

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

**CASE OF BARAONA BRAY V. CHILE**

**JUDGMENT OF NOVEMBER 24, 2022**

***(Preliminary objections, Merits, Reparations and Costs)***

In the case of *Baraona Bray v. Chile*,

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,  
Nancy Hernández López,  
Verónica Gómez,  
Rodrigo Mudrovitsch;

also present:

Romina I. Sijniensky, Deputy Registrar, \*\*

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, 65 and 67 of the Rules of Procedure of the Inter-American Court (hereinafter “the Rules of Procedure” or “the Rules”), delivers this judgment which is structured as follows:

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\* Judge Patricia Pérez Goldberg, of Chilean nationality, did not take part in the processing of this case or in the deliberation and signing of this judgment, pursuant to Articles 19(1) and 19(2) of the Court’s Rules of Procedure.

\*\* The Registrar of the Court, Pablo Saavedra Alessandri, of Chilean nationality, did not take part in the deliberation and signing of this judgment.

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## I

### INTRODUCTION TO THE CASE AND CAUSE OF THE ACTION

1. *The case submitted to the Court.* On August 11, 2020, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) submitted the case of *Baraona Bray against the Republic of Chile* (hereinafter “the State” or “Chile”) to the jurisdiction of the Inter-American Court. According to the Commission, the case relates to the alleged international responsibility of the State for the violation of the right to freedom of expression, due to the imposition of subsequent liabilities and the inappropriate use of criminal law in matters of public interest. In May 2004, Carlos Baraona Bray (hereinafter “Mr. Baraona Bray” or “Mr. Baraona” or “the alleged victim”), a lawyer and environmental defender, gave a series of interviews and made statements that were reported by different media outlets, in which he claimed that a senator of the Republic had exerted pressure and influenced the authorities to carry out illegal logging of the *alerce* (Patagonian cypress) an ancient tree species in Chile. The senator filed a criminal complaint against Carlos Baraona Bray, who was convicted of the crime of “serious insults” through the media. He was sentenced to 300 days imprisonment, which was suspended, a fine, and the additional penalty of suspension from holding public positions or public office during the term of the sentence. Mr. Baraona then filed an appeal for annulment, however, the first instance ruling was upheld. The Commission concluded that the State is responsible for the violation of the rights to freedom of thought and expression and the principle of legality and judicial protection, enshrined in Articles 13, 9 and 25(1) of the Convention, in relation to Articles 1(1) and 2 of thereof, to the detriment of Carlos Baraona Bray.
2. *Procedure before the Commission.* The procedure before the Commission was as follows:
  - a) *Petition.* On March 4, 2005, the Public Interest and Human Rights Clinic of the Diego Portales University filed an initial petition on behalf of Carlos Baraona Bray.
  - b) *Admissibility Report.* On July 24, 2007, the Commission adopted Admissibility Report No. 50/07, in which it concluded that the petition was admissible.
  - c) *Merits Report.* On May 4, 2019, the Commission adopted Merits Report No. 52/19 (hereinafter “Merits Report” or “Report 52/19”), in which it reached a series of conclusions and made several recommendations to the State.
3. *Notification to the State.* The Commission notified the Merits Report to the State on June 11, 2019, granting it two months to report on its compliance with the recommendations. The State requested four extensions, three of which were granted by the Commission for a period of three months each and one for a period of two months. On July 28, 2020, the State submitted a report on the measures it had adopted, indicating that recommendations 1, 3, 4 and 5 “were, essentially, fulfilled” and that the second recommendation is not applicable.
4. *Submission of the case to the Court.* On August 11, 2020, the Commission<sup>1</sup> submitted to the Court’s jurisdiction all the facts and human rights violations described in the present case, considering “the need to obtain justice and reparation.” The Court notes with concern that more than 14 years have elapsed since the filing of the initial petition before the Commission and the submission of the case to the Court.

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<sup>1</sup> The Commission appointed Commissioner Joel Hernández García, then Executive Secretary Paulo Abrão, and then Special Rapporteur for Freedom of Expression, Edison Lanza, as its delegates before the Court. It also appointed Marisol Blanchard Vera, Jorge Humberto Meza Flores and Cecilia La Hoz Barrera as legal advisers.

5. *Request of the Inter-American Commission.* Based on the foregoing, the Commission asked the Court to conclude and declare the international responsibility of the State for the human rights violations indicated in its Merits Report and to order the State to implement the reparation measures included in said report.

## II PROCEEDINGS BEFORE THE COURT

6. *Notification of the case to the State and the representatives.* The submission of the case by the Commission was notified to the State<sup>2</sup> and the representatives<sup>3</sup> on September 23, 2020.

7. *Brief with pleadings, motions and evidence.* On November 24, 2020, the representatives of the alleged victim (hereinafter “the representatives”) submitted their brief with pleadings, motions and evidence (hereinafter “pleadings and motions brief”), pursuant to Articles 25 and 40 of the Rules of Procedure of the Court. The representatives endorsed the violations alleged by the Commission, agreeing that the State was responsible for the violation of the aforementioned articles of the Convention. However, in their petition they did not refer to Articles 9 and 25(1) of the Convention.

8. *Answering brief.* On February 8, 2021, the State submitted to the Court its brief containing preliminary objections, its answer to the submission of the case by the Commission, as well as its observations on the pleadings and motions brief (hereinafter “answering brief”). In said brief, the State raised two preliminary objections and denied its international responsibility with respect to Articles 1(1), 2, 9, 13 and 25(1) of the Convention.

9. *Observations on the preliminary objections.* On April 23 and April 26, 2021, respectively, the representatives and the Commission submitted their observations on the preliminary objections filed by the State.

10. *Call to a public hearing.* In an order of May 27, 2022, the President of the Court called the parties and the Commission to a public hearing on the preliminary objections and possible merits, reparations and costs.<sup>4</sup>

11. *Public hearing.* The public hearing was held on June 20, 2022, during the Court’s 149<sup>th</sup> Regular Session which took place in San José, Costa Rica.<sup>5</sup> During the hearing, the Court

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<sup>2</sup> On October 26, 2020 the State appointed Juan Pablo Crisóstomo Merino, Francisco Javier Urbina Molfino and Constanza Alejandra Richards Yáñez as its agents, and Oliver Román López Serrano, Sebastian Andrés Lemp Donoso and Josemaría Rodríguez Conca as alternate agents. On February 2, 2021 the State appointed Ambassador Jaime Chomali Garib as agent in replacement of Juan Pablo Crisóstomo Merino. On May 18, 2022 the State designated Ambassador Tomás Ignacio Pascual Ricke, Director of Human Rights of the Ministry of Foreign Relations, and Pamela Paz Olivares, Oliver Román López Serrano and Lorena Pérez Roa, as alternate agents, in replacement of the persons accredited. On June 9, 2022, the State designated José Ignacio Escobar Opazo as alternate agent. On July 27, 2022 the State appointed Catalina Fernández Carter as alternate agent, in replacement of Lorena Pérez Roa.

<sup>3</sup> The alleged victim is represented by Cristian Gustavo Riego Ramírez and Cristián Sanhueza Cubillos of the Public Interest and Human Rights Action Clinic of the Diego Portales University.

