INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF MOYA CHACÓN *ET AL. V.* COSTA RICA

JUDGMENT OF MAY 23, 2022

(Preliminary objections, merits, reparations and costs)

In the case of *Moya Chacón et al. v. Costa Rica*,

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

Ricardo C. Pérez Manrique, President,
Humberto Antonio Sierra Porto, Vice President,
Eduardo Ferrer Mac-Gregor Poisot,
Verónica Gómez,
Patricia Pérez Goldberg,
Rodrigo de Bittencourt Mudrovitsch,

also present,

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

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

* Judge Nancy Hernández López, a Costa Rican national, did not take part in the deliberation and signature of this judgment in accordance with the provisions of Article 19(1) and (2) of the Court's Rules of Procedure.

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I
INTRODUCTION OF THE CASE AND CAUSE OF ACTION

1. *The case submitted to the Court.* On August 5, 2020, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Inter-American Court the case of "Ronald Moya Chacón and Freddy Parrales Chaves" against the Republic of Costa Rica (hereinafter "the State" or "Costa Rica"). According to the Commission the case relates to the imposition of subsequent liability for the alleged legitimate exercise of the right to freedom of expression by the journalists, Ronald Moya Chacón and Freddy Parrales Chaves. The Commission concluded that the sentence to pay civil compensation for non-pecuniary damage due to the publication of a newspaper article reporting presumed irregularities in the control of the smuggling of liquor into Costa Rica involved the violation of the rights recognized in Articles 13 (Freedom of Thought and Expression) and 9 (Freedom from *Ex Post Facto* Laws) of the American Convention, in relation to Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects), to the detriment of the said journalists.

2. *Procedure before the Commission.* The procedure before the Commission was as follows:

a) *Petition.* On August 29, 2008, Pedro Nikken and Carlos Ayala Corao lodged the initial petition before the Commission.

b) *Admissibility Report.* On August 15, 2014, the Commission adopted Admissibility Report No. 75/14 in which it concluded that the petition was admissible.[1]

c) *Merits Report.* On September 28, 2019, the Commission adopted Merits Report No. 148/19, under Article 50 of the Convention (hereinafter "the Merits Report" or "Report No. 148/19"), in which it reached a series of conclusions and made several recommendations to the State.

d) *Notification to the State.* The Merits Report was notified to the State on December 5, 2019, granting it two months to report on compliance with the recommendations. After the Commission had agreed to a first extension of two months and a second of three months, the State of Costa Rica presented a report in which, according to the Commission, it failed to provide information on progress in compliance with the recommendations or to request a further extension of the time frame.

3. *Submission to the Court.* On August 5, 2020, the Commission submitted to the jurisdiction of the Inter-American Court all the facts and human rights violations described in the Merits Report "given the need to obtain justice and reparation."[2]

4. *The Inter-American Commission's requests.* Based on the foregoing, the Commission asked the Court to declare the international responsibility of the State for

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[1] This was notified to the parties on October 2, 2014.

[2] The Commission appointed Commissioner Julissa Mantilla Falcón, then Special Rapporteur for Freedom of expression, Edison Lanza, and then Executive Secretary Paulo Abrão as its delegates before the Court. It also appointed Marisol Blanchard Vera, Deputy Executive Secretary, together with Jorge Humberto Meza Flores and Cecilia La Hoz Barrera, Executive Secretariat experts, as legal advisers.

the violations indicated in its Merits Report. The Commission also asked the Court to order the State to adopt measures of reparation, and these are described and analyzed in Chapter VIII of this judgment. The Court notes with concern that there was a lapse of almost twelve years between the presentation of the initial petition before the Commission and the submission of the case to the Court.

II
PROCEEDINGS BEFORE THE COURT

5. *Notification to the representatives and to the State.* The Court notified the Commission's submission of the case to the representatives of the alleged victims[3] (hereinafter "the representatives") and to the State on September 2, 2020.

6. *Brief with pleadings, motions and evidence.* On November 3, 2020, the alleged victims' representatives submitted to the Court their brief with pleadings, motions and evidence (hereinafter "the pleadings and motions brief"). The representatives agreed substantially with the allegations made by the Commission and asked the Court to declare the international responsibility of the State for the violation of the articles indicated by the Commission (with the exception of Article 9) and, also, for the violation of Article 8 of the American Convention.[4]

7. *Answering brief.* On January 19, 2021, the State submitted to the Court its brief with preliminary objections and its answer to the submission of the case and the Merits Report of the Inter-American Commission and also to the pleadings and motions brief of the representatives (hereinafter "the answering brief"). In this brief, the State contested the alleged violations and the measures of reparation proposed by the Commission.

8. *Public hearing.* In an order of December 13, 2021,[5] the acting President of the Court called the State, the representatives and the Inter-American Commission to a public hearing to receive their final oral arguments and observations on the preliminary objections and eventual merits, reparations and costs, and also the statements of one of the alleged victims proposed by the representatives, one expert witness offered by the State, and one expert witness offered by the Inter-American Commission. The public hearing took place on February 14, 2022, during the Court's 146th regular session held at its seat.[6]

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[3] The alleged victims in this case were represented by Carlos Ayala Corao, Carlos Tiffer Sotomayor, Edward Jesús Pérez and María Daniela Rivero.

[4] In their brief with final arguments they added the violation of Article 9 of the American Convention.

[5] *Cf. Case of Moya Chacón et al. v. Costa Rica.* Call to a hearing. Order of the acting President of the Inter-American Court of Human Rights of December 13, 2021. Available at: https://www.corteidh.or.cr/docs/asuntos/ moya_chacon_13_12_2021.pdf

[6] At this hearing, there appeared:

a) for the Inter-American Commission: Carlos Bernal Pulido, Commissioner; Tania Reneaum Panszi, Executive Secretary; Pedro José Vaca Villareal, Special Rapporteur for Freedom of Expression; Jorge Meza Flores, Adviser; Analía Banfi Vique, Adviser, and César Mauricio González Flores, from the Special Rapporteurship for Freedom of Expression;

b) for the alleged victims: Carlos Ayala Corao, Carlos Tiffer, María Daniela Rivero and Armando González Rodicio.

c) for the State of Costa Rica: Patricia Solano Castro, President of the Third Chamber of the Supreme Court of Justice (Agent); Natalia Córdoba Ulate, Director for Legal Affairs of the Ministry of Foreign Affairs and Worship (Agent); Ricardo Salas Porras, Member of the Third Chamber of the Supreme Court of Justice (Agent); Carlos Jiménez González, Consultant on criminal matters of the Third Chamber of the Supreme Court of Justice; José

9. *Amicus Curiae*. The Court received an *amicus curiae* brief submitted by the Foundation for Press Freedom (FLIP), El Veinte, and Media Defence.[7]

10. *Final written arguments and observations.* On March 9, 2022, the State forwarded its final written arguments and, on March 15, 2022, the representatives remitted their final written arguments and the Commission its final written observations. The representatives forwarded two annexes with their brief with final written arguments. Neither the State nor the Commission made any observations on those documents.

11. *Deliberation of the case.* The Court deliberated this judgment on May 16, 17, 18 and 23, 2022, during its 148th regular session.

III
JURISDICTION

12. The Inter-American Court has jurisdiction to hear this case pursuant to Article 62(3) of the American Convention because Costa Rica has been a State Party to the American Convention since April 8, 1970, and accepted the contentious jurisdiction of the Court on July 2, 1980.

IV
PRELIMINARY OBJECTIONS

A. Alleged violation of the principle of procedural equality and the right of defense

13. The ***State*** argued that, during the substantiation of this case before the Commission, the latter had "modified the matter in dispute" which had previously been determined by both the alleged victims when lodging their initial petition before the Commission, and the factual and legal framework delimited by the Commission when adopting its Admissibility Report, in which it declared that Petition No. 1018-08 was admissible only with regard to Articles 13, 8 and 25 of the American Convention, in relation to Article 1(1) of this instrument. The State noted that the Commission had included the violation of Articles 2 and 9 of the Convention in its Merits Report, "without the State having the procedural opportunity to outline its arguments on admissibility and merits"; this had placed the State in a "clear situation of procedural inequality because it was determined that two articles had been violated that – in addition to not having been considered by the petitioners – had not been determined thus by the [Commission] when deciding on the petition's admissibility." Therefore, the State asked the Court to "review the decisions taken" and to declare the violation of the principle of procedural equality and the State's right of defense.

Carlos Jiménez Alpízar, Coordinator of the International Law and Human Rights Department of the Legal Affairs Directorate of the Ministry of Foreign Affairs and Worship; Rodolfo Lizano Ramírez, Third Secretary of the Legal Affairs Directorate of the Ministry of Foreign Affairs and Worship, and Steven Orozco Fonseca, Legal Adviser of the Legal Affairs Directorate of the Ministry of Foreign Affairs and Worship.

[7] The brief was signed by Jonathan Carl Bock Ruiz, Raissa Carrillo Villamizar and María José González Méndez (FLIP); Ana Bejarano Ricaurte, Emmanuel Vargas Penagos and Susana Echavarría Medina (El Veinte) and Carlos Gaio (Media Defence) and referred to: (i) the enhanced protection of expressions on matters of public interest and the role of the press in their dissemination; (ii) the international principles concerning the standard of proof applicable in cases of defamation, and (iii) the elements for analyzing the proportionality of a civil sanction under the inter-American human rights system.

14. The ***Commission*** noted that, following the lodging of the initial petition, the criminal proceedings, their result and, consequently, the law that supported the latter, formed part of the facts of which the State had been made aware, and the State had presented its observations in that regard. It underscored that, based on the *iura novit curia* principle, it was empowered to assess the legality of the facts submitted to its consideration and declare that articles that had not been cited by the parties were applicable.

15. The ***representatives*** argued that the right of defense could be violated owing to inconsistency between the Admissibility Report and the Merits Report when the factual framework on which the case was based had been modified. However, in the instant case, the right of defense had not been violated because, after analyzing the merits of the matter in its Merits Report – based on the facts contained in its Admissibility Report – the Commission had declared the violation of another article of the Convention. Second, they indicated that the *iura novit curia* principle empowered the Inter-American Court (and the Commission) to identify – even *ex officio* – human rights violations arising from the factual framework of a case, regardless of the procedural moment at which the violation of the said articles was alleged, and even whether it had been alleged.

16. This ***Court*** has indicated that the Inter-American Commission has autonomy and independence in the exercise of its mandate as established by the American Convention and, particularly, in the exercise of its functions in the procedure for processing individual petitions established in Articles 44 to 51 of the Convention. However, in matters that it is examining, the Court has the power to conduct a review of the legality of the Commission's actions.[8] This does not necessarily signify that it reviews the procedure carried out before the Commission, unless one of the parties alleges credibly that a serious error occurred that violated its right of defense.[9] However, the Court must maintain an appropriate balance between the protection of human rights, the ultimate purpose of the system, and the legal certainty and procedural equality that ensure the stability and reliability of the international protection.[10]

17. The Court also recalls that the party arguing that an action of the Commission during the procedure before it has involved a serious error that affected its right of defense must provide proof of this prejudice. Therefore, a complaint or difference of opinion in relation to the Inter-American Commission's actions is not sufficient in this regard.[11]

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[8] *Cf. Control of due process in the exercise of the powers of the Inter-American Commission on Human Rights (Articles 41 and 44 to 51 of the American Convention on Human Rights).* Advisory Opinion OC-19/05 of November 28, 2005. Series A No.19, first and third operative paragraphs; *Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2007. Series C No. 172, para. 32, and *Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru. Preliminary objections, merits and reparations.* Judgment of February 1, 2022. Series C No. 448, para. 18.

[9] *Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2006. Series C No. 158, para. 66, and *Case of Villamizar Durán et al. v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of November 30, 2018. Series C No. 364, para. 43.

[10] *Cf. Case of the Saramaka People v. Suriname*, *supra*, para. 32, and *Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru. Preliminary objections, merits and reparations, supra*, para. 18.

[11] *Cf. Case of the Saramaka People v. Suriname, supra*, para. 32, and *Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru, supra*, para. 18.

18. In the instant case, the Court, as a jurisdictional organ, will proceed to review the actions and decisions taken by the Commission in order to ensure the validity of the admissibility requirements and that the principles of adversarial proceedings, procedural equality and legal certainty were respected.[12]

19. Regarding the inclusion of human rights violations in the Commission's Merits Report that had not been indicated previously in its Admissibility Report, the Court notes that the rights indicated in the Admissibility Report are the result of a preliminary examination of the petition. Therefore, this does not limit the possibility of other rights or articles that were allegedly violated being included at later stages, provided that the State's right of defense is respected within the factual framework of the case being analyzed, as occurred in this case. In addition, the Court notes that the State did not submit any arguments concerning the possible prejudice caused and, in particular, any harm that had occurred to its right of defense.

20. Based on the above, and considering that the Commission's inclusion in the Merits Report of the alleged violation of Articles 2 and 9 of the American Convention falls within the factual framework of this case and, in particular, is related to the laws applicable at the time of the facts that are the subject of the dispute before this Court, the preliminary objection must be rejected.

B. Alleged failure to exhaust domestic remedies

21. The ***State*** indicated that the alleged victims and their representatives had failed to comply with the obligation to exhaust domestic remedies in relation to the facts associated with the violation of Articles 2 and 9 of the Convention. In particular, it indicated that they should have filed an action of unconstitutionality, which was an "available and effective" remedy. Regarding the alleged violation of Article 8 of the Convention, it added that the alleged victims had not had recourse to the available legal remedy to submit specific arguments concerning the determination of the sum imposed as civil compensation.

22. The ***Commission*** underlined that, although the State was aware of the facts relating to the criminal proceedings, it had failed to cite the failure to exhaust domestic remedies in relation to the action of unconstitutionality or to present any evidence that this would have been appropriate and effective during the procedure before the Commission. To the contrary, at both the admissibility and the merits stage, the State had indicated that the actions taken during the criminal proceedings were in keeping with the American Convention. Consequently, the objection concerning the failure to exhaust the action of unconstitutionality that the State was seeking to introduce at the current stage of the proceedings was time-barred pursuant to the consistent case law of the Court.

23. The ***representative***s argued that the State had not filed a preliminary objection regarding the exhaustion of domestic remedies before the Commission during the first procedural stages of the litigation. They also indicated that even the Admissibility Report

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[12] *Cf. Case of Grande v. Argentina. Preliminary objections and merits.* Judgment of August 31, 2011. Series C No. 231, para. 46, and *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 22, 2013. Series C No. 265, para. 28.

in this case had mentioned that the State of Costa Rica recognized that the alleged victims had exhausted the remedies available under the laws of Costa Rica to contest the judicial sanction that had been imposed. They indicated that, in any case, in addition to the time-barred and inadmissible nature of the objection filed by the State, the fact that, initially, the latter had upheld a position in favor of admissibility in which it recognized that the domestic remedies had been exhausted gave rise to the principle of estoppel. Subsidiarily, they indicated that the State had not proved when, how or why the remedy of unconstitutionality would have been an appropriate remedy against the norms of the Criminal Code to prevent the alleged victims from being subject to criminal proceedings. They added that it was not possible to file an action of unconstitutionality against the definition of the offenses of defamation or libel by the press established in articles 147 of the Criminal Code and 7 of the Printing Act because, once the Supreme Court of Justice had handed down the final judgment convicting the alleged victims, it would have been impossible to file the action of unconstitutionality, because to do so, Costa Rican law required the existence of ongoing proceedings.

24. The Court recalls that Article 46(1)(a) of the American Convention establishes that admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 requires that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.[13] However, this supposes not only that such remedies must exist formally, but also that they must be adequate and effective, owing to the exceptions established in Article 46(2) of the Convention.[14] In addition, it has been the consistent case law of this Court that an objection to the exercise of the Court's jurisdiction based on the supposed failure to exhaust domestic remedies must be presented at the proper procedural moment;[15] that is, during the admissibility procedure before the Commission,[16] and the remedies that remained to be exhausted and their effectiveness must be indicated precisely.

25. In keeping with the above, the Court notes that, in the initial petition before the Commission, the criminal proceedings, their result and, consequently, the laws that supported this, formed part of the facts of which the State was made aware. This also meant that the conventionality of the laws applied by the domestic courts was called into question from the time of the said initial petition. Therefore, the State had the procedural burden of presenting its arguments on admissibility based on those facts at the first possible opportunity before the Commission[17] and, in this case, this corresponded to the admissibility stage; all this without prejudice to other violations, strictly related to the same facts, being alleged at a subsequent stage. Thus, even though the State was aware of, and was able to comment on the facts related to the criminal proceedings and the laws that were applied from the moment the initial petition was forwarded to it, it did

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13 *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections.* Judgment of June 26, 1987. Series C No. 1 para. 85, and *Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru, supra*, para. 25.

14 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 63, and *Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru, supra,* para. 25.

15 *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections, supra*, para. 88, and *Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru, supra,* para. 26.

16 *Cf. Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of July 2, 2004. Series C No. 107, para. 81, *and Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru, supra,* para. 26.

17 *Cf. Case of Mémoli v. Argentina, supra*, para. 50, and *Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru, supra,* para. 26.

not argue the failure to exhaust domestic remedies in relation to the action of unconstitutionality, or present any evidence that this would have been appropriate and effective. Indeed, the Court notes that the State filed this preliminary objection for the first time in its answering brief; that is, at a procedural moment long after it had been advised of those facts. Therefore, the presentation of this preliminary objection is time-barred and, consequently, it is rejected by the Court.

V
EVIDENCE

A. Admissibility of the documentary evidence

26. The Court received diverse documents presented as evidence by the Commission, the representatives and the State and, as in other cases, it admits them in the understanding that they were presented at the appropriate procedural moment (Article 57 of the Rules of Procedure).[18]

27. The Court also received documents attached to the final written arguments presented by the alleged victims' representatives.[19] With regard to the document attached as Annex I, the Court admits this because it finds it useful for the correct identification of one of the alleged victims, and in application of the provisions of Article 58 of the Rules of Procedure. Regarding the documents attached as Annex II, the Court notes that these were issued after the presentation of the principal briefs and, therefore, they constitute evidence of supervening facts. Consequently, those documents are admissible pursuant to of Article 57(2) of the Rules of Procedure.

B. Admissibility of the testimonial and expert evidence

28. The Court finds it pertinent to admit the statements made during the public hearing,[20] and also the affidavits received,[21] insofar as they are in keeping with the purpose defined by the President in the order requiring them.[22]

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[18] The documentary evidence may be presented, in general and according to Article 57(2) of the Rules of Procedure, together with the briefs submitting the case or with pleadings, motions and evidence, or the answering brief, as applicable, and evidence forwarded outside these procedural opportunities is not admissible, subject to the exceptions established in the said Article 57(2) of the Rules of Procedure (namely, *force majeure* or grave impediment) or if it refers to a supervening fact; that is, one that occurred following the said procedural moments. *Cf. Case of the Barrios Family v. Venezuela. Merits, reparations and costs.* Judgment of November 24, 2011. Series C No. 237, paras. 17 and 18, and *Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru, supra,* para. 35.

[19] Annex I: identity card of Ronald Chacón Chaverri (known as Ronald Moya Chacón), and Annex II: documents authenticating litigation expenses in the context of these proceedings dated November 9, 2020, and February and March 2, 2022.

[20] During the public hearing, the Court received the statements of alleged victim Ronald Moya Chacón and expert witnesses Rafael Ángel Sanabria Rojas and Joan Barata Mir.

[21] The Court received affidavits made by alleged victim Freddy Parrales Chaves, witness Armando Manuel González Rodicio, and expert witness Javier Dall'Anese Ruiz, proposed by the representatives.

[22] The purpose of all these statements was established in the order of the acting President of the Inter-American Court of December 13, 2021. Available at: https://www.corteidh.or.cr/docs/asuntos/moya_chacon_13_12_2021.pdf

VI
FACTS

29. In this chapter, the Court will establish the facts of the case based on the factual framework submitted to its consideration by the Inter-American Commission in relation to the following aspects: (a) Legal framework; (b) Ronald Moya Chacón and Freddy Parrales Chaves; (c) Publication of the article in La Nación on December 17, 2005; (d) domestic proceedings instituted as a result of that publication, and (e) subsequent cassation proceedings before the Supreme Court of Justice.

A. Legal framework

30. The Court notes that, in the instant case, Messrs. Moya Chacón and Parrales Chaves were prosecuted for the offense of libel established in article 7 of the Printing Act in relation to article 145 of the Criminal Code, as well as for the offense of defamation established in article 146 of the said Criminal Code.[23] They were finally acquitted in the criminal jurisdiction and convicted in the civil jurisdiction in application of Article 1045 of the Civil Code.[24]

31. Article 7 of the Printing Act establishes:

> Anyone responsible for defamation or libel committed through the press shall be punished with from one to one hundred and twenty days' detention. This sanction shall apply jointly to the authors of the publication and to the editors responsible for the newspaper, pamphlet or book in which it may have appeared. If the name of the responsible editors does not appear in the newspaper, pamphlet or book, the directors of the publishing company shall be considered as such for the effects of this article, and if there are no such directors, their responsibility shall revert to the owner of the publishing company. But, if this be leased or held by another person in any other capacity, the lessee or possessor of the publishing company shall assume the responsibility that falls to the owner, provided that the Governor of the province has been advised of this tenure.
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> If the defamatory or libelous publication has not been made in a newspaper, pamphlet or book, the authors and the director or owner or lessee or possessor of the publishing company shall be held jointly responsible pursuant to the rule established in their regard in the preceding paragraph.

32. Regarding the current status of the said article 7 of the Printing Act, the Court underlines that the State has indicated that, owing to a judgment delivered by the Third Chamber of the Supreme Court of Justice on December 18, 2009, this provision has been abrogated. However, in its final written arguments, the State indicated that discussions on the status of this article had "not been finalized" under the laws of Costa Rica and, at this time, "conflicting opinions" existed in this regard.

33. Meanwhile, article 145 of the Criminal Code establishes that "[a]nyone who insults the dignity or decorum of another person, by word or act, either in their presence or by means of a communication addressed to them shall be penalized with a fine based on

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[23] *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folios 16 and 23).

[24] *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folio 21).

ten to fifty days"; while, article 146 of the Criminal Code establishes that "[a]nyone who dishonors another person or spreads rumors that may affect their reputation shall be penalized with a fine based on twenty to sixty days."

34. Lastly, Article 1045 of the Civil Code establishes that "[a]nyone who, by malice, omission, negligence or imprudence, causes another person harm shall be obliged to redress this, and also pay damages."

