of the State, as such conduct was sanctioned in this case, the sanction imposed contravened Article 13(2) of the American Convention, in relation to Articles 1(1) and 2 of the same instrument.

B. Right to personal freedom

B.1. Arguments of the Commission and the parties

128. The ***representatives*** argued that the criminal prosecution itself had an impact on the presumed victims personal freedom, in a broad sense, notably the restrictions that every criminal proceeding imposes on victims. Thus, they argued that they suffered "the penalty of being in the dock", characterized by the restriction of freedom due to being subject to criminal proceedings, the need to be available to appear in said proceedings, the subsequent anguish of being deprived of their liberty as a consequence of the accusation presented by the then President, and the measures taken as a result of the persecution to which they were subjected, are subsumed in Article 7 of the Convention. In particular, the representatives argued, as constitutive elements of the violation of the right to personal liberty: a) the material illegality of the custodial sentence; and b) the arbitrariness in issuing a custodial measure to the detriment of the alleged victims, which was also carried out based on a misuse of power.

129. The ***State*** indicated that, in this case, there was no deprivation of liberty and therefore the protection provided by Article 7 of the Convention to persons deprived of liberty cannot be extended in a broad sense, as the Inter-American Court itself has established in its case law. Regarding the allegation of the so-called "penalty of being in the dock", the State indicated that the alleged victims faced a judicial process that, like any other, requires individuals to appear and participate in a process in its entirety, which cannot be considered as a violation of their right to personal liberty. The State argued that the custodial sentence was never carried out, therefore the existence of the conviction, although it was disproportionate, does not constitute a violation of personal liberty. The Commission did not make specific arguments related to the alleged violation of the right to personal liberty.

B.2. Considerations of the Court

130. The ***Court*** holds that the essence of Article 7 of the American Convention is the protection of the liberty of the individual against any arbitrary or illegal interference by

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[189] *Cf. Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs.* Judgment of August 31, 2004. Series C No. 111, par. 107.

the State.[190] It has stated that this article has two types of regulations that are well differentiated from each other, one general and the other specific. The general is found in the first numeral: "[e]very person has the right to personal liberty and security." While the specific one is made up of a series of guarantees that protect the right not to be unlawfully deprived of liberty (article 7(2)) or arbitrarily (article 7(3)), to know the reasons for the detention and the charges filed against the detainee (article 7(4)), to judicial control of the deprivation of liberty and the reasonableness of the period of preventive detention (article 7(5)), to challenge the legality of the detention (article 7(6)) and not to be detained for debts (article 7(7)).[191] Any violation of numerals 2 to 7 of Article 7 of the Convention will necessarily entail the violation of article 7(1) thereof.[192]

131. In this case, the Court confirms that the presumed victims were subject to criminal proceedings from March 21, 2011, the date on which the then President filed a complaint before the Fifteenth Court, until February 28, 2012, on which the National Court accepted the pardon granted by the then President. Similarly, the Court recalls that the alleged victims were sentenced on July 20, 2011, in the first instance, to three years in prison and the payment of USD $30,000,000 (thirty million United States dollars) jointly and severally. This decision would later be confirmed by the decision of the Provincial Court of September 22, 2011, where the motions for annulment and appeal filed by the alleged victims were rejected.

132. The Court notes that, throughout this process, the alleged victims were subject to the requirements of the criminal process, which included attending the hearings during the first instance trial, and during the annulment and appeal process, as well as being available for the different actions that occurred throughout that period. Furthermore, that, in effect, they suffered the anguish of the possible depravation of their liberty from the moment the first instance conviction was handed down, and even more so from the moment it was confirmed by the Provincial Court. However, the Court notes that the alleged victims were never effectively deprived of their liberty during the process and after the sentence was handed down, and that they were granted a pardon that eliminated the legal possibility of being detained in relation to said process.

133. Thus, the Court notes that the restrictions on the personal liberty of the alleged victims due to the actions they had to carry out during the trial against them are inherent to the existence of a criminal proceeding, and therefore they did not constitute a limitation that violates the right to freedom of expression under the terms of Article 7 of the Convention. In addition, the Court notes that the mere existence of the criminal conviction against the alleged victims did not constitute a restriction on their personal liberty, since it was not carried out and because the then President granted a pardon that extinguished the sentence.[193] Consequently, the Court concludes that the State is not responsible for the violation of Article 7(2) of the Convention, to the detriment of

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190 *Cf. Case of "Instituto de Reeducación del Menor" v. Paraguay. Preliminary Exceptions, Merits, Reparations and Costs*. Judgment of September 2, 2004. Series C No. 112, par. 223, and Case of *González et al. v. Venezuela. Merits and Reparations.* Judgment of September 20, 2021. Series C No. 436, par. 94.

191 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary Exceptions, Merits, Reparations and Costs.* Judgment of November 21, 2007. Series C No. 170, par. 51, and *Case of Guerrero, Molina et al. v. Venezuela. Merits, Reparations and Costs. Judgment of June* 3, 2021. Series C No. 424*,* par. 103*.*

192 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, par. 54, and Case of *Jenkins v. Argentina. Preliminary Exceptions, Merits, Reparations and Costs*. Judgment of November 26, 2019. Series C No. 397, par. 71.

193 *Cf.* Expert report of Juan Pablo Albán (Merits File, folio 1562).

Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga, and César Enrique Pérez Barriga.

C. Right to property

C.1. Arguments of the Commission and of the parties

134. The ***representatives*** argued that the compensation demanded from the alleged victims and from the legal entity El Universo had an impact on their rights and affected other workers and directors of the media outlet. In this sense, they argued that the pecuniary sanction of more than USD $40,000,000 (forty million United States dollars) for damage to the reputation of the then President was contrary to the Convention, because it had a punitive purpose aimed at sanctioning the alleged victims and El Universo media outlet, and to generate a 'chilling effect' to the detriment of journalists and the Ecuadorian press. This sanction was therefore openly contrary to freedom of expression. Similarly, they argued that the judicial sentence for civil compensation legally affected the alleged victims' right to property, as well as that of the directors and shareholders of El Universo newspaper. This affectation was caused by the judicial process itself, causing losses to El Universo of more than USD$8,000,000 (eight million United States dollars).

135. The ***State*** pointed out that the conviction did not produce legal effects, so the factual assumption that the representatives point to as the core of the alleged violation of the right to property never materialized. It thus maintained that there was never any damage to the alleged victims' assets, therefore there is no international responsibility. In addition, the State maintained that El Universo continued to function normally during the period in which the events occurred, subsequently and to the present day. The State even stated that the expert accounting report presented as evidence shows that it was the year in which the company had greater profits. For this reason, it argued that there was no property damage caused by the conviction against the alleged victims and El Universo. The Commission did not make specific arguments regarding the alleged violation of the right to property.

C.2. Considerations of the Court

136. In its case law, this Court has developed a broad concept of property that encompasses the use and enjoyment of property, defined as material things that can be appropriated, as well as any right that may form part of a person's assets.[194] The Court has also protected, through Article 21 of the Convention, acquired rights, understood as rights that have been incorporated into individuals' assets.[195] It is necessary to reiterate that the right to property is not absolute and, in this sense, it may be subject to restrictions and limitations,[196] as long as these are carried out through the appropriate

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[194] *Cf. Case of Ivcher Bronstein v. Peru, supra*, par. 120 and 122, and *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary Exceptions, Merits, Reparations and Costs.* Judgment of November 21, 2019. Series C No. 394, par. 192.

[195] *Cf. Case of Ivcher Bronstein v. Peru, supra*, par. 122, and *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru, supra*, par. 192.

[196] *Cf. Case of Ivcher Bronstein v. Peru, supra*, par. 128, and *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru, supra*, par. 192.

legal means and in accordance with the parameters established in said article 21.[197] In this sense, the Court has established that for the deprivation of a person's assets to be compatible with the right to property, it must be based on reasons of public utility or social interest, be subject to the payment of fair compensation, be limited to cases, be carried out according to the forms established by law and be carried out in accordance with the Convention.[198]

137. In this case, the Court confirms that the sentence imposed by the Fifteenth Court established that the presumed victims had to pay the then President a sum of USD $30,000,000 (thirty million United States dollars) jointly and severally. For its part, El Universo had to pay the sum of USD $10,000,000 (ten million United States dollars). These amounts were made as the judge of first instance's assessment of the consequential damages and lost profits caused to the honor of the then President. Additionally, it was determined that the alleged victims and El Universo had to pay the professional fees of the then President's lawyers, which were 5% of the value ordered as payment in the judgment. Thus, the total amount ordered to be paid was USD $42,000,000 (forty-two million United States dollars).

138. The Court notes that the net monthly remuneration received by Mr. Palacio Urrutia at the time of the events amounted to USD $11,489.92 (eleven thousand four hundred and eighty-nine United States dollars and ninety-two cents).[199] Cesar Enrique Pérez Barriga received a net monthly remuneration of USD $6,306.49 (six thousand three hundred and six United States dollars and forty-nine cents),[200] Carlos Eduardo Pérez Barriga received a net monthly remuneration of USD $6,271.51 (six thousand two hundred and seventy-one United States dollars and fifty-one cents),[201] and Carlos Nicolás Pérez Lapentti received a net monthly remuneration of USD $6,180.14 (six thousand one hundred and eighty United States dollars and fourteen cents).[202]

139. Additionally, the Court confirms that El Universo limited company has the following shareholders: N Perez Holdings LLC, Victoria Pamela Olcott Levi, Carlos Eduardo Pérez Barriga, and Cesar Enrique Pérez Barriga, and that it has registered share capital for the year 2020 of USD $26,090,000.00 (twenty-six million United States dollars).[203]

140. In accordance with the foregoing, the Court notes that the civil penalty imposed in the conviction by the Fifteenth Court, confirmed by the Provincial Court, was a much higher amount than the income they received, and in its entirety exceeded double the

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197 *Cf. Case of Salvador Chiriboga v. Ecuador. Preliminary Exceptions and Merits.* Judgment of May 6, 2008. Series C No. 179, par. 60 to 63 and *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru, supra*, par. 192.

198 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, par. 174, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela, supra*, par. 104.

199 *Cf.* Human Resources Certificate from *El Universo* Newspaper from October 19, 2011 (evidence file, folio 4483).

200 *Cf.* Human Resources Certificate from *El Universo* Newspaper from October 19, 2011 (evidence file, folio 4484).

201 *Cf.* Human Resources Certificate from *El Universo* Newspaper from October 19, 2011 (evidence file, folio 4485).

202 *Cf.* Human Resources Certificate from *El Universo* Newspaper from October 19, 2011 (evidence file, folio 4486).

203 *Cf.* Superintendency of companies, securities and insurance of Ecuador (evidence file, folio 7453).

share capital that El Universo holds even today. Thus, if said judgment had been carried out, the alleged victims would have been insolvent, and the media outlet would have gone bankrupt. Furthermore, the Court recalls that the civil sanction imposed was the result of a criminal conviction that constituted a violation of the alleged victims' right to freedom of expression. Therefore, the civil sanction undoubtedly constituted a risk to the alleged victims' right to property. However, the Court notes that the alleged victims did not suffer direct damage to assets as a result of this judgment, since it was never executed.

141. The representatives argued that there was a loss of profits of 8 million dollars for the shareholders of El Universo due to the submission to trial, as a result of the deterioration of the equity value expected for the shareholders due to the lawsuit initiated by the then President.[204] The Court notes that, in effect, in 2011 El Universo saw a decrease in its advertising sales, and the newspaper's income in general. However, from the evidence submitted to this Court, it is considered that there is no clarity regarding how this decrease in sales affected the newspaper's assets,[205] nor about the causal link between the lawsuit against the alleged victims and the loss of profits for the shareholders. In this sense, the Court considers that other factors such as technological changes in the industry, or state competition in communication, could also be the cause of the effects on sales by the newspaper during the period in which the trial lasted.[206]

142. Consequently, the Court concludes that the State is not responsible for the violation of Article 21 of the Convention, to the detriment of Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga, and César Enrique Pérez Barriga.

D. Right of movement and residence

D.1. Arguments of the Commission and the parties

143. The ***representatives*** argued that the persecution of Mr. Palacio Urrutia by the Judicial authorities and the criminal judges of Ecuador led to his forced displacement, constituting a violation of Article 22 of the Convention. Specifically, they maintained that as a consequence of the criminalization of his work, he was forced to leave Ecuador as the only way in which he could continue a life free from political and judicial persecution. By virtue of this, he was granted asylum in the United States of America. In these conditions, the representatives argued, the alleged victim and his family were forced to give up their life project in Ecuador, which included his work as a journalist reporting for El Universo. In other words, they argued that his life project was frustrated due to the harmful action of the judicial bodies of his country.

144. The ***State*** maintained that there is not nor has been any prohibition for Mr. Palacio Urrutia to return to Ecuador, nor have there been complaints of harassment or threats against him that could have activated the domestic protection mechanisms. Therefore, the State pointed out, it is not possible to establish international responsibility for the violation of the right of movement. Additionally, the State indicated that Messrs. Pérez were also prosecuted for the same crime, and yet only Mr. Palacio Urrutia decided to leave the country, which demonstrates the absence of a risk that would have forced

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204 *Cf.* Expert statement by Fausto Ortiz de la Cadena (merits file, folio 1068).

205 *Cf.* Expert statement by Mauricio Santiago Sosa Chiriboga on June 1, 2021 (merits file, folio 2072) and Expert statement by Gloria Paulina Serrano on June 1, 2021 (merits file, folio 968).

206 *Cf.* Expert statement by Fausto Ortiz de la Cadena on May 28, 2021 (merits file, folio 1073 to 1074).

him to leave the country. Furthermore, they argued that, if Mr. Palacio Urrutia had not returned because Mr. Correa was President, he would have done so when he left office, however, he decided not to do so. The Commission did not make specific arguments on the matter.

D.2. Considerations of the Court

145. The ***Court*** has indicated that "the right of movement and residence, protected in Article 22(1) of the American Convention, is an indispensable condition for the free development of the person, and considers, inter alia, the right of those legally within a State to move freely in it, as well as to choose their place of residence.[207] This right can be violated formally or by de facto restrictions when the State has not established the conditions or provided the means to exercise it.[208] Said de facto violations may occur when a person is the victim of threats or harassment and the State does not provide the necessary guarantees to be able to move freely and reside in the territory in question. The Court also indicated that failure to conduct an effective investigation into violent incidents may promote or perpetuate forced displacement or exile."[209]

146. Similarly, the Court has indicated that the granting of asylum in another country reveals the high level of credibility that the authorities of the State granting asylum accorded to the claims made by the victims. However, such acknowledgment alone is not sufficient to affirm that the violation of the right of residence was configured in the case. This is one more indication to take into account in the set of particular circumstances of the case.[210] Furthermore, the Court has reaffirmed that the State of origin's obligation of guarantee to protect the rights of displaced persons entails not only the duty to adopt preventive measures but also to provide the necessary conditions to facilitate a voluntary, dignified and safe return to their usual place of residence or their voluntary resettlement in another part of the country. As such, their full participation in the planning and management of their return or reintegration must be guaranteed.[211]

147. This Court has also established that, in accordance with Article 13 of the Convention, the practice of professional journalism cannot be differentiated from freedom of expression, for which the journalist must be free to exercise his profession without undue interference from the authorities. Similarly, the Court notes that the Principles on Freedom of Expression state that "the murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media violate the fundamental rights of individuals and severely restrict

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[207] *Cf. Case of Ricardo Canese v. Paraguay*, *supra*, par. 115, and *Case of Omeara Carrascal et al. v. Colombia. Merits, Reparations and Costs Judgment of November* 21, 2018. Series C No. 368, par. 272.

[208] *Cf. Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 15, 2005. Series C No. 124, par. 119 and 120, and *Case of Omeara Carrascal et al. v. Colombia. Merits, Reparations and Costs*. Judgment of November 21, 2018. Series C No. 368, par. 272.

[209] *Cf. Case of the Moiwana Community v. Suriname*, *supra*, par. 119 and 120, and *Case of Alvarado Espinoza et al. v. México. Merits, Reparations and Costs*. Judgment of November 28, 2018. Series C No. 370, par. 274.

[210] *Cf. Case of Vélez Restrepo and family v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 3, 2012. Series C No. 248, par. 161, and *Case of V.R.P., V.P.C. et al. v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs*. Judgment of March 8, 2018. Series C No. 350, par. 310.

[211] *Cf. Case of Chitay Nech et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs*. Judgment of May 25, 2010. Series C No. 212, par. 149*, and Case of Carvajal Carvajal et al. v. Colombia, supra*, par. 190.

freedom of expression. It is the duty of the States to prevent and investigate such occurrences, punish their perpetrators and to ensure that victims receive due compensation."[212] In this sense, the Court considers that journalists must enjoy protection in exercising their profession, as part of the duty to guarantee the right to freedom of expression.

148. In this case, the Court determined that the State was responsible for the violation of Mr. Palacio Urrutia's freedom of expression in light of the criminal and civil sentence imposed for the publication of his article "NO to lies." The State also recognized that in the trial carried out against him and the other victims, proceedings occurred contrary to judicial guarantees and judicial protection, due to the fact that there was an inequality in the process and the guarantees of independence and impartiality were affected, in addition to the fact that there was a violation of the right to a defense. The Court also determined that, after the publication of the aforementioned article, during the criminal proceedings against him, and after the pardon was granted, there was an environment of confrontation and conflict between the then President and Mr. Palacio Urrutia.

149. Mr. Palacio Urrutia left Ecuador after his resignation to relocate his residence in the United States of America from August 2011. In this regard, the Court notes that Mr. Palacio Urrutia declared, during the public hearing, that his decision to leave Ecuador to live in the United States of America was due to the fact that he and his family "[lived in] a climate of terror", in reference to the expressions that the then President made against him in his weekly program.[213] Furthermore, Mr. Palacio Urrutia stated that he received threats on Twitter from third parties, and that there was a death threat against his son investigated by the police, that located the computer from which those threats were issued, without locating those responsible.[214] In these circumstances, the alleged victim explained, he "realized that what he was risking was the fact that [he] might go to jail or even that they kill me."[215] Additionally, the Court notes that on August 22, 2012, the government of the United States of America granted asylum to Mr. Palacio Urrutia and his family, by virtue of Article 208 (a) of the Immigration and Nationality Act.[216]

150. In this regard, the Court considers that in this case the actions of the State, particularly the trial and criminal sentence imposed on Mr. Palacio Urrutia, which occurred with a lack of guarantee of due process, and the statements of the then President in the media, generated insecurity and a well-founded fear in the alleged victim that the State would not act in the face of the possible risk of being deprived of his liberty or his life. Alternatively, there is no evidence that the State has carried out actions aimed at protecting Mr. Palacio Urrutia from the threats made against him or his family, or that measures have been taken that allow him a voluntary, dignified, and safe return. Consequently, the Court considers that a de facto restriction was set regarding the right of movement that also led to the indirect restriction of Mr. Palacio Urrutia's freedom of expression, and therefore a violation of Article 22 of the Convention, in relation to articles 13 and 1(1) of the same instrument.

E. Right to work

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212 IACHR. *Declaration of Principles on Freedom of Expression*, adopted in October 2000, Article 9.

213 *Cf.* Statement to the public hearing by Emilio Palacio Urrutia.

214 *Cf.* Statement to the public hearing by Emilio Palacio Urrutia.

215 *Cf.* Statement to the public hearing by Emilio Palacio Urrutia.

216 *Cf.* United States of America. Immigration and Nationality Act of 1965.

E.1. Arguments of the Commission and the parties

151. The ***representatives*** argued that there was a violation of the right to work to the detriment of Mr. Palacio Urrutia, under the terms of Article 26 of the American Convention, in relation to Articles 13 and 1(1) of the same instrument. This violation occurred because the criminal proceedings constituted an indirect restriction against the alleged victim continuing to practice journalism, given that he was threatened and sanctioned for practicing his profession. In addition, this violation took place because, as a consequence of the criminal proceedings against him, he had to resign from his job at El Universo, as a means to prevent future sanctions against him and against the media outlet. They also pointed out that as a result of the chilling effect generated by this process, no other media outlet in Ecuador hired him and he even had to leave the country. The representatives added that the fear of Rafael Correa and Correismo in power also caused the economic failure of the news outlet itself on the Internet.

152. The ***State*** argued that Article 26 of the American Convention does not recognize a catalogue of rights, but rather refers to the State's obligations in terms of progression. Therefore, it is not for the Court to rule on violations of the right to work to the detriment of Mr. Palacio Urrutia. Similarly, it maintained that the alleged indirect restriction on the right to work due to the proceedings against the alleged victim never occurred, which explains why the alleged victim continued publishing on a regular basis until July 2011, the date on which he decided to quit his job. The State maintained that there was no limitation on his right to work, and that there is no proof that he cannot continue to carry out his work as a journalist. Accordingly, it concluded that there is no causal link between the criminal proceedings against him and the resignation of his employment, and therefore there is no international responsibility of the State. The Commission did not make specific arguments regarding the alleged violation of the right to work.

E.2. Considerations of the Court

153. This Court has noted that Articles 45(b) and (c)[217], 46[218] and 34(g)[219] of the OAS Charter establish a series of norms that make it possible to identify the right to work. In

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217 *Cf.* Article 45 of the Charter of the OAS. "The 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:
a) All human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security; b) Work 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; c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws; […]".

218 *Cf.* Article 46 of the Charter of the OAS. "The Member 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.".