<sup>4</sup> Cf. *Case of Baraona Bray v. Chile*. Call to a hearing. Order of the President of the Inter-American Court of Human Rights of May 27, 2022. Available at: [https://www.corteidh.or.cr/docs/asuntos/baraona\\_bray\\_27\\_05\\_22.pdf](https://www.corteidh.or.cr/docs/asuntos/baraona_bray_27_05_22.pdf)

<sup>5</sup> The following persons appeared at the hearing: a) for the Inter-American Commission: José Vaca Villarreal, Special Rapporteur for Freedom of Expression; and Erick Acuña Pereda, adviser; b) for the representatives: Cristian Sanhueza Cubillos, Juan Pablo Olmedo, and Andrea Ruiz, lawyers, respectively, of the Public Interest and Human Rights Action Clinic, of the Diego Portales University, and c) for the State: Tomás Pascual Ricke, Ambassador and Director of Human Rights of the Ministry of Foreign Relations; Oliver Román López Serrano; Pamela Olivares Sandoval and José Ignacio Escobar Opazo.

received the statements of the alleged victim and two expert witnesses, one offered by the Commission and another offered by the State. The judges of the Court also requested further information from the parties and the Commission.

12. *Amici curiae*. The Court received three *amicus curiae* briefs presented by: a) the Civil Association for the Protection and Promotion of Human Rights (XUMEK)<sup>6</sup>; b) the Transparency and Human Rights Law Clinic of the Law Faculty of the Alberto Hurtado University of Chile<sup>7</sup>, and c) the Observatory on the Right to Communication.<sup>8</sup>

13. *Final written arguments and observations*. On July 20, 2022, the State, the representatives and the Commission submitted, respectively, their final written arguments and final written observations. In addition, the State and the representatives each presented an annex with their submissions.

14. *Observations on the annexes*. On August 1, 2022, the State presented its observations on the annex submitted by the representatives. On the same date, the Commission stated that it had no observations to make. The representatives did not submit observations.

15. *Deliberation of the case*. The Court began deliberating this judgment on November 15, 2022.

### **III JURISDICTION**

16. The Court has jurisdiction to hear this case pursuant to Article 62(3) of the American Convention, given that Chile has been a State Party to the Convention since August 21, 1990, and accepted the Court's contentious jurisdiction on that same date.

### **IV PRELIMINARY OBJECTIONS**

17. The **State** filed two preliminary objections, which the Court will examine in the following order: A) Control of the legality of the Commission's submission of the case, and B) Objection of fourth instance.

#### **A. Control of the legality of the Commission's submission of the case**

##### ***A.1 Arguments of the parties and the Commission***

18. The **State** raised two issues in relation to this objection. First, it alleged a serious error, attributable to the Commission, for its failure to follow up on the State's efforts to redress the alleged victim. It pointed out that the Commission has not properly justified the reasons why the Court should examine this case, and that its application for submission is general and imprecise. It added that the Commission mentioned that, "although the State

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<sup>6</sup> The brief was signed by Estefanía Araya, vice president of XUMEK. It discusses the importance of protecting the right to freedom of expression, specifically of environmental defenders, and how the lack of this right interferes with access to information for people living in a society.

<sup>7</sup> The brief was signed by Branislav Marelic Rokov. It assesses the scope of the State's obligations to investigate, punish and provide reparation, based on the considerations analyzed in the instant case.

<sup>8</sup> The brief was signed by Javier García. It includes statistics on cases involving the crimes of insults and slander in Chile during the last decade and identifies cases in which the statements denounced concerned issues of public interest.

has shown evidence of progress, it is not possible to conclude that such compliance was total or substantial," a matter that the State learned of through the submission of the case. It alleged that this has adversely affected its right of defense, as Chile only had the opportunity to know whether or not the State's actions were satisfactory for the Commission, when the contentious case was already underway before the Court.<sup>9</sup>

19. The State also argued that its right of defense was violated by the application of the "*iura novit curia*" principle, owing to the inclusion of Articles 9 and 25(1) of the Convention in the Merits Report, despite the fact that these articles were not included in the Admissibility Report or in the arguments of the parties. Consequently, the State did not have the procedural opportunity to refer to these arguments in previous phases. It pointed out that the Commission, not being a jurisdictional body, overstepped its jurisdiction by considering that rights not included by the petitioners were violated, and that there is no express provision allowing it to do so.

20. The **representatives** argued that all the "illegalities" that the State attributes to the Commission are erroneous interpretations of the current regulations. They considered that the Commission fulfilled its duty to provide due justification when submitting the case and that the State's claim differs substantially from the position of the Commission and the petitioner, which is a matter for discussion on the merits. They argued that there is no proof of any serious error prejudicial to the State's right of defense and that the Court is being asked to carry out a control of legality in the abstract. With respect to the reparations, they pointed out that these have not been complied with<sup>10</sup> and that, in any case, any discussion in this regard is a matter that corresponds to the merits. Therefore, they asked the Court to dismiss this preliminary objection.

21. Regarding the first issue raised, the **Commission** argued that the State had an opportunity to exercise its right of defense throughout the processing of the case prior to the issuance of the Merits Report, and has not proven any error in this regard. The Commission

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<sup>9</sup> Regarding the Commission's recommendations, the State explained: a) on the first recommendation, it reiterated that Mr. Baraona does not have an effective criminal conviction for the facts described in the Merits Report. Therefore, the recommendation lacks merit; b) regarding the second recommendation: it indicated that the Commission limited itself to observing that the victim did not receive any compensation. It considered that this recommendation is not appropriate, since its factual basis is the conviction imposed by the Puerto Montt Court of Guarantee, which was annulled. Therefore, there is no damage to be repaired; c) regarding the third recommendation: it specified that the current 2018 Draft Criminal Code crystallizes the concept of the "doctrine of legitimate criticism", regulated by national law in the second paragraph of Article 29 of Law No. 19,733. The draft bill that will soon be submitted to the National Congress for discussion would be subject to an examination and weighing of interests that may exist on a case-by-case basis, which is necessary to guarantee the right to protection of honor and dignity recognized in Article 11 of the Convention. The State has made efforts, which are still ongoing, to bring domestic criminal law into line with Inter-American standards on freedom of expression; d) regarding the fourth recommendation: it pointed out that it was not included by the Commission as a recommendation in the Merits Report. It asked the Court not to rule on the considerations of the Commission related to this recommendation, and e) on the fifth recommendation: it pointed out that the Commission omitted to refer to the information provided by the State. On June 16, 2020, by resolution of the Plenary of the Supreme Court, together with the dismissal of the criminal case, it expressed its willingness to disclose and circulate the Merits Report No. 52/19 within the Judiciary. On December 2, 2020 and by resolution of the Plenary of the Supreme Court, the Judiciary disseminated the aforementioned Merits Report, which was made available to the general public via the website of the Judiciary and through its social media networks as well as in the video released by the Judicial Branch to disseminate the Merits Report. In addition, the Judiciary reported that the Judicial Academy, the body in charge of continuous training of judicial officials, offers courses on human rights issues. The State considered that this recommendation has, essentially, been fully complied with.

<sup>10</sup> In this regard, they argued that the dismissal of the criminal case against Carlos Baraona cannot be considered as an annulment of the proceeding, since a record of the charges against him continues to exist and there is no order from the Judicial Branch to annul the criminal case from start to finish. They added that the State has made no attempt to compensate the victim for the harm caused to his psychological and personal integrity, and thus it has not complied with the reparations. Finally, there has been no change to the domestic criminal legislation.

pointed out that, pursuant to Articles 51 of the Convention, 35 of the Court's Rules of Procedure and 45 of the Commission's Rules of Procedure, there is a presumption that cases are referred to the Court, unless there is a well-founded decision by an absolute majority of its members.<sup>11</sup> It reiterated that the decision to submit the case to this Court was derived from the Commission's own autonomous practice and that this does not affect the State's right to due process or its right to defense. Through the adversarial proceedings before the Court, the State may report on the actions it has taken after the events that gave rise to the violations declared in the Merits Report, and argue why, in its opinion, this precludes a declaration of the State's international responsibility. Thus, it considered that the State's arguments do not constitute a preliminary objection, but rather a manifestation of its non-conformity and/or disagreement with the decision to submit the case to the Court.