B. Ronald Moya Chacón and Freddy Parrales Chaves

35. At the time of the facts examined in this judgment, Ronald Moya Chacón,[25] a journalist by profession, was employed as the editor of the "incidents" section of La Nación, a Costa Rican newspaper. Meanwhile, Freddy Parrales, also a journalist, worked as a correspondent for this newspaper, responsible for covering the southern part of the country.[26]

C. Publication of the article in La Nación on December 17, 2005

36. In December 2005, the journalist Freddy Parrales received information that several police chiefs and officers of the State's law enforcement agency were being investigated for matters relating to liquor smuggling in the Panamanian border region. According to Mr. Parrales, he proceeded to consult the Judicial Investigation Department (hereinafter "the OIJ") as to whether the department was investigating the region's police chiefs.[27] Following confirmation by the OIJ, Mr. Parrales informed the editor of the "incidents" section of La Nación, Ronald Moya Chacón, of the situation and the latter contacted and requested information from the then Minister of Public Security of Costa Rica, R.R.M. The Minister confirmed verbally to the journalist Moya Chacón that a "disastrous situation" existed in the southern part of the country in which several police chiefs were implicated.[28] The Minister of Public Security asked Mr. Moya Chacon to give him two days to carry out internal consultations, following which he had a further conversation with Mr. Moya Chacón in which, based on a report prepared by his Ministry's Press Office, he confirmed the situation and, in particular, the existence of an investigation into "extortion" owing to the contraband of liquor, involving, among others, J.C.T.R., who, at that time, was a police major, employed as assistant police chief of the San Vito de Coto Brus Police Station.[29]

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[25] The Court notes that, as the representatives advised in their final written arguments, Ronald Moya Chacón's legal name is "Ronald Chacón Chaverri" and his identity card indicates that he is "known as" Ronald Moya Chacón (merits file, folio 551).

[26] *Cf.* Affidavit of Freddy Parrales Chaves dated January 27, 2022, p. 1 (evidence file, folio 1450).

[27] *Cf.* Affidavit of Freddy Parrales Chaves dated January 27, 2022, p. 2 (evidence file, folio 1451). See also, Statement made by Ronald Moya Chacón at the public hearing held on February 14, 2022, during the Court's 146th regular session, indicating that: "the genesis or origin of this information was a phone call from our correspondent in the area, Freddy Parrales, who said to me: Ronald, I have this information; members of the Judicial Investigation Department [OIJ] are telling us that there is a problem with some police chiefs in the area – and he mentioned 3 or 4 police chiefs – who are being investigated by the Judicial Investigation Department".

[28] *Cf.* Statement made by Ronald Moya Chacón at the public hearing held on February 14, 2022, during the Court's 146th regular session. See also, Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folios 8 and 14).

[29] *Cf.* Complaint filed by J.C.T.R. against Freddy Parrales Chaves, Ronald Moya Chacón and the then Minister of Public Security for the alleged perpetration of the offenses of calumny and defamation, on February 7, 2006 (evidence file, folio 676).

37. On December 17, 2005, a newspaper article signed by the journalists, Ronald Moya and Freddy Parrales, was published in the "incidents" section of La Nación entitled "OIJ accuses police chief of failing to detain truck with liquor." The article reported that, on June 29, 2005, a regional chief of police had released a vehicle that contained merchandise consisting of liquor without any "legal reasons" for doing so.[30] As a result, the OIJ had filed a complaint against this police chief. Then, and in a section entitled "More cases," the article indicated that this was not the only case in the southern part of the country because, according to the Minister of Public Security at the time, there were at least two other cases that were being investigated, and the police chiefs who were implicated (referring to J.C.T.R., and another police chief in the region) might even be removed. In particular, the article indicated:

> [R.R.M] also confirmed that the police chief of San Vito de Coto Brus […] together with the police chief of Ciudad Neily […] are under investigation and may be removed. "At this time, they are both taking vacations," he said. A case is underway in the Corredores Prosecutor's Office against [J.C.T.R.], who has been a law enforcement agent for more than 16 years, for alleged extortion in relation to contraband liquor. […] It was not possible to speak to the two police chiefs yesterday because they were in meetings.[31]

38. As a result of this newspaper article, on December 19, 2005, police chief J.C.T.R. sent a notarized letter to the director of the news desk of La Nación in which he required that "within two days, [he] be informed of the source of the information provided and the evidence it had seen in order to make such serious assertions."[32] He also indicated that the assertions were "false," that this would be proved opportunely, and that the information requested was of interest to him in order "to determine who had taken upon himself or themselves to provide erroneous information to the media."[33] In response to this demand, in a note of December 21, 2005, the secretary of the Director of La Nación indicated that "La Nación's sources and documents are confidential and are not released to private individuals."[34]

39. On January 31, 2006, the Press Office of the Ministry of Public Security sent a note to Mr. Moya Chacón, advising him that J.C.T.R. was being investigated for "extortion" by the Coto Brus prosecutor rather than the Corredores prosecutor, without referring to the said liquor contraband. In particular, this noted indicated:

> THE POLICE ARE INVESTIGATING IN COTO BRUS, NOT IN CORREDORES
>
> An article published in La Nación on Saturday, December 17, 2005, entitled: "OIJ accuses police chief of failing to detain truck with liquor" indicates the following: "A case is underway in the Corredores Prosecutor's Office against [J.C.T.R.], who has been a law enforcement agent for more than 16 years, for alleged extortion in relation to contraband liquor."

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30 *Cf.* La Nación, newspaper article "*OIJ denunció a jefe policial por no detener camión con licores"* ["OIJ accuses police chief of failing to detain truck with liquor], of December 17, 2005 (evidence file, folio 25).

31 *Cf.* La Nación, newspaper article "*OIJ denunció a jefe policial por no detener camión con licores,*" of December 17, 2005 (evidence file, folio 25).

32 *Cf.* Notarized letter from J.C.T.R. to La Nación dated December 19, 2005 (evidence file, folio 28).

33 *Cf.* Notarized letter from J.C.T.R. to La Nación dated December 19, 2005 (evidence file, folio 28).

34 *Cf.* Letter from La Nación addressed to J.C.T.R. on December 21, 2005 (evidence file, folio 31).

> In this regard, the Press Office clarifies that the Legal Support Directorate of the Ministry of Public Security has advised that the case against [J.C.T.R.] and others is summary investigation 05-000367-036-PE for the offense of extortion and it is being investigated by the Coto Brus assistant prosecutor and not by the Corredores prosecutor, as was published erroneously.[35]

40. Accordingly, on February 9, 2006, in the lower left-hand corner of page 2A of the newspaper, La Nación published an erratum entitled "Erroneous prosecutor's office," in which it rectified an error regarding the jurisdiction in which J.C.T.R. was being investigated for the offense of extortion. In particular, the note indicated:

> Erratum. Erroneous prosecutor's office
>
> Regarding the article, 'OIJ accuses police chief of failing to detain truck with liquor' published on December 17, 2005, the Press Office of the Ministry of Public Security has clarified that the case against the police chief [J.C.T.R.] for the offense of extortion is being investigated by the Coto Brus assistance prosecutor and not by the Corredores prosecutor, as was published by error.[36]

D. Internal proceedings resulting from the publication of the newspaper article

41. On February 7, 2006, based on the publication of the said newspaper article of December 17, 2005, J.C.T.R. filed a complaint against the journalists Ronald Moya Chacón and Freddy Parrales Chaves, as well as against the then Minister of Public Security, for the perpetration of the offenses of calumny and defamation;[37] and private complaint case No. O6-000003-538-PE was opened for the offenses of calumny and "defamation by the press."[38] In addition, under the same criminal case, J.C.T.R. filed a civil action for damages against the two journalists, the Minister of Public Security, La Nación and the State of Costa Rica.[39]

42. On January 10, 2007, the Second Circuit Trial Court of San José, Goicoechea (hereinafter "the Trial Court") delivered a judgment in which, after reclassifying calumny as libel by the press,[40] it decided to acquit Freddy Parrales Chaves, Ronald Moya Chacón, and the Minister of Public Security "of all criminal liability for the offenses of defamation and libel by the press," because the subjective element of the offense had not been proved. Regarding the journalists, the Trial Court considered that it did not observe a "direct intention to harm the complainant's honor; rather, very probably their only intention when publishing the article was to perform their task of providing information to the public" although, in this case, they did so "without taking the care required by their profession."[41]

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35 *Cf.* Press and Public Relations Office of the Ministry of Public Security, email sent to Ronald Moya Chacón headed "Clarification," dated January 31, 2006 (evidence file, folio 750).

36 *Cf.* La Nación, Erratum "Erroneous prosecutor's office," of February 6, 2006 (evidence file, folio 33).

37 *Cf.* Complaint filed by J.C.T.R., on February 7, 2006 (evidence file, folios 675 to 685).

38 *Cf.* Second Circuit Criminal Court, Goicoechea, Judgment of January 10, 2007 (evidence file, folio 4).

39 *Cf.* Corredores Southern Region Court, Ruling of February 28, 2006 (evidence file, folio 732).

40 *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folio 16).

41 *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folio 16).

43. However, the judgment also noted that "a harmful action" had been constituted which, although it was not a criminal act, had "given rise to civil liability caused directly by the publication in a written medium of a false fact that was discrediting and injurious."[42] In particular, the Trial Court considered that the said publication had "falsely attributed" to J.C.T.R. that he was being investigated for the alleged perpetration of an offense of extortion linked to liquor contraband activities, when the reality was that he was being investigated, as of August 2005, for the offense of extortion, subsequently reclassified as bribery.[43] Thus, the said court noted that when the article was published in December 2005, "no criminal or administrative case was being processed [against J.C.T.R.] for an offense of 'extortion' related to liquor contraband [...]; but merely with regard to a vehicle and an individual who should have been referred to the customs and immigration [authorities] and, apparently, an undue charge and payment occurred."[44]

44. The Trial Court "rejected the objection based on [the] truth argued by all the defendants' representatives,"[45] in the understanding that the case to which the said article referred bore no relationship "whatsoever" to liquor contraband, a charge that, according to the said court, constituted "an extremely serious accusation,"[46] of an "injurious, defamatory and offensive" nature.[47] This entailed "serious" moral harm to J.C.T.R., affecting his "objective and subjective honor," resulting in "harm and disrepute in the workplace" and vis-à-vis "subordinates, family and community."[48] It also considered that, in that case, there had been a "serious error and lack of due care," as well as negligence[49] by the three defendants[50] and that the erratum that was published on February 9, 2006, failed to correct "the serious assertion" that a case was pending against J.C.T.R. for extortion related to contraband liquor.[51] The Trial Court added that the journalists Moya Chacón and Parrales Chaves should have made further verifications of the sources and the story, "for example, consulting the Judiciary's Press Office to confirm the details of the criminal case."[52]

45. Accordingly, the Trial Court decided to declare the civil action for damages admissible and, consequently, sentenced, as jointly and severally liable, Freddy Parrales

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42 *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folio 20).

43 *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folio 13).

44 *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folios 7 and 8).

45 *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folio 14).

46 *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folio 13).

47 *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folio 14).

48 *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folios 14, 16 and 21).

49 *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folio 21).

50 *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folio 17).

51 *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folio 19).

52 *Cf.* Second Circuit Criminal Court of San José, Ruling of September 28, 2009 (evidence file, folios 19 and 21).

Chaves and Ronald Moya Chacón, and also the Minister of Public Security, La Nación, and the State of Costa Rica to the joint payment of five million colones (approximately US$9,600 at the date of the facts) for non-pecuniary damage and one million colones (approximately US$1,900 at the date of the facts) for personal costs.[53]

E. Remedy of cassation before the Supreme Court of Justice

46. On January 30 and February 7, 2007, Messrs. Moya Chacón and Parrales Chaves, La Nación, and the Minister of Public Security, R.R.M., filed a remedy of cassation against the Trial Court's judgment of January 10, 2007, requesting its annulment.[54]

47. Following an oral hearing on May 29, 2007, on December 20, 2007, the Third Chamber of the Supreme Court of Justice (hereinafter "the Supreme Court of Justice") confirmed the Trial Court's judgment. The Supreme Court of Justice characterized the newspaper article as a piece of "informative journalism," noting that the right to information existed insofar as "the information provided is true" because, to the contrary, this type of action is subject to the "criminal and pecuniary liability" that may arise from the harm caused.[55] It also considered that the Trial Court's ruling had found proved that fault-based liability existed because there was "clearly" a causal nexus between the conduct and the harm caused, "since erroneous information had been reported on situations that could easily have been corroborated."[56] It added, with regard to the objective liability of La Nación, that "a media outlet should endeavor to corroborate the veracity of the information it provides because, due precisely to the nature of the activity, it is subject to the liability it may incur in case of imprudent or negligent conduct."[57]

48. On April 29, 2008, La Nación made a payment for the full six million colones to which all the defendants had been sentenced jointly and severally.[58]

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[53] *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folio 23). In particular, the said judgment considered that La Nación and the State, respectively, should respond for objective civil liability for the harm caused to the plaintiff due to the "negligent actions in exercise of their functions" together with the said physical persons, all pursuant to the said article 1048 of the Civil Code. *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folio 21).

[54] *Cf.* Supreme Court of Justice, Third Chamber, Cassation judgment of December 20, 2007 (evidence file, folio 37).

[55] *Cf.* Supreme Court of Justice, Third Chamber, Cassation judgment of December 20, 2007 (evidence file, folios 40 and 41).

[56] *Cf.* Supreme Court of Justice, Third Chamber, Cassation judgment of December 20, 2007 (evidence file, folio 40).

[57] *Cf.* Supreme Court of Justice, Third Chamber, Cassation judgment of December 20, 2007 (evidence file, folio 40).

[58] *Cf.* Second Circuit Criminal Court of San José, Ruling of September 28, 2009 (evidence file, folio 35).

VII
MERITS

RIGHT TO FREEDOM OF THOUGHT AND EXPRESSION, JUDICIAL GUARANTEES, AND THE PRINCIPLE OF LEGALITY AND NON-RETROACTIVITY, IN RELATION TO THE OBLIGATION TO RESPECT RIGHTS AND THE DUTY TO ADOPT DOMESTIC LEGAL PROVISIONS[59]

49. This case relates to a series of alleged violations of the American Convention owing to the imposition of subsequent liability against the journalists Ronald Moya Chacón and Freddy Parrales Chaves as a result of a newspaper article published on December 17, 2005. The article reported on presumed irregularities that had allegedly occurred in the control of the smuggling of liquor into Costa Rica in the Panamanian border region and mentioned various police officers who were supposedly involved in the said facts.

50. Taking into account the arguments presented by the parties and the Commission in this case, the Court will examine, first, the compatibility of the sanction imposed on the alleged victims with the right to freedom of thought and expression (Article 13) and the principle of legality and non-retroactivity (Article 9), all in relation to the obligation to respect rights (Article 1(1)) and the duty to adopt domestic legal provisions (Article 2). It will then examine the alleged violation of the right to judicial guarantees (Article 8), which was also cited by the representatives.

A. Arguments of the parties and of the Commission

51. The ***Commission*** underlined the relevance of the right to freedom of thought and expression based on the protection provided by Article 13 of the American Convention. It indicated that, despite its fundamental importance, freedom of expression was not an absolute right and, exceptionally, could be subject to restrictions.

52. The Commission also stressed that, when determining the conventionality of such restrictions, it was necessary to apply the tripartite test to the limitations of freedom of expression. This requires that any sanctions imposed owing to the exercise of this right must be: (1) precisely and clearly defined in a formal and pre-existing law; (2) aimed at achieving legitimate objectives authorized by the Convention ("respect for the rights or reputation of others" or "the protection of national security, public order, or public health or morals"), and (3) necessary in a democratic society (and thus comply with the requirements of suitability, necessity and proportionality.

53. Regarding the legality test, the Commission indicated that article 7 of the Printing Act, read in relation to article 145 of the Criminal Code, permitted resort to criminal mechanisms for the assignment of subsequent liability in situations in which it was considered that freedom of expression had been abused, contrary to the standards established by the Commission. It added that the said articles were incompatible with the principle of due process of criminal law and the right to freedom of expression because they did not establish clear parameters that allowed the prohibited conduct and its elements to be predicted. It also indicated that the application of article 1045 of the Civil Code, which established the obligation to redress any harm caused by "malice, omission, negligence or imprudence," was not incompatible *per se* with the American

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[59] Articles 13, 8, 9, 1 and 2 of the American Convention on Human Rights.

Convention; rather, it was its application by the State's judicial authorities that gave rise to this incompatibility. It pointed out that the civil law should have been applied pursuant to inter-American standards so that civil damages should not entail the inhibition or self-censorship of those who exercise their right to freedom of expression. It added that the sanction imposed did not meet the requirements of necessity and proportionality. In this regard, the Commission noted that, when establishing civil sanctions for possible abuses in the dissemination of information involving officials and public matters, the standard of "actual malice" should be used to assess them. According to this standard, the public official or public figure who alleges the harm must prove that the person disseminating the information did so fully intending to cause harm and with knowledge that it was false information or with reckless disregard for the truth. The Commission noted that, according to the initial judgment – and its subsequent confirmation in cassation – the courts of justice concluded that, when disseminating the erroneous information, the journalists were not acting with malice or intending to cause harm.

54. The Commission also noted that the dissemination of erroneous information in good faith is "inevitable in a pluralist, free and democratic society; therefore, imposing a requirement of absolute truth for the exercise of the right to freedom of expression, especially in relation to matters of public interest, such as abuse of power and corruption, would affect the very essence of this right." On this basis, the Commission considered that the subsequent liability of journalists should be excluded, even if the facts of public interest that were reported were erroneous or inexact, when journalists acted with reasonable diligence in seeking and verifying the information divulged. Moreover, given the "urgent" nature of the exercise of news journalism, it is not always possible to ensure the complete veracity of a news item, based on all the possible or imaginable sources identified *a posteriori*. In conclusion, the Commission understood that, although the journalists had divulged erroneous information, they did so without full knowledge that the information they were disseminating was false; furthermore, they did not act with manifest negligence in their quest for the truth regarding the news story. Therefore, the State violated Article 13(1) and 13(2) of the American Convention, in relation to Article 1(1) thereof. Also, in exercise of its competence *iura novit curia*, since this violation occurred as a result of the application of a law that did not meet the requirements of strict legality, the Commission concluded that the State also failed to comply with Articles 9 and 2 of the Convention.

55. Furthermore, the Commission pointed out that, in practice, the reference made by the Trial Court to verification of the facts by consulting the Judiciary's Press Office resulted "in requiring that this source should be consulted obligatorily, or at least preferably, in order to prove the said corroboration or diligent conduct." It indicated that journalists should have the freedom to choose their journalistic sources; thus, the State's imposition of a preferential source signified an exaggerated restriction of freedom of expression and could also give rise to a high risk of censorship.

56. Lastly, the Commission concluded that it had insufficient elements to determine whether the State of Costa Rica had violated Articles 8(2)(h) and 25(1) of the American Convention as argued by the petitioners in the procedure before the Commission. Regarding the alleged violation of Article 8 indicated by the representatives in their pleadings and motions brief, the Commission considered that its analysis "was not focused on the failure to provide the reasons for the domestic rulings, but rather on the fact that the reasons adopted [by the domestic courts] were not in keeping with Article 13 of the American Convention."

57. The ***representatives*** argued, first, that the newspaper article written by the

alleged victims referred to information of public interest. They added that the opening of criminal proceedings due to the publication of information of "evident public interest" was totally contrary to freedom of expression because it harmed that right to the detriment of both the victims and democratic society as a whole. They indicated that this constituted an internationally wrongful act because, according to the Court's case law, in cases of discourse that was protected owing to its public interest – such as when it referred to the conduct of public officials in the exercise of their functions – pursuant to the Convention, the State's punitive response by means of criminal law was not appropriate to protect the honor of the official. They also indicated that the measure of subsequent civil liability applied in this case did not meet the requirements of legality, pursuit of a legitimate purpose and suitability, necessity and proportionality. They added that the purpose of the criminal proceedings filed against the journalists was not to obtain a rectification, but rather to silence criticism of the plaintiff's actions in his capacity as a public official. The representatives also argued that the journalists acted with due diligence when asking the Minister of Public Security to confirm information concerning a public official under his hierarchy and control. Moreover, they indicated that the sentence imposed a duty of maximum diligence – a "sort of special burden of diligence" – on the journalists because it required them to consult a specific and obligatory official source to confirm information.

58. The representatives also considered that, in the instant case, the appropriate way to restore the honor and provide redress to the public official concerned would have been by means of the right of rectification or reply. In addition, they indicated that, by subjecting the alleged victims to criminal proceedings for "libel by the press" based on the provisions of articles 145 of the Criminal Code and 7 of the Printing Act, the State had violated Articles 9 and 2 of the Convention, in relation to Article 13 of this instrument.

59. Lastly, the representatives argued that the State had violated the right to judicial guarantees because the determination that the alleged victims bore civil liability did not comply with the essential minimum standards imposed by the right to be heard in its material scope and, specifically, with the guarantee of a reasoned judgment. They indicated that the Trial Court had considered that the compensation amount established was "proportionate" to the harm caused; however, it failed to include any details of the reasons based on which it had identified the harm and calculated the sum corresponding to civil liability. According to the representatives, the Trial Court merely outlined what it considered "obvious" when determining the compensation amount, without providing any type of justification in this regard; moreover, this was ratified by the Third Chamber of the Supreme Court of Justice. Therefore, they concluded that the State had violated Article 8 of the American Convention.

60. The ***State*** underscored that this case does not relate to a criminal matter, but is solely civil in nature. It added that the journalists had not duly corroborated the information they published; they failed to consult other sources, such as the Judiciary's Press Office. According to the State, the publication caused humiliation and discredit to J.C.T.R. among his co-workers and in the community of San Vito de Coto Brus, where he was employed as deputy police chief. It also argued that the erratum published in La Nación two days after J.C.T.R. had filed his complaint and civil action for damages was "almost invisible" and failed to rectify the error committed by the serious accusation made against J.C.T.R. Moreover, "it repeated the harm because it was published in unequal conditions compared to the initial coverage, and due to its location under a humorous item." According to the State, the right of reply and rectification did not constitute "an essential principle for the control of mass communication"; rather, it

"mandates a duty of the media which, in good faith, should proceed to make the corresponding corrections." The State also argued that the proceedings against the civil defendants had complied "fully" with all the procedural guarantees and rules in force in the Republic of Costa Rica. It added that, in the instant case, it was not the Costa Rican State that "prosecuted" the journalists, but a private individual "in exercise of his right to justice."