219 *Cf.* Article 34(g) of the Charter of the OAS. "The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable 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

particular, the Court has noted that Article 45(b) of the OAS Charter establishes that "b) work is a right and a social duty, it gives dignity to the one who performs it and it should be performed under conditions, including a system of fair wages, that ensure life, health and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working." Thus, the Court has considered that there is a reference with a sufficient degree of specificity to the right to job security to derive its existence and implicit recognition in the OAS Charter. Based on the foregoing, this Court has held that the right to job stability is a right protected by Article 26 of the Convention.[220]

154. Regarding the content and scope of this right, the Court recalls that Article XIV of the American Declaration of the Rights and Duties of Man provides that "[e]very person has the right to work, under proper conditions, and to follow his vocation freely […]". Similarly, Article 6 of the Protocol of San Salvador establishes that "[e]very Everyone has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity." At the universal level, the Universal Declaration of Human Rights establishes that "[e]veryone has the right to work,… to just and favorable conditions of work and to protection against unemployment." For its part, the International Covenant on Economic, Social and Cultural Rights establishes that "[t]he States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."[221]

155. The Court has specified that job stability does not consist of an unrestricted permanence in the job, but of respecting this right, among other measures, granting protection to the worker so that, in the event of dismissal or arbitrary dismissal, it is carried out under justified causes, which implies that the employer provides sufficient reasons for it with due guarantees, and against which the worker can appeal said decision before the domestic authorities, who must verify that the causes imputed are not arbitrary or contrary to law.[222] Similarly, the Court considers that the right to job stability protects the worker from being deprived of his job due to direct or indirect interference by the judiciary, since this affects the freedom of people to earn a living through the work they choose, and their right to remain in employment, as long as there are no justified causes for their termination.

156. In this regard, the Court notes that the Committee on Economic, Social and Cultural Rights, in its General Comment No. 18 on the right to work, affirmed the obligation of States "to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly".[223] Furthermore, said Committee established that the States have the obligation to respect this right, which implies that they "refrain from interfering directly or indirectly with the enjoyment of that right".[224]

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following basic goals: […] g) Fair wages, employment opportunities, and acceptable working conditions for all".

220 *Cf. Case of Lagos del Campo v. Peru, supra*, par. 143, and *Case of Casa Nina v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 24, 2020. Series C No. 419, par. 105.

221 International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 7(b).

222 *Cf*. *Case of Lagos del Campo v. Peru*, supra, par. 150, and *Case of Casa Nina v. Peru, supra*, par. 107.

223 *Cf.* Committee on Economic, Social and Cultural Rights. General Comment No. 18. The right to work (Art. 6). Approved on November 24, 2005, par. 4.

224 *Cf.* Committee on Economic, Social and Cultural Rights. General Comment No. 18, *supra*, par. 22.

It also considered that it constitutes a breach of the obligation to respect "any discrimination in access to the labor market or to means and entitlements for obtaining employment on the grounds of […] political or other opinion."[225]

157. In this case, the Court recalls that Mr. Palacio Urrutia worked as a journalist, columnist and "Opinion Editor" in El Universo newspaper from February 1, 1999, until July 7, 2011, the date on which he resigned (supra par. 50). In this regard, Mr. Palacio Urrutia declared, during the public hearing, that said resignation had been directly related to the threats he had suffered during the criminal proceedings that led to his conviction on July 20, 2011, and his unequal status against the state apparatus throughout the process, and after it ended, which affected his ability to carry out his work as a journalist at El Universo, and even of remaining in the country after his resignation (supra par. 149).[226] In particular, Mr. Palacio Urrutia declared that, after the lawsuit, realizing that he was "confronting citizen Correa, President Correa and the entire State apparatus centralized in one person [...] it was a completely unequal fight ". Faced with this situation, he expressed, his reaction was "I forget about everything, the newspaper, other aspects of my personal life and I have to concentrate on this defense because I'm risking everything [...]".[227]

158. Thus, the alleged victim left the country to reside in the United States of America with his family, where he has a web page to undertake work as a journalist that, in his words, was a "journalistic success" but a "commercial failure".[228] This "commercial failure" was due, as explained by Mr. Palacio Urrutia, to the fact that potential advertisers on the digital platform did not want to be associated with him due to possible reprisals from the government.[229] Going into his employment situation in greater detail, Mr. Palacio Urrutia stated that he was unable to work as a journalist in Miami, "for various reasons, one of them was, for example, that I speak English, but not to the level expected of an editorial journalist, and nor do I know American politics and economy to the level that I would be able to give an opinion as a recently arrived foreigner, so I said I prefer to continue doing journalism for Ecuador". He also expressed that in the investment he made to continue his activity through a digital medium, that "not a single advertisement appeared in all this time", as there was fear that the government of Ecuador would take reprisals against those who bought advertising.[230]

159. In relation to the foregoing, the Court recalls that during the time in which the criminal proceedings were carried out, and after, there was a context of confrontation and conflict between the then President and the alleged victims, including Mr. Urrutia Palacio. This conflict was expressed in the existence of the judicial process, and in the statements that were made by the then President in the media regarding Mr. Palacio Urrutia during the process, and once it had ended (supra par. 45).[231] These statements included expressions regarding how the trial sought not only to punish Mr. Palacio Urrutia for the publication of the article "NO to lies", but also those who hired him and the media

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225 *Cf.* Committee on Economic, Social and Cultural Rights. General Comment No. 18, *supra*, par. 33.

226 *Cf.* Statement by Emilio Palacio Urrutia at public hearing.

227 *Cf.* Statement by Emilio Palacio Urrutia at public hearing.

228 *Cf.* Statement by Emilio Palacio Urrutia at public hearing.

229 *Cf.* Statement by Emilio Palacio Urrutia at public hearing.

230 *Cf.* Statement by Emilio Palacio Urrutia at public hearing.

231 *Cf.* Statements by the President of the Republic regarding El Universo newspaper of its journalists (evidence file, folio 4427 to 4478).

where it was published. In this regard, by way of example, on July 19, 2011, the then President declared, in reference to the alleged victims, that "it is not only the hitman's fault, but also the person who hires him. In the case of ink hitmen, where the culprit is not only the hitman, but also those who hire him and allow those ink assassinations."[232]

160. Based on the foregoing, the Court considers it proven that the criminal proceedings and the criminal conviction against Mr. Palacio Urrutia following the publication of the article "NO to lies," and the circumstances surrounding said proceedings, which included a context of confrontation and conflict between the then President and the alleged victims and El Universo, caused Mr. Palacio Urrutia to resign from his job as a journalist at the newspaper where he worked. For the same reasons, the Court considers that Mr. Palacio Urrutia's possibilities for exercising the profession of journalist were affected after his resignation, due to his inability to obtain employment in Ecuador due to the chilling effect caused by the process against him and the need to leave the country to live in the United States of America (supra par. 149). Consequently, the Court concludes that the State is responsible for the violation of the right to job stability to the detriment of Emilio Palacio Urrutia, in terms of Article 26 of the Convention, in relation to Articles 13, 22 and 1(1) of the same instrument.

F. Conclusion

161. The Court recalls the subsequent liabilities for the exercise of freedom of expression must comply concurrently with the requirements developed by this Court in its case law, and that the opinion pieces referring to the conduct of public officials in the exercise of their duties enjoy special protection, therefore the criminal response by the State is contrary to the Convention (supra par. 120). In this case, the Court concludes that the article "NO to lies", published by Mr. Palacio Urrutia regarding the events that occurred in Ecuador on September 30, 2010, constituted an opinion article that referred to a matter of public interest, so it enjoyed special protection in view of its importance in the democratic debate. Thus, the Court notes that the conviction of three years in prison constituted a violation of the right to freedom of expression of the victims in the case, and as a consequence Mr. Palacio Urrutia saw his voice silenced in the media outlet where he worked, being deprived of his job. Similarly, the Court warns that the pecuniary sanction imposed on the victims, and on *El Universo* newspaper, was disproportionate, and constituted an attack on the exercise of freedom of expression.

162. This Court also concludes that Mr. Palacio Urrutia was forced to leave Ecuador due to the insecurity and fear generated by the possibility of being subject to new proceedings and even of losing his life, which constituted a violation of his right of movement and residence and produced an indirect restriction on the exercise of his freedom of expression. Similarly, the Court concludes that the consequences of the criminal proceedings brought against the victims, and the circumstances surrounding it, had an impact on Mr. Palacio Urrutia's enjoyment of the right to job security, since he had to resign his position at El Universo, and was prevented from exercising his duties as a journalist in Ecuador. At this point, the Court recalls that the violation of the rights to movement and residence, and to job stability, is closely related to violation of freedom of expression, which is the driving force behind the different aspects analyzed in this process.

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[232] *Cf. El Universo* newspaper, *Defensa de Correa apelará el fallo para insistir en $ 80 millones*, (*Correa's defense will appeal the ruling to insist on $80 million*) July 21, 2011.

163. Based on all of the above, and in consideration of the State's acknowledgment of responsibility, the Court concludes that the State is responsible for: (a) the violation of the rights to freedom of expression, the principle of legality, movement and residence, and job stability, recognized in articles 13, 9, 22 and 26 of the Convention, in relation to articles 1(1) and 2 of the same instrument, to the detriment of Emilio Palacio Urrutia, (b) the violation of the rights to freedom of expression and the principle of legality, recognized in Articles 13 and 9 of the Convention, in relation to Articles 1(1) and 2 of the same instrument, to the detriment of Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga and César Enrique Pérez Barriga, and (c) the violation of the rights to judicial guarantees and judicial protection, recognized in Articles 8(1), 8(2)(c), 8(2)(f) and 25(1) of the American Convention, in relation to Articles 1(1) and 2 of the same instrument, to the detriment of Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga and César Enrique Pérez Barriga. The Court also concludes that the State is not responsible for the violation of the rights to personal liberty and property, pursuant to Articles 7 and 21 of the American Convention.

VIII
REPARATIONS

164. Based on the provisions of Article 63(1) of the American Convention, the Court has indicated that any violation of an international obligation that has caused harm entails the obligation to adequately repair it, and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary International Law on State responsibility.[233] The Court has also established that reparations must have a causal link with the facts of the case, the declared violations, the proven harm, as well as the measures requested to repair the respective harm. Therefore, the Court must analyze said concurrence in order to rule appropriately and in accordance with the law.[234]

165. Consequently, without prejudice to any form of reparation that is subsequently agreed between the State and the victims, and based on the considerations set forth on the merits and the violations of the Convention declared in this Judgment, the Court will proceed to analyze the claims presented by the Commission and the victims' representatives, as well as the State's observations thereon, in light of the criteria established in its case law concerning the nature and scope of the obligation to make reparation, in order to establish measures aimed at repairing the harm caused.[235]

A. Injured Party

166. This Court considers the injured party, pursuant to Article 63(1) of the Convention, to be the victim of the violation of any right recognized therein. Therefore, this Court considers Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga and César Enrique Pérez Barriga to be the "injured party", who, as victims of the violations declared in Chapter VII, will be considered beneficiaries of the reparations ordered by the Court.

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233 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs.* Judgment of July 21, 1989. Series C No. 7., par. 24 and 25, and *Case of Manuela et al. v. El Salvador, supra*, par. 268.

234 *Cf. Case of Ticona Estrada et al. v. Bolivia. Merits, Reparations and Costs.* Judgment of November 27, 2008. Series C No. 191, par. 110, and *Case of Manuela et al. v. El Salvador, supra*, par. 268.

235 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs, supra*, par. 25 and 26, and *Case of Manuela et al. v. El Salvador, supra*, par. 269.

B. Measures of Restitution

B.1. Requests of the Commission and the parties

167. The ***Commission*** requested that the State annul the criminal conviction imposed on Emilio Palacio Urrutia, Carlos Eduardo Pérez Barriga and César Enrique Pérez Barriga and El Universo limited company. In this regard, it stated that the Commission understands that the conviction is upheld and that the names of the victims appear in the judicial records. It also considers that there must be a guarantee that the offended party in the criminal process cannot now request compensation.

168. The ***representatives*** agreed with the Commission's request. Additionally, they requested that the State eliminate any reference to Emilio Palacio, Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga and César Enrique Pérez Barriga in the "Automatic System of Ecuadorian Judicial Processing" register held by the Council of the Judiciary in Ecuador, and in the records of the State security bodies, and any other legal effect that said judgment may have generated.

169. The ***State*** argued that the judgment indicated by the Commission and the representatives cannot be annuled, since it never came into effect. In relation to the alleged elimination of any reference in the Registry System, the State warned that the names of Emilio Palacio, Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga and César Enrique Pérez appear in cases unrelated to these proceedings and that this does not prejudice them.

B.2. Considerations of the Court

170. In this case, the Court determined that the State is responsible for the violation of the rights to freedom of expression and the principle of legality, for the criminal sentence of three years in prison and the payment of a fine, imposed by the Fifteenth Court on July 20, 2011, which was confirmed on November 22, 2011 by the Provincial Court. However, the Court confirmed that on February 28, 2012, the National Court of Justice accepted the request for pardon of the sentence and the remittance of the payment of damages and procedural costs and ordered the case be archived, for which the conviction of first instance was never carried out.

171. In relation to the foregoing, based on the proven violations, the specifics of the case, and its possible procedural consequences, the Court determines that the State must adopt all the necessary measures to annul, in every respect, the Judgment of July 20, 2011, confirmed on September 22, 2011, including, where appropriate, the scope that these have regarding namely (a) the attribution of criminal and civil responsibility to Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga and César Enrique Pérez, and (b) any other effect that those decisions have or may have had, including any judicial or administrative record, or the possibility that it may be recognized as a judicial precedent. In order to comply with this reparation, the State must adopt all necessary judicial, administrative and other measures, and to do so it has a period of one year from notification of this Judgment.

C. Measures of satisfaction

C.1. Requests of the Commission and the parties

172. The ***representatives*** requested that the State publish: (a) the judgment in its entirety in the Official Gazette; (b) the official summary in a newspaper with national circulation and, (c) the full text of the judgment for a period of one year, on an official website, accessible to the public. The Commission and the State did not refer specifically to this measure.

C.2. Considerations of the Court

173. The ***Court*** orders, as it has done in other cases,[236] that the State publish, within a period of six months of notification of this judgment, in a legible and adequate font size, the following: (a) the official summary of this judgment prepared by the Court, once, in the Official Gazette and in a newspaper with national circulation, and (b) this Judgment in its entirety, available for a period of one year, on the official website of the Judiciary in a manner that is accessible to the public and from the website's home page. The State must inform the Court immediately once it has made each of the publications ordered, regardless of the one-year timeframe to present its first report, established in operative paragraph 9 of this judgment.

D. Guarantees of non-repetition

D.1. Requests of the Commission and the parties

174. The ***Commission*** requested that the State adapt the domestic criminal law, in accordance with the State's obligations in terms of freedom of expression, "recourse to subsequent civil liability" for cases of expression of public interest, or concerning the actions of public officials, observing the principle of proportionality and actual malice. It also requested that the regime of civil sanctions in matters of freedom of expression be adapted, in accordance with the obligations of the State under the American Convention, which implies establishing that the communicator disseminating the information had the intention of inflicting harm, or was proceeded with gross negligence in the search for the truth or falsehood of the news, respecting the principles of necessity and proportionality in the establishment of compensation, if applicable. The Commission stated that the legislative change that occurred in Ecuador in 2014 did not unequivocally eliminate the possibility of penalizing criticism directed at public authorities, by maintaining the crime of slander and "class four offenses."

175. The ***representatives*** requested, as a guarantee of non-repetition, that the State be ordered to adopt the necessary measures to eliminate from the legal system all those norms that allow punishing critical or disrespectful statements against public officials in the exercise of their duties. In particular, they requested the adaption of articles 182 and 396 of the Criminal Code. Furthermore, they requested that the State be required to adopt legislative or other measures necessary to ensure that the establishment of civil compensation for damages cannot be used as a mechanism to impose punitive sanctions of any kind or disproportionate compensation for the legitimate exercise of freedom of expression. In addition, they requested that judicial officials be trained on the standards of freedom of expression in public affairs.

176. The ***State*** stated that the Criminal Code applied to the victims was in force until October 10, 2014, the date of publication of the Comprehensive Organic Criminal Code

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[236] *Cf. Case of Cantoral Benavides v. Peru. Reparations and Costs.* Judgment of December 3, 2001. Series C No. 88, par. 79, *and Case of Manuela et al. v. El Salvador, supra*, par. 273.

(hereinafter "COIP" according to its initials in Spanish), which is currently in force. In the COIP, the crime of slanderous insult was changed to be called slander, and the classification underwent substantial changes. In this regard, the State argued that the new structure of the norm meets the requirements of clarity, precision and limits the punishable conduct. It also stated that, through legal reforms, Ecuadorian regulations have sought to be compatible with the standards of the Inter-American System regarding proportionality. Furthermore, regarding the "punitive civil sanctions", it stated that the regulations applied to the victims were repealed by the COIP, so that in each case the judge must determine the comprehensive reparation. Consequently, the State considered that a pronouncement by the Court on the matter is not necessary. Regarding the request for training, the State stated that judicial officials have received a large number of virtual courses on human rights issues, which include content on freedom of expression. For this reason, the State considered that a pronouncement by the Court on this aspect is not necessary.

D.2. Considerations of the Court

D.2.1. Legislative amendments and conventionality control

177. In this case, the State recognized that Articles 489 and 493 of the Criminal Code in force at the time of the events, which allowed punishing acts that constituted "serious slanderous insult against authority," did not comply with the principle of strict legality and were contrary to the right to freedom of expression, and as such constituted a violation of article 2 of the American Convention, in relation to articles 9 and 13 of the same instrument. The Court also notes that Ecuadorian criminal legislation regarding crimes against honor has been modified since the entry into force of the COIP in 2014.[237]

178. In this regard, the Court notes that, based on the information presented by the State, said legislative amendments constitute progress in fulfilling the duty to adopt domestic legal measures. In particular, the Court notes that although the COIP did not expressly eliminate the possibility of criminal prosecution for criticism directed at public officials in the exercise of their duties, since slander and "class four offenses" could be used in practice to condemn speech related to matters of public interest,[238] the reformed norm eliminated the possibility of prosecuting the crime of "slanderous insult against authority", as occurred in this case. Therefore, given that the applied norm has already been reformed, and there is no clear incompatibility between the current norm and the Convention, this Court does not consider it appropriate to order the modification of the COIP norms.

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[237] In particular, article 182 classifies the crime against honor and good name in the following terms: Slander - The person who, by any means, makes a false accusation of a crime against another, will be punished with a custodial sentence of six months to two years. Pronouncements made before authorities, judges and courts do not constitute slander, when the accusations/charges have been made due to the defense of the case. Whoever proves the veracity of the accusations will not be responsible for slander. However, in no case will evidence be admitted on the imputation of a crime that has been the subject of a judge confirming the innocence of the accused, dismissal or filing. There will be no criminal liability if the author of slander voluntarily retracts before an enforceable sentence is pronounced, provided that the publication of the retraction is made at the expense of the person responsible, is fulfilled in the same medium and with the same characteristics in which it was published. the imputation. The retraction does not constitute a form of admission of guilt. For its part, article 396 establishes the following: "Class four offences. The following shall be sanctioned with a custodial sentence of fifteen to thirty days: 1. The person who, by any means, utters expressions of discredit or dishonor against another. This violation will not be punishable if the expressions are reciprocal in the same act."

[238] *Cf.* Expert opinion of Juan Pablo Albán (Merits file, folio 1556).

179. However, for this Court, not only the suppression or issuance of regulations in domestic legislation guarantee the rights enshrined in the American Convention, pursuant with the obligation included in Article 2 of that instrument. The development of State practices conducive to the effective observance of the rights and liberties enshrined therein is also required. Consequently, the existence of a regulation does not in itself guarantee that its application will be adequate. It is necessary that the application of the regulations or their interpretation, as jurisdictional practices and a manifestation of state public order, conforms to the same purpose sought by Article 2 of the Convention.[239] In practical terms, the interpretation of articles 182 and 396 of the COIP must be consistent with the convention's principles on freedom of expression, contained in article 13 of the American Convention.

180. In relation to the foregoing, this Court has established in its case law that it is aware that all State authorities are subject to the rule of law and, therefore, are obliged to apply the provisions in force in the legal system. But when a State has ratified an international treaty such as the American Convention, all its organs, including its judges, are subject to it. This obliges them to ensure that the effects of the provisions of the Convention are not undermined by the application of regulations contrary to its object and purpose. Thus, judges and bodies linked to the administration of justice at all levels are obliged to exercise, ex officio, a conventionality control between the domestic regulations and the American Convention, evidently in the within the framework of their respective competencies and the corresponding procedural regulations. In this task, they must take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, the ultimate interpreter of the American Convention.[240]

181. Thus, it is necessary that the interpretations referred to the cases that involve lawsuits for slander or for statements that discredit or dishonor another, in application of articles 182 and 396 of the COIP, be adapted to the principles established in the case law of this Court regarding freedom of expression, which have been reiterated in this case (supra, par. 87 to 120).

182. Additionally, considering that media pluralism and diversity constitute substantial requirements for democratic debate, the Court decides that, within a reasonable period of time, and as a guarantee of non-repetition, the State must adopt legislative measures to achieve full realization of the exercise of freedom of expression, in order to make it compatible with the State's obligation to prevent public officials from resorting to judicial channels to file lawsuits for slander and insult with the aim of silencing criticism of their actions in the public sphere, in accordance with the parameters established in this Judgment. As part of compliance with this measure, the State must establish channels, alternative to criminal proceedings, for the protection of the honor of public officials with respect to opinions related to their actions in the public sphere (supra, par. 93 and 94).

D.2.2. Implementation of training programs

183. The Court considers it pertinent to order the State to create and implement, within one year, a training plan for public officials, to guarantee that they have the

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239 *Cf. Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 23, 2009. Series C No. 209, par. 338, and Case of *Fernández Prieto y Tumbeiro v. Argentina. Merits and Reparations.* Judgment of September 1, 2020. Series C No. 411, par. 122.

240 *Cf. Case of Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of September* 26, 2006. Series C No. 154, par. 124, and Case of *Cuya Lavy et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 28, 2021. Series C No. 438, par. 206.

necessary knowledge in the field of human rights. The training should focus on the analysis of the case law in the Inter-American System for the Protection of Human Rights in relation to freedom of expression, as well as the rights to judicial guarantees and judicial protection. Such programs will be directed specifically at members of the Judiciary, including prosecutors and judges.