22. Regarding the second issue related to the application of the *iura novit curia* principle, the Commission pointed out that both organs of the inter-American system are empowered to legally classify the facts submitted to them. In addition, it argued that the State had knowledge of the facts that supported the inclusion of Articles 9 and 25(1) of the Convention from the moment the initial petition was submitted to the Commission, since at all stages of the criminal proceedings, Articles 416, 417 and 418 of the Criminal Code and Article 29 of Law No. 19.733 were applied, and the ruling of the Supreme Court regarding the appeal for annulment constituted the factual basis for the Commission's decision. The State then had an opportunity to submit any observations it deemed pertinent on those issues, as indeed it did. Thus, in view of the fact that "the State has not proven any serious harm to its right of defense," the Commission asked the Court to dismiss the preliminary objection.

#### **A.2. Considerations of the Court**

23. The State's arguments amount to a request for a review of the legality of the Commission's actions. In this regard, the Court recalls that, in matters within its jurisdiction, it has the power to review the legality of the Commission's actions, but this does not necessarily imply an *ex officio* review of the proceedings before the Commission. Furthermore, the Court must maintain a fair balance between the protection of human rights - the ultimate purpose of the Inter-American System - and the legal certainty and procedural equality that ensure the stability and reliability of international protection.<sup>12</sup> The Court also recalls that a party claiming that the Commission's actions have been seriously flawed in a manner that impaired its right of defense must effectively demonstrate such prejudice. Therefore, in this regard, a complaint or difference of opinion in relation to the actions of the Inter-American Commission is not sufficient.<sup>13</sup>

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<sup>11</sup> The Commission indicated that when it submitted the case, it considered that after four extensions had been granted, and fourteen months had passed since the notification of the Merits Report, the State had not made significant progress in complying with the recommendations, and did not request the granting of a new extension. In this regard, it stated: a) on the first recommendation "the Commission observes that the criminal conviction against Mr. Baraona was annulled and a final dismissal was issued. However, said dismissal [...] would have responded to the application of a procedural mechanism and not to the recognition of the unconstitutionality of the crime for which Mr. Baraona was convicted nor to the application of the standards of the Inter-American system on the special protection of public interest speech [...]"; b) regarding the second recommendation it stated that "the [alleged] victim did not receive any compensation"; and c) regarding the recommendation to adapt domestic legislation, it indicated "there is no dispute over the fact that the draft Criminal Code that would, according to the State, make it possible to comply with the recommendation regarding the adaptation of criminal legislation, has not yet been discussed in the National Congress."

<sup>12</sup> Cf. *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 Moya Chacón et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of May 23, 2022. Series C No. 451, para. 16.

<sup>13</sup> Cf. *Case of the Saramaka People v. Suriname, supra*, para. 32, and *Case of Moya Chacón et al. v. Costa Rica, supra*, para. 17.

24. As to the State's first argument regarding the alleged violation of its right of defense, the Court notes that the Commission decided to submit the case to its jurisdiction "taking into account the will of the petitioner, as well the need to obtain justice and full reparation for the [alleged] victim." The State had an opportunity to submit information after being notified of the Merits Report, which was evaluated by the Commission. In this regard, the Court notes that, upon submitting the instant case, the Commission referred to the State's response on its compliance with the recommendations made in the Merits Report. In turn, the Presidency of the Court considered that, by submitting the case, the Commission complied with the requirements stipulated in Article 35 of the Court's Rules of Procedure and, consequently, required the Secretariat to notify the submission of the case. The Court agrees with this assessment and considers that the Commission complied with the requirements of Article 35 of the Rules of Procedure. The Court concludes there has been no error that violates the State's right of defense.

25. As for the State's second argument concerning the inclusion of Articles 9 and 25(1) of the Convention in the Merits Report, the Court reiterates that there is no rule that stipulates that the Admissibility Report must establish all the rights allegedly violated.<sup>14</sup> In this regard, Articles 46 and 47 of the American Convention establish exclusively the criteria under which a petition may be declared admissible or inadmissible, but does not require the Commission to determine definitively which rights would be the subject of the proceedings. The rights specified in the Admissibility Report are the result of a preliminary examination of the petition that is currently underway, and therefore do not limit the possibility that other rights or articles that have allegedly been violated may be included in subsequent stages of the proceedings, as long as the State's right of defense is respected within the factual framework of the case under analysis.<sup>15</sup>

26. The Court finds that in this case the State was aware of the facts that supported the inclusion of Articles 9 and 25(1) of the Convention when the initial petition was submitted to the Commission. Indeed, the inclusion of these conventional rights in the Merits Report is based on the application of Articles 416, 417 and 418 of the Criminal Code and Article 29 of Law No. 19.733 in the criminal proceedings against Mr. Baraona Bray, which was alleged in the initial petition. Consequently, the Commission could address the violation of these conventional rights in its Merits Report, without this implying a violation the State's right to defense.

27. In conclusion, the Court finds that, in this particular case, there was no violation of the right of defense in the proceedings before the Inter-American Commission in the terms alleged by the State, and therefore dismisses the preliminary objection.

## **B. Objection of fourth instance**

### ***B.1 Arguments of the parties and the Commission***

28. The **State** argued that the purpose of the petition submitted to the Commission by Mr. Baraona is to force the institutions of the inter-American system to reassess the weighing of rights and interests that has already taken place at the domestic level, so that it may be replaced by a new decision adopted at the international level, this being a typical case of

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<sup>14</sup> Cf. *Case of Furlan and Family v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2012. Series C No. 246, para. 52, and *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340, para. 20.

<sup>15</sup> Cf. *Case of Furlan and Family v. Argentina, supra*, para. 52, and *Case of Lagos del Campo v. Peru, supra*, para. 20.

“fourth instance.” For this reason, it requested that the Court accept this preliminary objection and decline to exercise its jurisdiction in the instant case.

29. The **representatives** explained that the purpose of the instant case is not to revisit or re-examine in a fourth instance a matter that has been decided by the domestic courts. Reference is made to the existence of a criminal offense that violates the Convention and the possibility of its use as mechanism to silence debate of public interest. They also noted the absence of specific measures to reverse the situation experienced by Mr. Baraona.

30. The **Commission** pointed out that the subject matter of the case concerns violations of the right to freedom of expression, as well as the rights to judicial protection, legality and adaptation of domestic law, and in no way constitutes a fourth instance. Regarding the State’s arguments on the criminal conviction, the Commission emphasized that this aspect relates to the merits and the evaluation of the reparation measures, for which reason the Court could not respond to the State’s arguments at the preliminary objections stage. This means that the State’s argument does not constitute a preliminary objection and should be declared inadmissible by the Court.

### **B.2. Considerations of the Court**

31. The Court has indicated that for the fourth instance objection to be admissible, it would be necessary for the petitioner to seek a review of the judgment of a domestic court on the grounds of its incorrect assessment of the evidence, the facts or domestic law, without alleging that such judgment violated international treaties over which the Court has jurisdiction.<sup>16</sup> This, in the context of the Court’s consistent case law, which has advised that the decision on whether or not the actions of judicial bodies constitute a violation of the State’s international obligations may lead the Court to examine the respective domestic proceedings to establish their compatibility with the American Convention.<sup>17</sup>

32. In this case, the Court notes that the Commission’s claims, which have been taken up by the alleged victim’s representatives, are not limited to the review of the judgments of the domestic courts for possible errors in the assessment of the evidence, in the determination of the facts or in the application of domestic law. On the contrary, they allege the violation of several rights enshrined in the American Convention, within the decisions taken by the national authorities in judicial proceedings. Consequently, in order to determine whether said violations actually occurred, it is essential to analyze, on the one hand, the decisions issued by the different judicial authorities and, on the other hand, their compatibility with the State’s international obligations which, in the end, is a substantive issue that cannot be resolved by means of a preliminary objection. Consequently, the Court dismisses the preliminary objection filed by the State.