61. With regard to the alleged violation of judicial guarantees indicated by the representatives, the State emphasized that the civil judgment that convicted the journalists was substantiated and that the civil liability imposed on them was subjective, stressing that "it is one matter if the judgment does not contain a statement of reasons or has not paid attention to the arguments of the defense, and another if its decision does not satisfy the latter." It indicated that the judgment considered that, the false attribution of the opening of a criminal case for extortion based on liquor contraband to J.C.T.R., who was well-known to the community and to the police officers under his responsibility, had been "extremely harmful for his public image, especially considering that La Nación is a serious newspaper with national coverage and international recognition." It argued that the domestic court had taken into consideration: (a) his personal circumstances (assistant police chief of a rural area); (b) the contextual circumstances (that the case related to an area severely impacted by the illegal trafficking of merchandise, particularly liquor; (c) the information subsequently provided to the journalists and the newspaper (that the said criminal case did not exist); (d) the failure to rectify the information; (e) the harm to the honor of J.C.T.R. among his co-workers and the community (he was jeered at and called names such as "*choricero*" [scam artist] in relation to liquor contraband, and even transferred to another post), and (f) the scope and credibility of the newspaper that published the story, which increased the scale of the harm.

B. Considerations of the Court

b.1 Importance of freedom of expression in a democratic society

62. The Court's case law has provided broad content to the right to freedom of thought and expression established in Article 13 of the Convention. Thus, the Court has indicated that this article protects the right to seek, receive, and impart information and ideas of all kinds.[60] It has also indicated that freedom of thought and expression has both an individual dimension and a social dimension, and this has resulted in a series of rights that are protected by the said article.[61] The Court has affirmed that the two dimensions are equally important and must be fully guaranteed simultaneously in order to ensure the full effectiveness of the right to freedom of thought and expression in keeping with the provisions of Article 13 of the Convention.[62]

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[60] *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, November 13, 1985. Series A No. 5, para. 30, and *Case of Palacio Urrutia et al. v. Ecuador. Merits, reparations and costs.* Judgment of November 24, 2021. Series C No. 446, para. 97.

[61] *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, para. 74, and *Case of Palacio Urrutia et al. v. Ecuador, supra*, para. 97.

[62] *Cf. Case of Ivcher Bronstein v. Peru. Merits, reparations and costs.* Judgment of February 6, 2001. Series C No. 74, para. 149, and *Case of Palacio Urrutia et al. v. Ecuador, supra*, para. 97.

63. The Court has also established that freedom of expression, particularly in matters of public interest, "is a cornerstone upon which the very existence of a democratic society rests."[63] In its Advisory Opinion OC-5/85, the Inter-American Court referred to the close relationship between democracy and freedom of expression when establishing that this right "is indispensable for the formation of public opinion. It is also a condition *sine qua non* for the full development of political parties, labor unions, scientific and cultural associations and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed."[64] Moreover, democratic control exercised by society by means of public opinion encourages the transparency of State activities and promotes the accountability of public officials in public administration; consequently, there should be a very reduced margin for any restriction of political debate or discussions on matters of public interest.[65]

64. The Court recalls that, in a democratic society, the inherent human rights and freedoms, their guarantees, and the rule of law constitute a triad, each component of which defines, completes and acquires meaning in function of the others.[66] In this regard, the Court notes that Articles 3 and 4 of the Inter-American Democratic Charter stress the importance of freedom of expression in a democratic society when establishing that "[e]ssential 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." And, that "[t]ransparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy."[67]

65. Thus, without an effective guarantee of freedom of expression the democratic system is weakened and pluralism and tolerance are harmed; the mechanisms for control and complaint by the individual become ineffectual and, ultimately, a fertile ground is created for authoritarian systems to take root in society.[68] Consequently, a

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[63] *Cf.* Advisory Opinion OC-5/85, *supra*, para. 70, and *Case of Palacio Urrutia et al. v. Ecuador, supra*, para. 87.

[64] *Cf.* Advisory Opinion OC-5/85, *supra*, para. 70.

[65] *Cf. Case of Ivcher Bronstein, supra*, para. 155, and *Case of Herrera Ulloa v. Costa Rica*, *supra*, para. 127. Similarly, ECHR, *Feldek v. Slovakia*, no. 29032/95, Judgment of July 12, 2001, para. 83, and *Sürek and Özdemir v. Turkey* [GS], Judgment of July 8, 1999, nos. 23927/94 and 24277/94, para. 60.

[66] *Cf. Habeas Corpus in Emergency Situations (Arts. 27.2, 25.1 and 7.6 American Convention on Human Rights),* Advisory Opinion OC-8/87, January 30, 1987. Series A No. 8, para. 26, and *Rights to freedom of association, to collective bargaining and to strike, and their relationship 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, Articles 3, 6, 7 and 8 of the Protocol of San Salvador, Articles 2, 3, 4, 5 and 6 of the Convention of Belem do Pará, 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 of the Rights and Duties of Man).* Advisory Opinion OC-27/21 of May 5, 2021. Series A No. 27, para. 39.

[67] *Cf.* OAS General Assembly, Inter-American Democratic Charter Resolution AG/RES. 1 (XXVIII-E/01) of September 11, 2001, Articles 3 and 4, and *Case of Palacio Urrutia v. Ecuador, supra,* para. 88.

[68] *Cf. Case of Herrera Ulloa v. Costa Rica*, *supra*, para. 116, and *Case of Palacio Urrutia v. Ecuador, supra,* para. 87.

society that is not well informed is not fully free.[69]

b.2 Importance of the role of the journalist in a democratic society

66. The Court has emphasized that "[t]he professional practice of journalism cannot be differentiated from freedom of expression. On the contrary, both are obviously intertwined, for the professional journalist is not, nor can he be, anything but someone who has decided to exercise freedom of expression in a continuous, regular and paid manner."[70] The Court has indicated that mass media plays an essential role as a vehicle for the exercise of the social dimension of freedom of expression in a democratic society. Therefore, it is essential that it reflects the most diverse information and opinions.[71] Indeed, the Court has characterized mass media as a true instrument of freedom of expression[72] and has also indicated that "[i]t is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, *inter alia,* a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists."[73]

67. The Court recalls that, for the press to be able to play its role of journalistic control, it must not only be free to impart information and ideas of public interest, but also to collect, compile and evaluate that information and those ideas. In his 2012 report to the United Nations Human Rights Council, the United Nations Special Rapporteur for the promotion and protection of the right to freedom of opinion and expression indicated that "journalists are individuals who observe and describe events, and document and analyse events, statements, policies, and any propositions that can affect society, with the purpose of systematizing such information and gathering of facts and analyses to inform sectors of society or society as a whole."[74] This means that any measure that interferes in the journalistic activities of those who are performing this function will inevitably obstruct the right to freedom of expression in its individual and collective dimensions.[75]

68. Furthermore, with regard to freedom of information, this Court considers that the journalist has a duty to verify reasonably, although not necessarily exhaustively, the facts he divulges. In other words, it is valid to require fairness and diligence in the comparison of sources and the search for information. This signifies the right of everyone not to receive a distorted version of the facts. Consequently, journalists are obliged to take a critical distance in relation to their sources and compare them with other relevant

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69 *Cf.* Advisory Opinion OC-5/85, *supra*, para. 70.

70 *Cf.* Advisory Opinion OC-5/85, *supra*, paras. 72 to 74, and *Case of Palacio Urrutia v. Ecuador, supra,* para. 94.

71 *Cf. Case of Ivcher Bronstein v. Peru, supra*, para. 149, and *Case of Palacio Urrutia v. Ecuador, supra,* para. 90.

72 *Cf. Case of Ivcher Bronstein v. Peru, supra,* para. 149, and *Case of Palacio Urrutia v. Ecuador, supra,* para. 92.

73 *Cf.* Advisory Opinion OC-5/85, *supra*, para. 34, and *Case of Palacio Urrutia v. Ecuador, supra,* para. 92.

74 *Cf.* United Nations, Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/20/17, paras. 3 and 4, and *Case of Bedoya Lima et al. v. Colombia, supra*, para. 107.

75 *Cf. Case of Bedoya Lima et al. v. Colombia, supra*, para. 107.

information.[76] The European Court of Human Rights has indicated that freedom of expression does not guarantee unlimited protection to journalists, even with regard to matters of public interest. That court has indicated that, even though they are protected by freedom of expression, in the performance of their task, journalists must abide by the principles of responsible and "ethical journalism," and this is particularly relevant in contemporary society where "not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed."[77]

69. In addition, given the importance of freedom of expression in a democratic society and the enhanced responsibility that this entails for professionals employed in the mass media, the State must not only minimize the restrictions to the circulation of information, but must also, insofar as possible, aim at a balanced participation of diverse information in public discussions, encouraging the pluralism of information.[78] Lastly, the Court has indicated that it is essential that journalists who work in the media should enjoy the necessary protection and independence to perform their task effectively because it is they who keep society informed, and this is an indispensable requirement for the latter to enjoy full freedom and to enhance public debate.[79]

70. In the context of the protection that States must grant, "privacy is essential to protect journalistic sources."[80] This is a cornerstone of freedom of the press "which enable[s] a society to benefit from investigative journalism, to strengthen good governance and the rule of law."[81] The confidential nature of journalistic sources is, therefore, essential for the work of journalists and for their role in society as providers of information concerning matters of public interest.[82]

b.3 Permitted restrictions to freedom of expression and the application of subsequent liability in cases in which honor and dignity are affected in matters of public interest

71. The Court recalls that, in general, the right to freedom of expression cannot be subject to prior censorship but rather to subsequent liability in very exceptional cases,[83]

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[76] *Cf. Case of Kimel v. Argentina*. *Merits, reparations and costs.* Judgment of May 2, 2008. Series C No. 177, para. 79, and *Case of Mémoli v. Argentina, supra*, para. 122.

[77] *Cf. Case of Mémoli v. Argentina, supra*, para. 122, referring to ECHR, *Stoll v. Switzerland* [GS], no. 69698/01, Judgment of December 10, 2007, paras. 103 and 104, and *Novaya Gazeta and Borodyanskiy v. Russia*, no. 14087/08, Judgment of March 28, 2013, paras. 37 and 42.

[78] The Court has indicated that "there must be […] a plurality of means of communication, the barring of all monopolies thereof, in whatever form." *Cf.* Advisory Opinion OC-5/85*, supra*, para. 34, and *Case of Álvarez Ramos v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 30, 2019. Series C No. 380, para. 99.

[79] *Cf. Case of Ivcher Bronstein v. Peru, supra*, para. 150, and *Case of Álvarez Ramos v. Venezuela*, *supra*, para. 126.

[80] The Court considers that a source is any person who provides information to a journalist. *Cf. ECHR, Nagla v. Latvia*, no. 73469/10, Judgment of July 16, 2013, and Committee of Ministers of the Councill of Europe, Recommendation No. R(2000) 7 to member states on the right of journalists not to discloses their sources of information. "Definitions."

[81] *Cf.* UNESCO, General Conference, 37 C/61, of November 7, 2013, para. 12. See also, ECHR, *Goodwin v. The United Kingdom* [GS], no. 17488/90, Judgment of March 27, 1996, para. 39, and *Becker v. Norway*, no. 21272/12, Judgment of October 5, 2017, para. 65.

[82] *Cf.* IACHR, "Corruption and human rights; inter-American standards," OEA/Ser.L/V/II., of December 6, 2019, para. 210.

[83] *Cf. mutatis mutandis, Case of Herrera Ulloa v. Costa Rica, supra,* para. 120, and *Case of Fontevecchia*

if appropriate and subject to meeting a series of strict requirements. Thus, Article 13(2) of the American Convention establishes that subsequent liability for the exercise of freedom of expression must meet the following requirements concurrently: (i) it must be previously established by law, both formally and substantively;[84] (ii) it must respond to a purpose permitted by the American Convention, and (iii) it must be necessary in a democratic society (to which end, it must meet the requirements of suitability, necessity and proportionality).[85]

72. Regarding strict legality, the Court has established that restrictions must be established previously by law to ensure that they are not left to the discretion of the public authorities. Accordingly, the legal definition of the conduct must be clear and precise,[86] particularly in the case of criminal rather than civil proceedings.[87] The permitted or legitimate purposes are indicated in the said Article 13(2) and they are: (a) respect for the rights or reputation of others, and (b) the protection of national security, public order, or public health or morals. In addition, restrictions to freedom of expression must be suitable; that is, truly conducive to achieving the legitimately permitted objective.[88] Regarding necessity, the Court has affirmed that, for a restriction of free expression to be compatible with the American Convention, it must be necessary in a democratic society, understanding by "necessary" the existence of an essential social need that would justify the restriction.[89] Thus, the Court must examine the alternatives that existed to achieve the legitimate aim and analyze whether they represented a greater or a lesser harm.[90] Lastly, regarding the proportionality of the measure, the Court has understood that restrictions imposed on the right to freedom of expression must be proportionate to the interest that justifies them and strictly tailored to the achievement of that purpose, interfering as little as possible in the effective enjoyment of the right.[91] In this regard, it is not sufficient that a restriction has a legitimate purpose; rather, the measure in question must respect proportionality when infringing freedom of expression. In other words, "[i]n this last step of the analysis, it is necessary to consider whether the restriction is strictly proportionate so that the sacrifice inherent in it is not exaggerated or disproportionate in relation to the advantages obtained from the

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and D'Amico v. Argentina, supra, para. 43.

84 *Cf. The Word "Laws " in Article 30 of the American Convention on Human Rights,* Advisory Opinion OC-6/86, May 9, 1986. Series A, No. 6, paras. 35 and 37, and *Case of Palacio Urrutia et al. v. Ecuador, supra*, para. 104.

85 *Cf. Case of Tristán Donoso v. Panama. Preliminary objection, merits, reparations and costs.* Judgment of January 27, 2009. Series C No. 193*,* para. 56, and *Case of Palacio Urrutia et al. v. Ecuador. Merits, reparations and costs*. Judgment of November 24, 2021. Series C No. 446, para. 104.

86 *Cf. Case of Tristán Donoso v. Panama, supra,* para. 56, and *Case of Palacio Urrutia et al. v. Ecuador, supra*, para. 104.

87 *Cf. Case of Kimel v. Argentina, supra,* para. 77, and *Case of Palacio Urrutia et al. v. Ecuador, supra*, para. 105.

88 See, *mutatis mutandis, Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of November 22, 2019. Series C No. 395, para. 107, and *Case of Manuela et al. v. El Salvador. Preliminary objections, merits, reparations and costs.* Judgment of November 2, 2021. Series C No. 441, para. 99. See also, expert opinion provided by Joan Barata Mir at the public hearing held on February 14, 2022, during the Court's 146th regular session.

89 *Cf.* Advisory Opinion OC-5/85, *supra*, paras. 41 to 46, and *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340, para. 124.

90 *Cf. Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs.* Judgment of June 23, 2005. Series C No. 127*,* para. 206, and *Case of Manuela et al. v. El Salvador, supra,* para. 219.

91 *Cf. Case of Herrera Ulloa v. Costa Rica*, *supra*, para. 123, and *Case of Palacio Urrutia et al. v. Ecuador, supra*, para. 108.

adoption of such limitation."[92] The Court recalls that such restrictions are exceptional in nature and should not limit the full exercise of freedom of expression more than strictly necessary and become a direct or indirect mechanism of prior censorship.[93]

73. The Court has established that it is possible to impose such subsequent liability if the right to honor and reputation has been harmed.[94] Thus, Article 11 of the Convention establishes that everyone has the right to have his honor respected and his dignity recognized. The Court has indicated that the right to honor "recognizes that everyone has the right to respect for this, prohibits any unlawful attack on honor or reputation, and imposes on the States the duty to provide legal protection against any such attacks." In general, the Court has indicated that "the right to honor is related to self-esteem and self-worth, while reputation relates to the opinion that others have of a person."[95] Accordingly, the Court has recognized that "both freedom of expression and the right to have one's honor respected, two rights protection by the Convention, are extremely important. Therefore, it is imperative to ensure both rights so that they coexist harmoniously."[96] Each fundamental right must be exercised respecting and safeguarding the other fundamental rights. Consequently, the Court has indicated that "the resolution of any conflict arising between two rights requires weighing one against the other and, to this end, examining each case in accordance with its specific characteristics and circumstances, considering the existence and extent of the elements on which the decision is based."[97]

74. The Court recalls in this regard that, to determine the compatibility with the Convention of a restriction of freedom of expression when this clashes with the right to honor, it is of vital importance to analyze whether the statements made are of public interest because, in such cases, the judge must assess the need to limit freedom of expression with special care.[98] In its case law, the Court has considered that public interest relates to those opinions or that information on matters regarding which society has a legitimate interest to be informed, in order to be aware of anything that bears on the performance of the State or impacts on general interests or rights, or that has significant consequences.[99] The determination of the foregoing has consequences on the analysis of the conventionality of the restriction of the right to freedom of expression, because statements related to matters of public interest – such as those concerning the suitability of an individual to exercise public office or the actions of public officials in the exercise of their functions – enjoy greater protection in order to encourage democratic

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92 *Cf. Case of Kimel v. Argentina, supra,* para. 83, and *Case of Palacio Urrutia et al. v. Ecuador, supra*, para. 108.

93 *Cf. Case of Herrera Ulloa v. Costa Rica, supra*, para. 120, and *Case of Palacio Urrutia et al. v. Ecuador, supra*, para. 100.

94 *Cf. Case of Mémoli v. Argentina, supra*, para. 123, and *Case of Palacio Urrutia et al. v. Ecuador, supra*, para. 100.

95 *Cf. Case of Tristán Donoso v. Panama, supra*, para. 57, and *Case of Palacio Urrutia et al. v. Ecuador, supra*, para. 101.

96 *Cf. Case of Kimel v. Argentina, supra,* para. 51, and *Case of Palacio Urrutia et al. v. Ecuador, supra*, para. 102.

97 *Cf. Case of Kimel v. Argentina, supra,* para. 51, and *Case of Palacio Urrutia et al. v. Ecuador, supra*, para. 102.

98 *Cf. Case of Mémoli v. Argentina*, *supra*, para. 145, and *Case of Lagos del Campo v. Peru, supra*, para. 109.

99 *Cf. Case of Tristán Donoso v. Panama, supra*, para. 121; *Case of Fontevecchia and D'Amico v. Argentina, supra*, para. 121, and *Case of Lagos del Campo v. Peru, supra*, para. 110.

debate.[100]

75. Thus, the Court has indicated that, in a democratic society, those individuals who have an impact on matters of public interest are more exposed to the public's scrutiny and censure. This different threshold of protection is explained by the fact that their activities extend beyond the private domain to enter the realm of public debate and, therefore, they have voluntarily laid themselves open to this more intense scrutiny.[101] This in no way means that the honor of those who take part in matters of public interest should not be protected by law, but that this protection should be accorded pursuant to the principles of democratic pluralism.[102]

76. Furthermore, regarding the necessary nature and rigorous analysis of proportionality that must govern decisions involving the limitation of the right to freedom of expression and the protection of the right to honor, it is essential to seek the intervention that – while most appropriate to restore the damaged reputation – also minimizes the harm to freedom of expression.[103] Accordingly, in the context of freedom of information, the Court considers that journalists have a duty to verify reasonably, although not necessarily exhaustively, the facts they divulge.[104] That said, this does not signify a strict requirement of veracity, at least as regards matters of public interest, recognizing as a disclaimer that the publication was made in good faith or with justification, and always respecting minimum standards of professional ethics in pursuit of the truth.[105] Moreover, the Court notes that, for investigative journalism to exist in a democratic society, journalists must be allowed "room for error" because, without this margin of error, neither independent journalism nor the possibility of the necessary democratic scrutiny that results from this can exist.[106]

77. In addition, the Court considers that no one may be subject to subsequent liability for the dissemination of information related to a public matter that is based on material that is accessible to the public or derived from official sources.[107]

78. Lastly, it should also be underlined that, if it is considered appropriate to award

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[100] *Cf. Case of Herrera Ulloa v. Costa Rica, supra,* para. 128, and *Case of Fontevecchia and D'Amico v. Argentina, supra,* para. 47.

[101] *Cf. Case of Herrera Ulloa v. Costa Rica, supra,* para. 129, *and Case of Tristán Donoso v. Panama, supra*, para. 115.

[102] *Cf. Case of Herrera Ulloa v. Costa Rica, supra,* para. 128.

[103] *Cf.* Expert opinion provided by Joan Barata Mir at the public hearing held on February 14, 2022, during the Court's 146th regular session.

[104] Ver*, mutatis mutandis, Kimel v. Argentina, supra*, para. 79.

[105] *Cf. mutatis mutandis*, *Case of Herrera Ulloa v. Costa Rica*, *supra*, para. 127, and *Case of Palamara Iribarne v. Chile. Merits, reparations and costs.* Judgment of November 22, 2005. Series C No. 135, para. 82. According to expert witness Joan Barata: "the idea of veracity refers to the idea of informational diligence and, above all, also of a subjective element which is the intention to do everything possible to get as close to the truth as possible in the exercise of reasonable diligence in good faith." Expert opinion provided by Joan Barata Mir at the public hearing held on February 14, 2022, during the Court's 146th regular session.

[106] *Cf.* Expert opinion provided by Joan Barata Mir at the public hearing held on February 14, 2022, during the Court's 146th regular session.

[107] *Cf.* ECHR, *inter alia, Bladet Tromsø and Stensaas v. Norway* [GS], no. 21980/93, Judgment of May 20, 1999, paras. 68 and 72; *Selistö v. Finland*, no. 56767/00, Judgment of November 16, 2004, para. 60; *Colombani and Others v. France*, no. 51279/99, Judgment of June 25, 2002, para. 65; *Godlevskiy v. Russia*, no. 14888/03, Judgment of October 23, 2008, para. 47, and *Yordanova and Toshev v. Bulgaria*, no. 5126/05, Judgment of October 2, 2012, para. 51.

reparation to the person whose honor has been harmed, the purpose of this should not be to punish the originator of the information, but rather to provide redress to the person concerned.[108] In this regard, States should exercise the greatest care when imposing reparations, so that they do not discourage the press from contributing to discussion of matters of legitimate public interest.[109]

b.4 Application of the standards to this specific case

79. The Court will now examine the compatibility with the American Convention of the subsequent liability imposed on the alleged victims in this case, taking into account the preceding standards.