E. Additional measures requested

E.1. Requests of the Commission and the parties

184. The ***Commission*** and the ***representatives*** requested that the State carry out a public act of reparation to Emilio Palacio and the directors of El Universo, in the presence of the authorities. Additionally, the representatives requested that educational scholarships be granted to the children of Mr. Palacio Urrutia to undertake their studies until they complete their professional training in the place of their choice. Furthermore, they requested that measures be adopted to strengthen the independence of the Judiciary in Ecuador, including the admission and tenure of trial judges.

185. The ***State*** argued that in this case there is no causal link that would make it possible to verify that Mr. Palacio Urrutia's children's access to studies was indeed affected by the criminal proceedings against the father, for which reason it considers that said request is impertinent. Similarly, regarding the measures related to the strengthening of judicial independence, the State indicated that there is no basis to dictate said measure, and referred to a decision of the Constitutional Court of Ecuador in this regard.

E.2. Considerations of the Court

186. In this regard, the Court recalls that in this case no legal consequences have been established regarding the absence of guarantees of independence and impartiality in the Judiciary, beyond those related to the specific conditions of the case involving the victims, which were recognized by the State. For this reason, it does not consider it necessary to order specific measures aimed at strengthening the independence of the Judiciary in Ecuador. Moreover, the Court considers that the reparation measures ordered in this Judgment are sufficient and appropriate for the declared violations, so that it does not consider it pertinent to order additional measures.

F. Compensation

E.1(1). Pecuniary Damages

187. The ***Commission*** requested that the State compensate Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga and César Enrique Pérez Barriga for the pecuniary and non-pecuniary damages caused by the violations established in the Merits Report.

188. Regarding pecuniary damage, the ***representatives*** indicated that compensation should be paid for loss of earnings and consequential damages in favor of Mr. Palacio Urrutia, in relation to the following: (a) payment of salary not received calculated on the basis of his last annual income, by the number of years he did not receive said income since the termination of his employment relationship with El Universo, (b) the losses due to the forced sale of his property, and the payment of the lease at the place he moved to, (c)

purchase of private insurance in the United States of America and (d) tax on the outflow of foreign currency from his family during the years 2011 to 2016. Compensation was also requested for other expenses incurred, such as (e) books lost due to his forced exile, travel expenses, medical expenses not covered, and (f) investment in new means to carry out his work. Due to the above, they requested compensation of USD$1,845,281.94 (one million, eight hundred and forty-five thousand, two hundred and eighty-one United States dollars).

189. Regarding Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga and César Enrique Pérez Barriga, the representatives stated that the material damage they suffered must be repaired in their capacity as shareholders of El Universo, which requires technical studies that transcend the work and expertise of a human rights court. Therefore, they requested that an arbitration court be established, with the required experience, to set the amount of compensation for the damages incurred to the detriment of the shareholders and directors of *El Universo* newspaper.

190. The ***State*** indicated that the representatives did not provide evidence that proves Mr. Palacio Urrutia's salary, and that the victim left his job voluntarily, therefore, he is not entitled to compensation for pecuniary damage. The State declared that, in the event that reparation for pecuniary damage is determined, it should be limited to the time frame of the events. Similarly, the State expressed that there is no causal link between the facts of the case and the sale of Mr. Palacio Urrutia's property, or any other expenses that may have arisen from his departure from the country. Regarding the request related to the directors of El Universo, the State stated that the company El Universo was not affected, so a measure of reparation or the requirement that an arbitration tribunal determine the alleged damage is not appropriate.

191. The ***Court*** has developed in its case law the concept of pecuniary damage and has established that this supposes "the loss or detriment to the victims' income, the expenses incurred as a result of the facts and the consequences of a pecuniary nature that have a causal link with the facts of the case".[241]

192. In relation to the loss of earnings or loss of income, the Court observes that there is not enough information to determine the income that Mr. Palacio Urrutia effectively stopped receiving due to his resignation from El Universo, nor about the real economic impact that this had on his assets by having to practice his profession from the United States. Notwithstanding the foregoing, the Court considers that, considering the circumstances in which he left his job (supra par. 157 to 159), which forced his departure from the country, the victim found himself in a situation that affected his condition and employment opportunities, and that made it impossible for him to return to the country during the period between 2011 and 2017. Consequently, the Court finds it pertinent to award, in equity, an amount of USD$250,000.00 (two hundred and fifty thousand United State dollars) for loss of earnings in favor of Mr. Palacio Urrutia.

193. The Court observes that Mr. Palacio Urrutia incurred additional expenses that arose from the need to leave Ecuador to relocate to the United States of America. Although the State cannot be held responsible for all the expenses that could have been generated by reason of said transfer, it is evident that it generated expenses that had to be assumed by Mr. Palacio Urrutia and that have a direct connection with the circumstances that motivated his departure from the country. Consequently, the Court

[241] *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and Costs*. Judgment of February 22, 2002. Series C No. 91, par. 43, and *Case of Cuya Lavy et al. v. Perú, supra,* par. 211.

establishes that the State must pay him, in fairness, the amount of USD$20,000.00 (twenty thousand United States dollars) for consequential damage.

194. The Court considers that it is not appropriate to order a measure of reparation for pecuniary damage to the detriment of Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga and César Enrique Pérez Barriga, since the existence of an impairment to the assets was not demonstrated for these victims.

F.1.2. Non-pecuniary damage

195. The ***Commission*** requested that the State compensate Emilio Palacio, Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga and César Enrique Pérez Barriga for the pecuniary and non-pecuniary damages caused by the violations established in the Merits Report.

196. The ***representatives*** indicated that Mr. Palacio Urrutia saw his personal and professional life project curtailed, for which they requested that compensation be granted for non-pecuniary damage of USD$50,000.00 (fifty thousand United States dollars). Regarding the remaining victims, the representatives stated that compensation for non-pecuniary damage of USD$10,000.00 (ten thousand United States dollars) should be established.

197. The ***State*** maintained that it has not been proven that Mr. Palacio Urrutia's departure from Ecuador was forced, therefore, the alleged non-pecuniary damage cannot be assumed by the State. In relation to the non-pecuniary damage to the directors of El Universo, the State asked the Court to take into account the provisions in the Case of Granier et al. v. Venezuela.

198. The ***Court*** has developed the concept of non-pecuniary damage and has established that this "can include both the suffering and affliction caused to the direct victim and their relatives, detriment to values that are very significant for individuals, as well as non-monetary alterations in the conditions of existence of the victim or the victim's family".[242]

199. In this regard, considering the circumstances of this case, the damages caused and the violations committed, as well as the remaining immaterial consequences suffered, the Court deems it pertinent to establish, in equity, compensation equivalent to USD $30,000.00 (thirty thousand United States dollars) for Emilio Palacio Urrutia, and USD $20,000.00 (twenty thousand United States dollars) for each of the following persons: Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga and César Enrique Pérez Barriga.

G. Costs and expenses

200. The ***representatives*** stated that the amount invested by the victims in the domestic criminal proceeding was USD$2,252,937.67 (two million, two hundred and fifty-two thousand, nine hundred and thirty-seven million United States dollars). In this sense, they asked the Court, taking into account the complexity of the legal defense, to estimate the amount corresponding to costs and expenses. The victims stated that they reserve the

[242] *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and Costs*, par. 56, and *Case of Manuela et al. v. El Salvador, supra,* par. 307.

right to sue, subsequently, before an abitration body or in the national forum, any pending amount for costs and expenses. In relation to the costs and expenses incurred during the litigation before the Commission, payment of the amounts indicated in Annex 48(a) of the pleadings and motions brief is requested, which must be paid directly to the victims.

201. The ***State*** argued that the representatives did not demonstrate that the law firms that intervened in the domestic sphere had provided services exclusively in sponsoring the case, and that additionally, the invoices demonstrating such matter were not presented. Additionally, it stated that the amount requested is excessive, for which it requests that an amount of between five thousand and ten thousand United States dollars be set.

202. The ***Court*** reiterates that, in accordance with its case law,[243] the costs and expenses are part of the concept of reparation, since the activity carried out by the victims in order to obtain justice, both at the national and international levels, implies expenses that must be compensated when the international responsibility of the State is declared through a conviction. Regarding the reimbursement of costs and expenses, it is up to the Court to prudently assess their scope, which includes the expenses generated before the authorities in the domestic jurisdiction, as well as those generated in the course of the process before the Inter-American System, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment can be made based on the principle of equity and taking into account the expenses indicated by the parties, provided that their quantum is reasonable.[244]

203. In addition, the Court has indicated that it is necessary that, when dealing with alleged economic disbursements, the representatives clearly establish the items and their justification.[245] In this case, the evidence provided by the representatives and the corresponding arguments do not allow a complete justification of the amounts requested. However, the Court considers that such procedures necessarily involved pecuniary expenditures, for which it determines reasonable to establish, in equity, the payment of a total amount of US$40,000.00 (forty thousand United States dollars) for costs and expenses. Said amount must be delivered and divided equally between the lawyers who participated in the domestic litigation and those who participated in the litigation before the Commission and the Inter-American Court. In the stage of monitoring compliance with this Judgment, the Court may order the State to reimburse the victim or his representatives for the reasonable expenses incurred in said procedural stage.[246]

H. Method of compliance with payments ordered

204. The State must pay the compensation ordered for pecuniary and non-pecuniary damage and the reimbursement of costs and expenses established in this Judgment, directly to Mr. Emilio Palacio Urrutia, and for non-pecuniary damage to the persons indicated

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243 *Cf. Case of Garrido y Baigorria v. Argentina. Reparations and Costs.* Judgment of August 27, 1998. Series C No. 39, par. 82, and Case of *Manuela et al. v. El Salvador, supra,* par. 317.

244 *Cf. Case of Garrido y Baigorria v. Argentina, supra,* par. 82, and Case of *Manuela et al. v. El Salvador, supra,* par. 317.

245 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra*, par. 277 and Case of *Manuela et al. v. El Salvador, supra,* par. 318.

246 *Cf. Case of Gudiel Álvarez et al. (Diario Militar) v. Guatemala. Interpretation on Judgment on Merits, Reparations and Costs*. Judgment of August 19, 2013. Series C No. 262, par. 62 and Case of *Manuela et al. v. El Salvador, supra,* par. 319.

in the same, within a period of one year from the notification of this ruling, without prejudice to making the complete payment sooner, under the terms of the following paragraphs.

205. In the event that the beneficiaries die before the respective compensations are delivered, these will be made directly to their heirs, pursuant to the applicable domestic law.

206. The State shall comply with the pecuniary obligations by paying in United States dollars, using for the respective calculation the market exchange rate published or calculated by a relevant banking or financial authority, on the date closest to the date of payment.

207. If, for reasons attributable to the beneficiaries of the compensation or their heirs, it is not possible to pay the amounts determined within the indicated period, the State shall deposit said amounts in their favor in an account or certificate of deposit in a solvent Ecuadorian financial institution, in United States dollars, and in the most favorable financial conditions permitted by law and banking practice. If the corresponding compensation is not claimed after ten years have elapsed, the amounts will be returned to the State with the interest accrued.

208. The amounts assigned in this Judgment as compensation for pecuniary and non-pecuniary damages and as reimbursement of costs and expenses, must be delivered to the persons indicated in full, in accordance with the provisions of this Judgment, without reductions derived from possible taxes or charges.

209. In the event that the State incurs in arrears, it shall pay interest on the amount owed corresponding to bank interest on arrears in the Republic of Ecuador.

IX
OPERATIVE PARAGRAPHS

210. Therefore,

THE COURT

DECIDES,

By five votes in favor and one against:

1. Accept the State's acknowledgment of responsibility, in the terms of paragraphs 18 to 30 of this judgment.

Judge Eugenio Raúl Zaffaroni disagrees.

DECLARES,

By four votes in favor and two against, that:

2. The State is responsible for the violation of the rights to freedom of expression and the principle of legality, the right of movement and residence and the right to work, established in articles 13, 9, 22 and 26 of the American Convention on Human Rights, in relation to articles 1(1) and 2 of the same instrument, to the detriment of

Emilio Palacio Urrutia, in the terms of paragraphs 23 to 30, 87 to 127, 145 to 150, and 153 to 160 of this judgment.

Judges Eduardo Vio Grossi and Eugenio Raúl Zaffaroni disagree.

By five votes in favor and one against, that:

3. The State is responsible for the violation of the rights to freedom of expression and the principle of legality, established in articles 13 and 9 of the American Convention on Human Rights, in relation to articles 1(1) and 2 of the same instrument, to the detriment of Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga and César Enrique Pérez Barriga, in the terms of paragraphs 23 to 30, and 87 to 127 of this judgment.

Judge Eugenio Raúl Zaffaroni disagrees.

4. The State is responsible for the violation of the rights to judicial guarantees and judicial protection, established in Articles 8 and 25 of the American Convention on Human Rights, in relation to Articles 1(1) and 2 of the same instrument, to the detriment of Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga and César Enrique Pérez Barriga, in the terms of paragraphs 23 to 30 of this judgment.

Judge Eugenio Raúl Zaffaroni disagrees.

Unanimously, that:

5. The State is not responsible for the violation of the right to personal liberty established in Article 7 of the American Convention on Human Rights, in relation to Article 1(1) of the same instrument, to the detriment of Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti , Carlos Eduardo Pérez Barriga and César Enrique Pérez Barriga, in the terms of paragraphs 130 to 133 of this judgment.

6. The State is not responsible for the violation of the right to property established in Article 21 of the American Convention on Human Rights, in relation to Article 1(1) of the same instrument, to the detriment of Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga and César Enrique Pérez Barriga, in the terms of paragraphs 136 to 142 of this judgment.

AND ESTABLISHES

By five votes in favor and one against, that:

7. This Judgment constitutes, in itself, a form of reparation.

Judge Eugenio Raúl Zaffaroni disagrees.

Unanimously, that:

8. The State will adopt all necessary measures to annul the judgment passed against Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga and César Enrique Pérez Barriga and the consequences derived from it, in the terms of paragraph 171 of this judgment.

By five votes in favor and one against, that:

9. The State will carry out, within six months, the publications indicated in paragraph 173 of this judgment.

Judge Eugenio Raúl Zaffaroni disagrees.

10. The State shall adopt legislative and other measures to achieve the full effectiveness of the right to freedom of expression with respect to lawsuits for slander and insults by public officials with the aim of silencing their critics, in the terms of the paragraphs 177 to 182 of this judgment.

Judge Eugenio Raúl Zaffaroni disagrees.

11. The State will create and implement, within one year, a training plan for public officials, to ensure that they have the necessary knowledge in the field of human rights, in particular with respect to the case law of the Inter-American System for the Protection of Human Rights in relation to freedom of expression, judicial guarantees and judicial protection, in the terms of paragraph 183 of this judgment.

Judge Eugenio Raúl Zaffaroni disagrees.

12. The State will pay the amounts established in paragraphs 192, 193, 199 and 203 of this judgment, for pecuniary and non-pecuniary damage, and for reimbursement of costs and expenses, in the terms of paragraphs 204 to 209 of this judgment.

Judge Eugenio Raúl Zaffaroni disagrees.

13. The State, within one year from notification of this judgment, will submit to the Court a report on the measures adopted to comply with it, without prejudice to the provisions of paragraph 173 of this judgment.

Judge Eugenio Raúl Zaffaroni disagrees.

14. The Court will monitor full compliance with this judgment, in the exercise of its powers and in compliance with its duties under the American Convention on Human Rights and will consider this case closed once the State has fully complied with the provisions therein.

Judge Eugenio Raúl Zaffaroni disagrees.

Judges Humberto Antonio Sierra Porto, Eduardo Ferrer Mac-Gregor Poisot and Ricardo Pérez Manrique announced their individual concurring opinions, Judge Eduardo Vio Grossi announced his partially dissenting opinion, and Judge Eugenio Raúl Zaffaroni announced his dissenting opinion.

Drafted in Spanish in San José, Costa Rica in a virtual session, on November 24, 2021.

Inter-American Court. *Case of Palacio Urrutia et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of November 24, 2021. Judgment adopted in San José, Costa Rica through a virtual session.

Elizabeth Odio Benito
President

Eduardo Vio Grossi

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Eugenio Raúl Zaffaroni

Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri
Secretary

So ordered,

Elizabeth Odio Benito
President

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE HUMBERTO ANTONIO SIERRA PORTO IN THE CASE OF PALACIO URRUTIA ET AL. V. ECUADOR

I. Regarding the inadequate assessment of the violation of the right to freedom of expression

1. The case of *Palacio Urrutia et al. v. Ecuador* adds to the Inter-American Court's case law on freedom of expression, through which the broad substance of the protection granted by Article 13 of the American Convention has been established. This judgment reaffirms that the right to freedom of expression is essential for the existence of a democratic society, therefore its protection must be guaranteed with respect to the dissemination of ideas and information, even when it could be considered offensive and hurtful (par. 87). In this sense, it reiterates the importance of pluralism in the exercise of freedom of expression, for the promotion of tolerance, and to facilitate dialogue between different actors in society (par. 89).

2. In relation to the foregoing, the judgment states that the plurality of media constitutes an effective guarantee of freedom of expression, since this prevents discrimination in access to spaces for participation (par. 90). This reaffirms the importance of the State's action to prevent the existence of monopolies or oligopolies in media ownership from impeding the pluralism of voices and opinions. Actions by the State to achieve pluralism must, of course, be carried out with full respect for the rights protected in the American Convention, so they must refrain from engaging in conduct that, for the sake of democratizing access to the media, violates rights recognized under the convention (par. 93).

3. Similarly, the Judgment referred to the consistent case law on the protection of freedom of expression including both the individual and collective dimensions of this right, indicating that both dimensions are of equal importance and must be fully guaranteed simultaneously to give freedom of expression its full effect (par. 97). In its individual dimension, this right includes the right to use any means to disseminate opinions, ideas and information for it to reach the greatest number of recipients. In its social dimension, it implies the right of people to receive information and news provided by third parties (para. 98). Freedom of expression, in this way, is constituted as a right that seeks to prevent undue interference in the expression of ideas, and also guarantee that they reach their audience.

4. However, the Court has reiterated in its case law that the right to freedom of expression is not absolute. Article 13(2) of the Convention prohibits prior censorship, but provides for the possibility of establishing subsequent liability in the abusive exercise of this right, including to ensure "respect for the rights or reputation of others." Hence, the Court has recognized the possibility of such subsequent liabilities being imposed in cases in which other rights may be affected, such as the honor or reputation of individuals. For this reason, it has been argued that it is necessary to guarantee that both rights "coexist harmoniously" (par. 100). The solution to guarantee this coexistence between the different rights that are in conflict is carried out, in abstraction, by a weighting, which is carried out according to the particular characteristics of the cases brought before the Court.

5. In most of the Court's case law, the classification of the validity of the imposition of subsequent liabilities has been carried out based on the application of a proportionality test. The application of this test entails a concurrent analysis of the following requirements: a) that the sanction is previously established by law, in a formal or material sense; b) that its imposition responds to an objective established by the American Convention, such as the protection of the rights of others; and c) that it is necessary in a democratic society, for which it must meet the requirements of suitability, necessity and proportionality (par. 104-105). In this way, the Court has been able to analyze cases that involve the application of criminal or

civil sanctions for the abusive exercise of freedom of expression, when crimes of slander or insult are established.

6. The application of this analytical methodology has allowed the Court to view, with sufficient flexibility and prudence, the different cases that have involved the application of subsequent liability for statements that interfere with other rights protected by the American Convention, when there is an abusive exercise of freedom of expression that constituted a crime. This has allowed it to distinguish cases where the application of a criminal sanction for the crime of slander and libel resulted in an abuse of criminal law by the State and a violation of freedom of expression[1], from those cases where it was considered that the application of a similar sanction was legitimate considering the seriousness of the conduct of the person who issued opinions that justified the application of criminal sanctions[2]. The analytical methodology has made it possible to draw fundamental distinctions in different factual hypotheses that arise in specific cases, which adequately weight the different rights that are at stake.

7. Within this conceptual framework of analysis, the Court has established that the State can decide what sanctions are necessary to harmonize the right to freedom of expression and the other human rights that may be at stake, such as honor. Of course, the recognition of this state power is not absolute, and it has been reasoned that criminal law should be used as the *ultima ratio* in the face of the most serious attacks that damage or endanger other fundamental legal rights. Thus, criminal law should only be used when it corresponds to the existence of serious injuries to said rights, and is closely related to the magnitude of the damage that is caused. The examination of when a criminal sanction relates to the Convention is qualified taking into account the various factors that surround the necessity and proportionality of a measure, such as the nature of the statements (whether they are opinions or facts), the person to whom they are addressed, whether they are matters of public interest, and if the sanctions imposed were proportional to the damage caused.

8. For example, in the case of *Kimel v. Argentina*, it was concluded that, although the application of a criminal sanction against Mr. Kimel pursued a legitimate purpose, that is, to protect the honor of a public official, said sanction was unnecessary due to the repercussion it had on the complainant's legal interests, and it was also disproportionate. In relation to this last point, the Court considered the degree of impairment of the plaintiff's legal interests, the importance of satisfying the opposing interest, and whether the satisfaction of the first justifies the restriction of the other. It is in this analysis that it considered that "in some cases the balance will be tilted to the prevalence of freedom of thought and expression, while in others it will be tilted to safeguarding the right to have one's honor respected." When carrying out the specific analysis, the Court took into consideration that public officials are more exposed to criticism, that the threshold for protection of freedom of expression is broader in debates of public interest, and that Mr. Kimel's statements constituted opinions. Thus, the Court concluded that in the case the application of a criminal sanction was obviously disproportionate.[3]

9. In contrast, in the case of *Memoli v. Argentina*, the Court concluded that the imposition of a criminal sanction for the crime of libel did not lead to a violation of the right to freedom of expression, since said sanctions are provided for in the law, served a legitimate purpose (protecting the reputation of others) and were proportionate. As part of the analysis of proportionality, the Court took into account the analysis carried out by the domestic judicial

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1 *Cf. Case of Kimel v. Argentina. Merits, Reparations and Costs.* Judgment of May 2, 2008. Series C No. 177., par. 80.