## **V PRELIMINARY CONSIDERATIONS**

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<sup>16</sup> Cf. *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 26, 2010. Series C No. 221, para. 18, and *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394, para. 27.

<sup>17</sup> Cf. *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, para. 222, and *Case of Mina Cuero v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of September 7, 2022. Series C No. 464, para. 19.

33. The **State** argued that the pleadings and motions brief included factual elements (*infra* paras. 36 and 37) that extend beyond those denounced by the petitioners before the Commission, adding facts that were not included in the initial petition. The State concluded that such facts contained in the pleadings and motions brief cannot be classified as supplementary, since they do not explain, clarify or dismiss any of the facts included in the factual framework established by the Commission. Finally, the State requested that all the challenged facts be excluded from the factual framework of this case because they are not referenced in the Commission's Merits Report.

34. The **Commission** and the **representatives** did not refer specifically to the State's arguments.

35. The **Court** recalls that, according to its constant case law, the factual framework of the proceedings before the Court is constituted by the facts contained in the Merits Report, with the exception of those classified as supervening, provided that they are linked to the facts of the case. This does not prevent the representatives from presenting facts that may explain, clarify or dismiss those mentioned in the Merits Report and submitted to the Court for consideration.<sup>18</sup> Furthermore, this Court has indicated that the alleged victims and their representatives may invoke the violation of rights other than those included in the Merits Report, as long as they remain within the factual framework established by the Commission.<sup>19</sup> Thus, it is up to this Court to decide in each case the merits of the arguments related to the factual framework in order to safeguard the procedural balance of the parties.<sup>20</sup>

36. First, the State argued that the civil lawsuit for damages filed by Senator SP against the alleged victim was expressly excluded by the Commission in its Merits Report.<sup>21</sup> The Court notes that in the Merits Report, the Commission mentioned this civil suit and indicated that it did not have updated information on it. Therefore, the Court considers that the Commission did not expressly exclude the aforementioned lawsuit and the civil proceedings to which it gave rise, and for this reason they are part of the factual framework of this case.

37. Secondly, the State argued that the following points made by the representatives would be outside the factual framework of the case: a) the regime of civil sanctions that protect the right to honor and reputation; b) the judicial proceedings brought against third parties following the petition filed before the Commission<sup>22</sup> in which political criticism was

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<sup>18</sup> Cf. *Case of "Five Pensioners" v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C 98, para. 153, and *Case Herzog et al. v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of March 15, 2018. Series C No. 353, para. 98.

<sup>19</sup> Cf. *Case of the Pacheco Tineo Family v. Bolivia. Preliminary objections, merits, reparations and costs.* Judgment of November 25, 2013, para. 22, and *Case of Sales Pimenta v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of June 30, 2022. Series C No. 454, para. 35.

<sup>20</sup> *Case of Acosta et al. v. Nicaragua. Preliminary objections, merits, reparations and costs.* Judgment of March 25, 2017, para. 30, and *Case of Sales Pimenta v. Brazil, supra*, para. 35.

<sup>21</sup> The representatives explained that, parallel to the second complaint for insults, Senator SP filed a civil suit for the harm that Carlos Baraona had allegedly caused him with his comments. For its part, the Commission pointed out there had been no final ruling in this case and that it had no information about the current procedural status of this claim.

<sup>22</sup> Convictions: Raúl Quintana with Javier Rebolledo, Eighth Court of Guarantee of Santiago, RUC N° 1810018991-3, RIT N° 3187-2018 (2018); Citizen with Miodrag Marinovic, Third Court of Guarantee of Santiago, RUC N° 1310027365-3, RIT N° 6389-2013 (2013); Gaspar Rivas with Andrónico Luksic, Eighth Court of Guarantee of Santiago, RUC N° 1610015512-9, RIT N° 3799-2016 (2016); Gonzalo Cornejo with Daniel Jadue, Fourth Criminal Court, RUC N° 1710019007-9, RIT N° 599-2017 (2017); Fidel Meléndez with Claudio Pucher, Civil Court of Licantén, RUC N° 1610017451-4, RIT N° 272-2016 (2016). Acquittals: Andrés and Adolfo Zaldivar with Marcel Claude, Court of Appeals of Santiago, Case 62.720-2002 (2002); Pedro Sabat with Danae Mlynarz, Eighth Court of Guarantee of Santiago, RUC N° 0810010361-4, RIT N° 4093-2008 (2008); Rodolfo Carter with Marcela Abedrapo Fourteenth Court of Guarantee of Santiago, RUC N° 1710025106-k, RIT N° 4581-2017 (2017); Raúl Quintana with Javier Rebolledo Eighth Court of Guarantee of Santiago, RUC N° 1810018991-3, RIT N° 3187-2018 (2018). Dismissed: *Ramón*

allegedly prosecuted; c) the arguments of the representatives regarding the conflict between the right to honor and freedom of expression in the abstract; d) the references of the representatives to the protection of journalistic work,<sup>23</sup> and e) the issues raised during the public hearing concerning the “review of the crime of “verbal abuse of the Carabineros”, and the “tendency to use criminal instruments, particularly defamation, especially in cases involving politicians.” In this regard, the Court notes that, although the representatives referred to the foregoing points, their comments are not supported by arguments or claims of violations of conventional rights in the pleadings and motions brief. Therefore, the Court will not take them into consideration.

## VI EVIDENCE

### A. Admission of documentary evidence

38. In the instant case, as in others,<sup>24</sup> the Court admits the evidentiary value of the documents submitted by the parties and by the Commission at the proper procedural opportunity (*supra* paras. 1, 7 and 8), which were not challenged or disputed,<sup>25</sup> and whose authenticity was not questioned.

39. In its answering brief, the State also mentioned that, among the annexes presented with the pleadings and motions brief, there is an undated brief from 2019 which is already included in the case file through the submission brief presented by the Commission. According to the State, in that brief “the petitioners [made] a presentation to the Commission” and requested that it refer in the abstract to the conflict between the right to freedom of expression and the right to honor. In this regard, the State argued that “part of the documentary evidence provided by the representatives of the alleged victim is not relevant, since it is far removed from the factual framework under analysis in the instant case” and requested that it not be included. The Court notes that the issue raised by the State has already been resolved in the chapter on preliminary considerations (*supra* para. 37).

40. During the public hearing Mr. Baraona submitted a sworn statement provided by Rosa Flora Muñoz Gibert, a former substitute judge of the Court of Los Muermos, dated June 15, 2022, which was read out at the hearing. Furthermore, in their brief containing final arguments, the representatives again attached said document. For its part, the State objected to the reading of the sworn statement during the hearing and, in its observations on the annex, asked the Court not to admit it. The Court notes that the representatives did not justify or provide reasons for presenting the document containing said statement, pursuant to Article 57 of the Rules of Procedure. On this point, the Court reiterates that evidence submitted

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*Galleguillos Castillo et al. v. Hugo Gutiérrez Galvez*, Guarantee Court of Iquique. RUC N° 1310013817-9, RIT N° 5629-2013 (2013); *Franco Parisi with Evelyn Matthei*, Eighth Court of Guarantee of Santiago. RUC N° 1310033640-k, RIT N° 9913-2013 (2013); *Michelle Bachelet with Revista Qué Pasa* RUC N° 1610019481-7, RIT N° 6028-2016 (2016); *Sebastián Dávalos with Tomás Mosciatti* Eighth Court of Guarantee of Santiago. RUC N° 1310012252-3, RIT N° 3787-2013 (2013).

<sup>23</sup> According to the State, it is outside the factual framework as the subject matter of the case has to do with the speech of the alleged victim, who is not a journalist but a lawyer, and is not even part of a journalistic investigation.