80. First, the Court notes that the newspaper article "OIJ accuses police chief of failing to detain truck with liquor," published La Nación on December 17, 2005, and signed by the journalists, Ronald Moya Chacón and Freddy Parrales Chaves, can be classified as an item of information that, also, relates to a matter of public interest, which is the presumed existence of the smuggling of liquor into Costa Rica in the border region with Panama in which several police chiefs were allegedly involved. In particular, in the case of J.C.T.R. – who subsequently filed a complaint against the journalists – the article mentioned that he had been investigated for the said facts and, evidently, at the time, this formed part of the public debate. The Court notes that even the judgment of the Second Circuit Criminal Court of San José recognized that "the news item was of public interest."[110]

81. The Court will now apply the previously described standards in order to verify whether the subsequent liability to which the journalists were subject (that is, the civil sentence to pay, jointly and severally, five million colones for non-pecuniary damage and one million colones for costs) was compatible with the Convention.

82. Regarding the obligation that possible subsequent liability must be previously established by law, both formally and substantively, the Court notes that, in the instant case, Messrs. Moya Chacón and Parrales Chaves were prosecuted for the offense of libel established in article 7 of the Printing Act in relation to Article 145 of the Criminal Code, as well as for the offense of defamation established in article 146 of the said Criminal Code,[111] although, finally, they were acquitted in the criminal sphere and received a civil conviction in application of Article 1045 of the Civil Code.[112] Thus, the journalists did not receive the sanction established in article 7 of the Printing Act or Articles 145 and 146 of the Criminal Code. Therefore, the Court will not examine the conventionality of those

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[108] *Cf.* Human Rights Committee, General Comment No. 34. "Article 19: Freedoms of opinion and expression", CCPR/C/GC/34, of September 12, 2011, para. 47. In addition, expert witness Joan Barata indicated that, in the case of "any sanction whatsoever that is established under civil law, it should be understood that its purpose is not to punish, but to restore to the "injured" party his legitimate situation; that is, I believe, the first issue that should be considered." *Cf.* Expert opinion provided by Joan Barata Mir at the public hearing held on February 14, 2022, during the Court's 146th regular session.

[109] *Cf.* ECHR, *Jersild v. Denmark* [GS], no. 15890/89, Judgment of September 23, 1994, para. 35, and *Cumpana and Mazare v. Romania* [GS], no. 33348/96, Judgment of December 17, 2004, para. 111.

[110] *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folio 20).

[111] *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folio 16).

[112] *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folio 21).

articles pursuant to Articles 2, 9 and 13 of the American Convention.

83. Nevertheless, the Court notes with concern the existence in Costa Rica of criminal laws exclusively addressed at the exercise of journalism; these include the said Printing Act. Although the State advised that, in a judgment of December 18, 2009, the Third Chamber of the Supreme Court of Justice had declared that article 7 of the said Act had been tacitly abrogated, the existence of this type of criminal norm could have had a chilling effect on the dissemination of information of public interest. The Court also underlines two additional aspects relating to the said article 7 that deserve special attention owing to their harmful effects for the exercise of freedom of expression. The first is the establishment of objective criminal liability for the editors, directors and owners of the media outlet, a provision that violates the principle of guilt in criminal matters. The second refers to the existence of increased penalization for conducts that could infringe honor when carried out by journalists; thus, providing harsher punishment for those whose profession involves, above all, the exercise of freedom of expression.

84. That said, the Court notes that article 1045 of the Civil Code – which was applied in this case – establishes that "[a]nyone who, by malice, omission, negligence or imprudence, causes another person harm shall be obliged to redress this, and also pay damages."

85. The Court notes that the wording of that article is not incompatible *per se* with the standard of legality; nevertheless, its interpretation must be coherent with the Convention's principles concerning freedom of expression contained in Article 13 of the American Convention and developed by this Court's case law.

86. Regarding the legitimate purpose sought, this case falls within one of the purposes permitted by Article 13(2) of the Convention, namely: "respect for the rights or reputation of others."

87. Also, with regard to the appropriateness of the measure, the Court notes that, in principle, the civil action filed by J.C.T.R. against Messrs. Moya Chacón and Parrales Chaves could have provided appropriate protection in relation to the violation of the right to honor that he suffered owing to the publication of the newspaper article

88. Therefore, the necessity and proportionality of the sanction imposed remain to be examined. To this end, the Court notes, preliminarily, that although it is true that Messrs. Moya Chacón and Parrales Chaves published information regarding J.C.T.R. that turned out to be inexact, it was not proved at the domestic level – and this is indicated in the Trial Court's judgment when acquitting the two journalists of criminal charges – that the alleged victims had any specific intention of inflicting harm on the person or persons affected by the article. Thus, the judgment of the Trial Court indicated that no "direct intention to harm the honor of the complainant [could be observed], but very probably the only intention when publishing the article was to perform their task of providing information to the public."[113]

89. That said, the Trial Court did consider that the article published by Messrs. Moya Chacón and Parrales Chaves had been written "without taking the care required of their

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[113] *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folio 16).

profession"[114] and that, in this case, "a serious omission and a lack of due care" had occurred, as well as negligent action[115] by, among others, the said journalists. In this regard, the Court notes that, after obtaining the initial information on the alleged liquor contraband that was occurring on the southern border with Panama, the journalist Parrales Chaves proceeded to consult the OIJ regarding whether that entity was investigating the region's police chief.[116] Also, a matter that is fundamental for the analysis of this case is that the journalist Moya Chacón proceeded to verify the information with the Minister of Public Security. In this regard, during the public hearing, Mr. Moya Chacón pointed out that it was his usual practice to have recourse to that Minister to corroborate this kind of information.[117] In the instant case, the information published in the newspaper article came from an official source; therefore, the journalists could not be required to make additional verifications.[118]

90. In this regard, the judgment of the Trial Court reproached the journalists for failing to have recourse to the Judiciary's Press Office "to verify the details of the criminal case."[119] This signified that the said court was suggesting a preferential source, based on its own criteria, which was a disproportionate requirement in relation to freedom of expression, one that was extremely restrictive for freedom of the press. The Court notes that it would be erroneous if what, in reality, is an obligation of the public authorities – namely, to provide information to the public in general and to journalists in particular – is confused with the obligation of journalists to have recourse to one specific type of source as compared to others, particularly, when those sources are official. Imposing such criteria would entail establishing a mechanism of prior intervention in the way in which journalists perform their task which, in turn, could become an act of censorship.[120] Indeed, an excessively rigorous control of journalistic methods may have a chilling effect on the work of the press.[121]

91. Furthermore, it should be stressed that the journalists consulted the person mentioned in the article, J.C.T.R., directly, and he declined to respond to their request

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[114] *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folio 16).

[115] *Cf.* Second Circuit Criminal Court of San José, Goicoechea, Judgment of January 10, 2007 (evidence file, folio 21).

[116] *Cf.* Affidavit of Freddy Parrales Chaves dated January 27, 2022, p. 2 (evidence file, folio 1451). Also, during the public hearing, Mr. Moya Chacón stated that: "the genesis or origin of this information was a phone call from our correspondent in the area, Freddy Parrales, who said to me: Ronald, I have this information; members of the Judicial Investigation Department are telling us that there is problem with some police chiefs in the area." Statement made by Ronald Moya Chacón at the public hearing held on February 14, 2022, during the Court's 146th regular session.

[117] *Cf.* Statement made by Ronald Moya Chacón at the public hearing held on February 14, 2022, during the Court's 146th regular session.

[118] *Cf.* ECHR, *Bladet Tromsø and Stensaas v. Norway* [GS], no. 21980/93, Judgment of May 20, 1999, para. 72; *Selistö v. Finland*, no. 56767/00, Judgment of November 16, 2004, para. 60; *Yordanova and Toshev v. Bulgaria*, no. 5126/05, Judgment of October 2, 2012, para. 51, and *Koniuszewski v. Poland*, no. 619/12, Judgment of June 14, 2016, para. 58.

[119] *Cf.* Second Circuit Criminal Court of San José, Ruling of September 28, 2009 (evidence file, folios 19 and 21).

[120] *Cf.* Expert opinion provided by Joan Barata Mir at the public hearing held on February 14, 2022, during the Court's 146th regular session.

[121] *Cf.* ECHR, *Bozhkov v. Bulgaria,* no. 3316/04, Judgment of April 19, 2011, para. 51, *Yordanova and Toshev v. Bulgaria*, no. 5126/05, Judgment of October 2, 2012, para. 55, and *Fedchenko v. Russia (No.3),* no. 7972/09, Judgment of October 2, 2018, para. 53.

indicating that he did not have time because he was "in meetings."[122] Far from providing his version of the facts, J.C.T.R., sent a notarized letter addressed to the director of the news desk of La Nación in which he required that "within two days, [he] be informed of the source of the information provided and the evidence it had seen in order to make such serious assertions."[123] The Court recalls the importance of the protection of journalistic sources, a cornerstone of freedom of the press and, in general, of a democratic society (*supra* para. 70). This leads the Court to consider that J.C.T.R.'s request was totally inappropriate. What would have been appropriate – and also more expeditious and effective – and what did not occur in this case, was the use of the right of rectification, a non-punitive mechanism that could have repaired the harm caused by the dissemination of an inexact information.

92. Lastly, the Court notes with concern that the sanction imposed on the journalists had a chilling effect on them and was disproportionate to the objective sought. Thus, Mr. Moya Chacón referred to the proceedings and the subsequent sentence as "one of the most distressing moments" of his life and that, as a professional journalist, it made him fearful of "continuing the work of journalism," affecting his work performance and even resulting in a sort of "self-censorship."[124] Witness Armando Manuel González Rodicio, Editor in Chief of La Nación when the article was published, expressed himself similarly when indicating that "[u]nfortunately, and as a result of these reflections, we have frequently chosen silence or the omission of some information in order not to run risks" and that "[t]he insecurity caused by the possibility of a civil conviction, despite the conformity of what is published with the rules of good journalism, c[ould] only lead to self-censorship."[125]

93. Based on the foregoing, the Court concludes that, in the instant case, the civil sanction imposed on Messrs. Moya Chacón and Parrales Chaves was not necessary or proportionate to the purpose sought and, therefore, violated Article 13(1) and 13(2) of the American Convention, in relation to Article 1(1) of this instrument. Finally, although

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[122] During the public hearing, Mr. Moya Chacón stated: "when we were about to publish, we called – I say we because I called [J.C.T.R.] personally and Freddy tried to locate him in the area, to tell him that we were about the publish; that we had this; in other words, we laid out the whole scenario we had, and he just sent word that he did not have time, that he was in meetings and, therefore. the article was published." Statement made by Ronald Moya Chacón at the public hearing held on February 14, 2022, during the Court's 146th regular session.

[123] *Cf.* Notarized letter of J.C.T.R. sent to La Nación, dated December 19, 2005 (evidence file, folio 28).

[124] In this regard, Mr. Moya Chacón stated the following:

> The impact on journalism is closely related, as I have already mentioned, to the self-censorship that one imposes on oneself, especially following the conviction, because the risk of being sued again for situations is always latent, and I can illustrate this with a situation – perhaps anecdotic – but which is explanatory: following the conviction, some people called us, not source people, rather people who were involved in acts of corruption, some of them members of the police, telling us that if we published anything, the same thing would happen to us that had happened in the case of [J.C.T.R]; the same meant that they would sue us, and since that possibility was real owing to the sentence against us, we said that we did not want our assets to be harmed again, and we therefore applied self-censorship.

Mr. Moya Chacón also indicated that the judgment convicting them in the civil sphere "emboldened organized crime in Costa Rica," because it resulted in a "fear of publishing"; moreover, they had even been threatened by members of the police forces following the delivery of the said judgment who told them that "the same would happen to [them], as happened in the matter of [J.C.T.R.]." *Cf.* Statement made by Ronald Moya Chacón at the public hearing held on February 14, 2022, during the Court's 146th regular session.

[125] *Cf.* Affidavit of Armando Manuel González Rodicio dated December 13, 2021, pp. 2 and 3 (evidence file, folios 1457 and 1458).

the Court has declared that the civil sentence of the journalists Moya Chacón and Parrales Chaves to pay damages violated the right to freedom of thought and expression recognized in Article 13 of the American Convention, it considers that it is not necessary to analyze the alleged violation of Article 8 of the American Convention.

VIII
REPARATIONS

94. 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 duty to make adequate reparation and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.[126]

95. The reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in the re-establishment of the previous situation. If this is not feasible, as in most cases of human rights violations, the Court will determine measures to guarantee the violated rights and to redress the consequences of such violations.[127] Therefore, the Court has considered the need to grant diverse measures of reparation in order to redress the harm integrally; thus, in addition to pecuniary compensation, measures of restitution, rehabilitation and satisfaction together with guarantees of non-repetition have special relevance for the harm caused.[128]

96. The Court has established that the reparations must have a causal nexus to the facts of the case, the violations declared, the harm proved, and the measures requested to redress the respective harm. Therefore, the Court must observe the concurrence of these elements to rule appropriately and pursuant to law.[129]

97. Taking into account the violations of the American Convention declared in the preceding chapters in light of the criteria established in the Court's case law in relation to the nature and scope of the obligation to make reparation,[130] the Court will now examine the claims presented by the Commission and the representatives, together with the corresponding arguments of the State, in order to establish measures aimed at redressing those violations.

A. Injured party

98. The Court considers that, pursuant to Article 63(1) of the Convention, those who

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[126] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Pavez Pavez v. Chile. Merits, reparations and costs.* Judgment of February 4, 2022. Series C No. 449, para. 161.

[127] *Cf. Case of Velásquez Rodríguez v. Honduras*. Reparations and costs, *supra*, paras. 25 and 2, and *Case of Pavez Pavez v. Chile, supra*, para. 162.

[128] *Cf. Case of Las Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of November 24, 2009. Series C No. 211, para. 226, and *Case of Pavez Pavez v. Chile, supra*, para. 162.

[129] *Cf. Case of Ticona Estrada v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Pavez Pavez v. Chile, supra*, para. 163.

[130] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, paras. 25 to 27, and *Case of Pavez Pavez v. Chile, supra*, para. 164.

have been declared victims of the violation of any right recognized in this instrument are the injured party. Therefore, the Court considers that Ronald Moya Chacón and Freddy Parrales Chaves are the "injured party" and, as victims of the violations declared in Chapter VII of this judgment, they will be the beneficiaries of the reparations ordered by the Court.

B. Restitution

99. The ***Commission*** recommended annulling the civil sanction imposed on the journalists Ronald Moya Chacón and Freddy Parrales Chaves.

100. The ***representatives*** also asked the Court to require the State "to annul all aspects of the judgment handed down by the Second Circuit Trial Court of San José on January 10, 2007, and its subsequent ratification by the judgment of the Third Chamber of the Supreme Court of Justice on December 20, 2007." They also requested that the State annul any other legal effects that the said judgment could have given rise to, "including all financial effects."

101. The ***State*** contested the measure of reparation requested "because the plaintiffs were guilty of causing unjust harm." The State also emphasized that the civil compensation had been paid by La Nación, arguing a "lack of legal standing" of the alleged victims "because the only persons authorized to require the payment of damages are those who have suffered harm or their family members." Moreover, La Nación could not be considered an "injured party" in the terms of the Convention because it was a legal entity.

102. The Court determines that the State must adopt the necessary measures to annul the attribution of civil liability to Freddy Parrales Chaves and Ronald Moya Chacón imposed by judgment No. 02-2007 handed down by the Second Circuit Criminal Court of San José, Goicoechea, on January 10, 2007, and confirmed in cassation by the Third Chamber of the Supreme Court of Justice on December 20, 2007; this includes any administrative or judicial record, or the possibility that it could be recognized as a judicial precedent. To comply with this reparation, the State must adopt the administrative, judicial or any other measure necessary within one year of notification of this judgment. It corresponds to the State to identify the legal act, measure or action it can adopt to ensure adequate reparation to the victims in relation to the annulment of this attribution of civil liability.

103. The Court does not find it appropriate to order the repayment of the sums disbursed due to the civil conviction to pay damages and procedural costs because the victims in this case did not have to make this payment (*supra* para. 48) and there is no record in the body of evidence – and it has not been argued – that La Nación has filed or could eventually file an action against the victims to reclaim the amounts disbursed by the newspaper.

C. Measures of satisfaction

104. The ***Commission*** recommended, in general, the adoption of measures of satisfaction.

105. The ***representatives*** asked the Court to require the State to publish, within six months of notification of the judgment: (a) the official summary of the judgment prepared by the Court, once, in the Official Gazette of Costa Rica in an appropriate and

legible font; (b) the official summary of the judgment prepared by the Court, once, in a national newspaper, and (c) the entire text of the judgment, available for one year on an official website, in a manner accessible to the public. They also asked that a public act to acknowledge international responsibility be held. In particular, they requested that "a public act [be held] to apologize to the journalists Ronald Moya and Freddy Parrales, in the presence of senior authorities, acknowledging that they suffered judicial harassment due to the exercise of their profession, in light of the social dimension of the right to freedom of expression."

106. The Court finds, as it has in other cases,[131] that the State must publish, within six months of notification of this judgment: (a) the official summary of this judgment prepared by the Court, once, in the Official Gazette of Costa Rica in an appropriate and legible font; (b) the official summary of this judgment prepared by the Court, once, in a national newspaper with widespread circulation, in an appropriate and legible font, and (c) this judgment in its entirety, available for one year on an official website of the State, in a manner that is accessible to the public from the website's home page. The State must advise the Court immediately it has made each of the publications ordered, regardless of the one-year time frame to present its first report established in the eighth operative paragraph of the judgment.

107. Regarding the public act to acknowledge international responsibility, the Court finds that the delivery of this judgment and the reparations ordered in this chapter are sufficient and adequate to redress the violations suffered by the victims.

D. Other measures requested

d.1 Adaptation of the regime of subsequent liability in relation to freedom of expression

108. The ***Commission*** recommended adapting the regime of subsequent liability in relation to freedom of expression to align it with the inter-American standards in cases in which the injured person is a public person or official, or a private individual who has voluntarily become involved in matters of public interest. In particular, it recommended establishing that civil compensation for eventual abusive exercise of freedom of expression should respect the standards of the intentionality, harm caused or manifest negligence of the author, as well as the principles of necessity and proportionality. In addition, in its final written observations, the Commission stipulated that the State should take measures to ensure that its civil laws established sufficient safeguards or, in any case, were interpreted and applied based on the importance of the role played by journalism and the nature of the work of journalists, their freedom to choose their sources, and also the criteria of legality, necessity and proportionality established in this case, which may include the attribution of liability pursuant to the doctrine of actual malice or for similar reasons, such as absence of good faith or due diligence. Furthermore, it asked the Court to order Costa Rica to decriminalize offenses against honor or, at least, to eliminate "unequivocally" the possibility of criminalizing the criticism of public authorities or other public figures in relation to matters of public interest.

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[131] *Cf. Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of January 27, 2020. Series C No. 398, para. 226, and *Case of Pavez Pavez v. Chile, supra*, para. 168

109. The ***representatives*** agreed with the Commission's recommendations and asked the Court to require the State to eliminate from its laws all those norms that permit the penalization of critical or disrespectful expressions against public officials in the exercise of their functions. Also, regarding the provisions of article 1045 of the Costa Rican Civil Code, they asked that Costa Rica be ordered to stipulate in its legal system, "either by law or by the case law of its courts, the need to conduct the test of malice or actual malice as a requirement for imposing civil liability on those who express their opinions on matters of public interest or in relation to public officials, in those cases where it has been proved and justified that it may be appropriate." In addition, they asked the Court to require the State to adapt the offenses of defamation and libel by the press established in articles 145 of the Criminal Code and 7 of the Printing Act to inter-American standards.

110. The ***State*** emphasized that, at no time, had the victims in this case been criminally convicted and, therefore, "the consequences of the offenses regarding which they now seek condemnation by the Court were never applied to them." It also reiterated that the discrepancy now raised concerning the criminal offenses and article 1045 of the Civil Code in relation to their condition as journalists had not been broached in the domestic jurisdiction by means of the corresponding action of unconstitutionality

111. The Court notes, first, that Messrs. Moya Chacón and Parrales Chaves, among others, were prosecuted for the offense of libel established in article 7 of the Printing Act in relation to Article 145 of the Criminal Code, as well as for the offense of defamation established in article 146 of the said Criminal Code, although, finally, they were acquitted in the criminal sphere and received a civil conviction in application of article 1045 of the Civil Code.[132] The Court considered that the civil conviction was contrary to Article 13 of the American Convention, in relation to Article 1(1) of this instrument, because it was neither necessary nor proportionate to the legitimate purpose sought; nevertheless, it did not question the conventionality of article 1045 on which the conviction was based. Consequently, the Court does not find it necessary to require the adaptation of the laws on subsequent liability in relation to freedom of expression. That said, the Court recalls that the interpretation of article 1045 of the Civil Code must be coherent with the American Convention's principles on freedom of expression contained in its Article 13 and developed by the Court's case law and, in particular, by this judgment.

d.2 Training programs

112. The ***Commission*** recommended providing training programs to the Costa Rican Judiciary to disseminate the standards and criteria established in its Merits Report.

113. Similarly, the ***representatives*** asked that training be provided to judges and other agents of justice on the international standards with regard to the right to freedom of expression in matters of public interest.

114. The ***State*** contested this measure of reparation indicating that, at no time, had the victims in this case been criminally convicted and, therefore, "the consequences of the offenses regarding which they now seek condemnation by the Court were never applied to them."

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[132] This article stipulates that "[a]nyone who, by malice, omission, negligence or imprudence, causes another person harm shall be obliged to redress this, and also pay damages."

115. Regarding this request, the Court finds that the delivery of this judgment and the reparations ordered in this chapter are sufficient and adequate to redress the violations suffered by the victims.

E. Compensation

116. In its case law, the Court has developed the concept of pecuniary damage and has established that this entails the loss of or detriment to the income of the victims, the expenses incurred as a result of the facts, and the consequences of a pecuniary nature that have a causal nexus to the facts of the case.[133]

117. The Court has also established in its case law that non-pecuniary damage "may include both the suffering and affliction caused by the violations, and also the impairment of values of great significance to the individual, and any alteration of a non-pecuniary nature in the living conditions of the victims." Moreover, as it is not possible to allocate a precise monetary equivalent to non-pecuniary damage, it can only be compensated, for the purposes of full reparation to the victim, by the payment of a sum of money or the delivery of goods or services of a monetary value, that the Court determines in reasonable application of sound judicial discretion and based on equity.[134]

118. The ***Commission*** recommended providing full reparation, both pecuniary and non-pecuniary, for the human rights violations declared in the Merits Report.