2 *Cf. Case of Mémoli v. Argentina. Preliminary Exceptions, Merits, Reparations and Costs.* Judgment of August 22, 2013, Series C No. 265., par. 139.

3 *Cf. Case of Kimel v. Argentina*. *Merits, Reparations and Costs*. Judgment of May 2, 2008. Series C No. 177., par. 68-94.

authorities that had qualified that the said matter under analysis had overstepped the range of opinion for the purpose of slandering, and that there was an *animus injuriandi* or malice. Similarly, the Court noted that the weighting carried out by the domestic authorities between freedom of expression and the right to honor was adequate, justifying the imposition of the criminal sanction.[4] It should be noted that the case does not refer to opinions expressed on the action of public officials, nor on matters of public interest, but rather in actions between individuals. These elements, although not decisive, influence the assessment of the specific case.

10. This case differs from the way in which the Court has classified the imposition of subsequent liabilities in most of its case law, since it reiterates, following the same analysis as in the case of *Álvarez Ramos v. Venezuela*, the criterion under which an opinion article, produced by a journalist regarding the acts of a public official carrying out their duties, cannot be subject to a criminal sanction (par. 120). In this way, the judgment affirms that in the case of the article "NO to lies", since it is an opinion article criticizing the actions of then President Rafael Correa Delgado, regarding facts of well-known public interest, the existence of criminal proceedings and a sanction constitutes *per se* a violation of the right to freedom of expression in terms of Article 13 of the American Convention.

11. The position taken by the majority in this case, despite the fact that it may be motivated by noble intentions to expand the protection of freedom of expression in the region, has a series of difficulties that it is pertinent to point out. In the first place, Article 13(2) of the Convention does not exclude the possibility of a criminal sanction to ensure "respect for the rights or reputation of others", or "the protection of national security, public order or public health or morals". What it expressly prohibits is prior censorship, which is a characteristic of the broad protection of freedom of expression, but which cannot be extrapolated to other aspects without disrupting the meaning of said protection. Of course, the excessive use of criminal law to establish subsequent liability results in a violation of freedom of expression. This is not the case when it is used as a means to protect relevant legal interests (such as other rights), in accordance with the very conditions established by the Convention.

12. The precedents of the Court prior to the case of *Álvarez Ramos* have been consistent in that the classification of the crime of libel and slander must comply with the principle of legality and minimal intervention and criminal law as *ultima ratio*. In addition, that the use of criminal law for the protection of other rights must be analyzed with special caution, taking into account the intent of the person who issued the opinions, the characteristics of the damage caused, and the degree of protection given to certain statements (for example, those of public interest that involve the acts of authorities) in order to qualify whether the use of criminal law is legitimate. These conditions are analyzed when evaluating the need for the measure and when the proportionality of the sanction is assessed. It has also been recognized that the burden of proof rests with the decision maker. Thus, the Court has been able to give greater protection to speeches of opinion which have a public interest, and which refer to the authorities, without establishing an absolute rule that prohibits the imposition of said sanctions.

13. In addition to the norm, and most of the Court's case law, it is important not to lose sight of the possibility of criminal sanctions being applied in the case of the most serious violations of other fundamental rights (such as the honor and dignity) being of special relevance to maintain a healthy balance between the different rights recognized by the American Convention. It is important to keep in mind that opinions, even when referring to issues of public interest, can cause serious damage to fundamental interests for a public

[4] *Cf. Case of Mémoli v. Argentina. Preliminary Exceptions, Merits, Reparations and Costs.* Judgment of August 22, 2013, Series C No. 265., par. 129-149.

official, who is not an abstract entity but a person whose rights must be equally protected. While there could be many hypotheses, what happens if the opinion of a journalist insinuates that the actions of a public official on firing an employee in a public hospital, were motivated by racial and gender prejudice? The mere distribution of information, which may well be an opinion on a matter of public interest, is enough to cause irreparable damage to the public official's personal and professional life.

14. Therefore, my particular position is that, in cases where the expressions cause serious harm to the individual, criminal sanction may be justified when the rest of the requirements established by Article 13 of the Convention itself and developed by the Court in its case law are met. In this way, the *Palacio Urrutia* judgment follows a logic that seeks to resolve, in a dogmatic manner and establishing a strict rule, an issue that requires a casuistic evaluation based on the various factors that have been identified by the Court in its case law, some of which have been reiterated in this particular opinion. From that perspective, I consider that the precedent of the case of *Álvarez Ramos* should not be understood in the sense that there has been a modification of the content and logic of Article 13(2) of the American Convention, since this would mean a setback with respect to the possibilities of the Court to adequately address cases involving subsequent liability in matters of public interest.

15. However, despite the fact that it seems to me that the *way* in which the case has been resolved has been wrong, I consider that the final *result* is adequate. In the first place, the crime of "serious slanderous insults against authority" constituted a norm that was contrary to Article 13 of the Convention, inasmuch as it granted special protection to the authorities, when in reality the authorities are more exposed to scrutiny and therefore the threshold of protection of the norm should be lower in matters of public interest. Secondly, there is a lack of justification regarding the need for the criminal sanction, considering that the then President Correa enjoyed ample space to contradict what Mr. Palacio Urrutia pointed out, (which he, in fact, used frequently) and also the victims offered to rectify the article, which was rejected by the offended party (par. 61). Third, there was an evident lack of proportionality between the damage and the imposed sanction of 3 years in prison and the payment of more than USD $40,000,000, which also had a chilling effect on other journalists who worked at *El Universo*.

16. From the foregoing it follows that, although I disagree with the tendency to establish an absolute rule regarding the impossibility of establishing criminal sanctions in cases such as this one, I do agree with the declaration of international responsibility for violations of freedom of expression to the detriment of the victims in the case. This is the reason why I voted in favor of the Second Operative Point, although I warn, I insist, that the tendency to decriminalize the crimes of libel and slander in this case and the case of *Álvarez Ramos,* weakens the guarantee of other human rights that may be affected by the abuse of freedom of expression. At this point it is pertinent to remember that human rights are interdependent and indivisible, and the protection of some cannot be at the expense of the protection of the rest. The criteria of the Court must be adequate to cover the complexity of the legal world, especially when it is considered that domestic judges must follow the criteria of the Court.

II. Regarding the inappropriate grouping of the rights declared as violated in the case

17. In this point, it is pertinent to highlight the inadequacy of the majority's criterion for grouping the conclusions of all rights analyzed in the judgment, with respect to Mr. Palacio Urrutia, in a single operative paragraph (Second Operative Paragraph).[5] This situation once

[5] The State is responsible for the violation of the rights to freedom of expression and the principle of legality, the right to movement and residence and the right to work, pursuant to Articles 13, 9, 22 and 26 of the American Convention on Human Rights in relation to Articles 1(1) and 2 of the same instrument, to the detriment of Emilio Palacio Urrutia, pursuant to paragraphs 23 to 30 and 145 to 160 of this judgment.

again forced the members of the Court to issue a single vote in favor or against all the aspects analyzed in the central controversy, even when it is evident that each right has autonomy in the analysis of the case. The "unified" conclusion in the operative points does not make it possible to show the aspects where there are agreements or divergences among the judges. In my particular case, it did not allow me to state my differing position regarding the violation of the rights to freedom of expression and the right of movement of Mr. Palacio Urrutia, an issue with which I agree, and my dissent regarding the declaration of responsibility for the violation of the right to work in terms of article 26 of the Convention.

18. Regarding this last point, the Court declared the violation of Mr. Palacio Urrutia's right to job stability in terms of Article 26 of the Convention. My dissent regarding the use of said article as a device to analyze individual violations of ESCER, which I have pointed out on multiple occasions and reiterate in this vote, is based on the fact that article 26 of the Convention does not recognize the right to job stability and refers to the progressive obligations that the State assumes with respect to ESCER. Mr. Palacio Urrutia effectively had to leave the country due to the conflict he had with the then President and the threats he received from third parties, which led to his being granted asylum status in the United States of America (par. 149). Hence, the Judgment recognizes that there was a violation of his right to movement and residence.

19. However, it was unnecessary to address the right to job security in a differentiated manner. This is so because a) the analysis of the judgment is weakened when rights that are not recognized by the American Convention are invoked, b) the facts related to the impact that the violations in the case had on Mr. Palacio Urrutia's work could have been addressed in the sections corresponding to the analysis of the right to freedom of expression and movement, and c) the reparations in the case could have included those related to the pecuniary and non-pecuniary damage suffered by the victim due to his departure from the country, which would have included the amounts not received due to his resignation from *El Universo*. In other words, we are faced with a case where the invocation and autonomous analysis of Article 26 of the Convention is superfluous, and weakens rather than strengthens the analysis of this judgment.

III. Regarding the State's acknowledgment of international responsibility and the participation of third parties in the process

20. Finally, with regard to this concurring opinion, it is relevant to refer to the State's actions throughout the process and the objections to the legitimacy of its acknowledgment of responsibility raised by the then President Rafael Correa in the *amicus curiae* submitted to the Court (par. 11). In this regard, it should be recalled that the State acknowledged its international responsibility regarding the facts presented by the Commission and the representatives and their legal consequences regarding the criminal proceeding against the victims, as well as some specific events subsequent to said proceedings (par. 18). Rafael Correa asked to appear before the Court as a witness to present his version of the facts in the case, and when said request was rejected, he presented an *amicus curiae* brief alleging, inter alia, that the State's acknowledgment of responsibility had a political and not legal motivation, which seeks to cause damage to his image and good name (par. 11).

21. The request of the then President was rejected by the Court, at the appropriate procedural moment, because the Court's Rules of Procedure do not provide for third parties unrelated to the process to present evidence, and in this sense, the only appropriate procedural route for the presentation of factual and legal considerations was in the form of an *amicus curiae*. On the other hand, there is no doubt that the State has the power to recognize the facts, rights and reparations that it considers pertinent as part of the process, which are qualified by the Court at the time of issuing its judgment and at the time of ruling on them,

as occurred in this case. It is also clear that the determination of responsibility in a court ruling refers to the State, and not to individuals, so it was not a trial of then President Rafael Correa, but rather the actions of the authorities that produced the violations to human rights, which in this case falls fundamentally on the Judiciary.

22. However, despite the fact that the judgment is clear on each of these aspects, I consider it relevant to point out the importance that international acknowledgments of the State be carried out in response to the legal conviction that the actions of the authorities constituted violations of the American Convention, avoiding the instrumentalization of said recognitions, either to obtain political benefits from a group, or to achieve goals pursued by a government. Failure to do so may affect the legitimacy of a judgment and therefore its effectiveness. It is also important to take into consideration the importance that people outside a process, but whose image may be affected by it especially when there is an acknowledgment of responsibility, have some possibility of participation. The current Rules of Procedure do not allow this participation, but finding ways to allow such participation can be an element that contributes to the legitimacy and justice of the process.

Humberto Antonio Sierra Porto
Judge

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF THE JUDGES EDUARDO FERRER MAC-GREGOR POISOT AND RICARDO C. PEREZ MANRIQUE

CASE OF PALACIO URRUTIA ET AL. V. ECUADOR

JUDGMENT OF NOVEMBER 24, 2021 (Merits, Reparations and Costs)

I. INTRODUCTION REITERATION OF THE PRECEDENT OF THE CASE OF *ÁLVAREZ RAMOS V. VENEZUELA* REGARDING THE PROTECTION OF SPEECH IN THE PUBLIC INTEREST

1. The judgment in the *Case of Palacio Urrutia et al. v. Ecuador* (hereinafter "the judgment" or "Palacio Urrutia")[1] constitutes an important contribution to the case law regarding the right to freedom of expression. The judgment adds to the approach followed by the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court") in the case of *Álvarez Ramos v. Venezuela*, with regard to the scope of the protection granted by Article 13 of the American Convention on Human Rights (hereinafter "American Convention", "Convention" or "San José Pact") to public interest speech, specifically when it is issued by a journalist and refers to the action of public officials in the exercise of their duties.[2] Of course, the approach of the Court in this case follows, in its fundamental assumptions, the extensive case law on freedom of expression developed since OC-5/85 regarding the compulsory licensing of journalists.[3]

2. The Judgment reaffirms the Court's case law regarding the importance of freedom of expression in matters of public interest, as essential elements of a democratic society. In particular, we highlight the reference that the protection of this type of speech, even if it is critical or ungrateful to a person or a group of people, is protected by Article 13 of the American Convention. The protection of critical discourse allows the existence of pluralism of ideas, and encourages citizens to control the actions of the rulers through participation in the public sphere. In this sense, the Court has referred to the fact that, as the Inter-American Democratic Charter indicates, and the Judgment reiterates, there is a close relationship between freedom of expression and democracy, since they allow the existence of pluralism in the public sphere, which in turn is based on a spirit of openness and tolerance.[4]

3. Within this conceptual framework, it is important to highlight that the judgment reiterates the importance of plurality in the news media. This requires the State to adopt measures that allow all media to be open to all people and groups without discrimination. It also entails a two-way obligation. On the one hand, not to engage in conduct that allows people to be excluded from access to the media, and on the other, the adoption of positive measures that allow under-represented groups to be able to participate in the public sphere and the media. Thus, the importance of social media has emerged, as a central element in

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[1] *Cf. Palacio Urrutia et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of November 24, 2021.

[2] *Cf. Case of Álvarez Ramos v. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 30, 2019. Series C No. 380.

[3] *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.

[4] *Cf. Palacio Urrutia et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of November 24, 2021, par. 87-89.

the exercise of the social dimension of freedom of expression, and the consequent need for the State to adopt measures for its effective protection.[5]

4. Similarly, and fundamentally, the judgment reflects on the importance of the State adopting measures to combat oligopolies in media ownership. This obligation of the State constitutes one of the ways to guarantee the principle by which "freedom of expression goes further than the theoretical recognition of the right to speak or to write. It also includes and cannot be separated from the right to use whatever medium"[6] offers effective access to the least represented groups in society. This is so because avoiding the concentration of the media in a few hands allows minority voices in society, or those who do not have the economic resources that allow them to compete with the large media groups, to have access to spaces for public participation. Avoiding this concentration democratizes access to the media and allows a pluralism of ideas in society, strengthening democracy and increasing the effectiveness of the exercise of freedom of expression. Of course, the judgment recognizes that the fight against oligopolies can never be a reason to affect the human rights of those who work or own said media.[7]

5. In this context, the judgment pronounces on how the protection of journalism cannot be differentiated from freedom of expression, since the journalist is a person who has decided to exercise their freedom of expression in a constant and remunerated manner. Journalists must enjoy freedom, and protection by the State, to be able to collect and disseminate opinions, information and ideas, even more so when they are of public interest. For this reason, the Court has established in its case law that measures restricting the exercise of journalism also obstruct freedom of expression. At this point it should be added, and the judgment refers to this matter, that the work of journalists in society not only constitutes an exercise of the freedom of expression of those who carry out said activity, but also of those who receive that information. Thus, the protection of journalists is constituted as an aspect of the social dimension of freedom of expression, for which it requires special consideration and protection of the right.[8]

6. Hence, the judgment highlights that the recurrence of public officials before judicial instances to present actions for crimes against good name, honor or reputation, such as slander or insult, represents a threat against freedom of expression when the objective of the lawsuit is to silence the criticism that is made of them, even more so when it is aimed at de facto censoring journalists or media outlets critical of the government.[9] Later in this opinion we will refer to this particular issue, but it is important to highlight how these complaints or actions, when presented by the authorities with the aim of de facto sanctioning or censoring a media outlet or a journalist, as in fact what happened in the present case with the lawsuit filed against Mr. Palacio Urrutia and the directors of the newspaper, constitute a particularly serious incident with respect to freedom of expression. The right to freedom of expression protects both the person who sends the message and the person who receives or knows said information.

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[5] *Cf. Palacio Urrutia et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of November 24, 2021, par. 93-94.

[6] *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.

[7] *Cf. Palacio Urrutia et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of November 24, 2021, par. 93.

[8] *Cf. Palacio Urrutia et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of November 24, 2021, par. 94.

[9] *Cf. Palacio Urrutia et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of November 24, 2021, par. 95.

7. However, the Court's case law, including this judgment, has been emphatic in maintaining that freedom of expression is not an absolute right, and that although Article 13 of the Convention prohibits prior censorship, it recognizes the possibility of establishing subsequent liability for the abusive exercise of this right, for example, to secure the rights or reputation of others. In other words, the Convention provides for the possibility of regulating and imposing sanctions or other subsequent liabilities with respect to those expressions that may affect the reputation and honor of individuals. At this point it is worth mentioning that the Court has recognized that Article 11 of the Convention, which recognizes the right to honor or reputation, imposes the State obligation to protect said legal interests.

8. Based on the foregoing, the case law of the Court has stated that, when there is a conflict between both rights, for example, when a person expresses opinions that attempt against a person's honor, a weighting is necessary to determine whether the imposition of subsequent liabilities was appropriate. In this scheme of analysis, the Court has qualified in its case law that the restrictions must meet the following requirements: be established by law, respond to an objective established in the Convention, and be necessary in a democratic society. This test has served as a starting point for analysis in the Court's case law in cases that require an analysis of the validity of a sanction imposed as a result of expressions that infringe upon the honor of individuals. However, this is not the only way to analyze whether a restriction on freedom of expression constituted a violation of Article 13 of the Convention.[10] The Court's recent case law, reiterated in this case, has proposed a new form of analysis that allows a greater effectiveness of protection in cases such as this one.

9. In the case of *Àlvarez Ramos v. Venezuela* (2019), the Court addressed a particular assumption regarding the imposition of subsequent liabilities: the application of criminal sanctions regarding speeches of public interest that involved the conduct of public officials in the exercise of their duties. In the case, the victim was tried for having committed the crime of "ongoing aggravated defamation" for the publication of a journalistic piece that referred to the management of public resources by an official. The Court considered that in these cases "the State's punitive response through criminal law is not appropriate under the convention to protect the honor of an official".[11] Within its reasoning, the Court warned that the criminal response must be an exception, and that applying it in this type of speech limits freedom and prevents subjecting acts of corruption, abuse of authority, etc. to public scrutiny. In other words, based on this precedent, the Court considered that the Convention prohibits the imposition of a criminal sanction in the particular case addressed.

10. The Case of *Palacio Urrutia* reiterates the aforementioned thesis. It concluded that, given a speech of public interest, which constituted an opinion on the part of Mr. Palacio Urrutia regarding the actions of then President Rafael Correa in the exercise of his duties, the criminal sanction imposed on the victims violated their right to freedom of expression. The Court also developed some aspects that are equally relevant. In the first place, it recognized that the sanctions or civil responsibilities that are imposed in this type of case, although they are not per se outside the convention, like the criminal sanctions, must be duly reasoned, be proportional, and not be aimed at affecting freedom of expression of the person issuing said opinion, or of those who work in a media outlet. Thus, the imposition of

[10] *Cf. Palacio Urrutia et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of November 24, 2021, par. 100-109.

[11] *Cf. Case of Álvarez Ramos v. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 30, 2019. Series C No. 380, par. 121.

a sentence of this nature may also constitute an infringement of freedom of expression pursuant to Article 13 of the Convention. This was the situation in this case.[12]

11. Secondly, and based on the above, the Court determined that, as a measure of reparation, the State should adopt legislative and other measures in order to make its domestic law compatible with the obligations established in the judgment. In particular, the State authorities had to carry out a control of conventionality to prevent the criminal law that protects honor from being applied in cases such as that of Mr. Palacio Urrutia. Additionally, legislative measures should be adopted so that criminal proceedings are not used by public officials to claim protection of their honor in cases where speeches of public interest were made that could have constituted insults or slander against them when they were carrying out their duties. This reparation measure, although it is applicable only in this specific case, is the logical consequence of criminal sanctions being outside the convention in the assumption analyzed in the case.[13] It is a solution that the judgment proposes in this specific case, but that must serve as a basis for actions that States could carry out in the future to avoid incurring international responsibility.

12. With the above in mind, we will now delve into two aspects that, although they have already been addressed in the previous paragraphs, are of special relevance for the future of the protection of freedom of expression in the region, 1) the importance of the anti-SLAPP measures, and 2) the scope of the protection of freedom of expression in the case of speeches of public interest.

II. ANTI-SLAPP MEASURES: AN EFFECTIVE PRACTICE FOR THE PROTECTION OF FREEDOM OF EXPRESSION

13. The term "SLAPP" is an acronym for the expression "Strategic Lawsuit Against Public Participation". This term refers to legal actions, whether of a criminal or civil nature, that are filed not to vindicate a just legal claim by a person whose honor or good name has been affected, but to punish or harass the defendant for participating in public life. Defendants facing so-called "SLAPP lawsuits" may include journalists and traditional media organizations, but also individuals and companies in other sectors who express opinions on issues of public interest, in the media, marketing, or any other form of participation in the marketplace of ideas.

14. The "strategy" of a SLAPP lawsuit is to burden the defendant with litigation costs so burdensome that they desist, cease or retract their speech, or face the threat of jail time or monetary damages so high that produce an effect of self-censorship and retraction of a statement. Given this, in some latitudes the creation of "anti-SLAPP" laws has been promoted. These laws seek to deter SLAPP lawsuits by increasing the legal protections available to defendants. These laws allow the defendants a remedy to dismiss lawsuits that lack legal basis, or that seek to indirectly censor those who issue statements that make a certain person or sector uncomfortable (such as a government official or a business group), especially when these issues include criticism of the government and are matters of public interest.

15. The Ontario legislation is a relevant example of the type of provisions that have been made to combat the SLAPP. In 2015, in an effort to address lawsuits aimed at silencing or

[12] *Cf. Palacio Urrutia et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of November 24, 2021, par. 111-127.