<sup>24</sup> Cf. *Case of Velásquez Rodríguez v. Honduras*. Merits Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of Leguizamón Zaván et al. v. Paraguay*. Merits, reparations and costs. Judgment of November 15, 2022. Series C No. 473, para. 28.

<sup>25</sup> In its answer, the State indicated that in their pleadings and motions brief, the representatives added to their annexes a series of documents that are already included in the case file, through the brief of submission of the case presented by the Commission, without specifying the documents. The Court considers that the fact that the documents are repeated in the body of evidence does not affect their admissibility.

outside the proper procedural opportunities is not admissible, unless the exceptions established in Article 57(2) of the Rules of Procedure are met, namely: *force majeure*, serious impediment or if it concerns a fact that occurred after the aforementioned procedural moments.<sup>26</sup> Consequently, said document is inadmissible because it is time-barred, since it was presented during the public hearing and as an annex to the final written arguments.<sup>27</sup>

## **B. Admissibility of the testimonial and expert evidence**

41. The Court deems it pertinent to admit the statement of the alleged victim<sup>28</sup> and the expert opinions provided at the public hearing and by affidavit,<sup>29</sup> insofar as they are in keeping with the purpose defined by the President in the order requiring them and the purpose of this case (*supra* para. 10).

## **VII FACTS**

42. In this chapter, the Court will establish the facts of this case based on the factual framework submitted by the Commission and the body of evidence. This information will be presented in the following order: A) the regulatory framework; B) the logging of alerce trees in Chile; C) regarding Carlos Baraona Bray; D) statements made by Carlos Baraona Bray to various media outlets; E) criminal proceedings for slander and serious insult brought against Carlos Baraona Bray, and F) events subsequent to the dismissal of the case.

### **A. Regulatory framework**

43. The crime of slander and serious insult, as well as other legislation applicable to the case at the time of the facts, is regulated in the Chilean Criminal Code<sup>30</sup> and in Law No. 19733, on Freedom of Opinion and Information and the Practice of Journalism.<sup>31</sup>

44. Article 412 of the Criminal Code establishes that slander is “the imputation of a specific but false crime that can currently be prosecuted *ex officio*.” Likewise, Article 413 of the same Code establishes that:

Defamation propagated in writing and with publicity shall be punished:

1. With penalties of minor imprisonment in its medium degree and a fine of eleven to twenty monthly tax units, when a crime is imputed.
2. With penalties of minor imprisonment in the minimum degree and a fine of six to ten monthly tax units, if a simple offense is imputed.<sup>32</sup>

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<sup>26</sup> Cf. *Case of the Barrios Family v. Venezuela. Merits, reparations and costs*. Judgment of November 24, 2011. Series C No. 237, para. 17, and *Case of the Teachers of Chañaral and other Municipalities v. Chile. Preliminary objection, merits, reparations and costs*. Judgment of November 10, 2021. Series C No. 443, para. 36.

<sup>27</sup> The sworn statement rendered by Rosa Flora Muñoz Gibert, former substitute judge of the Court of Los Muermos, refers to aspects related to the investigation carried out and led to the arrest of the ex-director of CONAF.

<sup>28</sup> Statement of Carlos Baraona Bray made at the public hearing before the Court on June 20, 2022, offered by the representatives.

<sup>29</sup> Expert opinions provided at the public hearing by Martín Prats, offered by the Commission, and by Alan Bronfman Vargas, offered by the State, as well as the expert opinion of Flavia Carbonell Bellolio rendered by affidavit, on June 14, 2022, proposed by the State.

<sup>30</sup> Cf. Law 21467, Criminal Code of Chile, published on November 12, 1874. Available at: <https://www.bcn.cl/leychile/navegar?idnorma=1984>. Consulted on August 24, 2022.

<sup>31</sup> Cf. Law 19733, on Freedom of Opinion and Information and Exercise of Journalism, published on June 4, 2001, Articles 29 and 30. Available at: <https://www.bcn.cl/leychile/navegar?idNorma=186049>. Consulted on August 24, 2022.

<sup>32</sup> Law 21467, Criminal Code of Chile, Articles 412 and 413, *supra*.

45. Article 416 of the Criminal Code states: “[a]n insult is any expression proffered or action executed to dishonor, discredit or disparage another person.” Subsequent articles of the Code establish the aggravating factors for said crime:

Article 417: Serious insults consist of:

1. The imputation of a crime or simple offense that does not give rise to an *ex officio* proceeding.
2. The imputation of a punishable or prescribed crime or simple offense.
3. The imputation of a vice or lack of morality whose consequences may significantly harm the reputation, credit or interests of the victim.
4. Insults that by their nature, occasion or circumstances are understood by the public as an affront.
5. Those that rationally deserve the classification of serious given the status, dignity and circumstances of the offended party and the offender.

Article 418:

Serious insults made in writing and with publicity shall be punished with the penalties of minor imprisonment of minimum to medium degree and a fine of eleven to twenty monthly tax units.

In the absence of those circumstances, the penalties shall be minor imprisonment in its minimum degree and a fine of six to ten monthly tax units.

Article 420:

Proof of the truth of the accusations shall not be admitted from the person accused of slander, except when they are directed against public employees regarding facts concerning the performance of their office.

In this case the accused shall be acquitted if he proves the truth of the accusations.<sup>33</sup>

46. In addition, Article 12, paragraph 13 of the Criminal Code establishes among the aggravating circumstances of any crime: “to execute it with contempt or offense against the public authority or in the place where it is exercising its functions.”<sup>34</sup>

47. Similarly, Articles 29 and 30 of Law No. 19.733, mentioned above, establish the rules for crimes committed through the media.

Article 29. - The crimes of slander and insult committed through any means of social communication shall be punished with the prison terms set forth in Articles 413, 418, first paragraph, and 419 of the Criminal Code, and with fines of twenty to one hundred and fifty monthly tax units in the cases of paragraph 1 of Article 413 and Article 418; of twenty to one hundred monthly tax units in the case of paragraph 2 of Article 413; and of twenty to fifty monthly tax units in the case of Article 419.

Personal opinions expressed in specialized commentaries on political, literary, historical, artistic, scientific, technical and sports criticism do not constitute insults, unless their tenor reveals the intent of slander as well as criticism.

Article 30. - A person accused of having caused injury through a means of social communication shall not be allowed to prove the truth of his expressions, except when he has imputed specific facts and at least one of the following circumstances is present:

- a) That the imputation was made for the purpose of defending a real public interest;
- b) That the affected party exercises public functions and the imputation refers to facts pertaining to such exercise.

In these cases, if the truth of the imputation is proven, the judge will proceed to definitively dismiss or acquit the defendant, as the case may be.

For the purposes of this article, the following shall be considered as facts of public interest regarding a person:

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<sup>33</sup> Law 21467, Criminal Code of Chile, Articles 416, 417, 418, and 420, *supra*.

<sup>34</sup> Law 21467, Criminal Code of Chile, Article 12, *supra*.

- a) Those referring to the performance of public duties;
- b) Those carried out in the exercise of a profession or trade, the knowledge of which is of real public interest;
- c) Those consisting of activities to which the public has had free access, whether free of charge or for payment;
- d) Actions that, with the consent of the interested party, have been recorded or disseminated by any means of social communication;
- e) Events or expressions of which the interested party has left testimony in public records or archives public, and
- f) Those consisting of the commission of crimes or culpable participation therein.