119. The ***representatives*** asked the Court to establish compensation for both the pecuniary damage (consequential damage and loss of earnings) and the non-pecuniary or moral damage suffered by the victims. Regarding the pecuniary damage, they asked that the sentence and all its effects be annulled, requiring the reimbursement of the amounts imposed by that ruling and paid by La Nación due to the civil conviction to pay damages of ₡5,000,000.00 colones (five million colones) and to pay procedural costs of ₡1,000,000.00 (one million colones). Regarding the non-pecuniary damage, they asked for compensation of US$50,000.00 (fifty thousand United States dollars) for each victim.

120. The ***State*** indicated that the alleged victims had not proved that they had made any disbursements from their own assets, or that their income had been impaired owing to the civil compensation imposed by the civil judgment convicting them. It noted that the joint and several sentence to pay 5 million colones had been paid by La Nación and not by the alleged victims, and that there was no evidence of a "risk of a claim for restitution" by this newspaper, so that the assets of the journalists were not affected. It noted that, in their pleadings and motions brief, the representatives had not provided any evidence to substantiate the assertion that there had been "emotional damage and reputational harm" other than the testimony of the direct interested parties. It added that this was supported by the fact that Messrs. Moya and Parrales had continued to work as journalists without interruption and that, as confirmed by the statement of witness Armando González, following the civil compensation payment, there had been no change of any kind in the way they practiced journalism.

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[133] *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Pavez Pavez v. Chile, supra*, para. 192.

[134] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs.* Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Pavez Pavez v. Chile, supra*, para. 197.

121. Regarding the pecuniary damage requested, in the section on the measure of restitution requested (*supra* para. 103), the Court has already indicated that it did not find it appropriate in to award the said compensation in this case.

122. Regarding the non-pecuniary damage requested, the Court notes that the victims' civil conviction by the judgment of the Second Circuit Criminal Court of San José, confirmed subsequently by the Supreme Court of Justice, caused them some degree of suffering and anguish and had consequences on their personal and professional life. In this regard, during the public hearing in this case, Mr. Moya Chacón declared that the conviction entailed a "stain" that remained up until the present; that it was like "a wound that has not healed," referring to the whole process for him and his family as "one of the most distressing times" of his life.[135] Meanwhile, Mr. Parrales Chaves indicated that both he and his family had suffered "psychological, emotional, financial [and] work-related" consequences because the sentence to pay 5 million colones "increased [his] anxiety as [he was] a journalist with limited resources at that time and, as now, he did not have the money to pay [the sum required]"; moreover, he even though that he "might be imprisoned due to this" or lose his home or his car, which also affected his health.[136]

123. In view of the above, and considering the circumstances of this case, the violations committed, the suffering caused and experienced to different degrees, and the time that has passed, the Court will establish, in equity, compensation for non-pecuniary damage in favor of the victims.

124. Accordingly, the Court orders, in equity, the payment of US$20,000.00 (twenty thousand United States dollars) in favor of Ronald Moya Chacón and US$20,000.00 (twenty thousand United States dollars) in favor of Freddy Parrales Chaves, for the concept of non-pecuniary damage.

F. Costs and expenses

125. For costs and expenses at the domestic level, the ***representatives*** requested US$1,920.00 (one thousand nine hundred and twenty United States dollars). For costs at the international level, they requested US$75,000.00 (seventy-five thousand United States dollars) plus the expenses incurred to date for international courier services of US$2,813.00 (two thousand eight hundred and thirteen United States dollars). In their brief with final written arguments, they asked that the Court include litigation expenses related to attending the public hearing in this case amounting to US$3,137.75 (three thousand one hundred and thirty-seven United States dollars and seventy-five cents), which resulted in a total for costs and expenses at the international level of US$80,950.75 (eighty thousand nine hundred and fifty United States dollars and seventy-five cents).

126. The ***State*** indicated that, from an analysis based on the equity principle, the amounts were "totally disproportionate" to the presumed harm suffered by the alleged victims.

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[135] *Cf.* Statement made by Ronald Moya Chacón at the public hearing held on February 14, 2022, during the Court's 146th regular session.

[136] *Cf.* Affidavit of Freddy Parrales Chaves dated January 27, 2022, p. 3 (evidence file, folio 1452).

127. The Court reiterates that, pursuant to its case law, costs and expenses form part of the concept of reparation because the actions undertaken by the victims in order to obtain justice, at both the national and the international level, entail disbursements that must be compensated when the international responsibility of the State has been declared in a judgment. Regarding the reimbursement of costs and expenses, the Court must make a prudent assessment of their scope, which includes the expenses incurred before the authorities of the domestic jurisdiction and also those incurred during the proceedings before the inter-American system, taking into account the specific circumstances of the case and the nature of the international jurisdiction for the protection of human rights. This assessment may be made based on the principle of equity and taking into account the expenses indicated by the parties, provided their *quantum* is reasonable.[137]

128. Taking into account the amounts requested and the expense vouchers presented, the Court decides to establish, in equity, payment of a total of US$20,000.00 (twenty thousand United States dollars) for costs and expenses in favor of the representatives, which must be shared equally among them all. At the stage of monitoring compliance with judgment, the Court may establish that the State reimburse the victims or their representatives any reasonable expenses incurred at that procedural stage.[138]

G. Method of complying with the payments ordered

129. The State shall make the payments of the compensation for non-pecuniary damage and to reimburse costs and expenses established in this judgment directly to the persons indicated herein, within one year of notification of this judgment, without prejudice to making the complete payment before this, pursuant to the following paragraphs.

130. If either of the beneficiaries is deceased or dies before they receive the respective amount, this shall be delivered directly to their heirs, pursuant to the applicable domestic law.

131. The State shall comply with the pecuniary obligations by payment in United States dollars or the equivalent in national currency using the exchange rate published or calculated by a pertinent financial or banking authority on the date nearest to the day of payment to make the respective calculation.

132. If, for reasons that can be attributed to the beneficiaries of the compensation or their heirs, it is not possible to pay the amounts established within the established time frame, the State shall deposit the said amounts in their favor in a deposit account or certificate in a solvent Costa Rican financial institution, in United States dollars, and in the most favorable financial conditions permitted by banking law and practice. If the corresponding compensation is not claimed within ten years, the amounts shall be returned to the State with the interest accrued.

133. The sums allocated in this judgment as compensation for non-pecuniary damage and to reimburse costs and expenses must be delivered to the persons indicated in full,

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[137] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs.* Judgment of August 27, 1998. Series C No. 39, para. 82, and *Case of Pavez Pavez v. Chile, supra*, para. 200.

[138] *Cf. Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, reparations and costs.* Judgment of September 1, 2010. Series C No. 217, para. 29, and *Case of Pavez Pavez v. Chile, supra*, para. 202.

as established in this judgment, without any deductions derived from possible taxes or charges.

134. If the State should incur in arrears, it shall pay interest on the amount owed corresponding to banking interest on arrears in Costa Rica.

IX
OPERATIVE PARAGRAPHS

135. Therefore,

THE COURT

Unanimously,

DECIDES,

1. To reject the preliminary objection concerning the alleged violation of the principle of procedural equality and the right of defense pursuant to paragraphs 16 to 20 of this judgment.

2. To reject the preliminary objection of alleged failure to exhaust domestic remedies pursuant to paragraphs 24 and 25 of this judgment.

DECLARES,

Unanimously, that:

3. The State is responsible for the violation of Article 13(1) and 13(2) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Ronald Moya Chacón and Freddy Parrales Chaves, pursuant to paragraphs 62 to 93 of this judgment.

AND ESTABLISHES:

Unanimously, that:

4. This judgment constitutes, *per se*, a form of reparation.

5. The State shall annul the attribution of civil liability to Freddy Parrales Chaves and Ronald Moya Chacón by the judgment handed down by the Second Circuit Criminal Court of San José, Goicoechea, on January 10, 2007, and confirmed by the judgment delivered by the Third Chamber of the Supreme Court of Justice on December 20, 2007, as indicated in paragraphs 102 and 103 of this judgment.

6. The State shall make the publications indicated in paragraph 106 of this judgment.

7. The State shall pay the sums established in paragraphs 124 and 128 of this judgment as compensation for non-pecuniary damage, and to reimburse costs and expenses, pursuant to paragraphs 129 to 134 of this judgment.

8. The State, within one year of notification of this judgment, shall provide the Court with a report on the measures taken to comply with it.

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

DONE, at San José, Costa Rica, on May 23, 2022, in the Spanish language.

Judges Ricardo C. Pérez Manrique, Humberto Antonio Sierra Porto and Rodrigo de Bittencourt Mudrovitsch informed the Court of their concurring opinions.

Ricardo C. Pérez Manrique
President

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Verónica Gómez

Patricia Pérez Goldberg

Rodrigo Mudrovitsch

Pablo Saavedra Alessandri
Secretary

So ordered,

Ricardo C. Pérez Manrique
President

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF
JUDGE RICARDO C. PÉREZ MANRIQUE

CASE OF MOYA CHACÓN *ET AL. V.* COSTA RICA

JUDGMENT OF MAY 23, 2022

(Preliminary objections, merits, reparations and costs)

I. INTRODUCTION

1. In this opinion, I concur with the determinations made in the judgment in the case of *Moya Chacón et al. v. Costa Rica* of May 23, 2022, and I attach this opinion in order to analyze the international standards applicable to the protection of journalists in relation to their criminal and civil liability. Therefore, this opinion is organized as follows: first, I will introduce the case, and then examine the due diligence that should be required of journalists with regard to the verification of sources, and the civil and criminal liability that can be required in relation to the exercise of journalism.

2. The case relates to the imposition of subsequent liability on the journalists Ronald Moya Chacón and Freddy Parrales Chaves. They were sentenced to pay civil compensation for moral damage because they published a newspaper article reporting on presumed irregularities in the control of the smuggling of liquor into Costa Rica in the Panamanian border region, which mentioned several police officers who were allegedly involved in this.

3. In the judgment, the Inter-American Court of Human Rights ("the IACtHR" or "the Court") declared that the State of Costa Rica was responsible for the violation of Article 13(1) and 13(2) of the American Convention on Human Rights, in relation to Article 1 of this instrument, to the detriment of Ronald Moya Chacón and Freddy Parrales Chaves.

4. Regarding the domestic proceedings, on January 10, 2007, the Second Circuit Trial Court of San José, Goicoechea, handed down a judgment in which, after reclassifying calumny as libel by the press, it decided to acquit Freddy Parrales Chaves, Ronald Moya Chacón and the Minister of Public Security "of all criminal liability for the offenses of defamation and libel by the press" because the subjective element of the offense had not been proved. Regarding the journalists, the Trial Court considered that they had not had a "direct intention to harm the honor of the complainant, but very probably their only intention when publishing the news item was to perform their task of informing the public," although, in this case, they did so "without taking the care that their profession required."

5. That judgment also considered that "a harmful act" had been committed that, although not defined as a crime, did "give rise to civil liability caused directly by the publication of a false fact that was injurious and denigrating in a written medium." On this basis, the Trial Court decided to declare the civil action for damages admissible and, consequently, sentenced, as jointly and severally liable, Freddy Parrales Chaves and Ronald Moya Chacón, together with the Minister of Public Security, La Nación, and the State of Costa Rica to the joint payment of five million colones (approximately US$9,600 at the date of the facts) for non-pecuniary damage and one million colones (approximately US$1,900 at the date of the facts) for personal costs. The Trial Court's judgment was confirmed by the Third Chamber of the Supreme Court of Justice on December 20, 2007.

6. With regard to the domestic legal framework under which Messrs. Moya Chacón and Parrales Chaves were prosecuted, this relates to the offense of libel established in article 7 of the Printing Act in relation to Article 145 of the Criminal Code, and also the offense of defamation established in article 146 of the said Criminal Code. Regarding the latter, it is relevant to underline that the Inter-American Court considered that this article was not incompatible *per se* with the inter-American legal framework insofar as it was interpreted in accordance with the Convention's principles concerning freedom of expression. In other words, the Court reaffirmed the need to conduct the corresponding control of conventionality when applying this article. It is evident that, faced with the neutrality of a norm that may result in the violation of rights – such as freedom of expression in this case – it is the task of the domestic judge to make an interpretation that accords with the American Convention and the case law of this Court.

II. THE SUBSEQUENT LIABILITY OF JOURNALISTS AND THE USE OF CRIMINAL LAW IN DEMOCRATIC SOCIETIES

7. Following the Court's consistent case law, this judgment reaffirms the importance of freedom of expression in matters of public interest. The protection of critical speech permits the existence of a pluralism of ideas and encourages citizens to control the actions of their leaders by participating in public affairs.[1]

8. Although in this specific case – as can be noted from the facts described above – the Trial Court excluded a criminal sanction and, therefore, it was not necessary to analyze criminal liability, the consistent case law of this Court should be reiterated: that the application of criminal liability to journalists in cases aimed at protecting the honor of public officials is inadmissible. Hence, it is pertinent to repeat the factual assumptions and relevant standards of the precedents *Álvarez Ramos v. Venezuela* of August 30, 2019,[2] and *Palacio Urrutia et al. v. Ecuador* of November 24, 2021.[3]

9. The European Court of Human Rights has considered that Article 10 of the European Convention "leaves it for journalists to decide whether or not it is necessary to reproduce such documents [supporting their assertions] to ensure credibility. It protects journalists' right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism."[4] Thus, in light of the facts of the instant case, the consultation of one authoritative source was sufficient and any requirement beyond this was an action that was not protected by Article 13(2) of the Convention. Hence, the imposition of requirements and formalities for gathering information may have a chilling effect on the work of the press and impair its role in a democratic society (*infra* para. 24).

10. In the case of *Álvarez Ramos v. Venezuela*, the Court considered that the State was responsible for violating the right to freedom of expression and for the political disqualification of Tulio Álvarez Ramos owing to the criminal proceedings instituted against him for the perpetration of the offense of continuing aggravated defamation. The action was filed by a former member and President of the Venezuelan National Assembly and resulted in a sentence

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1 Concurring opinion of Judges Eduardo Ferrer Mac-Gregor Poisot and Ricardo C. Pérez Manrique. *Case of Palacio Urrutia et al. v. Ecuador*, para. 7

2 *Case of Álvarez Ramos v. Venezuela*. Preliminary objection, merits, reparations and costs. Judgment of August 30, 2019. Series C No. 380.

3 *Case of Palacio Urrutia et al. v. Ecuador.* Merits, reparations and costs. Judgment of November 24, 2021. Series C No. 446.

4 ECHR, *Fressoz and Roire v. France* [GS], 21/01/1999, para. 54

of 2 years and 3 months' imprisonment and an accessory sanction of political disqualification.[5]

11. The Court considered that, in this situation, "the State's punitive response by applying criminal law to protect the honor of the official was not admissible under the Convention."[6] Thus, in the case of matters of public interest divulged by journalists, the Convention prohibits the imposition of a criminal sanction to protect the honor of the public officials involved.

12. It is also relevant to refer to the case of *Palacio Urrutia et al. v. Ecuador,* which relates to the sanction of a journalist and the directors of the El Universo newspaper owing to the publication of an editorial article on a matter of considerable public interest concerning the events of the September 2010 political crisis in Ecuador, and the actions taken by former President Rafael Correa and other authorities in the context of that crisis.[7]

13. In *Palacio Urrutia*, the Court considered that the sanctions or civil liability imposed in that type of case – although they may not, *per se,* be contrary to the Convention as are criminal sanctions – must be duly reasoned and proportionate, and not aimed at impairing the freedom of expression of the author of the article, or of those employed in a media outlet.

14. In both cases, the Court made an analysis to determine whether the article or information that was the reason for the trial was part of the public debate and, to this end, it assessed the concurrence of, at least, the three following elements: "(i) the subjective element: in other words, that the person was a public official at the time of the allegations made in the media; (ii) the functional element: in other words, that the person was involved in the relevant events in their official capacity, and (iii) the material element: in other words, that the matter raised was of public relevance."

15. In the case of *Álvarez Ramos v. Venezuela*, the Court found that the three elements were present because the article: (i) referred textually to the actions of Mr. Lara as head of the National Assembly; (ii) referred to the exercise of functions by a public official, and (iii) noted that the management of public monies or resources of the Savings and Social Security Fund of the National Assembly employees was a matter of public interest. This was notwithstanding the critical stance taken by Mr. Álvarez. A critical opinion cannot harm the right to freedom of expression, which is a fundamental pillar of a democratic society and the rule of law. The Court found that "criticism of public officials is not only valid, but also necessary."[8]

16. In the case of *Palacio Urrutia*, the Court also considered that the article which resulted in those proceedings referred to a matter of public interest that was protected by the right to freedom of expression and related to the exercise of his functions by a public official. In this regard, according to the Court's standards, "an editorial article that refers to a matter of public interest enjoys a special protection owing to the importance of this type of discourse in a democratic society."[9]

17. Article 13(2) of the Convention indicates that the exercise of the right to freedom of expression may not be subject to prior censorship but shall be subject to subsequent liability.

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[5] *Case of Álvarez Ramos v. Venezuela*. Preliminary objection, merits, reparations and costs. Judgment of August 30, 2019. Series C No. 380.

[6] *Cf. Case of Álvarez Ramos v. Venezuela, supra*, para. 121.

[7] *Case of Palacio Urrutia et al. v. Ecuador.* Merits, reparations and costs. Judgment of November 24, 2021. Series C No. 446, para. 87.

[8] *Case of Álvarez Ramos v. Venezuela*, supra, para. 113.

[9] *Case of Palacio Urrutia et al. v. Ecuador, supra,* para. 115.

The Court has maintained that freedom of expression has a greater latitude when it relates to issues that are specific to public debate in a democratic society, but this does not mean that the honor of public officials should not be protected by law. However, it should be noted that the said article does not establish the nature of the liability that may be claimed. The Court considers that, in the case of discourse protected by its public interest, such as that relating to the conduct of public officials in the exercise of their functions, the State's punitive response by the use of criminal law in order to protect the honor of the public official is not compatible with the Convention; rather, to the contrary, it is an abuse that harms the transparency of a democratic society.

18. I find it relevant to underscore these aspects due to their significance for democratic society and public scrutiny because, as the Court indicated in the case of *Palacio Urrutia*, the use of criminal law to sanction journalists for disseminating news items of public interest, "would limit freedom of expression and would prevent public scrutiny of unlawful conduct, such as acts of corruption, abuse of authority, etc. Ultimately, this would weaken public control over the branches of State, causing significant harm to democratic pluralism."[10] As the European Court of Human Rights has indicated, "[t]he punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest."[11]

19. This does not mean that, eventually, journalism cannot result in liability in another legal area, such as the civil sphere, or a rectification or public apology: for example, in cases of possible abuse or excesses of bad faith. However, since this relates to the exercise of an activity protected by the Convention, criminal prosecution is excluded and, hence, the possibility that it should be considered a crime and subject to punishment.

20. I find it necessary to point out that, in the case of newspaper opinion pieces, the opinions are exempt from State control, except as mentioned in Article 13(5) of the American Convention. Regarding informative articles on matters of public interest, in addition to not being subject to prior censorship, they are also subject to the Court's case law on the incompatibility of a criminal response with the Convention. In all cases, the burden of proof falls to the plaintiff.

21. This interpretation is fully consistent with Article 14 of the American Convention, which establishes the right to rectification or reply as an appropriate mechanism to guarantee the right to honor and the honor of third parties.[12]

22. In any case, given that different measures can be taken to attribute liability, I will now examine the scope of the due diligence that can be required of journalists in the selection and use of sources of information and possible civil liability.

III. THE REQUIREMENT OF DUE DILIGENCE IN THE SELECTION AND USE OF SOURCES IN THE ANALYSIS OF THE LIABIITY OF JOURNALISTS

23. In the instant case, the Court has indicated that the information published in the

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10 *Case of Palacio Urrutia et al. v. Ecuador, supra*, para. 118.

11 ECHR. *Jersild v. Denmark,* no. 15890/89, September 23, 1994, para. 35.

12 Article 14. Right of Reply. 1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish. 2. The correction or reply shall not in any case remit other legal liability that may have been incurred. 3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges.

newspaper article came from an official source and that the journalists could not be obliged to make additional verifications. I fully agree with this assertion and find it relevant to provide additional grounds to those indicated by the Court. Thus, in the case of *Palacio Urrutia,* the Court considered that, in the context of freedom of information, journalists do indeed have a duty to verify, in a reasonable although not necessarily exhaustive manner, the facts on which they base their information; thus, "it is valid to demand fairness and diligence in the search for information and the verification of sources."

24. Source verification, as a necessary professional practice of journalists, is important within the specific sphere of action of this profession. However, this practice cannot become a demand for extreme meticulousness that ends up by exposing journalists to disproportionate requirements when publishing information of public interest. This task, which is inherent in the profession and must be guided by the pertinent code of ethics, is exempt from judicial control in the case of information of public interest provided by an official source. In such cases, a judge would be illegitimately assuming the function of editor. Thus, the European Court of Human Rights has indicated that "if the national courts apply an overly rigorous approach to the assessment of journalists' professional conduct, the latter could be unduly deterred from discharging their function of keeping the public informed."[13]

25. As the judgment indicates, the protection of journalistic sources,[14] is the cornerstone of press freedom and, in general, of a democratic society, because it "enable[s] a society to benefit from investigative journalism, to strengthen good governance and the rule of law."[15] The confidentiality of journalistic sources is, therefore, essential for the work of journalists and for the role they play of informing society on matters of public interest.[16] Although this Court has not had occasion to rule specifically on the issue of the protection of sources, insofar as it has not heard a contentious case on the topic, European case law – with which I agree – has been categoric in emphasizing that "an order of source disclosure" is contrary to Article 10 of the European Convention on Human Rights.[17]

26. The European Court of Human Rights has considered that the wording of Article 10 of the European Convention ''leaves it for journalists to decide whether or not it is necessary to reproduce such documents [supporting their assertions] to ensure credibility. It protects journalists' right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism."[18] Thus, in light of the facts of the instant case, the recourse to one authoritative source is sufficient, and any requirement beyond this is incompatible with Article 13(2) of the Convention. Therefore, the imposition of excessive requirements and formalities on the gathering of information may have a chilling effect on the work of the press and affect its role in a democratic society.