[13] *Cf. Palacio Urrutia et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of November 24, 2021, par. 177-182.

intimidating critics, the "Protection of Public Law Act"[14] was enacted. One of the purposes of the law is to discourage lawsuits that seek to limit freedom of expression in matters of public interest, and thus reduce the risk of participation in such matters. To achieve this, said law establishes mechanisms that allow a judge to dismiss this type of lawsuit when it is noticed that it refers to a matter of public interest, except in the exceptions that the norm itself provides. These exceptions refer, inter alia, to cases where the judge finds that the damage suffered by the plaintiff could exceed the public interest of the expression that generated it.[15]

16. The judgment addresses the problems raised by the SLAPP suits at three different points that it is important to highlight and understand in an interrelated manner. In the first place, the Judgment made a general consideration regarding the need for the protection that freedom of expression offers to journalists, so that they can gather, collect and disseminate their ideas. The importance of protecting journalists is essential not only for the individual protection of the freedom of expression of those who carry out journalistic activities, but also for those who receive the message that it transmits, that is, in its social dimension. In this way, the judgment affirms that the SLAPP lawsuits directed against those who speak publicly, constitute a threat to freedom of expression, and therefore constitute an abusive use of judicial mechanisms that must be regulated and controlled by the States.[16]

17. In relation to the foregoing, the duty to create alternative mechanisms to criminal proceedings is established so that public officials obtain a rectification or response when their honor or good name has been injured. The aforementioned protection is directly linked to the *Álvarez Ramos* precedent and can be understood as a protection for the exercise of journalism in the logic of anti-SLAPP laws, to the extent that it prohibits the use of criminal law to claim protection for the honor or good name of public officials, and establishes that civil penalties must be proportionate. This is one more protection for freedom of expression, which may be especially relevant in cases where the authorities use judicial mechanisms to silence political opponents, which excludes the possibility of criminal sanctions in certain cases. In the Court's words:

> This Court also considers that media pluralism and diversity constitute substantial requirements for an open and free democratic debate in society. This requires the following: (A) on the part of the State, compliance with the duty to respect and adopt decisions and policies that guarantee the free exercise of freedom of expression and freedom of opinion of the media. Similarly, establish, for the protection of the honor of public officials, alternatives to the criminal process, for example, rectification or response, as well as the civil pathway. This includes renouncing the use of stigmatizing speeches or practices against those who speak publicly and all types of harassment, including judicial harassment, against journalists and people who exercise their freedom of expression, and (B) it is up to the media to contribute to the strengthening of the democratic and participatory system, respectful of human rights, in accordance with the principles of the Democratic Rule of Law (contained in the Democratic Charter), in a context of plural and diverse media without discrimination or exclusions, as the Court has stated from Advisory Opinion OC-5/85. In short, the particular interests of its owners must not constitute an obstacle to the debate that implies indirect restrictions on the free circulation of ideas or opinions.[17]

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[14] *Cf.* Protection of Public Participation Act, 2015, S.O. 2015, c. 23 - Bill 52

[15] *Cf.* Protection of Public Participation Act, 2015, S.O. 2015, c. 23, 137.1 (4) (b).

[16] *Cf. Palacio Urrutia et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of November 24, 2021, par. 95.

[17] *Cf. Palacio Urrutia et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of November 24, 2021, par. 96.

18. However, subsequently, the judgment states that the prohibition of the use of criminal law to sanction crimes against honor is only the first element of the protection of freedom of expression since, as stated in the text, it is possible that a civil sanction is equally or more inhibitory of speech when it imposes sanctions that are disproportionate. In this case, it was demonstrated how the imposition of a sentence that implied the payment of thirty million dollars by Mr. Palacio Urrutia and the directors of *El Universo* newspaper, and ten million dollars by the El Universo Limited Company, had an impact on the exercise of freedom of expression of the victims in the case, and on the rest of the workers of the media outlet in which they worked. From the statements presented in the process, it was inferred that the media employees also suffered an impact on their work as a result of the criminal process and the sanction that was imposed on the victims. Hence, the judgment sanctioned the violation of freedom of expression due to the imposition of the disproportionate civil sanction.[18]

19. In this regard, it should be noted that the imposition of disproportionate civil penalties in proceedings involving violations of the right to honor have been sanctioned by the European Court of Human Rights (hereinafter, "European Court") as causes of the violation of freedom expression. In the *Case of Tolstoy Miloslavsky v. the United Kingdom*, said Court recognized that even in those cases where there is a seriously defamatory statement for which significant compensation is due, the sanctions imposed should be assessed in accordance with the right to freedom of expression, and therefore, should maintain a proportional relationship with the reputational damage suffered. In this framework of analysis, in the face of a disproportionate sanction for an act of defamation, there is a violation of Article 10 of the European Convention on Human Rights.[19] In a similar logic, in the *Case of Filipović v. Serbia*, it understood the following:

> "the amount of compensation awarded must "bear a reasonable relationship of proportionality to the ... [moral] ... injury ... suffered" by the plaintiff in question (see *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A no. 316-B, § 49; see also *Steel and Morris v. the United Kingdom*, no. 68416/01, § 96, ECHR 2005, where the Court held that the damages "awarded ... although relatively moderate by contemporary standards ... [were] ... very substantial when compared to the modest incomes and resources of the ... applicants ... " and, as such, in breach of the Convention)."[20]

20. In a similar vein, in the case of *Independent Newspaper v. Ireland*, the European Court indicated that the determination of high compensation for damages require a thorough examination of proportionality as restrictions on freedom of expression, even when they have not shown a chilling effect. In addition, it was indicated that in cases where a high amount of compensation is established, it should also be evaluated whether there are guarantees that allow protection against compensation that is disproportionate with respect to the established amount and damage to reputation.[21] In the specific case, the violation of freedom of expression was determined due to the absence of adequate guarantees that would prevent disproportionate compensation by a jury.[22]

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[18] *Cf. Palacio Urrutia et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of November 24, 2021, par. 121-126.

[19] *Cf.* ECHR. *Tolstoy Miloslavsky v. The United Kingdom*, Judgment of July 13, 1995.

20 ECHR, *Filipovic v. Servia*, November 20, 2007, par. 56.

[21] *Cf.* ECHR. *Independent Newspapers (Ireland) Limited. c. Ireland*, June 15, 2017, par. 113.

[22] *Cf.* ECHR. *Independent Newspapers (Ireland) Limited. c. Ireland*, June 15, 2017, par. 132.

21. Thirdly, as a logical consequence of the analysis of the violations in the specific case, and of the aforementioned considerations regarding the limits of the use of criminal and civil law for the determination of subsequent liabilities, the judgment established a measure of reparation that must be understood in three complementary dimensions. First, it ordered that the State authorities, and in particular the judges, carry out a control of conventionality in such a way as to avoid the initiation of criminal proceedings for slander against journalists who issue opinions on matters of public interest in which they question the action of the authorities in the exercise of their duties, and that the principle of proportionality be respected in the imposition of civil sanctions. This measure was issued in this way because the regulations applicable in the case of the victims in the case had already been modified and no manifest incompatibility between the new regulations and the Convention was observed.[23]

22. Second, the State was ordered to adopt legislative measures that prevent public officials from going to court to file lawsuits for slander and insults with the aim of silencing their critics. This reparation measure is directly related to the prohibition of the use of criminal law to sanction critical speech against the authorities in the terms indicated in the judgment, but it is also a reparation measure that represents an opportunity for the State to adopt anti- SLAPP provisions. In this way, it opens the door for the creation of procedural mechanisms that prevent civil lawsuits from silencing or disproportionately affecting those who are sued by the authorities, especially journalists or the media. Behind this measure is, as the judgment points out, the objective of allowing the plurality and diversity of the media, and preventing the authorities from indirectly affecting the journalistic and communication activities they carry out.[24]

23. Third, the Judgment ordered training courses for public officials regarding the standards of the Inter-American System for the Protection of Human Rights in relation to freedom of expression, judicial guarantees, and judicial protection. This measure is the corollary of the two previous measures, since in order for judicial officials to carry out an adequate control of conventionality and apply the current regulations in criminal and civil matters related to damages to the honor of public officials, it is necessary that they have the theoretical and practical tools that allow them to respect and guarantee freedom of expression.[25] On this point it is important to highlight that the protection of freedom of expression requires that the judges and prosecutors themselves be in charge of preventing the administration of justice system from being used as a means to censor journalists critical of the government.

24. The Judgment presents a first approach to the conceptualization in the Court's case law regarding the obligation of the States to protect freedom of expression through anti-SLAPP measures or laws. These measures are aimed at preventing the establishment of subsequent liabilities from allowing the existence of lawsuits or other judicial actions that have the practical effect of excluding journalists, or other people who speak in the public sphere. Article 13 of the Convention does not expressly provide for this obligation, but it is essential that the interpretations of the scope of the Convention are aimed at achieving the useful effect of its provisions. SLAPP suits constitute serious attacks on freedom of expression, therefore the interpretation of Article 13 of the Convention must be consistent

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[23] *Cf. Palacio Urrutia et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of November 24, 2021, par. 177-182.

[24] *Cf. Palacio Urrutia et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of November 24, 2021, par. 182.

[25] *Cf. Palacio Urrutia et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of November 24, 2021, par. 183.

with current demands for the protection of the right to freedom of expression, even more so considering the importance of the protection of the work of journalists and the media for democracy and pluralism in our societies.

III. THE PROTECTION OF FREEDOM OF EXPRESSION REGARDING OPINION SPEECH IN THE PUBLIC INTEREST

25. Both the precedent of the Case of *Álvarez Ramos* and this judgment recognize special protection for opinion speech made by journalists, regarding the actions of public officials carrying out their duties, when it comes to matters of public interest. As we have previously pointed out, this criterion prohibits the criminalization of journalists and the media in this case, as a measure of protection of their freedom of expression and of those who receive the message they transmit, which is fundamental to the existence of a democratic, tolerant and plural system. From this perspective, the approach that the Court has taken since 2019 represents progress with respect to the scope of the protection established in Article 13 of the American Convention, since it gives greater protection to speech in the public interest against attacks by the authorities whose objective is to silence those who criticize them for their actions as rulers.

26. However, it is important to point out the versatile space that the criterion reiterated in this judgment has, because although the factual assumptions that have been addressed in *Àlvarez Ramos* and in *Palacio Urrutia* have referred to opinion articles issued by journalists regarding public officials carrying out their duties, the protection of opinion speech and public interest may be broader than this particular assumption. In this sense, in the first place, it is possible to note that international human rights law has recognized a greater protection of opinions, which can be deduced from the fundamental importance that the protection of speech must have in order to achieve the effective participation of people, and in particular journalists, in the public sphere, and in this way sustain and increase democracy and pluralism. The paradigmatic example in this regard is article 19 of the International Covenant on Civil and Political Rights, which establishes that "[n]o one shall be harassed because of his opinions."

27. This high level of protection has been reflected in other authorized international sources, such as the Joint Declaration of the rapporteurs on freedom of expression of the UN and the OAS for the year 2000.[26] In said Declaration, it was pointed out that all States should review their defamation laws so that they are compatible with freedom of expression, and in particular that no one should be prosecuted for said criminal offenses for expressing opinions. In the same vein, the UN Human Rights Committee has declared that defamation "should not be applied with regard to those forms of expression that are not, by their nature, subject to verification".[27] The European Court has also upheld high protection for opinions regarding laws that sanction defamation. In the Case of *Dichand and Ors v. Austria*, it held that, unlike the facts, opinions cannot be proven and therefore should enjoy broader protection. [28] Following the same logic, the Inter-American Court stated the following in the Case of *Kimel v. Argentina*:

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[26] *Cf.* Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression. Current Challenges to Media Freedom, London, November 30, 2000, available at: https://www.osce.org/files/f/documents/c/b/40190.pdf.

[27] *Cf.* UN Human Rights Committee. General Observation nº 34. Article 19. Freedoms of opinion and expression, September 12, 2011, par. 47.

[28] *Cf.* ECHR. *Dichand and Ors c. Austria*, February 26, 2002, par. 42.

> The opinions expressed by Mr. Kimel can neither be deemed to be true nor false. As such, an opinion cannot be subjected to sanctions, even more so where it is a value judgment on the actions of a public official in the performance of his duties. In principle, truthfulness or falseness may only be established in respect of facts. Hence, the evidence regarding value judgments may not be examined according to truthfulness requirements.[29]

28. In addition, various instances have recognized the highest level of protection for speech related to issues of public interest, and in particular that referring to criticism directed at public officials. In the case of *Lingens v. Austria*, the European Court noted that politicians must show greater tolerance for media criticism, noting that "in these cases, the requirements of such protection must be weighed against the interests of a open debate on political questions".[30] In *Memére v. France*, it established that certain remarks by the petitioner, which strongly criticized the actions of a public official in a television debate, were political expressions that therefore enjoyed a high level of protection, which implied a narrow margin of appreciation for the imposition of a sanction by the French authorities.[31]

29. Similarly, the UN Human Rights Committee has stated that "the communication of information and ideas on public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media capable of commenting on public affairs without censorship or restriction and of informing public opinion".[32] In this regard, in short, it is essential to point out that the existence of an open and plural public debate requires safeguards for criticism of public officials, which in turn requires special protection for journalists and the media, and the recognition that political actors often have access to the media to respond to the criticism they are subjected to. The asymmetry between the position of the citizen, or the journalist, and the ruler justifies the special protection for speech in the public interest.[33]

30. On the other hand, in the States' domestic sphere, it is possible to observe that, although defamation continues to be criminalized in the codes, and this criminalization is not per se incompatible with international law, there is a trend towards the decriminalization of this behavior. As indicated by the expert witness Toby Mendel before the Court, countries such as Ghana, Estonia, Jamaica, Mexico and Zimbabwe have suppressed this type of regulation.[34] For its part, in the inter-American sphere, the American Declaration on Freedom of Expression, adopted by the Inter-American Commission, has indicated that the protection of reputation "should be guaranteed only through civil sanctions, in cases in which the person offended is an official or public or private person who has been voluntarily involved in a matter of public interest.[35]

31. The UN Human Rights Committee has reached a similar conclusion, and in this sense it has maintained that "the States parties should consider the possibility of decriminalizing

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[29] *Case of Kimel Vs. Argentina. Merits, Reparations and Costs.* Judgment of May 2, 2008. Series C No. 177., par. 93.

[30] *Cf.* ECHR. *Lingens v. Austria*, July 8, 1986, par. 43.

[31] *Cf.* ECHR, *Mamére v. France*, November 7, 2006.

[32] *Cf.* Human rights Committee, General Comments 25, UNDoc CCPR/C/21/Rev.1/Add/7 (1996), par. 25.

[33] *Cf.* ECHR, *Otegi Mondragon v. Spain,* November 15, 2011, par. 54.; *Tusalp v. Turkey*, February 21, 2012, par. 44, and *Thoma v. Luxembourg*, March 29, 2001.

[34] *Cf.* Report of Toby Mendel, par. 61.

[35] Adopted in the 108th Ordinary Session of the Inter-American Commission on Human Rights, October 19, 2000.

defamation and, in any case, criminal law should only be applied in the most serious cases".[36] The European Court decided, in the Case of *Castells v. Spain*, that it continues "to be possible for the competent State authorities to adopt, in their capacity as guarantors of public order, measures, including criminal measures, aimed at reacting appropriately and without excesses to defamatory accusations unfounded or made in bad faith".[37] It thus follows from the position of said Court that criminal sanctions for defamation could be appropriate in limited circumstances, establishing that their application must be made in matters related to the guarantee of public order that are especially serious, and not to protect a person's reputation.[38]

32. The aforementioned standards and criteria suggest the existence of a trend: that opinion discourse dealing with matters of public interest enjoys special protection, and that the criminalization of defamation is not the only measure, nor the ideal measure, to protect honor and reputation. By contrast, the recognition of civil proceedings or the exercise of the right of rectification or response are noted as adequate mechanisms to protect honor, being the most favorable approach for freedom of expression. An advanced interpretation of Article 13 of the American Convention, in accordance with the factual realities of our times and the progress of regional and international law on the matter, allows the scope of freedom of expression to be interpreted more broadly than what is indicated in this case, establishing that the criminalization of opinion speech and speech in the public interest is prohibited by the American Convention, with the civil route and the right of reply being the appropriate means for the protection of honor and reputation.

IV. CONCLUSION

33. The judgment represents a point of maturation in the case law on freedom of expression, as it reaffirms the interpretation previously made in the Case of *Álvarez Ramos*. This last judgment extended the scope of protection to freedom of expression by prohibiting the use of criminal law to punish opinion speeches that refer to the acts of public officials carrying out their duties, and that address issues of public interest. In addition to this, in the specific case, reflections of a general nature were made, and guarantees of non-repetition were established, which are based on the belief that the States must adopt alternative mechanisms to criminal proceedings for public officials to appeal against acts that they consider violate their honor or dignity. This aspect opens the door to reflect on the need and importance of anti-SLAPP measures, as a means to avoid strategic demands whose purpose is to censor critical opinion, and the need to continue strengthening the robust protection of freedom of expression granted by the American Convention, by strengthening the protection of opinion speech and freedom of expression on matters of public interest.

Eduardo Ferrer Mac-Gregor Poisot
Judge

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[36] *Cf. UN Human Rights Committee*. General Observation nº 34. Article 19. Freedoms of opinion and expression, September 12, 2011, par. 47.

[37] ECHR. *Castells v. Spain*, April 23, 1992, par. 46.

[38] Report of Toby Mendel, par. 65.

Ricardo C. Pérez Manrique
Judge

Pablo Saavedra Alessandri
Secretary

**PARTIALLY DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI,
INTER-AMERICAN COURT OF HUMAN RIGHTS,
CASE OF PALACIO URRUTIA ET AL. V. ECUADOR,
JUDGMENT OF NOVEMBER 24, 2021
(Merits, Reparations and Costs).**

This vote is issued with the purpose of expressing disagreement with the provisions of Operative Point No. 2[1] of the above judgment, as well as making a comment on Operative Point No. 1.[2]

Regarding Operative Point No. 2, it reiterates what was expressed in the partially dissenting vote issued by the undersigned in relation to the *Case of Guachalá Chimbo et al. v. Ecuador* of March 26, 2021, a brief that, therefore, is considered reproduced and made part of this document.

In regard to Operative Point No. 1, it should be noted that the undersigned voted affirmatively, taking into account the absence in the record of facts that substantiated it. The *amicus curiae* presented by former President Correa could not fulfill this task[3] and the applicable procedural rules do not provide for an institution analogous to the one that in some national laws is called third parties, that is, people outside the *litis* but who feel they are affected by what is ruled therein.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary

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[1] The State is responsible for the violation of the rights to freedom of expression and the principle of legality, the right of movement and residence and the right to work, established in articles 13, 9, 22 and 26 of the American Convention on Human Rights, in relation to articles 1(1) and 2 of the same instrument, to the detriment of Emilio Palacio Urrutia, in the terms of paragraphs 23 to 30, 87 to 127, 145 to 150, and 153 to 160 of this judgment.

[2] "Accept the State's acknowledgment of responsibility, pursuant to paragraphs 18 to 30 of this Judgment."

[3] Art.2(3) of the Inter-American Court of Human Rights*:* " the expression "*amicus curiae*" refers to the person or institution who is unrelated to the case and to the proceeding and submits to the Court reasoned arguments on the facts contained in the presentation of the case or legal considerations on the subject-matter of the proceeding by means of a document or an argument presented at a hearing".

DISSENTING VOTE OF
JUDGE EUGENIO RAUL ZAFFARONI

CASE OF PALACIO URRUTIA ET AL. V. ECUADOR

JUDGMENT OF NOVEMBER 24, 2021
(Merits, Reparations and Costs)

I
PRELIMINARY ARGUMENT

1. I advise that, in my opinion, the various elements contained in these files, those presented at the hearing, those emanating from the Inter-American Commission on Human Rights' documents, the United Nations Special Rapporteur on the Independence of Judges and Lawyers and this Court, the news broadcast by the national and international press, as well as the information that is public and common knowledge, are sufficiently precise and concordant, to consider it proven that the State voluntarily placed itself in a defenseless situation before this Court.

2. As a consequence of the defenseless position taken by the State, there has not been a true adversarial process in the proceedings undertaken before the System and the Court. Therefore, and according to the arguments that I will develop below, I consider that the central problem of this case is the *inadmissibility of the singular acknowledgment made by the State*.

3. Given that the factual framework allows us to verify that in Ecuador there is a manifest and fierce political struggle dividing the country that generated a complex institutional reality, the set of elements mentioned above builds a picture that allows us to conclude that the singular attitude assumed by the State seeks a conviction that affects a notorious leader of the main opposition party, not only politically but also financially (via a curious system of automatic repetition).

4. Thus, he and his political movement would be the convicted party, *real or ontic*, but before the Court they are deprived of the right of defense, as they are not the *formal subjects* of the conviction.

5. I will go on to analyze, in particular, the elements that lead to this conclusion, without prejudice to highlighting other issues, arising from the central and unavoidable fact of the *inadmissibility of the conspicuous recognition by the State*.

II
CONTEXT OF THE CASE

II.1. What is meant by "context"?

6. To weigh up all the elements of the case, it is essential to refer to what this Court has invariably considered as the *context* of the facts submitted to its jurisdiction on each occasion.

7. No human behavior operates in a vacuum and the law can only judge human interactions, which always take place under given circumstances, that is, in a certain situational constellation in time. Behaviors operate in the chronological concatenation of *temporality* (*Zeitlichkeit*) inherent in everything human.[1]

[1] *Cf.* Martin Heidegger, *Sein und Zeit [Being and Time]*, Tübingen, 1953, pp. 231 *ff*.

8. These circumstances allow a full understanding of the sense and meaning of the conduct to be judged that, incidentally, is not exhausted with the conduct itself, since it is a matter of evolving with its past and its continuity in the present, which could well be described as *Heraclitean*.[2]

9. In the realm of reality, interactive human behaviors are judged in their own environment and, therefore, in all cases an adequate weighting of that environment is essential for the correct understanding of the matter that is submitted to the judges for their legal assessment or dismissal.