Facts related to sexual, marital, family or domestic life shall be considered as pertaining to the private sphere of persons, unless they constitute a crime.<sup>35</sup>

48. Article 372 of the Code of Criminal Procedure provides for an appeal for annulment, which "is granted to invalidate the oral trial, in whole or in part, together with the final judgment, or only the latter, as appropriate, for the reasons expressly stated in the law."<sup>36</sup>

49. Article 398 of the same Code addresses the "suspension of the imposition of a sentence for an offense." It states the following:

Article 398. Suspension of the sentence for misdemeanor. When there is merit to convict for the offense charged, but there are favorable antecedents that do not make it advisable to impose the sentence on the accused, the judge may issue the judgment and provide therein for the suspension of the sentence and its effects for a period of six months. In such a case, this suspension shall not be applicable with any of the alternative penalties contemplated in Law No. 18,216.

Once the term provided for in the preceding paragraph has elapsed without the accused having been the object of a new injunction or a formalization of the investigation, the court will annul the sentence and, in its place, will decree the definitive dismissal of the case.

This suspension does not affect the civil liability arising from the crime.<sup>37</sup>

## **B. The logging of alerce trees in Chile**

50. The alerce (Patagonian cypress) is recognized as one of the most valuable natural assets of Chile's national heritage. This ancient tree is a native species with special characteristics that enable it to grow in the mountainous terrain and marshlands of southern Chile. In 1976, the alerce tree was declared a natural monument of Chile by Supreme Decree No. 490, which led to the prohibition of illegal logging of this forest species. The decree also recognized the "intense and irrational exploitation" of these trees in recent decades.<sup>38</sup> In the instant case, both the representatives and the State acknowledged that the illegal logging of the alerce was a matter of public interest in Chile.<sup>39</sup>

<sup>35</sup> Law 19733, Freedom of Opinion and Information and the Practice of Journalism, Articles 29 and 30, *supra*.

<sup>36</sup> Law 19696, Code of Criminal Procedure, published on October 12, 2000, Article 372. Available at: <https://www.bcn.cl/leychile/navegar?idNorma=176595&idVersion=2022-12-31&idParte=8646954>. Consulted on October 24, 2022.

<sup>37</sup> Law 19696, Code of Criminal Procedure, Article 398, *supra*.

<sup>38</sup> Cf. Supreme Decree No. 490, Declares the Alerce Forest Species a Natural Monument, published on September 5, 1977, final version of May 2003. Available at: [https://www.CONAF.cl/cms/editorweb/transparencia/potestades/Dto-490\\_alerce.pdf](https://www.CONAF.cl/cms/editorweb/transparencia/potestades/Dto-490_alerce.pdf). Consulted on August 24, 2022.

<sup>39</sup> Cf. Initial petition of March 4, 2005, submitted to the Inter-American Commission, "Complaint against the State of Chile for violation of the rights of Carlos Baraona" (evidence file, folios 782 to 799); Minutes of Hearing, Carlos Baraona Bray v. Chile before the Inter-American Commission, of October 27, 2008 (evidence file, folios 209 to 222), and brief of the State, June 11, 2008, in the proceeding before the Inter-American Commission (evidence file, folios 245 to 277).

51. At the end of 2003 and beginning of 2004, public discussion of the problem of illegal logging of alerce trees was influenced by reports of alleged unlawful conduct by public officials who facilitated that crime.<sup>40</sup> This led to a strong public debate in Chile and the creation of a Commission of Inquiry on illegal logging of alerce in the Chamber of Deputies.<sup>41</sup>

52. Legal action was also taken against officials allegedly involved in illegal logging of alerce trees, including the Executive Director of the National Forestry Corporation (*Corporación Nacional Forestal*, hereinafter "CONAF"), the state agency in charge of forestry policies,<sup>42</sup> who was arrested for this reason on May 10, 2004.<sup>43</sup> This situation created public speculation about the illegal trafficking of alerce trees and the possible existence of political pressures.<sup>44</sup>

### C. Regarding Carlos Baraona Bray

53. Carlos Baraona Bray is a Chilean attorney. Until mid-1998, he was the regional attorney for CONAF in the Los Lagos region of Chile.<sup>45</sup> In this capacity, he was involved in cases related to the exploitation and illegal logging of alerce trees.<sup>46</sup> After working at CONAF, he was the lawyer for "The Conservation Land Trust," an organization that placed him in charge of an environmental conservation project linked to an environmental philanthropist. He also worked on a voluntary basis in the preparation of a report on the protection of the

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<sup>40</sup> Cf. Newspaper articles entitled: "Logging of alerce trees in the Tenth Region: CONAF legitimized its work", on December 12, 2003, which mentions that the director of CONAF "regret[ed] the accusations against the institution for alleged negligence in the control of illegal logging of alerce trees" (evidence file, folio 69); "Ecologists ask minister to visit in case of logging of alerce trees," dated May 11, 2004, which reports that environmental organizations requested an investigation into the crimes of illegal association and influence peddling in the case of the illegal logging of alerce trees in the Los Lagos region (evidence file, folio 75); "If anyone believes that politicians are involved, let them say so", dated May 12, 2004, which mentions that the executive director of the Terram Foundation stated that "there is evidence of a protection network, political pressure and illicit association," to which the Minister of Agriculture at the time responded that "if anyone believes that politicians are involved in this situation, let them say so, but let them say so responsibly" (evidence file, folio 79); "Alerce: They claim that the director of CONAF received political pressures", dated May 15, 2004, which reports that the *Agrupación de Ingenieros Forestales por el Bosque Nativo* (Association of Foresters for the Native Forest) stated that the then executive director of CONAF received political pressures (evidence file, folio 85). These are online press reports, which do not include their publication reference.

<sup>41</sup> The Investigating Commission submitted a report to the Chamber of Deputies at its 60<sup>th</sup> session, on April 6, 2005, stating that it was unable to conclusively determine whether or not there was unlawful association or influence peddling. Regarding the responsibility of CONAF, it noted anomalies in the supervision of logging plans authorized by the institution, as well as in the monitoring and verification of the authorized extraction volumes in each of the plans. It also concluded that, from the information gathered by the Commission, it is possible to conclude that there is illegal logging of alerce in the Tenth Region. Cf. Session No. 60, Wednesday, April 6, 2005, of the Chamber of Deputies, Minutes of Session. Report of the Commission of Inquiry into the illegal logging of alerce trees. Available at: <https://www.camara.cl/verDoc.aspx?prmID=437%20&prmTIPO=TEXTOSESION>. Consulted on September 7, 2022; Initial petition of March 4, 2005, before the Inter-American Commission, "Complaint against the State of Chile for violation of the rights of Carlos Baraona," *supra*; Brief of the State of June 11, 2008, in the proceedings before the Inter-American Commission, *supra*, and news report in the online publication *Chiloenlínea*, entitled "Commission of Inquiry on Illegal Logging of the Alerce," dated March 24, 2004 (evidence file, folios 65 to 66).

<sup>42</sup> The *Corporación Nacional Forestal* (National Forestry Corporation) is a private law entity under the Ministry of Agriculture, whose main task is to manage Chile's forestry policy and promote the development of the forestry sector. <https://www.CONAF.cl/quienes-somos/>

<sup>43</sup> Cf. Judgment of the Court of Guarantee of Puerto Montt, of June 22, 2004 (evidence file, folios 4 to 47); News report published in the online newspaper *El Mostrador*, entitled "National Director of CONAF arrested," of May 11, 2004 (evidence file, folio 64), and news report in the online publication *Chiloenlínea*, entitled "Commission of Inquiry on Illegal Logging of the Alerce," *supra*.

<sup>44</sup> Cf. Initial petition of March 4, 2005 before the Inter-American Commission, "Complaint against the State of Chile for the violation of the rights of Carlos Baraona," *supra*, and brief of the State of June 11, 2008, in proceedings before the Inter-American Commission, *supra*.

<sup>45</sup> Cf. Statement of Carlos Baraona Bray before the Court, *supra*, and Judgment of the Court of Guarantee of Puerto Montt of June 22, 2004, *supra*.