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13 ECHR. *Bozhkov v. Bulgaria, No. 3316/04,* April 19, 2011, para. 51.

14 The Court considers that a source is anyone who provides information to a journalist. *Cf. ECHR, Nagla v. Latvia*, no. 73469/10, Judgment of July 16, 2013, and Committee of Ministers of the Councill of Europe, Recommendation No. R(2000) 7 to member states on the right of journalists not to discloses their sources of information. "Definitions."

15 *Cf.* UNESCO, General Conference, 37 C/61, of November 7, 2013, para. 12. See also, ECHR, *Goodwin v. the United Kingdom* [GS], no. 17488/90, Judgment of March 27, 1996, para. 39, and *Becker v. Norway*, no. 21272/12, Judgment of October 5, 2017, para. 65.

16 *Cf.* IACHR, "Corruption and human rights; inter-American standards," OEA/Ser.L/V/II., of December 6, 2019, para. 210.

17 Cf. ECHR Cases of *Becker v. Norway,* 05/10/2017, para. 65, and *Financial Times Ltd and Other v. The United Kingdom*, para. 63.

18 ECHR, *Fressoz and Roire v. France* [GS], 21/01/1999, para. 54

IV. CIVIL LIABILITY

27. In paragraphs 102 and 103 of the judgment, the Court determined that "the State must adopt the necessary measures to annul the attribution of civil liability to Freddy Parrales Chaves and Ronald Moya Chacón imposed by judgment No. 02-2007 handed down by the Second Circuit Criminal Court of San José, Goicoechea, on January 10, 2007, and confirmed in cassation by the Third Chamber of the Supreme Court of Justice on December 20, 2007; this includes any administrative or judicial record, or the possibility that it could be recognized as a judicial precedent." The Court did not find it appropriate "to order the repayment of the sums disbursed due to the civil conviction to pay damages and procedural costs because the victims in this case did not have to make this payment and there is no record in the body of evidence – and it has not been argued – that La Nación has filed or could eventually file an action against the victims to reclaim the amounts disbursed by the newspaper."

28. In this section, I will focus on stressing the importance of the protection of journalists and their freedom of expression in relation to the importance of the democratic system in the hypothesis of subsequent civil liability. Thus, it is also important to protect journalists from unjustified complaints that may have a chilling effect due to the possibility of receiving a conviction. Consequently, it must be emphasized that the proportionality test is a useful tool for preventing that effect because it involves an analysis of the circumstances of the journalist concerned to ensure that the sanction will be proportionate to the reality of that individual.

29. In this regard, paragraph 78 of the judgment clearly establishes that, regarding proportionality, "it should also be underlined that, if it is considered appropriate to award reparation to the person whose honor has been harmed, the purpose of this should not be to punish the originator of the information, but rather to provide redress to the person concerned."

30. The ECHR has ruled similarly, when stating that the nature and severity of the sanctions imposed are factors that should be taken into account when assessing the proportionality of an interference with freedom of expression. In particular it has referred to the requirement of "utmost caution where the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern."[19]

31. The abusive and disproportionate use of civil liability may result in the silencing of journalists and, eventually, also of the media in which they intervene. Its disproportionate nature in relation to the possibility of responding to such sanctions by those who receive them may have the same or an even more chilling effect than the criminal sanction.

32. In addition, it has already been pointed out that a succession of unjustified complaints is, today, one of the greatest risks to freedom of expression and makes it necessary to establish anti-SLAPP measures. As mentioned previously in my concurring opinion in the case of *Palacio Urrutia et al. v. Ecuador:*[20] "[t]he 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

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[19] *Cf.* ECHR, *Cumpănă and Mazăre v. Romania*, no. 33348/96, judgment of December 17, 2004, para. 111. See also, *Jersild v. Denmark*, no. 15890/89, judgment of September 23, 1994, Series A no. 298, para. 35, *Ceylan v. Turkey [GC]*, no. 23556/94, and *Tammer v. Estonia*, no. 41205/98.

[20] *Case of Palacio Urrutia et al. v. Ecuador.* Merits, reparations and costs. Judgment of November 24, 2021. Series C No. 446.

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."

33. This is why the duty to create mechanisms other than criminal laws has been established in this regard, so that public officials may obtain a rectification or reply when their honor or good name has been harmed. This protection has a direct link to the precedent of Álvarez Ramos and can be understood as a protection for the exercise of journalism in accordance with the anti-SLAPP laws insofar as it prohibits the use of criminal law to require the protection of the honor or good name of public officials, and establishes that the civil sanctions must be proportionate.

34. This additional protection of freedom of expression – which can be especially relevant in cases in which the authorities use judicial measures to silence political opponents – excludes the possibility of a criminal sanction in certain situations and is applicable to the instant case in relation to subsequent liability under civil law.

V. CONCLUSION

35. In conclusión, based on the importance of the work of journalists in relation to freedom of expression and its contribution to the democratic debate that protects and promotes the rule of law, I would like to underscore: (1) the prohibition of prior censorship; (2) the existence of subsequent liability; (3) the incompatibility with the Convention of applying criminal law to protect the honor of public officials (*supra*, paras. 13, 14 and 15); (4) the use of the right of rectification or reply (Art. 14 of the American Convention; (5) in the case of civil liability, the need for this to be applied in cases of extreme negligence or malice, and also proportionately, so that it avoids a chilling effect or censorship of journalists.

36. Regarding civil liability, it is important that the analysis of proportionality also include an analysis of the pecuniary amounts established in the judgment to ensure that they do not entail measures that dissuade democratic discussion.

37. The general and open standards concerning non-contractual liability, such as article 1045 of the Costa Rican Civil Code, should be analyzed in cases of the subsequent liability of journalists in relation to the protection of the honor of public officials in matters of public interest and with reference to acts relating to their functions, carrying out a strict control of conventionality in keeping with the parameters I have tried to develop in this opinion.

Ricardo C. Pérez Manrique
Judge

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF
JUDGE HUMBERTO ANTONIO SIERRA PORTO

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF MOYA CHACÓN *ET AL. V.* COSTA RICA

JUDGMENT OF MAY 23, 2022

(Preliminary objections, merits, reparations and costs)

1. With my usual respect for the decisions of the Inter-American Court of Human Rights (hereinafter "the Court"), the purpose of this opinion is to make some observations on the standards that substantiate the international responsibility of the State of Costa Rica (hereinafter "the State" or "Costa Rica") for the violation of the right to freedom of expression of Ronald Moya Chacón and Freddy Parrales Chaves. Even though I fully share the content of the third operative paragraph, I would like to underline that, contrary to the most recent decisions on these same matters,[1] on this occasion, the Court examined the conventionality of sanctions that limit the right to freedom of expression in cases of public interest, in light of the principle of proportionality, and reiterated its consistent case law on the legitimate limitations to this right.

2. In the judgment, the Court declared the responsibility of the State considering that the civil sanction imposed on Messrs. Moya Chacón and Parrales Chaves due to the publication in a newspaper of information that turned out to be inexact regarding the existence of a criminal investigation against a police officer for presumed smuggling in the frontier zone, was not necessary or proportionate to the legitimate purpose sought to protect the latter's honor and, therefore, violated Article 13(1) and 13(2) of the American Convention (para. 93). To reach this conclusión, the Court reiterated its case law standards in this regard; emphasized the role of the right to freedom of expression in a democratic society, the obligation of the State to limit this only in the situations accepted by the Convention, and the special need to protect this right in relation to journalism to avoid punitive measures discouraging or inhibiting the communication of matters of public interest.

3. In addition, the Court was emphatic in affirming that the right to freedom of expression is not absolute. Hence, it explained that Article 13(2) of the Convention sets out the possibility of establishing subsequent liability for the abusive exercise of this right in order to ensure "respect for the rights or reputation of others" (para. 73). In this regard, the Court has considered that civil or criminal sanctions can be used to achieve the harmonious coexistence between these rights. Such sanctions, in particular criminal sanctions, must be conceived as an *ultima ratio* response to very serious harm to fundamental rights that are closely related to the extent of the harm caused.

4. According to the Court's case law, the examination of the conventionality of a civil or criminal sanction calls for application of the proportionality test. Thus, in situations in which there are tensions between freedom of expression and other rights, the Court has been consistent in indicating that it is necessary to verify: (i) that the sanction has been previously established by law; (ii) that its imposition responds to an objective established by the

[1] *Case of Palacio Urrutia et al. v. Ecuador.* Merits, reparations and costs. Judgment of November 24, 2021. Series C No. 446, and *Case of Álvarez Ramos v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 30, 2019. Series C No. 380.

American Convention, such as the protection of the rights of others, and (iii) that it is necessary in a democratic society, to which end it must meet the requirements of suitability, necessity and proportionality (para. 71). In such situations, the factors surrounding the necessity for, and the proportionality of, the measure are especially important and they include the nature of the expressions (if they are opinions or facts), the person to whom they are addressed, if they are matters of public interest, and whether the sanctions imposed were proportionate to the harm caused.

5. The Court has undertaken this exercise of examining the conventionality of the measures of subsequent liability by an assessment of proportionality in cases such as *Palamara Iribarne v. Chile* (2005), *Kimel v. Argentina* (2008), *Tristán Donoso v. Panama* (2009), *Fontevecchia and D`Amico v. Argentina* (2011) and *Mémoli v. Argentina* (2013). However, the flexibility with which this exercise was carried out appears to have been limited in the cases of *Álvarez Ramos v. Venezuela* (2019) and *Palacio Urrutia v. Ecuador* (2021). Indeed, as I indicated in the concurring opinion in the latter case, the position assumed by the Court seemed to move away from its reiterated case law, because it considered that the criminal sanction imposed on a journalist for publishing a criticism of the actions of the then President Rafael Correa, constituted *per se* a violation of the right to freedom of expression pursuant to Article 13 of the American Convention. In other words, without it being necessary to decide on the proportionality, due to the nature of the communication (public interest).

6. In the instant case, the Court has not following the logic of the last two cases mentioned above which, as I noted in my opinion, created substantiation and application difficulties,[2] and reverted to its line of case law concerning the proportionality test. Nevertheless, I must note that, in this judgment, the Court did not examine the content of the Printing Act that establishes criminal sanctions for the exercise of the profession of journalism in situations that harm the right to honor. However, it is relevant to underline that it acknowledged that statements or communications of public interest have greater protection (para. 74), which does not automatically mean that civil or criminal sanctions are, *per se* and always, contrary to the Convention.

7. What I wish to emphasize is that, despite involving a case against journalists who published information of public interest, the Court did not ignore the existence of civil or criminal sanctions *per se*. Regarding the criminal sanction, it indicated that, since it was a type of offense addressed in particular at journalists and established objective liability for editors, directors or owners of the media outlet, it could give rise to a chilling effect. However, since the criminal sanction was not imposed on the applicants, the Court did not make any declaration of responsibility in this regard (para. 82). Regarding the civil sanction, the Court conducted a rigorous test of proportionality and concluded that, despite it being legal, seeking a legitimate purpose and being suitable to achieve that purpose, the measure imposed was not necessary or proportionate, because the diligence of the journalists had been proved, together with the absence of an intention to cause harm, on the one hand, and the negative effects of the sanction on the other (para. 89 *ff*).

8. I consider that the analysis made by the Court in this decision is more appropriate, by admitting the use of civil or criminal law to address the exercise of freedom of expression in matters of public interest when necessary to protect other rights and to meet the requirements of Article 13(2) of the Convention. The position that civil or criminal sanctions are not *per se* contrary to the Convention and that a proportionality test should be conducted to identify whether they represent admissible limitations – during which, among other factors,

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[2] Concurring opinion of Judge Humberto Antonio Sierra Porto. Para. 11. *Case of Palacio Urrutia et al. v. Ecuador. Merits, reparations and costs*. Judgment of November 24, 2021. Series C No. 446

it is possible to assess the malice of the person issuing the opinions, the characteristics of the harm caused, and the nature of the expression – permits giving greater protection to information of public interest without establishing an absolute rule that disregards the legal complexities and the rights at stake.

9. As I have already stated in the aforementioned opinion in the case of *Álvarez Ramos*, "it is pertinent not to lose sight of the fact that the possibility of applying criminal sanctions in the case of the most serious attacks on other fundamental rights – such as honor and dignity – is of special relevance to maintain a healthy balance between the different rights recognized by the American Convention. It is important to take into account that opinions, even when they refer to matters of public interest, may cause serious harm to the fundamental rights of a public official – who is not an abstract being, but a person whose rights [merit equal protection]."[3] This balance is clearly revealed in this case in which the Court admits that, in cases in which words cause serious harm to an individual, the civil or criminal sanction may be justified when it meets the other requirements under Article 13 of the Convention developed by the case law of this Court.

Humberto Antonio Sierra Porto
Judge

Pablo Saavedra Alessandri
Secretary

[3] Concurring opinion of Judge Humberto Antonio Sierra Porto, para. 12. *Case of Palacio Urrutia et al. v. Ecuador, supra.*

CONCURRING OPINION OF JUDGE RODRIGO MUDROVITSCH

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF MOYA CHACÓN *ET AL. V.* COSTA RICA

JUDGMENT OF MAY 23, 2022

(Preliminary objections, merits, reparations and costs)

I. The instant case

1. This case refers to the international responsibility of the State of Costa Rica for the judicial proceedings filed against the journalists Ronald Moya Chacón and Freddy Parrales Chaves owing to the publication of an article in La Nación on December 17, 2005, in which they reported supposed irregularities in the control of liquor contraband in the territory of Costa Rica.

2. The journalists were prosecuted in both the criminal and the civil jurisdictions, together with the Minister of Public Security at the time, R.R.M., following a complaint filed by one of the men named in the article, J.C.T.R. The plaintiff sought: (i) that the petitioners should be prosecuted under the offense of libel established in article 145 of the Costa Rican Criminal Code, and defamation established in article 146 of the Criminal Code, combined with article 7 of the Printing Act, and (ii) to obtain civil pecuniary compensation from the journalists and the Minister, based on the argument that they had the obligation to verify the information that was published with greater diligence. At both first instance and on appeal they were all acquitted of the criminal charges, but convicted under civil law and sentenced to compensate the alleged injured party.[1]

3. In its judgment in this case, the Inter-American Court of Human Rights ("the Court") underlined its concern due to the existence of criminal laws addressed exclusively at the exercise of journalism, such as the aforementioned Printing Act. It also emphasized two specific characteristics of article 7 of the Act that "deserve special attention owing to their harmful effects for the exercise of freedom of expression" (§83): harsher sanctions for offenses against honor when committed by journalists through the media, and the establishment of objective criminal liability for the editors, directors and owners of the media outlet in which an article that offends someone's honor has been published.

4. I consider it essential to address the incidental aspects of the issue of protection by criminal law, notwithstanding the acquittal ruling that considerably reduced the consequences of the criminal proceedings that had been filed. Ultimately, as the Court indicated, the validity of this type of legislation may, in certain circumstances, have a chilling effect in society – especially if special care is not taken regarding the requirement of a certain materiality in order to open proceedings (§83). This so-called chilling effect gives rise to concerns in relation to the guarantee of the free exercise of the right to freedom of expression, which is instrumental for the formation of a free marketplace of ideas in a democracy, because it is necessary not only to respect alternative opinions and versions of history and complex social events in a plural society, but also to create an authentic and welcoming institutional space for it exercise, free of pressure and reprisals due to the exercise of the nation-State's monopoly of power.

[1] The judgment was handed down by the Second Circuit Trial Court of San José, Goicoechea, on January 10, 2007, and confirmed in second instance by the Third Chamber of the Supreme Court of Justice on December 20, 2007.

5. In light of the principles of fragmentation and minimum criminalization, I find it necessary to insist on the absolute exceptionality of the use of criminal measures, based on the parameters of suitability (adequacy), necessity and proportionality, as reflected in paragraphs 71 and 72 of the judgment in this case, in order not to restrict freedom of expression excessively. Hence, I consider it relevant to emphasize that this does not mean that rights such as honor are left without any legal protection. Nor can it be deduced from this inference that journalists enjoy unlimited protection, as pointed out in paragraph 68 of the judgment, owing to the need for meticulous harmonization in situations in which human rights and fundamental collective values clash. Thus, the safeguard of honor and possible limitations of freedom of expression – in situations that entail the dissemination of information of public interest – should give priority to measures other than the criminal jurisdiction.

6. Therefore, in this concurring opinion, I will make observations *obiter dicta* on the use of criminal measures to limit the right to freedom of expression. In particular, I will address the conflict between substantive aspects of article 7 of the Printing Act – the applicability of which is in dispute in Costa Rica's domestic jurisdiction – with the Convention and with the case law of this Court.

7. First, I will set out my considerations on article 7 of the Printing Act of Costa Rica, starting with general observations on the existence and use of criminal measures to restrict freedom of expression and thought under domestic law. Then, I will address the two aspects that are particularly problematic and that have been stressed in the judgment: these are the existence of an aggravated form of the offense of libel and the possibility of imposing objective liability pursuant to article 7 of the Printing Act.

II. Establishment and use of criminal measures as instruments to restrict the right to freedom of expression

8. The interaction between criminal law and the right to freedom of expression is a recurrent issue on the agenda of the inter-American system of human rights ("inter-American system").

9. The Court had its first opportunity to address aspects of the right to freedom of expression in its Advisory Opinion OC-5/85 (1985), which referred to the compatibility with the Convention of compulsory membership in a professional association for journalists in Costa Rica. When discussing the content of Article 13 of the Convention, the Court underlined important standards that define the individual and the collective dimension of the right to freedom of expression and the importance of the requirements of the legality, legitimacy of purpose, and necessity of its restriction. On the specific issue on which it was consulted, the Court also indicated that the possibility of individual liability for the dissemination of information and ideas by those who were not registered as journalists –even criminal liability – was a restriction of their freedom of expression that raised concerns about its compatibility with the Convention. Thus, even though this was in embryonic form, the advisory opinion represented an important step towards establishing some of the first caveats about the expansive use of criminal law in the area of public communication.

10. Despite the paradigmatic nature of OC-5/85, it was in the exercise of its contentious function that this Court found fertile ground for developing its case law on the correct interpretation of the scope of the protection of freedom of the press, in particular, and of freedom of expression, in general, in order to delimit the way such communication rights could be restricted by Member States.

11. After including important considerations on the right to freedom of expression in its first contentious cases related to Article 13 of the Convention, particularly in "*The Last Temptation of Christ" (Olmedo* Bustos *et al.) v. Chile* (2001) and *Ivcher Bronstein v. Peru* (2001), the Court was able to able to enter the debate on the impact of criminal law on the conducts protected *a priori* by the right to freedom of expression in *Herrera Ulloa v. Costa Rica* (2004). On that occasion, the Court assessed, among other matters, the alleged violation of the right to freedom of expression owing to the criminal sanction imposed on a journalist who, in several articles, had reproduced information previously published by the Belgian press relating to supposed unlawful acts attributed to a diplomat.

12. On that occasion, the Court understood that the requirement of proof in relation to information published by the foreign press constituted an excessive limitation of freedom of expression, which resulted in a discouraging, intimidating and chilling effect on all those who exercised the profession of journalism. In keeping with this reasoning, a requirement of that type would be contrary to the facilitation of public debate on matters of general interest.[2] In addition, the Court reinforced its understanding – established in the case of *Ivcher Bronstein v. Peru*[3] – that public figures are exposed to greater public scrutiny of their conduct, although this does not mean that the honor of public figures and public officials should not be protected in another way. It merely indicates that the measures should be aligned with the basic principles of democratic pluralism, the content of which requires that the State and its agents be open to criticism by the citizenry and accountable in the exercise of their public functions.

13. In his concurring opinion, Judge García Ramírez included a useful reflection on the possible use of criminal law for penalizing conducts in the exercise of journalism. The then President of the Court indicated that, before discussing the best way to criminalize excesses in the exercise of freedom of expression, it was essential to decide whether it was necessary and desirable to resort to a criminal response instead of to civil or other measures. Hence, it was important to adopt, as the preferred interpretative standard, the minimalist approach to criminal law, reserving it for those cases in which less extreme solutions were inappropriate or evidently inadequate.[4]

14. That same year, in *Ricardo Canese v. Paraguay (2004),* the Court was called on to assess the criminal conviction of a candidate to the presidency of the Republic due to statements made concerning another candidate during the electoral process.[5] When examining the legitimacy of the restriction in light of the requirements of necessity (or enforceability) in a democratic society – in other words, that the restriction of the right must be proportionate to the interest that justifies it and interfere, as little as possible, with the right affected – the Court understood that "criminal laws are the most severe and restrictive means of establishing liability for an unlawful conduct,"[6] to conclude that the Stated had acted in a way that was incompatible with the Convention. It is worth pointing out that the Court indicated that, of itself, the criminal prosecution (and not only the applicant's conviction) was an indirect means of restricting his freedom of expression.[7]

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[2] IACtHR. *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004, §§132-133.

[3] IACtHR. *Case of Ivcher Bronstein v. Chile*. Judgment of February 6, 2001, §155.

[4] IACtHR. *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Opinion of Judge Sergio García Ramírez. §15.

[5] IACtHR. *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. §§106-107.

[6] Subsequently reiterated, *inter alia,* in *Palamara Iribarne v. Chile*, §79 when discussing the offense of disrespect for public authorities (*desacato*).

[7] IACtHR. *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004, §107. Reiterated in *Kimel v. Argentina* (§85) and *Uzcategui v. Venezuela* (§189).