10. In accordance with what has been stated, as is the Court's custom, the matter to be judged must be framed in its corresponding context, which recognizes a past and which is not terminated, abruptly or without consultation, at the time the imputed act took place or was committed, since it would be quite arbitrary to omit the details that previously or subsequently may shed light on occurrences, with a natural impact on the justice of the decision taken. In any case, appealing to the well-known Augustinian aporia, it is clear that, without the past and the future, only a dividing line would remain between two *voids of being*.

11. It can be said that in practically all cases this Court has proceeded considering both the precedents and the subsequent events. This criterion is imposed because, without evaluation of prior events, it is often not possible to establish the intentionality of an act. Without weighing subsequent events it would never be possible to know, for example, whether or not the measures of non-repetition, frequently established in the judgments of this Court, are fair.

12. Accordingly, in the case of *Acosta et al. v. Nicaragua*, the Court stated: *The factual framework of the process before the Court is constituted by the facts contained in the Merits Report submitted for its consideration. Consequently, it is not admissible for the parties to allege new facts other than those contained in said report, without prejudice to exposing those that explain, clarify or reject facts that have been mentioned in it and submitted to the consideration of the Court. The exception to this principle are facts classified as supervening or when these facts are known or evidence about them is later accessed, provided that they are linked to the facts of the case.*[3] It has made similar rulings in cases such as *I.V. v. Bolivia*[4], *"Five Pensioners" v. Peru* [5], *Herrera Espinoza et al. v. Ecuador*[6].

13. The Court's case law on this point has been peaceable in terms of accepting the inclusion of supervening facts as long as they are related to the facts of the case. In this regard, in the Case of *the Mapiripán Massacre v. Colombia*, it stated: "*This Court has the power to make its own determination of the facts of the case and to decide legal aspects not alleged by the parties based on the principle of iura novit curia. That is to say, although the action constitutes the factual framework of the*

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[2] Cf. his fragments in *Heraclitus, Parmenides, Empedocles, The Presocratic Wisdom*, Madrid, 1985; Martin Heidegger – Eugen Fink, *Heraclitus*, Barcelona, 1986; Rodolfo Mondolfo, *Ancient Thought*, Buenos Aires, 1974

[3] *Cf. Case of Acosta et al. v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs.* Judgment of March 25, 2017. Series C No. 334, par. 30.

[4] *Cf. Case of I.V. v. Bolivia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 30, 2016. Series C No. 329, par. 45.

[5] *Cf. Case of "Fiver pensioners" v. Peru, Merits, Reparations and Costs.* Judgment of February 28 2003. Series C No. 98, par. 154, 155.

[6] *Cf. Case of Herrera Espinoza et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 1, 2016. Series C No. 316, par. 41.

process, it does not represent a limitation to the Court's powers to determine the facts of the case, based on the evidence presented, on supervening facts, on complementary and contextual information in the file, as well as commonly or publicly known facts that the Court deems relevant to include in the set of said facts."[7]

14. The contextual inclusion of subsequent facts is not unique to this Court's practice and case law, but rather it is common in all punitive proceedings, where they are usually called *supervening facts*. Even in the most rigid of these processes, the criminal process itself, they are admitted after the sentence, although by the exceptional route of extraordinary review, since in this matter they give up nothing less than the principle of intangibility of *res judicata*. This Court has ordered the incorporation of supervening facts to a criminal proceeding by ordering a State to review the irrational *res judicata* surrounding them.[8]

15. Even less acceptable is the thesis that the Court would only be allowed to incorporate into the context of each case the data provided by the Inter-American Commission, given that it plays the accusatory role in its courts of law.

16. Although the prosecution defines and closes the matter to be judged, this does not limit the assessment of the circumstances in which it is immersed, fundamentally because these may well benefit the defense.

17. In all punitive proceedings, the rule according to which the accusation specifies and delimits the accusation, constitutes a guarantee for the accused, since it specifies the terms within which to articulate their defense, but in no way can this guarantee be perversely reversed to the detriment of that defense, depriving them of pleading and proving before the Court the circumstances before and after the fact, that is, their reality.

18. It would not be logically or legally admissible that, in any matter to be tried, it is intended that the specification made by the prosecution as a guarantee that they will be tried for that fact and not another, deprives the accused of the right to allege prior or subsequent circumstances that prove the non-existence of the fact, their non-involvement in it or even some cause of justification or exculpation (provocation, aggression, necessity, etc.).

II.2. Preliminary facts

II.2.a. The popular referendum and the decision of this Court in 2018[9]

19. Understanding the context in the manner presented, which is none other than that which is consistent throughout the Court's case law, it is possible to verify that, in the context of this case, there are significant prior facts that are highly relevant to the adoption of the decision and that refer to previous decisions of this very Court.

20. The most important of these is the decision by the Court majority in 2018, an occasion on which it did not grant the provisional measures requested by the Commission in order to suspend the dismissal of three members of Ecuador's Council of Citizen Participation and Social Control, taking into account that body's very important powers in accordance with the State Constitution.

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[7] *Cf. Case of the Mapiripán Massacre v. Colombia. Merits, Reparations and Costs.* Judgment of September 15, 2005. Series C No. 134, par. 58.

[8] *Cf. Case of Acosta et al. v. Nicaragua, supra*, par. 155 a 169.

[9] *Cf. Matter of Edwin Leonardo Jarrín, Tania Elizabeth Pauker Cueva and Sonia Gabriela Vera García, Request for Provisional Measures regarding Ecuador, of February 8, 2018. Opinion of Judge Zaffaroni.*

21. On that occasion, and based on a popular consultation convened by the Executive Branch without a prior review of constitutionality by the highest national court, as required by the State Constitution, the Executive Branch was given the power to remove the directors of that body and to nominate others. The majority of the Court decided that it was an issue that should be resolved as a matter of *merit*, without the provisional measures requested by the Commission being appropriate at that moment.

22. I then pointed out in my dissenting opinion: *The question of merit, which the Court cannot know in proposing mere provisional measures, is whether the removal of the Councilors affects the democratic structure of the State, and what would happen if it means a concentration or distortion of power that leads to disregard of plural democracy. Although popular consultation, the referendum, the plebiscite and other forms of direct democracy do not affect the democratic system in principle, since they are provided for in many constitutional systems, there are undeniable and sad historical experiences, even theorized and rationalized in the doctrinal field, which, by these or by other means, where the circumstantial majority result was used to suppress the rights of the minority, rights whose preservation forms the essence of the concept of open society. Cf. Peter Häberle, Europäische Verfassungslehre, Nomos, Baden-Baden, 2006, p. 299.*

23. I added at the time that there was a serious risk of undermining plural democracy by granting excessive powers to the executive that called for the consultation, close to the apex of public authority, with the possibility that the system would develop into one of the so-called *plebiscitary* democracies of the type postulated by Carl Schmitt[10], which would be contrary to the prescription by numerous international instruments that are well known enough not to need stating.

24. In this regard I pointed out: *It is widely known and emphasized by the constitutional doctrine of democratic States of law that, although the majority principle is the basis of democracy, it should not be understood in an absolute sense, since such an understanding, in its extreme limit, it would give rise to a totalitarian democracy (Cf. Livio Paladin, Diritto Costituzionale, Padova, 2006, p. 263), like the one established in the old Soviet constitution, since it would not guarantee the possibility of alternation in power (cf. Enrico Spagna Musso, Diritto Costituzionale, Padova, 1992, p. 151). The general principle seems to be that the majority cannot deny the rights of the minority, since doing so would deny the majority's own right to change their minds. Similarly, the limits of any constitutional reform and even the existence of the so-called "eternal clauses" are widely debated and problematic in this sense, as would be the republican principle for us (cf. Peter Häberle, El Estado Constitucional, Buenos Aires, 2007, p. 258).*

25. I concluded on that occasion maintaining that the position of the majority, according to which it was an issue that should be resolved in its entirety as a matter of *merit* and without distinguishing what at the time corresponded to a provisional measure, taking into account the prolonged processing time to reach the *merits* stage, would allow irreparable institutional damage to occur: *If the Councilors for whom provisional measures are requested are replaced before the State submits the conflict to its highest internal instance, the possible alleged injury to the democratic system would have been committed, given that in the event that the highest national court found that the petitioners were right, the new Councilors would have been able to carry out acts whose legal validity would be questionable or invalid, with very serious injury to legal certainty and the stability of the rights of the citizens.*

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10 *Der Begriff des Politischen*, (1932), Berlin, 1963.

26. For these reasons, I distanced myself from the highly respectable opinion of the majority and voted *to summon the State so that, within a reasonable time period, it empowers the jurisdiction of its highest court to hear the case and decide on it, without prejudice to the fact that, meanwhile, the three Directors should be kept in office until the highest national instance rules on the issue of merit.*

II.2.b. Recent admissibility of the merits claim

27. Unfortunately, the fear I expressed on that occasion regarding the possible consequences of this Court's refusal to grant the provisional measures requested by the Commission was confirmed, apparently even to a greater extent than I could have imagined at the time, to the point that on September 7, 2021, the Commission declared as admissible the merits raised by the removed directors and complainants in terms that can be summarized as follows:

28. Pursuant to article 207 of the Constitution, the Council is made up of seven directors who perform their duties for a period of five years. Article 205 provides that they have the jurisdiction of the National Court and can only be removed by impeachment, in which case they must be replaced according to a new appointment process, without the Legislature being able to designate the replacements. The petitioners before the Commission were appointed for the period 2015-2020.

29. In September 2017, the executive announced that it would call for a popular consultation and the following month sent the respective project to the Constitutional Court, as provided in article 104 of the Constitution, in order for it to control the constitutionality of the Questions: *In all cases, a prior ruling by the Constitutional Court on the constitutionality of the proposed questions will be required.*

30. Among the proposals was that of enabling the removal of directors and the appointment of a Provisional Council, which could evaluate the appointments of officials made by the Council that it proposed to remove. On October 5, 2017, the Constitutional Court admitted the process and called a public hearing for November 29, but without waiting for the Court's decision, the executive issued two decrees and called the popular consultation that took place on February 4, 2018. The popular referendum, thus, took place without prior control by the Constitutional Court, and it was in these circumstances that the aforementioned provisional measure was requested before this Court.

31. The Commission now declares the claim admissible and states that, given the petitioners' allegations and *after examining the factual and legal elements presented by the parties, the Commission considers that the petitioners' allegations regarding their dismissal as members of the Council for Citizen Participation and Social Control are not manifestly unfounded and require an examination of merits since the alleged facts, if confirmed as true, could characterize violations of articles 8 (Right to a Fair Trial), 23 (Right to Participate in Government), 24 (Right to Equal Protection) and 25 (Right to Judicial Protection) of the American Convention in relation to Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects), to the detriment of Edwin Leonardo Jarrín, Tania Elizabeth Pauker Cueva and Sonia Gabriela Vera García, under the terms of this report. Consequently, it declared the petition admissible in relation to Articles 8, 23, 24 and 25 of the Convention in relation to Articles 1(1) and 2 therein.*[11]

[11] Report nº 195/21, Request 2377-17, Admissibility Report Edwin Leonardo Jarrin, Tania Elizabeth Pauker Cueva and Sonia Gabriela Vera García, Ecuador. OEA /Ser. L/V/II. Doc. 203, September 7, 2021. Original: Spanish.

II.3. Institutional Consequences

II.3.a. Acts of the Provisional Council

32. According to the information in the public domain regarding the exercise of the functions assigned to the Executive Branch as a result of the aforementioned consultation, as well as the facts that the Commission now declares in principle with sufficient grounds to admit the case, plus those that were recently reported to the United Nations Rapporteur and those that the State admitted when responding to its requirements, the irreparable damage to the institutionality derived from the way in which the Executive exercised the powers attributed to it by the aforementioned consultation is evident.

33. In effect, the Executive at the time removed the councilors whose mandate expired in the year 2020 and replaced them with a Provisional Council, formally appointed by the Legislature, but from short lists previously sent by the executive, without the legislature being able to appoint any other person outside those proposed by the executive in the three lists, with the fact that it held the majority in the Assembly being noteworthy.

34. Everything seems to indicate that the members of that Provisional Council assumed and exercised powers not conferred on it by the Constitution, with which they removed, shortened the mandates or in some way released the judges of the Constitutional Court. They removed the councilors from the Judicial Council, appointed new councilors with the mission of *evaluating* judges and then interfered in the body's actions by stopping the selection process.

35. Thus, in principle it *follows that the consultation was convened and was carried out without the constitutional control of the Constitutional Court and, based on that consultation, the executive appointed a new Provisional Council that in some way would have removed the Constitutional Court judges who had not undertaken enabling control of the consultation.*

36. It is more than obvious that the Court's case law has always been extremely thorough, paying attention to the removal of magistrates, especially from supreme and constitutional courts, as in the cases of Peru and other States.[12] Although the case has not been raised, this does not mean the Court can ignore these episodes of high institutional volume when framing the case.

37. Given that the Provisional Council also appointed a new Council of the Judiciary, which was charged with evaluating and removing judges, the replacement of the councilors arranged by the executive empowered to do so by consultation, directly or indirectly, made the judges' dismissal possible and somehow the appointment of new judges by selection process was suspended, allowing the tenure of temporary judges, that is, there would be an institutional abnormality that would seriously compromise the independence of the Judiciary and the very principle of the natural judge.

38. It should be noted that the Provisional Council nominated by the executive based on the consultation, also dismissed the Attorney General, that is, the head of the Public Prosecution and called for a selection process to appoint the new head who carried out the allegations against the previous government officials of who identified

[12] *Cf. Case of Cuya Lavy et al. v. Perú, Preliminary Objections, Merits, Reparations and Costs, Judgment of September 28, 2021, Series C No. 438; Case of Moya Solís v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment of June 3, 2021, Series C No. 425; Case of Ríos Avalos et al. v. Paraguay, Judgment of August 19, 2021, Merits, Reparations and Costs, Series C No. 429.*

as part of what at that point had become the main opposition political party to the acting executive.

39. It is well known that every head of the Public Prosecutor's Office, as a hierarchical body representative of the interests of society, is the person who decides judicial policy regarding which criminal cases must be prosecuted over others and, in this aspect, has a decisive power of selection and organization of criminal prosecution.

40. Two individuals sentenced by these new temporary judges in the same proceedings (*Bribery Case*, to which I will refer below) in which the leader of the political opposition movement and the vice president of the executive who carried out the consultation and appointed to the Provisional Council, went to the United Nations, denouncing political persecution and anomalies that would affect judicial independence.

41. On July 9, 2021, the United Nations Special Rapporteur on the Independence of Judges and Lawyers summarized the facts denounced by the alleged victims and requested explanations from the State,[13] given that they presented before the United Nations the context of institutional measures that, based on popular consultation, gave rise to the appointment of the Provisional Council. It was alleged that it would be a case of political persecution usually known as *lawfare*, in which the intervening judges would have been appointed with interference from the executive, in a particularly accelerated criminal process in the midst of the pandemic, with the aim of preventing the candidacy of the main opposition leader in the February 2021 elections and, it should be added, preventing his personal participation in the electoral campaign and also ability to use his voice, or the mention of his name during the campaign.

42. The Rapporteur states verbatim as follows*: Messrs. Phillips Cooper and Fontana Zamora were parties prosecuted and criminally convicted in the framework of the investigation of the case known as "Bribes", which dealt with alleged cases of corruption committed during the government of the former President of Ecuador, Rafael Correa Delgado, where he, several of his officials and some businessmen, were prosecuted and sentenced. According to the source, it would be a case of political persecution given the improper use of the apparatus of justice administration, in order to issue a conviction to prevent the participation of Mr. Correa in the last elections of February 2021.*

43. In response to the Rapporteur's request, the State admitted that, in effect, the Provisional Council, appointed by the executive based on the powers conferred by the consultation, on January 23, 2019 *appointed the new principal members of the Council of the Judiciary and urged this body to proceed to the immediate evaluation of the judges and associate judges of the National Court of Justice*. It is clear, then, that the State admitted that, through officials appointed by the Executive Power, it ordered a sort of *purge* of the Judiciary.[14]

44. The Provisional Council would have interrupted the selection process convened by the Judicial Council appointed to fill vacancies, making it possible for the temporary judges to continue. Everything indicates that it would be a seriously harmful interference of judicial independence and the principle of the natural judge.

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[13] Request for information by the UN Special Rapporteur from the State of Ecuador, available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26537

[14] The information sent to the UN Special Rapporteur by the State of Ecuador, available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=36540

45. In brief*, the executive branch convened a popular referendum without the constitutional control of the Constitutional Court and, in exercise of the powers granted to it by that referendum, through a Provisional Council selected by it, dissolved the Constitutional Court, the Council of the Judiciary and of all the judges that it considered inadequate, as well as the head of Public Prosecutions, in addition to instructing the new Council of the Judiciary to suspend the selection process to fill the vacancies, prolonging the tenure of temporary judges.*

46. In fact, *to date the petition of the three councilors removed as a result of the consultation has been declared admissible in the Inter-American System and has also been pursued and explanations have been requested from the State, within the United Nations system, regarding possible judicial interference by the executive.*

II.3.b. The "Bribery Case"

47. The conviction in the so-called *Bribery Case* took place in the aforementioned circumstances, and is now being questioned before the United Nations and prompted the request by the Rapporteur. Indeed, the haste in this sentence seems to be plausible, since it would contrast with the pace of progress of other processes. In particular, the speed of the process is striking in the midst of the terrible and dramatic deadly effects of the pandemic in Ecuador and that are public knowledge.

48. The judgment in the case has been strongly criticized with solid legal arguments in a recent book by the Ecuadorian professor and defense attorney in the case, Dr. Alfonso Zambrano Pasquel.[15]

49. The voluminous book highlights possible problems of consistency, change of qualification, improper application of the theory of authorship via an organized apparatus of power, insufficient reasoning of the judgment and more. Although it is a work that should be considered with due caution, given that its author is a defense attorney, the objections it formulates are quite consistent with the complaint before the United Nations agencies and on which the Rapporteur requested explanations and, in addition, the depth with which the author analyzes in detail the procedural steps and the judgment, reveal at least a serious approach in terms of the legal technique applied to criticism.

50. Among other things, it should also be added that it is extremely striking that one of the pieces of evidence in this process was a handwritten notebook by a defendant, since apparently, this strange type of documentary evidence, provided in the handwriting of industrious persons with a good memory, has also been used in the region in other cases of practice of what is usually called *lawfare*, that is, alleged judicial set-ups for political persecution.

51. Another piece of information that is internationally significant is that the State requested the arrest of its main opposition leader residing in Belgium and sentenced in this case, but its request has been rejected by the International Criminal Organization (Interpol), as generally happens when this organization considers that there are well-founded reasons to suspect that these are acts of political persecution.

52. It is public and common knowledge that the bitter political struggle that divides Ecuador originated when former President Lenin Moreno broke with his predecessor, dividing the political movement that had brought him to power. In these circumstances, his predecessor and his supporters became the main opposition force, with serious difficulties in reorganizing their sector and participating in the elections.

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[15] '*El caso Sobornos. Ocaso del garantismo penal. Estudio doctrinario y jurisprudencial' ('Bribery Case. Decline of criminal guarantees. Doctrinal and Judicial Analysis.')*, Murillo Editores, Quito, 2021.

In any case, it is clear that at this point in time the country is suffering from very deep political polarization, in which the main opposition force is the movement led by the predecessor of the president who in 2018 called the consultation and who cannot return to the country due to of the conviction in the aforementioned *Bribery Case*.

53. It should be added that in the aforementioned *Bribery Case*, the vice president of the executive who called the consultation, Jorge Glas, was also sentenced and when the new president broke with his predecessor, he remained in the political opposition. He currently remains in detention.

54. It is not clear whether the popularly elected ex-vice president was dismissed according to constitutional procedure, or if he was replaced by the mere fact that being imprisoned he could not perform his duties, but beyond this circumstance, what is certain is that the conditions under which he is kept in detention have been a matter of serious concern and at some point raised fears for his life, such that the Inter-American Commission ordered precautionary measures that led to his relocation. It has also transpired that it would shortly proceed to make a visit to verify the current situation of the detainee *in situ*.

55. Notwithstanding the Commission's actions, news reports relay that other prominent international authorities have expressed concern about the situation of Jorge Glas, who apparently is undergoing new proceedings, in accordance with the well-known procedure of indefinite *cloning* of criminal proceedings, typical of repeated cases of *lawfare* in our region, such as the one affecting Milagro Sala in Argentina for more than four years and which also prompted measures by the Inter-American System and this very Court.[16]

56. I consider it absolutely unnecessary to draw attention to the enormous seriousness the above represents for democracy, the respect due to pluralism and the principles of the Rule of Law, widely developed in this Court's case law and ratified with the recent measures ordered regarding the State of Nicaragua.[17]

II.3.c. Conclusions with regard to context

57. Although some of the data set out above will be aired in the course of the investigations that have been processed in the Inter-American System and in that of the United Nations, the truth is that what has been fully proven and, therefore, is beyond any doubt, is the following:

(a) The institutional situation of Ecuador, as a result of the use that the Executive Branch made of the powers conferred by the aforementioned referendum, is internationally questioned and inquiries have been opened in this regard with proceedings underway both before the Inter-American System and before the United Nations, which indicates that in both areas *prima facie* credence has been given to the accusations.
(b) Interpol rejected the request for the international arrest of the Ecuadorian opposition leader due to his conviction in the *Bribery Case*, as usually happens when it recognizes signs of a possible case of political persecution.

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16 I/A Court HR,. *Matter of Milagro Sala regarding Argentina. Request for Provisional Measures.* Order of the Inter-American Court of Human Rights of November 23, 2017.

17 I/A Court HR,. *Matter of Juan Sebastián Chamorro et al. regarding Nicaragua. Provisional Measures.* Orders of the Inter-American Court of Human Rights of November 4 and 22, 2021.