<sup>46</sup> Cf. Judgment of the Court of Guarantee of Puerto Montt of June 22, 2004, *supra*, and press report of January 29, 2002 (evidence file, folios 51 to 54).

alerce and participated in several legal actions in defense of the environment.<sup>47</sup> In addition, Mr. Baraona has worked at different times as a lawyer for *Forestal Sarao S.A.*<sup>48</sup> He has stated that his life project included actively participating in the defense of human rights and a healthy environment and that he has carried out work related to forest protection.<sup>49</sup> Mr. Baraona currently lives in Puerto Varas, a town in the Los Lagos region, where there is a vast expanse of alerce trees.<sup>50</sup>

#### **D. Statements made by Carlos Baraona Bray to several media outlets**

54. Since December 2003, a lawyer acting for *Forestal Sarao* and the director of the Terram Foundation had accused CONAF of negligence in controlling the illegal logging of alerce trees.<sup>51</sup> In addition, the *Agrupación de Ingenieros Forestales por el Bosque Nativo* reported that Mr. CW, who served as Executive Director of CONAF, was being pressured to approve alerce management plans for private individuals.<sup>52</sup> At the same time, other organizations and groups of people denounced the existence of a political pressure network and illicit associations prejudicial to the conservation of the alerce.<sup>53</sup>

55. In the context of these claims, Mr. Baraona Bray made several statements to the media, where he referred mainly to the fact that Senator SP of the Los Lagos region had exerted political pressure on the authorities in charge of alerce conservation to continue to allow the illegal occupation of a property in the Los Lagos region and not to stop the illegal logging. Mr. Baraona considered that the journalists sought him out for an interview because he had filed a complaint related to this issue in 1999.<sup>54</sup> Some of Mr. Baraona's statements in this regard, established as proven facts in the domestic criminal proceedings,<sup>55</sup> were as follows:

a) On May 12, 2004 Carlos Baraona was interviewed on the "Teletrece" news program, where he stated that Senator SP was pressuring the authorities so that they would not stop the illegal logging of alerce trees in the Los Lagos region. He added that "Senator [SP] has pressured to maintain [the] situation of exploitation [...] on the property and the illegal occupation [...], the SEREMI (regional secretariat) [...] of the Ministry of National Assets [NB] and Mr. PB [regional director of CONAF,] yes, they have basically been, uh, faithful servants of the interests of

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<sup>47</sup> Cf. Statement of Carlos Baraona Bray before the court, *supra*, and Judgment of the Court of Guarantee of Puerto Montt of June 22, 2004, *supra*. The representatives indicated that Mr. Baraona's participated in those legal actions with the Terram Foundation.

<sup>48</sup> According to several statements mentioned in the judgments of June 22, 2004 and October 4, 2007, in 2001 Carlos Baraona was the lawyer of Forestal Sarao S.A. and filed complaints owing to various conflicts that the company was facing in relation to a 50,000 -hectare property located in the area of El Sarao which was owned by the company. Between 2002 and 2004, Carlos Baraona stopped working with Forestal Sarao (evidence file, folio 024, 080, 108, 183-184). Furthermore, in the public hearing he stated that "in 2000, 2001, 2002, 2003 and mid-2004, he had no connection with [Forestal Sarao]". Cf. Statement of Carlos Baraona Bray before the Court, *supra*; Judgment of the Court of Guarantee of Puerto Montt of June 22, 2004, *supra*, and Judgment of the Court of Guarantee of Puerto Montt of October 4, 2007 (evidence file, fs. 153 a 201).

<sup>49</sup> Cf. Statement of Carlos Baraona Bray before the Court, *supra*.

<sup>50</sup> According to statements given by the representatives and Mr. Baraona at the public hearing. Cf. Statement of Carlos Baraona Bray before the Court, *supra*.

<sup>51</sup> Cf. News report entitled "Logging of alerce trees in the Tenth Region: CONAF legitimized its work," *supra*.

<sup>52</sup> Cf. News article published in *El Mostrador*, entitled "National Director of CONAF arrested," *supra*.

<sup>53</sup> Cf. News article titled "Ecologists request minister's visit in alerce logging case," *supra*.

<sup>54</sup> At the public hearing, Mr. Baraona stated that he believes that the reason why the journalists sought him out is because they had been following the case and came to his office, because "anyone interested in investigating the judicial history related to the alerce - I imagine that they were aware that in [19]99, I filed a complaint in another city - that [...] is the reason why they came across my name. Also, in the Los Muermos case, Forestal Sarao was [the] plaintiff, there were several plaintiffs, including Forestal Sarao, and [he] had been a lawyer for Forestal Sarao, four, four and a half years earlier." Cf. Statement of Carlos Baraona Bray before the Court, *supra*.

<sup>55</sup> Cf. Judgment of the Court of Guarantee of Puerto Montt, of June 22, 2004, *supra*.

Senator [SP] ... if you go to CONAF ask ... Mr. [PB], he is more concerned about what [Senator SP] thinks, about what is happening with the forests in Chile."<sup>56</sup>

b) On May 13, 2004, he gave an interview to "Radio Chilena" and stated: "[...] the senator [SP] has spoken with both the head of CONAF, and the *Seremi de Bienes Nacionales*, and has asked for their cooperation on the illegal occupants who are illegally cutting down the alerce trees and who are stealing them"; [...] "these people arrive and say to *Bienes Nacionales*, I have been occupying this land peacefully, calmly, uninterruptedly for five years, so give me a title. [...] [L] the officials of *Bienes Nacionales* themselves who went to the field, found that these people did not meet the requirements to be able to request the title and so they reported it, and the Heads of *Bienes Nacionales* ordered these reports to be changed - I obviously have the documentation to back up my statements - and to give titles to these people, and behind all this there is always Senator [SP];" [...] "whether or not the senator's conduct [...] constitutes a crime [...] that will have to be decided by a court"; "[...] a specific case in which I learned about this issue is the case of [...] the legal representative of the Sarao forestry company, which owns a 50,000 hectare plot of land. Now he cannot exploit it. And what is the pressure that the Ministry of National Assets and [the] senator [SP] are putting on him? They say look, if you donate to us, you are going to make a donation of 10 thousand hectares, we will solve the problem of these people and you will be able to exploit the other 40 thousand hectares"; "I understand that the reason why Mr. [CW] [Director of CONAF] was arrested is because he admitted to various people that he could not do anything to protect the alerce in the case of my client, *Forestal Sarao*, because Senator [SP] had asked him not to do so." Mr. Baraona then clarified that he was not saying that "Senator [SP] is corrupt, a thief or that there is money for politicians, since [he] is not aware of this, nor does [he] believe it to be the case [...]." He also pointed out that the heads of CONAF and *Bienes Nacionales* had a "servile attitude towards the parliamentarians of the area, [...] of course, in order to reach these positions they obviously have to be endorsed and approved by the regional senator."<sup>57</sup>

c) On May 17, 2004, Mr. Baraona was interviewed on the program "*Poder y Poderes Políticos*", broadcast by the UCV TV channel, and reiterated what he had stated in previous interviews. He mentioned that the *Seremi de Bienes Nacionales* granted titles and regularization documents to people who did not meet the requirements, and had distributed 10,000 hectares in 2002. All this because Senator SP specifically wanted 10,000 hectares of the estate to be donated to solve the problem of the people who were there, in order to "look good" with those people. Similarly, he stated that "Senator [SP] is behaving like the 'landlord' of the estate, as we say in colloquial language. In other words, he believes that this region is his, so he is directly involved with the people who enter [public] office, in how a position is exercised, in what is done and what is not done. And that is not his job [...]." He also asserted that the oversight systems "were destroyed, destroyed by [CW, Executive Director of CONAF] and [PB, regional director of CONAF], who did not [supervise] even though Mr. [C, legal representative of *Forestal Sarao S.A.*] asked them to do so, [...] and [Senator SP] was behind all this." He pointed out that "[CW, the Executive Director of CONAF] told a group of forestry engineers - the group of forestry engineers for the native forest - that he could not supervise this property because he [Senator SP] was behind this, he told them ... if you want me to supervise it, you have to talk to [Senator SP...]." Finally, Mr. Baraona stated that "he met with the Provincial Director of CONAF, [LB] and asked him to do something, to which he replied that unless he spoke with [Senator SP] he could not do anything, proposing that they have a lunch and meet with [Senator SP]. He reiterated that he did not believe that it was a matter of dirty money to finance political campaigns, because the politicians were acting with good intentions."<sup>58</sup>