15. In 2008, the Court reiterated and developed its understanding of the use of criminal measures against freedom of expression in the case of *Kimel v. Argentina* (2008). In its acknowledgement of responsibility, the State admitted that the definition of certain offenses was imprecise and, therefore, incompatible with the Convention, which requires correct and specific legality. The Court accepted the State's acknowledgement and indicated that the "broad definition of the offenses of libel and defamation might be contrary to the principles of *ultima ratio* of criminal law and minimum criminalization." In this regard, even though the Court did not establish that any definition of offenses against honor would necessarily be contrary to the Convention,[8] it indicated that:

> this possibility should be **carefully analyzed,** pondering the extreme seriousness of the conduct of the individual who expressed the opinion, the malice with which he acted, the characteristics of the harm unjustly caused, and other information that reveals the absolute necessity of, exceptionally, resorting to criminal measures. At all times, the burden of proof must fall on the party who files the complaint.[9]

16. On this issue, I consider it essential to recall the reflections of Judge García Ramírez in his concurring opinion in the Kimel case. The judge reiterated the proposal made in his opinion in the case of Herrera Ulloa that it was necessary to determine the (in)adequacy of criminal law to combat possible excesses in the exercise of the right to freedom of expression, and underscored that the existence of adequate and less harmful alternatives to control excesses in the exercise of the right to freedom of expression made criminal proceedings unnecessary and incompatible with the Convention.[10]

17. It is also worth stressing the Court's decision, when determining the reparations applicable in the *Kimel* case, not only to require the annulment of the conviction under domestic law (a measure that had already been adopted), but also to establish, in extreme cases, the State's obligation to amend its domestic laws to align the definition of the offenses of defamation and libel to inter-American standards. Consequently, as the Court acknowledged, Argentina amended its Criminal Code to preclude the criminalization of expressions and opinions on matters of public interest, thus eliminating the sanction of imprisonment owing to defamation, among other measures in favor of the right to freedom of expression in compliance with the judgment in this case[11] – and, subsequently, also in the case of *Mémoli v. Argentina* in 2013.[12]

18. In 2012, in the case of *Uzcátegui et al. v. Venezuela*, the Court reinforced what it had already indicated in the case of *Ricardo Canese v. Paraguay*; in particular, that the very existence of criminal proceedings gives rise to an inhibiting and chilling effect on the exercise of freedom of expression contrary to the State obligation to ensure the free and full exercise of freedom of expression in a democratic society.[13]

19. The Court has recently returned to the issue of the use of criminal measures to regulate excesses in the exercise of freedom of expression in the case of *Álvarez Ramos v. Venezuela* (2019), in which the applicant had been convicted of the offense of aggravated defamation

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[8] Also in *Fontevecchia and D'Amico v. Argentina* (§55) and *Mémoli v. Argentina* (§126).

[9] IACtHR. *Case of Kimel v. Argentina*. Judgment of May 2, 2008, §78. Understanding reiterated, *inter alia*, in *Mémoli v. Argentina* (§139).

[10] Idem. Opinion of Judge García Ramírez, §§ 18-20.

[11] *Cf.* IACtHR. *Case of Kimel v. Argentina*. Monitoring compliance with judgment. Order of the Court of May 18, 2010, considering paragraph 35.

[12] The Court also took note of the change in *Fontevecchia and D'Amico v. Argentina* (§95).

[13] IACtHR. *Case of Uzcátegui et al. v. Venezuela*. Judgment of September 3, 2012. §189.

owing to the publication of an article that referred to the alleged misappropriation of funds by a former congressman. The Court divided its application of Article 13 to the case into two parts: first, it classified the statements made by Mr. Álvarez as speech on matters of public interest;[14] then, it examined the subsequent criminal liability attributed to him. Regarding such liability, the Court has consolidated the following understanding:

> [...] in the case of speech that is **protected because it concerns matters of public interest**, such as the conduct of public officials in the performance of their duties, **the State's punitive response through criminal law is not conventionally appropriate** to protect the honor of an official.
>
> Indeed, **the use of criminal law** against those who disseminate information of this nature would directly or indirectly constitute intimidation which, in the end, would limit freedom of expression and 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, in the hypothesis outlined previously, the protection of honor using criminal law, which may be legitimate in other cases, is not consistent with the Convention.**

20. Thus, I note that the Court has gone beyond analyzing the possible incompatibility with the Convention of the definition of specific offenses, and has examined the adequacy of criminal law, *per se*, to regulate freedom of speech on matters of public interest. This represents the culmination of its understanding, developed since the case of *Herrera Ulloa*, that the chilling effect of criminal law is a significant limitation to the exercise of freedom of expression, and that the importance of upholding open discussion on matters of public interest may, in certain cases, make criminal sanctions incompatible with the environment necessary for the pluralistic discussion that should be cultivated in democratic societies.

21. Nevertheless, after indicating the inadequacy of criminalizing speech that falls within this category, the Court underlined that "[t]his does not mean that journalistic conduct cannot produce liability in another legal sphere, such as in civil law, or require rectification or a public apology, for example, in cases of possible abuses or excesses of bad faith."[15] The consideration of these alternative measures is particularly valuable if we take into account that the Convention itself establishes the right of reply in its Article 14.

22. In the subsequent case of *Palacio Urrutia et al. v. Ecuador* (2021), the Court reiterated the progress made in its case law that was consolidated in *Álvarez Ramos*, in addition to referring back to the criteria identifying discourse as part of the public debate, it indicated that the use of criminal law to sanction the dissemination of information of this nature was not compatible with the Convention and underscored the existence of less onerous, and therefore preferable, alternatives.[16] It is also worth emphasizing the Court's acknowledgement of the chilling effect of the imposition of sanctions on Mr. Palacio Urrutia and the El Universo newspaper, which extended to all its journalists and employees.[17] Taking into account that, at the date of the judgment, Ecuador had already amended the definition of crimes against honor, the Court acknowledged the progress made, but indicated that the interpretation of the new provisions must be aligned with the rules of interpretation that it

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[14] To this end, the Court defined the elements as follows: a subjective element (the person concerned is a public servant); a functional element (the person carried out the reported acts in his official capacity), and a material element (the matter was of public relevance).

[15] IACtHR. *Case of Álvarez Ramos v. Venezuela*. Judgment of August 30, 2019, §124

[16] IACtHR. *Case of Palacio Urrutia v. Ecuador*. Judgment of November 24, 2021, §118-119.

[17] Ibid., §§123-124

had required.[18]

23. The Court has also integrated into its understanding of criminal measures some concerns regarding the frequency with which public officials use the courts to file complaints for libel or slander in order to silence or inhibit criticism of their actions in the public sphere, in the context of so-called "SLAPP proceedings" (Strategic Lawsuit Against Public Participation). In this regard, the Court gives special importance to the establishment of measures other than criminal prosecution to protect the honor of public officials, such as rectification and reply. In their concurring opinion, Judges Mac-Gregor Poisot and Pérez Manrique stressed that, despite being a measure of reparation in that specific case, the solution should serve as a basis for actions that States can take to avoid incurring international responsibility in the future.[19]

24. Examination of the aforementioned precedents allows us to identify the evolution of this Court's understanding of the issue which has culminated in the judgment adopted in the instant case.

25. There is a clear and growing tendency to increasingly restrict the use of criminal solutions to protect conduct relating to the exercise of freedom of expression, and this has already been consolidated in *Álvarez Ramos* and *Palacio Urrutia* with regard to matters of public interest.

26. This reduction of the scope of criminal protection is compatible with the tendency observed by other OAS and UN human rights treaty bodies. Among other significant approaches to the issue, it is worth stressing that, for more than ten years, the IACHR Special Rapporteurship for Freedom of Expression has been warning Member States about the inappropriateness of using criminal law to restrict freedom of expression – including specific recommendations to the State of Costa Rica.

27. In reality, the censure of and reservations regarding the use of criminal law as an instrument to restrict freedom of expression is not limited to the Inter-American Court.

28. In her 2009 Annual Report, the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, referring to the recommendations made by the Inter-American Court in the judgment in the case of *Herrera Ulloa*, reiterated to the Costa Rican State the importance of reforming its existing domestic laws to avoid the disproportionate application of criminal law to those who, while exercising their right to freedom of expression, denounce public officials.[20] In the 2018 Annual Report, the Special Rapporteur recalled that the protection of a person's reputation should only be guaranteed through civil sanctions,[21] in order to restrict the criminalization of conducts that jeopardize those rights only and exclusively to exceptional circumstances when there is an evident and direct threat of lawless violence. Also, in this regard, in the 2019 Annual Report, the same Special Rapporteur recommended that all Member States "*eliminat[e] the use of criminal proceedings to inhibit free democratic debate about all issues of public interest.*"[22]

29. In this understanding, the IACHR elaborated a Declaration of Principles on Freedom of Expression in October 2000.[23] Principle 11 establishes that:

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[18] Ibid., §§177-179

[19] Ibid. Concurring opinion of Judges Eduardo Ferrer Mac-Gregor Poisot and Ricardo Pérez Manrique, §11.

[20] IACHR, Special Rapporteurship for Freedom of Expression. Annual Report, 2009, §160.

[21] IACHR. Special Rapporteurship for Freedom of Expression. Annual Report, 2018, §371.

[22] IACHR, Special Rapporteurship for Freedom of Expression. Annual Report, 2019, p. 272.

[23] IACHR. Declaration of Principles on Freedom of Expression. Adopted by the Inter-American Commission on Human

> Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as "*desacato* laws," restrict freedom of expression and the right to information.

30. In addition to reiterating its condemnation of the criminalization of the offense of disrespect for public authorities (*desacato)*, the IACHR took the opportunity to express its concern with regard to the use of legal provisions on crimes against honor in the same way as laws concerning disrespect for public authorities:

> In addition, many of these States continue to have criminal libel, slander and defamation laws, which are frequently used in the same manner as *desacato* laws to silence governmental critics.[24]

31. Furthermore, in 2017, the UN Special Rapporteur on freedom of opinion and expression, the Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information issued a Joint Declaration on Freedom of Expression, Disinformation and Propaganda in which they affirmed that "[c]riminal defamation laws are unduly restrictive [to the right to freedom of expression] and should be abolished."[25]

32. Meanwhile, the European Court of Human Rights ("the ECHR") has adopted, when applicable, a position that also reinforces the exceptional nature of a criminal response. Thus, it has admitted the possibility of the criminal prosecution of journalists "only in exceptional circumstances, notably where other fundamental rights have been seriously impaired.[26] In addition, it has recognized that imposing a criminal sentence for defamation in a context of debate on matters of public interest, "by its very nature, will inevitably have a chilling effect" (see, *Cumpana and Mazare v. Romania*).[27] However, it should be pointed out that, even though the European Court refrained from adopting a more incisive position on the incompatibility of criminal prosecution to curb speech of public interest, on many occasions in its judgments that court has called attention to Resolution No. 1577/2007 of the Parliamentary Assembly of the Council of Europe (PACE), which urges the States to decriminalize defamation.[28]

33. Returning to the inter-American context, for some time now, as I have recapitulated above, the Court has indicated that manifestations of freedom of expression on matters of public interest – and therefore essential for democracy and the accountability of public officials – enjoy a higher level of protection than other manifestations.[29] Consequently, when matters of public interest are involved, we must increasingly question whether there is an essential social interest that truly justifies the existence of specific criminal laws to punish offenses against honor committed by journalists or through the press, or interpretations of case law that confer harsher reprisals in such cases. The specific legal provisions and their respective

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Rights at its 108th regular session held from October 16 to 27, 2000. Available at: https://www.oas.org/en/iachr/mandate/basics/declaration-principles-freedom-expression.pdf.

[24] IACHR, Annual Report, of the Inter-American Commission on Human Rights 2002. Vol. III. Report of the Rapporteurship for freedom of expression, Chapter V. §16.

[25] Available at: https://www.oas.org/en/iachr/expression/showarticle.asp?artID=1056&lID=1

[26] ECHR. *Case of Cumpana and Mazare v. Romania.* Judgment of December 17, 2004, §115. Similarly: ECHR. *Fatulalyev v. Azerbaijan*. Judgment of April 22, 2010, §103

[27] ECHR. *Case of Cumpana and Mazare v. Romania,* §116

[28] For example, *Otegi Mondragon v. Spain* (§31), *Ruokanen v. Finland*, (§50), and *Mariapori v. Finland* (§27).

[29] IACtHR. *Case of Ivcher Bronstein v. Peru*. Judgment of February 7, 2001, §§153-56.

interpretation frequently result not only in an excessive use of criminal law, but also in a direct affront to the basic precepts of a free and well-ordered society, such as the principle of minimum criminalization.

34. At this point, it is important to underline that often, and in a way that is of particular concern, judicial protection in cases of offenses against honor is exercised by private criminal actions filed by the alleged victim on a highly discretionary basis. In other words, the opening of criminal proceedings against someone for offenses of this nature does not depend on the initiative of a state entity with special prerogatives of autonomy, such as the Public Prosecution Service, but on a simple criminal complaint filed by the alleged victim. This makes it much easier to use criminal measures to intimidate, inhibit or have a chilling effect on expressions of freedom of expression, even if such measures do not result in a conviction, and especially in the context of newspaper articles resulting from investigative journalism on matters of public interest.

35. In the instant case, even though the victims were not criminally convicted, and despite the significant interpretative dispute concerning the validity of article 7 of the Costa Rican Printing Act, criminal proceedings were opened against the two men. It is important to consider that the international community understands that a criminal conviction is not required in order to execute this subtle violation of the sphere of free expression; criminal proceedings and the reasonable perspective of an unfavorable result, *per se* shameful, is sufficient to impair the right to freedom of expression. And, it is the so-called chilling effect[30] that, *per se*, constitutes a veiled form of obstruction of the exercise of journalistic freedom of expression; moreover, it discourages the investigation and dissemination of information of public interest. If the domestic jurisdiction is not already prudent with regard to the assessment of the substantive nature of the offense or the subjective elements of the criminalized conduct, greater is the power of intimidation that results from the filing of the proceedings, because greater is the risk of a conviction.

36. The European Court has also indicated that, in addition to inhibiting the free circulation of information for society as a whole, the chilling effect is also an obstructive factor that must be considered when examining the proportionality of measures that restrict the right to freedom of expression and, thus, the justification of the eventual sanctions imposed on media professionals.[31] Ultimately, as the European Court has stated, for example, in *Bozhkov v. Bulgaria*, "if the national courts apply an overly rigorous approach to the assessment of journalists' professional conduct, the latter could be unduly deterred from discharging their function of keeping the public informed."[32] Moreover, in the case of *Morice v. France*, the European Court declared that, the relatively moderate nature of the criminal sanction did not suffice to negate the risk of a chilling effect on the exercise of freedom of expression.[33]

37. On this point, in paragraph 52 of their brief with pleadings, motions and evidence, the representatives argued that "the dissuasive and perverse effect of subjecting the victims to

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[30] "*The threat of criminal sanctions, in particular imprisonment, exerts a chilling effect on freedom of expression. Prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media or to practise journalism or any other profession, excessive fines and other harsh criminal penalties should never be available as a sanction for breach of defamation laws."* Civil and political rights, including the question of freedom of expression: The right to freedom of opinion and expression, Report of the UN Special Rapporteur, Ambeyi Ligabo (2006). E/CN.4/2006/55. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/100/26/PDF/G0610026.pdf?OpenElement.

[31] ECHR. *Case of Kaperzynski v. Poland*, of April 3, 2012. Similarly, also: *Case of Lewandowska-Malec v. Poland*. Judgment of September 18, 2012.

[32] ECHR. *Case of Bozhkov v. Bulgaria*. Judgment of April 19, 2011, §51

[33] ECHR. *Case of Morice v. France*. Judgment of April 23, 2015, §127

criminal prosecution will not disappear, because the message threatening freedom of expression has already been sent to Costa Rican society." The concern expressed has special relevance, as can be noted from the statement made by Mr. Moya Chacón concerning some of the inhibiting consequences of the chilling effect on his own experience, when he described how the mere possibility of similar criminal cases being filed was used as an instrument of pressure and coercion by other police officers in the region in order to prevent not only him, but also other journalists, from publishing articles linking them to alleged irregularities.

38. It should also be stressed that, as this Court's case law has already added, criminal law cannot be used to sanction any type of rights violation because it is the harshest sanction that the State can impose on an individual. In other words, the availability of criminal offenses cannot disregard the *ultima ratio* nature of criminal law. In addition, in the case of the protection of conducts related to the exercise of freedom of expression, such as journalistic activities and the dissemination of information of public interest, this exceptionality acquires greater importance.

39. In this regard, I consider that the teachings of Claus Roxin should be highlighted:

> Criminal law is only the last among all the measures of protection that should be considered; in other words, it can only be used when other social measures to resolve the problem – such as the civil action, judicial or police regulations, or non-criminal sanctions, etc. – have failed. Therefore, the punishment is known as the "*ultima ratio* of social policy" and its mission is defined as the subsidiary protection of legal rights.
> [...]
> This limitation of criminal law arises from the principle of proportionality of our constitutional rule of law: given that criminal law enables the harshest of all State interferences in the individual's freedom, it may only intervene when it appears that other less harsh measures will not be sufficiently successful.[34]

40. More than a reflection on the subsidiary nature of criminal law, the German author reminds us that the modern criminal system should be guided teleologically; therefore, it should ensure the alignment of the assumptions of criminality to the objectives established by criminal policy in the context of the rule of law.[35] Moreover, this evaluative criteria cannot disregard the international commitments assumed by the State, especially as regards human rights.

41. A criminal policy informed by the principles of the American Convention in the sphere of the right to freedom of expression is one which restricts the effects of criminal law on the exercise of journalistic activities to the greatest extent possible.

42. A review of this Court's case law on freedom of expression, as well as the position taken by other international bodies, reveals that the concern expressed in the judgment in the case of *Moya Chacón v. Costa Rica* is in keeping with the principles established in international law on the exceptional nature of using criminal law in the case of offenses against honor, especially in the case of journalists or matters of public interest, or when such offenses involve public officials.

43. Having reviewed the Court's case law on this issue, I will now make an in-depth analysis

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[34] ROXIN, Claus. *Derecho penal: parte general - tomo I. Fundamentos: las estructuras de la teoría del delito.* Trad. Diego-Manuel Luzón Peña et al. Madrid: Civitas, 1997, p. 65.

[35] ROXIN, Claus. *Derecho penal: parte general - tomo I. Fundamentos: las estructuras de la teoría del delito*. Trad. Diego-Manuel Luzón Peña et al. Madrid: Civitas, 1997, pp. 217-218.

of the elements of article 7 of the Costa Rican Printing Act to which the attention of the Court's judges was drawn and that led them to express their legitimate and justified fear that this type of provision could be used as an effective vehicle for inducing the silence of journalists and compromising the collective and informative dimension of press freedom.

III. Article 7 of the Printing Act in relation to the Convention and the case law of the Inter-American Court

44. Under the Costa Rican legal system, the Criminal Code contains specific provisions that define the offenses of libel and defamation in articles 145 and 146, respectively; nevertheless, it should be noted that the two criminal offenses are only subject to fines. However, the Costa Rican Printing Act also defines conducts classified as libel and defamation as offenses in its article 7, establishing a harsher sanction, and expressly establishing imprisonment applicable exclusively to media professionals. See below:

> Anyone responsible for defamation or libel committed through the press shall be punished with from one to one hundred and twenty days' detention. This sanction shall apply jointly to the authors of the publication and to the editors responsible for the newspaper, pamphlet or book in which it may have appeared. If the name of the responsible editors does not appear in the newspaper, pamphlet or book, the directors of the publishing company shall be considered as such for the effects of this article, and if there are no such directors, their responsibility shall revert to the owner of the publishing company. But, if this be leased or held by another person in any other capacity, the lessee or possessor of the publishing company shall assume the responsibility that falls to the owner, provided that the Governor of the province has been advised of this tenure.
>
> If the defamatory or libelous publication has not been made in a newspaper, pamphlet or book, the authors and the director or owner or lessee or possessor of the publishing company shall be held jointly responsible pursuant to the rule established in their regard in the preceding paragraph.

45. For the analysis of the said article 7, it can be divided into three sub-categories of liability: the first refers to conducts specifically carried out through the press that are not sanctioned with a fine, but with one to one hundred and twenty days' imprisonment. The second refers to the criminal liability of the authors and managing editors of the publication. The third establishes the liability of the directors, owners and/or lessees of the medium if the name of the editors does not appear in the publication.

46. In the following paragraphs, I will first examine the first sub-category ("a") and then the second and third ("b"), to compare them with the provisions of the Convention and the case law of the Court. Before this, it will be necessary to make a brief digression on the actual status of the Costa Rican statute.

47. The Printing Act was promulgated more than a century ago, in 1904. During the public hearing of this case on February 14, 2022, I was able to question the State's representative on the legitimacy of its article 7. It would appear from his reply that, currently, discussions are ongoing as to whether or not this provision is in force – as recognized in paragraph 31 of the judgment – a fact that I considered of special relevance to justify my support for the unanimous judgment delivered by the Court.

48. In this regard, according to the 2009 written expert opinion of Francisco J. Dall'Anese in its judgment No. 1798/2009, the Third Chamber of the Supreme Court of Justice of Costa Rica recognized the tacit annulment of the said article 7, although the provision continues to

be applied by the lower criminal courts with certain frequency.[36]

49. In any case, when making an objective analysis, it cannot be denied that the criminal norm appears to have been applied in this case, revealing a certain disregard for the higher court's understanding that the norm was unenforceable. Indeed, in its judgment of January 10, 2007, the Second Circuit Trial Court of San José, Goicoechea, indicated that the defendants' conduct could not be included under the offense of libel from the criminal perspective owing to the absence of malice in their conduct; thus, evidently, that court not only considered that the criminal norm was in force but also applied it, even though it led to their acquittal because one of the elements of the offense was not present.

50. And, although the uncertainty concerning the validity and non-enforceability of the said rule *in casu* requires the Court to be prudent as regards the reparations it chooses, it does not eliminate the need to reflect on the possible responsibility of the State for the human rights violations committed in the context of the jurisdictional application of the Printing Act. Even though the provision has not been declared incompatible with the Convention, the most lenient measures of reparation, such as recourse to the Legislature, sometimes permit a productive discussion initiated by the human rights courts and by the domestic constitutional courts, so that an exercise in measured reasoning should be performed when on the point of proclaiming the invalidity of an act of a State Party.

51. In the first cases in which the Inter-American Court had occasion to rule on the non-conventionality of legal provisions that were not applied in a specific case, it determined that the said analysis would not be possible.[37] When the Court, on interpreting the judgment in the case of *El Amparo v. Venezuela*, opted once more not to rule on the issue – specifically on the incompatibility, *per se*, of an article of the Venezuelan Code of Military Justice with the Convention – the brilliant Judge Cançado Trindade[38] distanced himself from what he understood to be a "self-imposed limitation by the Court." In his separate opinion, the judge asserted that the mere existence of a norm potentially applicable to the victims that was incompatible with the Convention would allow the Court to analyze this and possibly find the State objectively responsible.[39] Accordingly, he described in detail and defended the thesis of

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[36] Evidence file, fl. 1479: "It can be added to the arguments that have been extensively developed by the Third Chamber, that article 7 of the Printing Act has no place in the laws of Costa Rica because it is totally at odds with the Constitution. It can be seen that this article 7 is prior to 1906, the year in which the modern theory of crime emerged that introduced the concept of *actus reus* and a precise definition in the structure of an offense. Thus, the said article 7 does not describe actions and settles for the *nomen iuris.* **The criminal courts insist in applying article 7 of the Printing Act – already abrogated – disregarding the opinion of the Third Chamber of the Supreme Court of Justice**. It could be argued that, under our civil law, case law is not binding (except for the rulings of the constitutional chamber of the Supreme Court of Justice), so that the interpretations made by the criminal cassation chamber do not have normative value for immediate application by other courts of the Republic."