(c) The conditions of Jorge Glas' detention, sentenced in the same case, led to measures by the Inter-American Commission[18] which continues to carefully observe his situation.
(d) The polarization and resulting political struggle in Ecuador is fierce, the country is deeply divided and the main opposition political party is that headed by the predecessor of the executive that called the referendum.

58. For these reasons, to which I add those that I will present below, and despite the high respect that the opinion of the majority deserves, I will deviate from its criteria, considering that *in this case everything indicates that the State intends to use this Court to apply its judgment in the framework of an open, ruthless and extremely crude internal political polarization.*

III
CONSEQUENCES OF THE JUDGMENT

III.1. Minimal Legal Realism

59. For decades I have declared myself decidedly inclined towards legal realism in the sense that the law must respect the facts of the world's reality. Since there are several currents of legal thought that are identified as *realist* (for example, North American legal realism and others),[19] I allow myself to specify the theoretical framework from which I proceed to consider the present case.

60. In post-war Germany, traumatized by the disaster, there was a revival of natural or supralegal law in all its versions, accusing legal positivism of having given way to the distortions that had allowed the perversion of law under Nazism.

61. This revival of all jusnaturalism responded to the healthy intention of limiting the omnipotence of the legislature and was even accepted in the first sentences of the brand new *Bundesverfassungsgericht*. In the midst of these discussions typical of the times of Adenauer's reconstruction, the most limited, modest and yet elementary of the invocations to realism was expressed, with the name of *logical-real structures* (*sachlogischen Strukturen*)[20], formulated in opposition to the Southwestern neo-Kantian position, which started from a theory of knowledge that limited it to the data of the world ordered by *value*, that is, to the school that held that what value did not order, although it belonged to the world, could not be incorporated to law, which was a cultural science or *of the spirit*, as opposed to the empirical or natural sciences.[21]

62. On the contrary, the theory of logical-real structures is based on the elementary premise that, although the legal order is an order, it is not the only order in the world, where there are many other orders (physical, natural, social , cultural, etc.) that belong to the reality or *ontology* of the *Welt (world)* and that, of course, is not chaos.

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[18] ICHR, Precautionary Measures in favor of Jorge David Glas Espinel in Ecuador, Order 69/2019, of December 31, 2019, Precautionary Measure No. 1581-18.

[19] Cf. Luis Recasens Siches, *Panorama del pensamiento jurídico en el siglo XX*, (Panorama of Legal Thought in the Twentieth Century) Mexico, 1963, pp. 619 *ff*.

[20] In Hans Welzel, *Más allá del derecho natural y del positivismo jurídico*, (Beyond natural law and legal positivism)trad. by Ernesto Garzón Valdez, Córdoba, 1962; more broadly in *Naturrecht und materiale Gerechtigkeit*, Göttingen, 1962.

[21] V. Wilhelm Windelband, *Geschichte der Philosophie*, Berlin, 1916; Heinrich Rickert, *Ciencia cultural y ciencia natural*, (Cultural science and natural science), Madrid, 1963.

63. The legislature and the judge are not necessarily bound by these orders, but when they do not respect them and begin to build their own concepts, ignoring them, the result is that the rules or decisions are directed at objects or entities other than those stated and, therefore, the objectives proclaimed as *ratio legis* are not the real ones (they are false), since they have different effects and fall on entities other than those stated.

64. The decisions of legislators and judges that proceed in this way are not invalid nor cease to be law, but in reality they do not fulfill their manifest purposes, but others alien to those proclaimed and even contrary to them.

65. Given that the methodology that allows the world's information to be selected at will leaves its incorporation into the law at the discretion of each theoretician, there were those who structured liberal systems and constructions within its framework[22], but others, using the arbitrariness made possible by the theory of knowledge on which it is based, took advantage of it to selectively limit the incorporation of data from the world with totalitarian intent and pervert the law in times of Nazism.[23] I do not ignore the efforts of the defenders of neo-Kantianism who, in my opinion, do nothing more than methodologically emphasize the defenselessness of law against authoritarian or totalitarian political attacks, although they personally do not cultivate these tendencies.[24]

66. International Human Rights Law imposes respect for human dignity, that is, for the anthropological consideration of every human being as an entity capable of a certain level of self-determination and endowed with a moral conscience, to which certain rights are inherent due to the simple fact of being a human. This is the way in which, in the 16th century, Fray Bartolomé de Las Casas articulated in our America the idea that, four centuries later, would be included in international law.

67. This essence of our subject cannot but impose strict respect for the logical-real structure due to its interpretation and application, that is, it is essential for us to attend to, incorporate and respect the data of the world and of the underlying legal anthropology. Otherwise omitting or arbitrarily selecting the facts of the world that make the path of each fact to be judged, make it possible for open-ended and cruel acts of violation of the most elementary rights to pass as respectful of a person's dignity, just because the circumstances that make up the concrete constellation of a situation were not incorporated on value and, therefore, fell outside legal consideration.

68. It is from this perspective of limited and very elementary legal realism that, despite the high respect that I feel the opinion of the majority of the Court deserves, I depart from its criterion of excluding the leader of the most important Ecuadorian opposition political force from the condition of convicted or, at least, directly prejudiced by the judgment.

69. I further reaffirm this position with the circumstance that the singular acknowledgment of responsibility by the State has been presented before the Inter-American System precisely during the administration of the former president who broke with the opposition leader who will be directly prejudiced by the judgment, that is, by the same individual who gave rise to the bitter political polarization in Ecuador, who irregularly convened a popular referendum, and then, based on it,

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22 Gustav Radbruch, *Rechtsphilosophie*, herausgegeben by Erik Wolf, Stuttgart, 1970.

23 *Cf*. nuestra monografía Doctrina penal nazi. La dogmática penal alemana entre 1933 y 1945 (Our monograph *Nazi criminal doctrine. The German criminal dogma from 1933 to 1945*.) Buenos Aires, 2017.

24 See the current state of the discussion in Attilio Nisco*, Neokantismo e scienza del diritto penale, Sull'involuzione autoritaria del pensiero penalistico tedesco nel primo novecento*, Torino, 2019.

removed the Constitutional Court, the Council of the Judiciary, the Attorney General and judges.

III.2. The effects of a formal conviction against the State

70. It is obvious that the formal sentencing of the State in this case is fully serves to discredit the person who is now the main leader of the opposition to the current ruling party and who, in addition to being forced into exile due to a process of questionable legality, would be stigmatized as a person who persecuted journalists and attacked freedom of opinion, confirming the description of dictator given to him by one of the alleged victims in the publication that is discussed as a central issue in the case and that is reproduced *in extenso* in the majority opinion of this Court, to which I refer *brevitatis causa*.

71. This will be the main detrimental political effect for the leader and for the main opposition party to the State government, that this Court's judgment will have by formally limiting itself to condemning the State.

72. Nevertheless, independently of what I have just stated, in accordance with the highly respectable majority opinion of this Court, pecuniary sanctions are also imposed on the State in favor of the alleged victims which, in all certainty, will fall by route of repetition on the aforementioned opposition political leader, with a clear and serious injury to his property rights.

73. This certainty stems from the statements made by numerous former Ecuadorian officials identified with the main opposition party, regarding the decisions of a state body called the *State Comptroller General*. According to the repeated and widely disseminated public denunciations of these former officials who are now in opposition, the Comptroller or head of the aforementioned body issues what are curiously called glosses, which are actually non-judicial seizure orders.

74. When the *State Comptroller General* considers that in the exercise of public duties a person has caused damage to the administration, he orders by his own accord, that is, without judicial involvement, an embargo that immobilizes his assets, and may even do so against democratically elected officials and during their respective mandates, as is the case of opposition legislators.

75. The so-called *glosses* are usually imposed for millions of dollars, which means a total deprivation of the right to dispose of the property, that is, a kind of general freezing of assets. This automatic repetition of the reparations ordered by the Court will be made against the property of the *real or ontically* convicted person in this judgment, for the same sums that it indicates as reparation by the State.

76. Although it is almost excessive to point it out, it is known that the right to property guaranteed by the Convention should not be understood in the narrow civil sense of real property right, but rather in that of availability of assets, that is to say that the right protected by the Convention is not only affected when the asset content is reduced, but also when it is frozen.

77. Consequently, an embargo for millions of dollars and that in many cases exceeds the amount of the person's entire assets, ordered by a non-judicial body and for whose revocation the affected party must go to the judges of an internationally challenged court, brings serious injury to the property right understood as the right to the availability of assets. It is equivalent, then, to a temporary, although indefinite, general confiscation of property, since not only is it not ordered by judges, but it also

does not present the characteristics of civil precautionary measures, since it does not admit the requirement of injunctions.

78. In summary, *the real consequence of a conviction of this Court is the political and property sanction against the main leader of the opposition party to the State government whose Executive was placed in a defenseless situation when formulating the singular acknowledgment of responsibility before this very Court.*

III.3. Defenselessness of the *ontically* convicted

79. If we ignore the real-world details that allow us to verify that the leader of the most important Ecuadorian political opposition force would be the main victim of the formal conviction of the State, it coherently imposes that he be deprived of exercising his right to defense. This is impeccable logic: by not being accused, he will not be convicted and, therefore, he has no right to claim to defend himself before the Court. In my opinion, this is a clear example of the breakdown of the logical-real structure that links law with the world and that, as in all similar assumptions, produces a paradoxical result.

80. The person directly prejudiced by this judgment noted before the Court the innumerable times that he was cited by name by the Commission, both in written and in oral statements, as well as by all the other participants in the hearing, which placed him in the position of central protagonist of the case. Faced with the possible infringement of his rights as a result of a judgment of this Court, he requested to be heard by its judges.

81. In a divided vote, the Court decided not to reopen the hearing to hear his version of the facts, while stating that he could do so by way of *amicus curiae*.

82. This decision is unique in the case law of this Court, due to the unsuitability of the nature and function of the *amicus curiae*, which, according to its traditional concept and its own *nomen iuris*, is that of a report, input or contribution enriching the Court's perspective, always coming from a *friend of the court* and not from one of the parties involved, compromised or directly prejudiced in the controversy, as the leader of the Ecuadorian opposition would be in this case.

83. As can be deduced from the above, this contribution by the *friend of the court* is not evidence. Even in the event that evidence was indicated that the court lacked and wished to take into account, it should order its receipt *ex officio*, but not consider the *amicus curiae* in itself as evidence. The procedural problem created by the highly respectable opinion of the majority of this Court is that it does not make it clear whether it assigns the character of evidence or an act of defense to something that traditionally and without any doctrinal dissent has always been considered as a friendly collaboration for greater and better enlightenment of the court.

84. Having ruled out the legal nature of evidence of the *amicus curiae*, in terms of its possible character as a statement by the accused, it should be noted that in all punitive proceedings it has the nature of an act of defense, in which the accused is given the possibility to explain their arguments as broadly as possible, whenever they so wish and without their refusal implying a presumption against them.

85. In fact and in accordance with the reality of the world, the main victim of this judgment formally pronounced against the State has not had the opportunity to be heard in the proceedings before the Court, where he has only been given the opportunity to declare himself as *friend of the court*, despite having been the most cited person by name in the written accusation, in the oral accusation, in the statements of witnesses and experts, that is, that he has been the constant presence

throughout the procedure and even now in the highly respectable opinion expressed by the majority of this Court.

86. I consider it procedurally and legally inappropriate to distort the traditional concept of the *amicus curiae* and consider it as a means of proof or as a act of defense supplementary to the statement of the accused or injured party, since on altering concepts that are peacefully accepted by the doctrine and case law, confusion and legal insecurity towards the future are sown. Therefore, in order to neutralize this effect, it is necessary to ask what is the true legal nature of the brief that the Court allowed the person who will ultimately bear the political and property sanctions as a consequence of the Court's decision, to present.

87. Ruling out the aforementioned conceptual alteration, it must be understood that the majority of the Court decided that, instead of a hearing, the political opposition leader could express himself only through a written document. He has therefore been given the opportunity to submit a brief to express his points of view, with the sole certainty that he would not be returned to him *in limine* as inadmissible.

88. It is known that a brief is not equivalent to a statement at a hearing, where the person who may be sentenced or seriously prejudiced can elaborate, be cross-examined by the parties and the judges and dispel doubts, in addition to the always important direct impression the declarant gives the judges, which is still relevant when it comes to assessing the veracity of the content of their statements, the spontaneity of the answers, the degree of sincerity of their statements, their state of mind, whether they are steady or nervous, or hesitate, etc.

89. For these and other reasons, for some time written procedure has tended to be shelved in procedural legislation, not only criminal, precisely because it prevents this face-to-face, direct communication. This is so true that, with all wisdom and prudence, this Court only admits written procedure when it comes to cases in which only questions of pure law are discussed, which is obviously not the assumption in this case.

90. The conclusion reached in light of the above is that*, on this occasion and in the proceedings before this Court, a well-known leader of the main opposition party was deprived of this right, and it is this leader who will bear the political and property effects of the conviction, formally pronounced by this Court against the State.*

III.4. Possible damage to democracy

91. The effect of a sentence formally condemning the State, but actually or ontically harmful to a popular leader of the main opposition force of the State, in circumstances of very strong and ruthless political polarization and with a contested institutional framework, is highly worrying for the future of democracy in the country, given that nothing less than democratic pluralism and the elementary principles of the rule of law are at stake, not to mention that it can be understood as the admission of some of the forms of the so-called *plebiscitary* democracies, that they are not quite that in the sense of international law in effect on the continent.

92. In this regard, it should be noted that, with all clarity and precision, this Court pointed out in 2010 in the case of *Manuel Cepeda Vargas v. Colombia,* the vital importance of democratic plurality*: "(…) it should be emphasized that opposition voices are essential in a democratic society; without them it is not possible to reach agreements that satisfy the different visions that prevail in society. Hence, in a democratic society States must guarantee the effective participation of opposition individuals, groups and political parties by means of appropriate laws, regulations and practices that enable them to have real and effective access to the different*

deliberative mechanisms on equal terms, but also by the adoption of the required measures to guarantee its full exercise, taking into consideration the situation of vulnerability of the members of some social groups or sectors."[25] In this case, it is not about minority sectors or social groups, but rather the one who is in a situation of vulnerability is no less than the main political opposition force.

IV
ALLEGATIONS BY THE APPLICANTS

IV.1. Legality of the criminal code

IV.1.a. The code in force at the time

93. The proceedings against the journalist and the editors and which, according to the highly respectable opinion of the majority of the Court, constituted a '*jus humano*' offense, were based on a criminal code that, in the singular acknowledgment of State responsibility, is accepted and takes it for granted that it violated the principle of criminal legality.

94. The State admits, therefore, that the category of criminal offense applied to the case and in force in Ecuadorian positive law at that time, would have violated the requirement of strict criminal legality. By admitting this acknowledgment, the Court also indirectly admits the violation of criminal law.

95. The elementary criminal guarantee of *strict legality*, which dates back to the Enlightenment of the eighteenth century and the liberals of the following century, synthesized by Anselm Ritter von Feuerbach in the formula *nullum penal sine lege*, now universally recognized in all legislation respectful of public liberties , requires the legislator to specify as accurately as possible the category (assumption in fact or legal *Tatbestand*) of the punishable conduct.

96. In this case, it referred to Articles 489 to 493 of the criminal code in force at that time, which was applied by enacting the criminal offense categorized in Article 493, which referred to the definition of Article 489. The basic typical behavior was clearly *the false accusation of a crime*, as stated in Article 489, calling it *slanderous insult*.

97. It should be clarified that Ecuador has had the terrible legislative custom of publishing official editions of the criminal code rearranging the numbering of the articles, but reproducing them verbatim. The devices numbered 489 to 493 that are examined are exactly the same ones that remained in the Ecuadorian criminal code since its authorization in 1938, only numbered as articles 465 to 469.

98. It is interesting to note that in Ecuadorian criminal law *the false accusation of a crime* has always been slander, although its distinction from insult was not always clear, which could lead to problems of legality. This has been the case since the curious and cumbersome wording of article 498 of the 1837 code, which followed article 699 of the Spanish code of 1822, although foreseeing penalties even more unusual and enormous than this[26]: *Slanderers are those who voluntarily and knowingly accuse another person of some false fact, which if true, would expose the person against whom the accusation was made, to criminal proceedings, and*

[25] I/A Court HR, *Case of Manuel Cepeda Vargas v. Colombia, Judgment of May 26, 2010, Preliminary Objections, Merits, Reparations and Costs.* Series C No. 213, par. 173.

[26] The Spanish Code of 1822 imposed sentences of up to six years, the Ecuadorian Code of 1837 up to ten years (*cf*. *Spanish Criminal Code decreed by the Courts on June 8, approved by the King and enacted on July 9, 1822,* Madrid, in the Government Press, 1822, p. 143).

provided that the accusation has been made in meetings or public places or in private attendance of sixteen or more individuals, they will be forced to give the slanderer right of public response, punished in the following way: - If the fact that is charged was of those with a criminal sentence indicated, they will be sentenced to prison for six to ten years, and if the act merits any other penalty, they will be sent to prison for two to six years.[27]

99. Slander was mixed with insult in García Moreno's code, although the first variant continued to be the false accusation of a crime, but stated in a different way: *Slander is the accusation made against a person of a specific fact of such a nature that it exposes them to prosecution for a crime or misdemeanor, or that it causes any dishonor, hatred or disregard in public opinion or any other damage*.[28] The confusion with libel in this text comes from the source of its inspiration, article 443 of the Belgian criminal code.[29] This confusion was maintained verbatim in article 420 of the Eloy Alfaro code of 1906.[30]

100. It can be said that, from the code of García Moreno, passing through that of Eloy Alfaro and up to 1938, the confusion of slander with insult and the questionable precision of the definition of the latter, did not respect the principle of strict criminal legality.

101. The 1938 code did not develop too much on the previous text by Eloy Alfaro, since it did not alter its structure, limiting itself to introducing some provisions inspired by Rocco's Italian code, but in this matter the codifiers seem to have realized the failure of previous texts and, despite using the term *insult* generically, clearly distinguished between *slanderous* and *non-slanderous*, defining the former precisely as *the false accusation of a crime*, a formula that leaves no room for doubt and, in article 469 (which with the number 493 is the one that was applied to the journalist and the editors) clearly refers to the *slanderous insult* that, beyond the *nomen juris*, is what in all comparative legislation is classified as *slander*.

102. Therefore, in the applied law it was perfectly delineated that *slander against authority* was prosecuted and that *slander* was understood as the *false accusation of a crime*. Beyond the sympathy or antipathy that this categorization may cause, it cannot be blamed for a lack of precision in the description of the behavior it wants to penalize: punishing the *false accusation of a crime against the authorities*. More precision could not be demanded from any legislator.

103. This case is completely different from the one resolved by this Court in the Case of *Usón Ramírez vs. Venezuela*[31], in which it was correctly considered that the State was internationally responsible for the conviction against Francisco Usón Ramírez for, among other things, the violation of the principle of legality due to the vague definition of the conduct characteristic of insults. In our case it is slander and the definition could not be more precise: *false accusation of a crime*.

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[27] *Criminal Code of the Republic of Ecuador. Approved by the legislature in 1837, Reprinted by order of the Government, correct and reviewed by the Senate Permanent commission,* Quito, March 16, 1845, Government Press, p. 95.

[28] Article 478, on page 104 *of the Código Penal y Código de Enjuiciamientos en materia criminal de la República del Ecuador*, (*Criminal Code and Criminal Prosecution Code of the Republic of Ecuador*) New York, Printed by Halley and Breen, Fulton St, Nos. 58 - 60, 1872.

[29] F. S. G Nyppels, Législation Criminelle de la Belgique ou Commentaire et Complément du Code Pénal Belge,(Criminal Legislation of Belgium or Commentary and Supplement to the Belgian Penal Code) Brussels, 1872, Vol. III, page XLI.

[30] *Official Edition*, page 94.

[31] I/A Court HR. *Case of Usón Ramírez v. Venezuela. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of November 20, 2009.* Series C No. 207, par. 56 and 57.

104. Although it is not essential, it is worth recalling that the doctrine explains that the distinction in relation to the greater seriousness of slander with respect to insult, is due to the fact that the first affects two legal rights, that is, honor due to injury and personal freedom due to danger, since *the false accusation of a crime* is likely to at least generate an investigation and prosecution.

105. As can be seen, the principle of strict legality in the legislation in force at the time of the processing was in no way affected and, with respect to the editors, it is a question of fact and evidence to determine whether they can be considered co-authors or participants (necessary or simple accomplices). Expecting that they are invariably safe from any responsibility would amount to establishing an undue privilege of total impunity for damage to the honor and freedom of any inhabitant, since there is always the simple case of an article signed by any unknown person inclined to do so or who is paid to do so. What has been said is also current in comparative legislation, doctrine and jurisprudence.

IV.1.b. Non-essential requirement for the express provision of justification

106. It is known that there is a current that proposes the abolition of the criminal offenses of crimes against honor, to proceed to resolve the conflict resulting from these injuries through civil justice. The question is debatable and in general, in Latin America this line has not been followed nor has this Court ruled on the matter, which is correct, given that it is up to each State to decide its own criminal policy criteria, as long as they do not violate the American Convention or other human rights instruments.

107. Comparative legislation shows that in some of our countries impunity for these crimes has been expressly established by law when they are motivated by issues that are in the public interest (for example, Articles 109 and 110 of the Argentine criminal code). The convenience of these provisions is debatable, but *the important thing is not whether or not it is legally established, but rather that the judges do not impose penalties when the journalistic activity is intended to criticize or expose issues that are of public interest, which is no more than the exercise of a right recognized by Constitutions and international law.* The legal order is not a normative chaos, but rather judges must understand it with the coherence of a system and, therefore, they must take for granted that no infra-constitutional provision can be interpreted outside the framework imposed by the norms of the highest hierarchy.