[37] See cases of *El Amparo v. Venezuela*. Judgment of September 14, 1996; *Caballero Delgado and Santana v. Colombia*. *Reparations and costs*, and *Genie Lacayo v. Nicaragua.* Judgment of January 29, 1997.

[38] While drawing up this opinion, with profound sadness, I received the news of the death of the judge and professor, Antônio Augusto Cançado. I consider it essential to underline the significance of his contribution to the institutional configuration of this Court. His awareness of the Court's mission was specifically illustrated in an address given in Bogota in 2006:

> "While, in other latitudes, the use of force was being discussed, at the seat of the Inter-American Court [...] our Latin American countries, faithful to our best legal traditions, renewed our belief in the primacy of law. And this was a renewed profession of faith in law as instrumental for the realization of justice [...]. As Latin Americans, we should be proud of our international law tradition." (Address by Professor Cançado Trindade, on receiving the title of Professor Honoris Causa from the Colegio Mayor de Nuestra Señora del Rosario, Bogotá, Colombia, on January 26, 2006. In: CANÇADO TRINDADE, Antônio Augusto. *El Ejercicio de la Función Judicial Internacional: Memorias de la Corte Interamericana de Derechos Humanos.* 5ª ed. Belo Horizonte: Del Rey Editora, 2018. p. 326.)

[39] IACtHR. *Case of El Amparo v. Venezuela*. Order of April 16, 1997 (Interpretation of the judgment on reparations and costs). Opinion of Judge Cançado Trindade.

the objective responsibility of States Parties to the Convention:

> A State [...] may have its **international responsibility engaged** [...] **by the mere approval and promulgation of a law in conflict with its conventional international obligations** of protection, or by its failure to harmonize its domestic law in order to ensure faithful compliance with such obligations, or by its failure to adopt the legislation needed to comply with the latter. [...] The *tempus commisi delicti* is, in my understanding, that of the approval and promulgation of a law which, *per se,* by its very existence and applicability, impairs protected human rights [...] **without the need to wait for the subsequent application of that law generating additional harm**.
> [...]
> The thesis of objective responsibility correctly emphasizes the element of due diligence by the State, and the control that the latter should exert over all its organs and agents to avoid the violation of the recognized human rights by act or omission. This being so, this is the thesis that, in my opinion, most **contributes to ensuring the practical effects of a human rights treaty**. [...][40]

52. Subsequently, in its judgment in the case of *Suárez Rosero v. Ecuador,*[41] the Court's understanding in this regard suffered a process that the judge referred to as a "giant quantum leap" a "true watershed moment,"[42] in which the Court declared that a provision of the Ecuadorian Criminal Code violated, *per se*, Article 2 of the Convention, combined with Articles 7(5) and 1(1) of this instrument, irrespective of its application in the specific case.[43] Thus, in 1997, the Court adopted the thesis of the State's objective international responsibility.

53. Commenting on this evolution – in a separate opinion in the case of *"The Last Temptation of Christ (Olmedo Bustos et al.) v. Chile*, the judge reflected on the auspicious evolution of the Court's case law and considered that the decision eliminated any doubt about the possibility that maintaining norms contrary to the Convention in domestic law could result in the State's international responsibility, affirming that "the attempt to distinguish between the existence and the effective application of a norm of domestic law, for the purpose of determining the configuration or otherwise of the international responsibility of the State, **becomes irrelevant**."[44]

54. The understanding that, *per se,* the domestic validity of a law could constitute a violation of human rights has also been supported by the case law of the European Court of Human Rights since 1981 when it heard the case of *Dudgeon v. The United Kingdom*.[45] On that occasion, the applicant alleged that the existence in Northern Ireland of laws which explicitly penalized and even established imprisonment for certain homosexual acts between consenting adult males – even when they occurred in private – violated his right to respect for his private life, in view of his identification as a homosexual.[46]

55. In that case, despite being questioned about his sexual orientation in a police station, Mr. Dudgeon was never prosecuted or convicted for the offenses in question. His complaint was that he had experienced and continued to experience fear, suffering and psychological

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[40] Ibidem. §22 and 27 (bold added).

[41] IACtHR. *Case of Suárez Rosero v. Ecuador.* Judgment of November 12, 1997.

[42] IACtHR. *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*. Judgment of February 5, 2001. Opinion of Judge Cançado Trindade §13.

[43] IACtHR. *Case of Suárez Rosero v. Ecuador*. Judgment of November 12, 1997, §98.

[44] IACtHR. *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*. Judgment of February 5, 2001. Opinion of Judge Cançado Trindade §14.

[45] ECHR. *Case of Dudgeon v. The United Kingdom*. Judgment of October 22, 1981.

[46] Ibidem. §13.

distress directly caused by the very existence of the law in force owing to the constant risk of being criminally prosecuted due to his sexual orientation. The European Court considered that the very existence of the law constituted an unjustified interference in the right to respect for his private life, in breach of Article 8 of the European Convention on Human Rights. The court also considered that the fact that Mr. Dudgeon had been questioned reinforced his fear of criminal prosecution, but was not essential for determining the violation.[47]

56. In a subsequent case concerning the same laws in the United Kingdom, the ECHR reinforced its understanding and added:

> A law which remains on the statute book, even though it is not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time, if for example there is a change of policy. The applicant can therefore be said to "run the risk of being directly affected" by the legislation in question.[48]

57. Thus, it is evident that the existence of a law may, *per se*, violate the international instruments that protect human rights.

58. In the instant case, the situation stands out as meriting greater attention. In the preceding paragraphs, I have had occasion to focus on the so-called chilling effect of the use of criminal sanctions that target the exercise of journalism. In other words, when freedom of expression is involved, the mere establishment of criminal norms that are potentially repressive may be more detrimental to the human rights of journalists.

59. Having set out these observations and caveats concerning the uncertainty as to whether or not article 7 was applicable, a matter that arose during the processing of this case, it is now necessary to make a more detailed analysis of the sub-categories that compose this article and that motivated the warning given by this Court.

a. The non-applicability of the aggravated category to offenses of libel and defamation

60. The first sub-category established in article 7, aimed at suppressing offenses against honor committed through the press, prescribes a more specific and harsher punitive provision than the general offense establish by articles 145 and 146 of the Criminal Code. Thus, the Printing Act stipulates a more severe form of criminal liability imposed on journalists and other media professionals; indeed, it imposes on them a harsher punishment than it imposes on any other individual whose conduct may be included in the definition of the offenses of libel or defamation under the Criminal Code.

61. It appears that the intention of the legislator was to confer a more rigorous protection of criminal law owing to the broader scope of the harm to someone's honor when it is perpetrated by the media.

62. However, in practice, the law establishes a more restrictive sanction only and exclusively in function of the exercise of a fundamental human right and of the professional role of the person exercising that right.

63. In this regard, it should be taken into account that the legal protection granted to

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[47] Indeed, that Court reiterated its decision in the *Case of Norris v. Ireland*, in which the victim had not been the subject of any police measure. (*Cf*. ECHR. *Case of Norris v. Ireland.* Judgment of October 26, 1988. §38).

[48] ECHR. *Case of Norris v. Ireland.* Judgment of October 26, 1988. § 33.

journalists not only should not be less, but rather should be more, owing to the collective (and instrumental) importance of their work in a democratic society. And it is the professional activities of the press that counteract the selective suppression of the circulation of information considered embarrassing for the State by introducing critical discourse on the exercise of public functions that are potentially aberrant.

64. It should be pointed out that limitations to press freedom have particular characteristics when compared to limitations to freedom of expression in its individual perspective. Any measure that seeks to restrict the free functioning of the media has an institutional effect in addition to affecting organs and actors that are essential for the proper functioning of the democratic rule of law: newspapers and journalists. Electoral accountability in modern societies and the expectation that institutional conditions exist for the effective alternation in power depend on the electorate receiving a considerable amount of information; without this, the voter may have to make his decision in the dark.

65. This significant institutional element refers us back to the need to ensure the full effectiveness of what this Court calls the social dimension of the right established in Article 13 of the American Convention: "the right of everyone to know the opinions, reports and news imparted by third parties."[49] Without this knowledge, the official truth may easily take root, and the tendency is that the unpredictable nature of the electoral process – a crucial sign of the modern democratic system – will be jeopardized by a deferential attitude and even by a sort of Caesarian cult in relation to the authorities, due to uninformed deliberative procedures.

66. Returning to a dogmatic analysis, it is sufficient to recall the restrictive test used by this Court in previous cases to reach this conclusion. In the previously mentioned case of *Herrera Ulloa v. Costa Rica*, the Court concluded that subsequent liability for the exercise of freedom of expression was in keeping with the Convention when: (i) it was expressly established by law; (ii) its purpose was to protect the rights or reputation of others, and (iii) it was necessary for the functioning of a democratic society.[50]

67. That said, analyzing the liability mechanism in article 7 of the Costa Rican Printing Act, I note that the criteria of legality and appropriate purpose appear to have been met, because the purpose was to safeguard the right to honor. However, we must ask ourselves whether the legal provision meets the requirement of necessity.

68. In other words, is there an essential social need – an expression used by the Court – that would justify the imposition of a harsher sanction for offenses against honor when they are committed through the press? I consider that the case file does not reveal the existence of this justification. Taking into account that a general criminal offense has been defined to suppress such offenses (articles 145 and 146 of the Criminal Code), as well as a civil offense (article 1045 of the Civil Code), I consider that, in that context, the establishment of a criminal sanction linked to the exercise of a fundamental right departs from the principle of strict necessity established by this Court's case law. It would also suppose an unacceptable element of non-isonomy because the fact that the person emitting the message is exercising press freedom professionally would be a reason to increase their levels of protection and not to subject them to stricter criminal control: the infamous strong arm of the State Party's punitive powers.

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[49] IACtHR. Advisory Opinion 05/1985, §32. Similarly: *"The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*. Judgment of February 5, 2001, §66, and *Granier et al. v. Venezuela*. Judgment of June 22, 2015, §136.

[50] IACtHR. *Case of Herrera Ulloa v. Costa Rica.* Judgment of July 2, 2004, §120.

69. In any case, from a comparative perspective, I believe it relevant to establish that, in the past, the Brazilian legal system contained similar provisions to those examined here.[51] However, since 2009, the said law is no longer in force in that country owing to the important judgment No. 130 of the Federal Supreme Court on the action on non-compliance with a fundamental right.[52] On that occasion, the Brazilian court understood that the regularization of journalism and the sanctions established for abuses in this area imposed unacceptable limitations on press freedom, a significant legal position aimed not only at promoting the full visibility of the exercise of power, but also at fostering public opinion in a plural environment and as an alternative to the official truth and, therefore, it concluded that the whole law was unconstitutional.[53]

70. I believe that an additional clarification is required on this point, in keeping with this Court's understanding in the case of *Palacio Urrutia v. Ecuador*. When examining the aggravated criminal liability of journalists in light of the American Convention, I am not referring solely and exclusively to the potential anti-conventional nature of the explicit wording of article 7 of the Costa Rican the Printing Act. In the case of the control of conventionality, it is necessary to consider any interpretation made by the courts that results in the same type of effects or that adopts the same rationale as the said article. See the Court's considerations when referring to measures of reparation on that occasion:

> 179. However, for this Court, not only the suppression or issue of norms of domestic law guarantee the rights enshrined in the American Convention, pursuant to the obligation contained in Article 2 of that instrument. The development of State practices conducive to the effective observance of the rights and freedoms enshrined therein is also required. Consequently, the existence of a law does not in itself guarantee that its application will be appropriate. The application of the norms or their interpretation, as jurisdictional practices and a manifestation of state public order, must conform to the purpose sought by Article 2 of the Convention. [...][54]

71. It is also worth mentioning that the declaration of unconstitutionality or incompatibility with the Convention of a specific aggravated criminal norm would not, of itself, exclude the possibility of the Judiciary deciding to impose a harsher sanction owing to certain characteristics of the agent or his conduct based on the norm, evidently respecting the principle of legality.

72. For example, in the instant case, even if article 7 of the Costa Rican Printing Act were to be amended, derogated, or interpreted as not being in force by the domestic courts, this would not, *per se*, be equal to eliminating the possibility of a specifically substantiated aggravated sanction in the case of special virulence of the malice and the negative impact on reputation derived from the circulation of information that was evidently false or the erroneousness of which could have been verified and rejected by simple procedures to consult ordinary journalistic sources (in other words, based on the circumstances of reckless disregard of the truth, or actual malice).

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[51] The Brazilian Press Act stipulated that journalists and media outlets could be detained or fined if they published something that offended "the moral and good customs," and even established harsher sanctions if the information published defamed or libeled a public authority.

[52] Federal Supreme Court of Brazil, ADPF 130, judgment of April 30, 2009.

[53] The judgment was welcomed by the press and by Brazilian society as a symbol of the guarantees of freedom of expression and information embodied in the 1988 Constitution – enacted around 20 years before the judgment. It is worth underlining that the Federal Supreme Court decided not to admit the offenses established in the Press Act, precisely because the Brazilian Criminal Code already defined the same offenses without conditioning their perpetration exclusively to members of the press, and establishing less severe sanctions for them.

[54] IACtHR. *Case of Palacio Urrutia v. Ecuador.* Judgment of November 24, 2021, §179

73. Thus, it is necessary to stress that the domestic courts also have the duty to adapt their interpretative powers to cease adopting any decision that imposes a harsher punishment for offenses against honor merely because these have been committed in exercise of press freedom, regardless of the fact that the laws of the State concerned do not establish that aggravated offense – or at least not expressly.

74. Thus, indicating the elements of the wording of article 7 that could potentially violate human rights is, in my opinion, only one of the steps required to address the issue of criminal measures that result in limiting the exercise of freedom of expression. To this is necessarily added moderation of the possible interpretations established by the domestic courts.[55]

b. The inadmissibility of objective liability for the offenses of libel and defamation

75. In light of the second and third sub-categories of article 7 of the Printing Act, criminal liability falls not only on the authors of the content that is eventually considered offensive or defamatory, but also on the editors of the communication medium in which it is published, and can even extend to the directors of the medium and, eventually, to the owners. Thus, the article uses attribution criteria that exceed the parameters established in criminal law to determine the objective criminal liability of diverse individuals, regardless of their specific causal contribution to the allegedly criminal conduct.

76. From this perspective, it is necessary to ponder the violation of the basic principle of criminal law, *nullum crimen sine culpa*, because the liability of agents is established, not for a wrongful act that could effectively be attributed to them, but merely based on the position they occupy in the media outlet concerned.

77. Similarly, the final part of the article seeks, briefly, to hold the directors of the media outlet liable for the wrongful act in the absence of the name of the responsible editors of the publication. Thus, this is also based on a liability that has no connection to the principle of guilt. Neither the presumption of malice due to a legal fiction nor merely objective criminal liability are admissible under the inter-American system.

78. I emphasize that, on other occasions, although not directly related to offenses against honor, the Inter-American Court has rejected incisively the objective criminal liability of an individual:

> 298. This Court does not advocate any form of objective criminal responsibility that would be contrary to the contemporary general principles of criminal responsibility and, consequently, pursuant to these universally recognized principles, reaffirms that only the person acting with intent or with imprudence or negligence commits a crime.[56]

79. Furthermore, always in relation to the dogmatic analysis of the offense, I discern a construction that would distance itself, *a priori*, from the principle of strict criminal legality. As established in Article 9 of the Convention, the criminal offense must be expressly described in a precise, exhaustive and prior manner to guarantee the legal security of the individual.

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[55] It is true that the laws of Costa Rica do not expressly establish an increase in the sanction for offenses against honor when these are committed against a public official. However, it is important to point out that jurisprudential interpretations that assess negatively, in the punitive sense, the fact that the victim of an offense against honor is a public official and, on this basis, increase the corresponding sanction, would also enter into conflict with the principles and precedents established under the inter-American system.

[56] IACtHR. *Case of Women Victims of Sexual Torture in Atenco v. Mexico.* Judgment of November 28, 2018, §298.

80. That said, article 7 of the Printing Act does not establish clear parameters for defining the offense in question, or its elements. Owing to its imprecise, indeterminate and unclear nature, it is not possible to predict, with certainty, in which cases it would be lawful or criminal to report or publish matters of public interest, as published in the article in La Nación. Thus, as indicated by the IACHR, "the imprecision of the norm opened the way to the use of criminal law to generate an intimidating environment that inhibited discourse and discussion on matters of public interest."[57]

81. From the perspective of the rights to freedom of expression and of the press, it can be seen that these sub-categories of article 7 of the Printing Act propose that the whole functional organization of a media outlet, from the journalist who wrote the article to the owner of the newspaper, should incur criminal liability.

82. Accordingly, it is difficult to reconcile the wording of the Costa Rican law with the social dimension of freedom of expression. Moreover, on several occasions, this Court has recognized the essential role that the media plays in democratic societies, such as in the case of *Ivcher Bronstein v. Peru*:

> 149. The Court considers that both dimensions are of equal importance and should be guaranteed simultaneously in order to give total effect to the right to freedom of expression in the terms of Article 13 of the Convention. The importance of this right is further underlined if we examine the role that the media plays in a democratic society, when it is a true instrument of freedom of expression and not a way of restricting it; consequently, it is vital that it can gather the most diverse information and opinions.

83. Ultimately, establishing offenses that are not based on the principle of guilt in order to affect the internal organization of a newspaper constitutes a provision that would appear to deviate from the standards established by the Court. Norms of this nature may also reveal a veiled and unnecessary negative animus against the very exercise of press freedom objectively considered. In this context, criminal law cannot serve as a dissuasive mechanism addressed at the media for what constitutes the legitimate exercise of its role: the dissemination of information of public interest.

c. Partial conclusion

84. In the instant case, as explained in the text of this opinion, I am setting out these considerations in *obiter dicta*. I join the other members of the Court to speak with one voice when affirming the international responsibility of the Costa Rican State for the unjust civil conviction of F.P.C. and R.M.C. for newspaper articles published in the normal and legitimate exercise of the right to press freedom.

85. Nevertheless, based on a criterion of judicial prudence, I did not find it specifically necessary, for the time being, to proclaim the anti-conventionality of article 7 of the Costa Rican Printing Act, owing to the special circumstance – which I consider relevant – that a reasonable interpretative dissent exists within the jurisdiction of the State Party itself with regard to the effective validity of the said criminal norm.

86. I would also like to point out, in defense of the adequacy of the reparations unanimously indicated by the Court, that the consequences under criminal law of the situation were accidentally lessened in the domestic jurisdiction by the introduction of the evidentiary

[57] IACHR. *Case of Moya Chacón v. Costa Rica*. Merits Report No. 148/19, §77.

standards for determining the existence of malice. Thus, the Judiciary's rejection of the State's punitive powers also resulted in a perceptible decrease in the chilling effect of the criminal proceedings in question because the establishment of precedents by the higher court in the sense of rejecting the conviction of the journalists contributed, to a certain extent, to providing a sense of security for the exercise of freedom of expression.

87. However, I reaffirm, in this opinion, my convinced and strict adherence to the Court's case law that domestic laws or judicial decisions that affect or restrict freedom of expression and of the press should only be deferred to up until the point at which they tolerate the promotion of a general situation that inhibits the free circulation of information of public interest, which is totally contrary to the objectives and the spirit of the protection of freedom of speech that the Convention evidently proclaims. Ultimately, with the exception of some types of content that are particularly offensive to fundamental rights, what the treaty seeks, in relation to the freedom of expression in general, is a sort of inter-American version of a free marketplace of ideas, in the immortalized phrase attributed to the jurist Oliver Wendell Holmes Jr., in which the truth is exposed by the free discussion of ideas and not by reasons of state.

IV. Final considerations

88. The judgment delivered by the Court in this case has made an exhaustive analysis of the international responsibility of the State derived from the civil judicial prosecution of the victims for activities carried out in the ordinary exercise of journalism, and I therefore agree fully with the reasoning and operative paragraphs of this prudent judgment.

89. With regard to the issues of criminal law that have been touched on parenthetically in this case, I believe that the judgment, in its substantial *obiter dicta* to which I am adding these considerations, adds to the significant historical evolution of the precedents developed by this Court in the sense of increasingly restricting the possibility of States using criminal law to curb offenses against honor, especially where the dissemination of matters of public interest is concerned.

90. Naturally, I will leave for another occasion – because it relates to a matter that falls outside the instant case – the delicate issue of whether there is a legitimate residual role for criminal protection against excesses in the exercise of freedom of expression.

91. For now, suffice for me to put on record that, even in exceptional situations, the control of proportionality in the use of criminal protection should be as strict as possible in the sensitive area of freedom of expression. It is only if civil protection is patently insufficient to protect the right to honor that, in theory, a more severe state response may be proposed, and it is naturally the State Party that has the heavy burden of proving the overriding need for measures that could be incompatible with the Convention based on urgent and essential collective interests.

92. Although this case constitutes an important addition to the Court's case law, some of the fundamental criminal issues that it deals with make me particularly cautious about taking a more incisive position and declaring the incompatibility with the Convention of article 7 of the Printing Act of Costa Rica.

93. Despite this, I consider that the instructive *dicta* contained in the judgment will soon require coherence and, inevitably, the Court will need to review the role of criminal liability as an ordinary means of protecting manifestations of the exercise of freedom of expression, especially the freedoms of speech, opinion and the press. On that occasion, the Court must

establish clear standards that provide guidance to the States Parties when defining the delicate limits of this criminal liability in the rare situations in which a clash of precisely substantiated rights may justify a stronger State response. However, for the purposes of this case, the rulings of the judgment and the concurring opinions will not only provide an adequate solution, but will provide a valuable basis for institutional dialogue with the State Party to improve its practices pursuant to the Convention, to which it sovereignly acceded, in a clear international commitment to the preservation of human rights.

Rodrigo Mudrovitsch
Judge

Pablo Saavedra Alessandri