108. Nor does the legal recognition of these provisions solve all the problems, since ultimately a constitutional and internationally recognized right is at stake, that is, in each case it will be necessary to weigh values such as an official's right to honor, on one hand, and the right of expression and criticism when it is in the public interest on the other. Whether or not impunity is expressly enshrined in the law, journalistic criticism in matters of public interest is always the exercise of a right and, therefore, it is a question that does not refer to the categorization of the conduct, but to its justification, taking into account that *the legitimate exercise of a right is always the essence of all the causes of justification.*

109. The impunity of journalistic activity in these cases does not emerge from criminal law, but from constitutional and international law. To claim that criminal law embodies all justifications or all reduction of the typical prohibitions resulting from the entire legal order, would be as absurd as considering that the offense of homicide violates legality because it does not elaborate with *unless it is in legitimate defense*, the offense of injury because it is not limited by *unless it is practiced by a doctor for*

therapeutic purposes, that of theft because *unless starving or in a state of need* is not added, or that of seizure for not making explicit *unless it is in exercise of the right of retention.*

110. In any case, this Court has made it clear, especially from the case of *Kimel v. Argentina* [32], that weighing up circumstances and values always prevails, without automatic resolution with the aforementioned legal formulas, since, for example, it cannot be considered that the justification for the injury to an official's honor takes place in the face of an extremely insignificant or trivial public interest, as is also the case when weighing the limit of any other cause of justification (such as an absolutely disproportionate defense, that of the electrification of a fence so that the child does not steal a flower).

IV.2. Public Interest: the weighting of values

IV.2.a. The weighting of values in general

111. In normal situations, it is necessary to protect journalism against punitive power when it comes to accusations directed at the authorities, for the sake of the right to criticize and publicly denounce, because this results in the proper functioning of the administration and institutions in general.

112. This protection is particularly essential when it comes to the possible commission of crimes of bribery, use of information, favor, illicit enrichment and other analogous crimes that are usually included in the vague characterization of *corruption*.

113. Here, two legal values are in opposition: the right to freedom of expression and criticism, and the official's right to the honor. As in any situation in which two positive legal values converge, it is necessary to weigh them in each case, as this Court has done in its case law. In short, what this weighting should establish in each case, is the limit to the legitimate exercise of the right of denunciation and journalistic criticism enshrined in the constitutions and international law.

114. This, as was pointed out, is what occurs in normal situations, but the situation is not normal in a large part of our region, where there is no plurality of media, but instead, due to the media market deregulation, there are cases of oligopoly or monopoly which would not be, and are not, admissible in any country in the northern hemisphere.

115. In these abnormal situations, the monopolistic or oligopolistic concentration of print, radio, television and virtual media often allows communication to be distorted and a company or business or economic group to set up a completely distorted *created reality*.

116. The highly respectable opinion of the majority of the Court itself points to this disadvantage, and it is appropriate to point out that in these extremes there is the paradox that invoking freedom of opinion is likely to harm freedom of opinion itself, since the media monopoly has in its hands the ability to organize silence regarding events of public interest and their protagonists.

117. But it is necessary to point out that, in the abnormal situation of media monopolies and oligopolies, the problem goes beyond respect for freedom of opinion

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[32] I/A Court HR., *Case of Kimel v. Argentina, Judgment of May 2, 2008, Merits, Reparations and Costs.* Series C No. 177.

and criticism, because the excessively concentrated media directly acquire the power to *create reality*, given that *our reality* is constructed almost entirely through communication. This has been sufficiently raised in sociology, in particular that of the phenomenological aspect and long before the current technological leap.[33]

118. In this regard, I must stress the need to incorporate into law, mainly into the branch of Human Rights, the data of reality basically coming from sociology and other social sciences, in order to avoid the traps of a closed normativism that obstructs the incorporation of this data and that, as noted above, can lead to paradoxical solutions in terms of real consequences, despite the fact that the decisions were motivated by the most noble intentions.

IV.2.b. The abnormal situation does not prevent weighting, but does complicate it

119. In any case, it is necessary to point out that the abnormality of a monopolistic or oligopolistic situation in no way cancels the need to safeguard the spaces for journalistic criticism necessary for the proper functioning of the administration from punitive power. However it complicates the weighting of values that always presupposes this limitation in terms of the scope of justification, since it introduces an element of social abnormality, given that concentrated media can generate total and singular creations of reality, as happened in the old totalitarianisms. It is not possible to forget that *Pravda* was a sole creator of reality and Göbbels abhorrent principles have not simply ceased to be effective.

120. The weighting of values, necessary to establish the limits of the cause of justification or legality, is complicated in a region where concentrated media ally with prevaricating judges, intelligence agents and secret services and set up processes now known as *lawfare*, which support coups in Bolivia, exclude opposition leaders from democratic competition in Brazil or stigmatize others in Argentina.

121. I stress that progress must be made in the protection of the critical press against the undue advance of the exercise of punitive power, but the weighting of values, which allows us to define the limits of justification in each case, becomes more complex. It requires extremely careful attention, given that often we do not live in societies with media plurality, befitting of the plural democracies that we all want, but with concentrated media with enormous power to create unique realities, enhanced by the growing adoption of renewed and more penetrating marketing methods, use of trolls and advertising targeted through big data. It is obvious that this complicates the weighting of values because another value also comes into play, the need to preserve democracy and the rule of law, in the face of fully created realities that are structured to encourage coups d'état or other less coarse, but equally effective attempts at *dismissal*.

122. Nor should we be naive and overlook the fact that strong economic interests operate in these attempts at destabilizing institutions, because otherwise we would believe that we are floating in a bucolic lake of calm waters when in reality we are being lashed and tossed by the impetuous waves of stark forces that compete for markets or advantages.

123. Although in these conditions the necessary weighting of values is enormously difficult, I do not believe that it has too much influence in this case, because contrary

[33] Amongst many, are the fundamental works on this subject, Peter Berger and Thomas Luckmann, *The social construction of reality,* Buenos Aires, 1986, Alfred Schutz, *The problem of social reality*, Buenos Aires, 1974; also fundamental Pierre Bourdieu, *On television*, Barcelona, 1998.

to the highly respectable opinion of the majority, I believe that the weighting of values in this case is relatively simple.

IV.2.c. The weighting of values in the case

124. Focusing now on the problem posed specifically by the brief for which the alleged victims were prosecuted, the first thing that is obvious is that it does not refer to any common act of administration, such as a tender or the granting of some benefit or preference to someone, but to the involvement of no less than the head of the executive in an attempted coup that led to his kidnapping or deprivation of liberty by the armed rebel police and during which there were fatalities.

125. This Court has argued finely and with notable and wise majority and dissenting opinions in cases such as *Mémoli v. Argentina*[34], where the public interest in the correct allocation of niches in a cemetery was discussed, but the mere factual statement of the event that gave rise to the brief that concerns us now, shows that we are facing an event and a context that cannot even remotely be compared with the public relevance of that and other cases.

126. Regardless of whether or not an attempt was actually made against the life of the constitutional president in those circumstances, there is no doubt that he was in danger, since there were shots and deaths, in a confused situation in which no sensible person would have considered himself safe and much less happy to have taken part.

127. There is little doubt that it was an episode of very particular institutional gravity and high risk to the personal integrity and life of the president and others, since this was an armed uprising against the institutional stability of the country.

128. I note that, in the written account of the facts, the Commission underestimated the episode as a *self-proclaimed coup d'état*, although in the footnote it cannot deny that it was a true coup attempt, recognized as such by the Permanent Council of the OAS. Although it is not recorded in that brief, at the time it also motivated reports from the UN and concern from European and American governments.

129. In his article, the journalist delegitimized the intervention of the executive to stop the coup, accusing it of committing a crime that he described as a crime against humanity, but on which he does not offer any evidence.

130. The current opposition leader was not a simple citizen, but the constitutional and democratically elected President of the Republic, who personally intervened to dismantle an attempted coup d'état, during which he was deprived of liberty for about six hours and his own life was in danger, that is to say that the article delegitimized as much as possible the conduct of the head of the executive power who had just intervened to stop a coup d'état in defense of the constitutional continuity of the rule of law.

131. The article not only charges him with a very specific crime, but even makes him responsible for his kidnapping, since it also attributes reckless and careless conduct.

132. It is worth insisting on this because it is central to the legal assessment of the case: faced with an attempted coup d'etat and the kidnapping of the constitutional

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[34] I/A Court HR., *Case of Mémoli v. Argentina, Judgment of August 22, 2013, Preliminary Exceptions Merits, Reparations and Costs.* Series C No. 265.

president, the journalist accuses him, clearly and precisely, that, deprived of liberty, he gave the order to shoot against a hospital and that with that he committed a crime against humanity, for which he advises him to request an amnesty and not to decree a pardon, in order to achieve his own impunity in the future. In addition to qualifying the president's intervention as criminal and typical of a crime against humanity, he holds him responsible for his own kidnapping and life-threatening risk, since he considers his conduct reckless, implying that it was almost bravado.

133. In order to adequately gauge the seriousness of the last of these accusations, prior knowledge of a certain local political tradition in the face of coups d'état is necessary. Like all our countries, Ecuador has some characteristics that are typical of its political culture, among which it is highlighted that, in democratic governments, attempted coups and other serious disturbances of public order have historically always been disarmed with direct, personal intervention by the presidents themselves, as evidenced throughout its history of the last century by the conduct of the one who marked the country's politics for decades, with five presidential terms, only managing to normally complete one without being overthrown by a coup d'etat.[35]

134. The disqualification of the constitutional president's conduct in defense precisely of the constitutional order, through the accusation of a crime against humanity and his victimization and threat to life as a result of conduct that is classified as clumsy and reckless, but that is culturally appropriate according to the national historical experience, is implicitly underestimating the coup attempt itself, that is, minimizing the attempt to alter the institutionality, the seriousness and violence of the armed rebellion.

135. It is clear that in this case it is not a question of a simple ordinary slander in which only the values of the right to exercise journalistic criticism and the honor of the official must be weighed, but rather that also relevant in the weighing is the disqualification of the role of the executive in defense of the constitutional order and the minimization or underestimation of an armed rebellion.

136. In these circumstances and in this case, another value must also be weighed, which is that of the duty of the democratic authorities to defend the constitutional order in the face of an attempted coup d'état carried out with weapons provided by the State itself.

137. It cannot be considered that this slander responded to a public interest objective, when it was clearly intended to disqualify a State executive and underestimate the seriousness of the threat against which it acted.

138. I insist that it is not just a matter of evaluating and weighing the right to freedom of information that must be guaranteed as necessary to control the proper functioning of an administration, against the right to honor of an official who, as was said, yields before the former. Rather they tried to manipulate that freedom to minimize a rebellion with a personal attack on the holder of a State power and discredit his intervention in the event. *The value that is added to the weighting is the preservation of the constitutional order and the image of the democratic power of the State in its defense in a serious emergency situation.*

139. The Commission itself, always extremely careful of the constitutional and international right to criticism and journalistic allegation, in its *Annual Report* of 2018, demands that the punishability of these crimes be limited solely and exclusively to *exceptional circumstances in which there is an evident threat and direct anarchic*

[35] *Cfr.* Robert Norris, '*El gran ausente'. Biography of Velasco Ibarra*, Quito, 2005.

violence. It is my understanding that an armed police uprising, with the kidnapping of the head of the Executive, with shots fired and deaths, is an unbeatable textbook example for the exception referred to in the aforementioned *Report* of the Commission.

IV.3. It is not an 'opinion piece' article

140. Finally, it is also not admissible that the article in question was a simple *opinion piece*, since any reader perceives that in that writing the accusation of a crime is being made with all the precision of time, place and occasion, without providing any evidence at all. No one could judiciously say that it is a mere opinion to accuse another of killing his father, or murdering his wife, or of robbing a bank with an indication of the day, time and place, nor, of course, of giving the order to shoot against a hospital in the middle of an armed rebellion while being kidnapped.

141. I have the greatest respect for the statements of the experts, but I cannot help but observe that it is contrary to all logic to claim that it is a mere opinion for someone to say: *So-and-so on such a day at such a time and in such a place killed his mother with ten stab wounds.*

V

THE PROCEEDINGS AND THE RESULTING DAMAGES [INCURRED]

V.1.The legality of the process

142. It follows from the foregoing that the processing and trial of the alleged victims was not irregular and did not produce any effects other than those derived from the situation of defendants themselves. Preventive detention was not appropriate, so the freedom of movement of the accused was not limited. There were also no freezing of assets of the type of glosses referred to above and that will surely fall on the current opposition leader as a consequence of the reparations ordered from the State.

143. Bearing in mind that the majority of the prisoners in our region are not sentenced, but rather suffer pre-trial detention and that some or many of them will ultimately be acquitted[36], it is obvious that many more negative procedural consequences and consequences in violation of Human Rights are considered normal in our countries, even in those cases in violation of the principle of innocence, than were suffered by the alleged victims in the course of a regular process. All based on an offense that respected the principle of strict legality and based on the false accusation of a crime in which the public interest was not at stake but rather devalued the action of an authority in nothing less than the interruption of an ongoing coup attempt.

144. To overlook this comparison of the damages suffered by the presumed victims of the case to those that are normalized on some millions of inhabitants of the region, would imply that the Court is extremely careful about the negative consequences of the prosecutions with a too high level of selectivity.

145. What is clearly disproportionate in the case is the sanction imposed in the judgment and that, as is fully established in the case file, was not executed nor was execution attempted, so that the judgment did not entail negative consequences for

[36] *Cf.* Carin Carrer Gomes, *O encarceramento Latino sem condenaçao, Análise da Justiça, do territorio e da globalizaçao*, XIV Encontro Nacional de Pos-graduaçao en Geografia, 10 a 15 de Outubro de 2021.

the alleged victims. In the event that any record or remnant of the conviction remains in force, it is appropriate that the judgment of this Court order the State to annul it.

V.2. Enmity and reciprocal insults

146. The current opposition leader maintained an old enmity with the journalist who was prosecuted, dating back to times before he assumed the constitutional presidency of the Republic, as the alleged victim himself declares. Judging by the reciprocal expressions, this open antipathy had gone beyond the normal level of political confrontation to the level of a personal enmity.

147. The mix of expressions accused by the alleged victim do not go beyond the common and frequent cases of reciprocal insults, which legislation generally leaves unpunished by way of compensation, as well as those uttered in court. That one of the personal enemies takes public office does not force him to remain silent or prevent him from benefiting from compensation for reciprocal injuries, whatever ethical judgment his conduct deserves, which is obviously independent and out of the jurisdiction of this Court.

148. There is no evidence, since it is not even reported, that the official had used his power to persecute or annoy the person with whom he had an old enmity nurtured by verbal statements and that had transcended the political plane to become a personal matter, since no proceedings by the public authority are invoked against him, except for those resulting from the process that is the subject of this case. The alleged victim himself reports having been threatened by third parties, but not by officials or by order or mandate of them.

149. Whoever assumes a position of open public and personal enmity with a well-known figure in the midst of very strong political polarization that divides the country and in which he takes sides and actively participates, accusing at times exceptional and violent crimes such as those in this case, knows that in this less than peaceful context hotheads usually appear. Therefore, he cannot rule out, and indeed must even anticipate as inevitable, that there are third parties who cause him some inconvenience or who threaten him without the public authorities, much less the official personally, having any influence over this. No active politician or any person with public prominence in circumstances of tense confrontation is oblivious to this experience.

150. In any case, the fear expressed by the alleged victim is not proven to have been appropriate to the risk he alleges. He even recounts that when faced with a threat, the importance of his complaint was not downplayed by the authorities, although he considered the police investigation insufficient.

151. The assertion that the disproportion of the sanction imposed by the unexecuted sentence would act as intimidation is unsupported: since the dark and unfortunately not too distant times of public executions in town squares, it is known that punishments intimidate, or it is believed that they do, when they are carried out. The degree of subjective fear must always be assessed in view of the objective danger, since it cannot be estimated only based on a person's greater or lesser degree of sensitivity. Normal fear requires proportionality with the effective presence of a threat. In addition to this, it is not appropriate to accept the statements of the alleged victim as true without other elements of evidence other than their own statements.

152. It should be noted that the alleged victim states that to date he lives outside the country, when for years the opposition leader lacks all power in State territory, which he explains by stating that he fears the return of the opposition party to the

government, which does not seem to be a convincing argument in regards to their fear in proportion to the actual risk invoked.

VI
DEFENSELESSNESS OF THE STATE: INADMISSABILITY OF ITS ACKNOWLEDGEMENT OF RESPONSIBILITY

VI.1. The State's hollow defense

153. The foregoing considerations regarding the event, although they deviate from the highly respectable opinion of the majority of the Court, in any case, at least make it clear that there are considerable weighty arguments that could have been put forward by the State in these proceedings. For example, the very clear legality of the code of criminal law in force at the time of the event, the extraordinary institutional significance of the act of anarchic violence to which the journalist was referring in his article, the absence of persecution or harassment by the authorities, the rare incident of the kidnapping of the leader of the executive and the public interest in institutional continuity.

154. None of this could have been overlooked by the State when considering the case, because they are arguments that could never escape the most elementary attention of any lawyer or attorney, no matter how inexperienced or novice they might be. However, the State did not try any of them before the Court.

155. However, everything indicates that the defenselessness of the State is not due to negligence or legal malpractice, but to clear intentionality. Proof that the State has not been bereft of adequate advice and its actions exhibited very good legal technique, is the skill with which it handles the not at all random partiality of its acknowledgment of responsibility. It separated with a fine scalpel the matter it rejects, limited exclusively to the very high sums claimed by the alleged victims due to unproven property damage, the broad acknowledgment of the responsibility for their claims all in detriment of the (real or ontic) convicted person, that is, the leader of the main opposition party in the fierce political polarization of the country.

156. I again stress that it is not possible to ignore that the acknowledgment of responsibility did not even take place during the current administration, but rather during the mandate of the president who was empowered in the aforementioned manner based on the disputed popular referendum and whose actions directed against his opposition produced the particular institutional context to which reference was made, under such conditions that his complaints are now declared admissible in the Inter-American Commission and are processed in the UN.

157. In the context of the extremely harsh internal political confrontation, it is clearly obvious that the *formal* sentencing of the State and the real or ontic sentencing of the political leader of the main opposition party, is perfectly effective for the ruling political sphere. In particular for the previous president empowered by the referendum, to the extent that they will be able to broadcast the condemnation widely, showing themselves to be zealous defenders of Human Rights, supposedly unknown by an opposition that they will paint as inclined to be authoritarian, dictatorial and as persecuting critical journalism.

158. The acknowledgment of the responsibility of the State in these circumstances and with the singular limitations indicated in its intelligent partiality, is nothing more than a formal and not material defense, totally empty of content that might defend. It is carried out by the same administration of the president who had caused the displacement of judges, which resulted in the conviction of his vice president, whom he keeps detained until this very day, and the opposition leader himself, on whom

the real effect of the sanctions imposed in this sentence will fall, all of which has been declared in principle at the international level.

159. Given the absolute lack of arguments in the State's formal defense in everything harmful to the opposition leader and his government, there has been no contradiction in the processing of the case before this Court, that is, it is a merely formal defense. In this sense, the Court has stated that the mere presence or appointment of a defense attorney or lawyer is not enough, since *a merely formal or symbolic appointment does not support the effective fulfillment of the right analyzed (*that of defense*).*[37] The special characteristic of this case is that this merely symbolic act is now taking place before the very courts of law and this Court, because the State decides not to mount a defense.

160. This particular situation of the defenselessness of the State poses two procedural problems, derived directly from the *inadmissibility of the State's acknowledgment of responsibility.*

VI.2. Evidential limitations of the confession

161. The first procedural problem is that, this Court's acceptance of the recognition, accepts everything that the State has admitted as proven. This overlooks that this acknowledgment is equivalent to a confession and that this, no matter how *probatio probatissima* it was, in an adversarial (not inquisitorial) process such as the one that has governed since the modern era, operates as proof of the charge only to the extent that that it is plausible. That is, as long as there are no elements that indicate that the act did not exist, that the person confessing cannot be the perpetrator, that the events did not unfold in the manner in which they confessed, that there were causes for justification, for exoneration, etc.

162. Consequently, the acceptance of the acknowledgment of responsibility in the terms proposed, sees this Court admit as procedural truth the facts as stated by the accusation, despite the fact that there is convincing evidence to the contrary regarding several of them.

VI.3. The State's refusal to defend itself

163. The other procedural problem is that the absence of a material defense by the State cannot be resolved in the same way as decided in a similar circumstance in a criminal or civil process.

164. In fact, in criminal proceedings it is appropriate to declare the proceedings null and void and assign another defender, a solution that is not feasible in the proceedings before this Court because *it is impossible for another to assume the defense of a State that does not want to defend itself, because the judgment favors its ruling party and harms its opposition. Nor is it feasible for this Court to make up for the defenselessness in which the State places itself and assume the defensive arguments that the State refuses to put forward.*

165. Everything would indicate that the highly respectable criterion of the majority of this Court seems to approach the solution of the civil process, in which, given the silence of the defendant, what was said by the applicant is taken for granted, a solution with which I allow myself to disagree because it contradicts the adversarial

[37] Case of Tibi v. Ecuador, Judgment of September 07, 2004. Preliminary Objections, Merits, Reparations and Costs.

principle that has always governed the procedure before this Court, given that it is not a process that solely pursues the purpose of property reparation.

VII
CONCLUSION

166. In conclusion, I consider that it is appropriate to reject the claims for reparation that the State did not admit in the manner in which the majority vote of the Court does so and to summon the State to cancel any record or effect that may remain from the unexecuted conviction, in the same sense as indicated by the majority.

167. In all other respects and as for the remainder, I consider that:

1) the State must be acquitted,
2) it must be warned that in the future it must refrain from incurring in formal defenses, respecting the adversarial nature of the procedure before this Court
3) and that the costs and expenses caused by this case be imposed on the State.

This is my opinion.

Eugenio Raul Zaffaroni
Judge

Pablo Saavedra Alessandri
Secretary