d) On May 17, 2004, Mr. Baraona stated on *Radio Bio* of Puerto Montt that Judge RM, Magistrate of Los Muermos Court, who was in charge of the investigation against the Executive Director of CONAF and who ordered his arrest, "decided to recuse herself from continuing to hear the case, not only because of the pressure and threats she received, and the pressures from CONAF's lawyers, but also because in her capacity as a judge investigating the illegal

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<sup>56</sup> Cf. Judgment of the Court of Guarantee of Puerto Montt, of June 22, 2004, *supra*.

<sup>57</sup> Cf. Judgment of the Court of Guarantee of Puerto Montt, of June 22, 2004, *supra*.

<sup>58</sup> Cf. Judgment of the Court of Guarantee of Puerto Montt, of June 22, 2004, *supra*.

logging of alerce she had received a call from Senator [SP].” At the end of the audio tape where Mr. Baraona’s statement to this media outlet is reproduced, the reporter clarifies that “the reason for the senator’s call, according to Carlos Baraona, was for the judge to protect the situation [of the then] Provincial Director of CONAF.” On May 18, 2004, this information was also broadcast on the *Medianoche* program of *Televisión Nacional de Chile*; published in the newspaper *El Mercurio* under the heading “Judge in alerce case receives death threats”; and appeared in the newspaper *El Llanquihue*, under the heading “Lawyer Baraona claims that judge was pressured by Senator [SP].” On May 23, 2004, the newspaper *La Tercera* published a reported entitled “Judge [RM] would order the arrest of [CW] again” in which, according to statements by Judge [RM...], “she considers Carlos Baraona to be very brave and does not believe that he would make statements if he does not have legal grounds, finding him to be consistent in what he says and what he does. She adds that it is not true that he has appointed her as his spokesperson and denies having received a call from Senator [SP] or from his secretary.”<sup>59</sup>

e) Finally, “Ercilla” magazine, in issue No.3242 of May 24-June 6, 2004, published an interview with Carlos Baraona entitled “Senator [SP] acts like a landlord,” in which he reiterated that the head of the Llanquihue province of CONAF, LB, told him that the land issue was a matter for Senator SP and that he should reach an agreement with Mr. C, the legal representative of *Forestal Sarao S. A.* He later reiterated that Senator SP acted like a “landlord” and that he used people to buy votes.<sup>60</sup>

56. In general, Mr. Baraona’s statements indicated that Senator SP, acting like “a landlord,” put pressure on the authorities of the Los Lagos region - specifically, the SEREMI *de Bienes Nacionales* (Regional Secretariat of the Ministry of National Assets) the Regional Director of CONAF and the Provincial Director of CONAF - to allow the illegal occupation of properties and the illegal logging of alerce trees. These individuals denied receiving any pressure from Senator SP or from any other authority.<sup>61</sup>

57. In response to Mr. Baraona’s comments, Senator SP issued various statements to different press organizations denying the charges made by Mr. Baraona.<sup>62</sup> For example, in the newspaper *El Mercurio online* he stated that he was the victim of a “character assassination” and that he detected a “media campaign in Baraona’s reasons for trying to involve [him] in influence peddling,” since this was useful to Mr. Baraona to attract foreigners for the sale of land. The senator also denied to various media outlets that he had any connection with alleged irregularities in the exploitation of alerce trees.<sup>63</sup>

## **E. Criminal proceedings for slander and serious insults brought against Carlos Baraona Bray**

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<sup>59</sup> Cf. Judgment of the Court of Guarantee of Puerto Montt, of June 22, 2004, *supra*.

<sup>60</sup> Cf. Judgment of the Court of Guarantee of Puerto Montt, of June 22, 2004, *supra*.

<sup>61</sup> Cf. Judgment of the Court of Guarantee of Puerto Montt, of June 22, 2004, *supra*.

<sup>62</sup> In an interview on May 23, 2004, published in the daily newspaper *El Tercero*, Senator SP states that he has “no connection with alleged irregularities in the alerce case and that there are people who want to establish an uncontrollable situation for the government in relation to the protection of the alerce.” A press release dated January 29, 2002, states that [Senator] SP alleged that “there are political motives – to end [his] career and leadership – behind the accusations linking him to the alerce case. As the visible head of this “political attack,” he pointed to the former CONAF lawyer, Carlos Baraona, against whom he filed a lawsuit for libel and slander.” Another article published in *El Llanquihue* on May 14, 2004, indicates that in a telephone conversation with said publication, Mr. SP “said he was completely unaware of the background or the accusations of the former CONAF lawyer, Carlos Baraona, whom he assured he does not know.” Another article in the same newspaper, dated May 21, 2004, states that Mr. SP “admitted being affected by the accusations made against him by the attorney Carlos Baraona, especially because he assured that he had nothing to do with the conflict”. Cf. Judgment of the Court of Guarantee of Puerto Montt, June 22, 2004, *supra*; press report dated January 29, 2002, *supra*; article published in *El Llanquihue*, on May 14, 2004 (evidence file, folios 67 to 68), and article published in *El Llanquihue*, on May 21, 2004 (evidence file, folio 87).

<sup>63</sup> Cf. Judgment of the Court of Guarantee of Puerto Montt, of June 22, 2004, *supra*.

### *E.1 First instance judgment of the Guarantee Court of Puerto Montt*

58. On May 14, 2004, as a result of the abovementioned statements, Senator SP filed a criminal complaint against Carlos Baraona Bray for the alleged crimes of slander and serious insults with publicity, established in Articles 412 and following articles, 416 and following articles and 423 of the Criminal Code<sup>64</sup> (*supra*, paras. 44 and 45). The complaint was expanded on May 24 of the same year and invoked the aggravating circumstance of Article 12 paragraph 13 of the Criminal Code, since the injurious comments "in addition to being aimed at discrediting and dishonoring [Senator SP], [were] made in disparagement and with offense to the public authority invested in the [senator]." The complaint stated that Mr. Baraona Bray's statements were "a gratuitous and public affront" against Senator SP, because they accused him of a vice or lack of morality that could damage his reputation, credit, image and interests which, in addition, were perceived by the public to be offensive and should be characterized as serious, taking into account the dignity and circumstances of the offended party and of the offender.<sup>65</sup>

59. In a judgment delivered on June 22, 2004, the Guarantee Court of Puerto Montt (hereinafter also "Guarantee Court") convicted Carlos Baraona Bray for the crime of serious insults through the media, to the detriment of Senator SP. In the ruling, the judge stated that "the defendant's statements cannot be considered as having the necessary seriousness and reasonableness for his right to inform to prevail over the plaintiff's honor, since there is no proportionality between the sacrifice of honor and the benefits that could be obtained from such criticism." The Guarantee Court sentenced him to a minimum term of 300 days imprisonment and a fine of 20 monthly tax units,<sup>66</sup> plus suspension from holding public office or public positions during the term of the sentence, with costs. These offenses were provided for in Articles 417 paragraph 3 and 418, first paragraph, of the Criminal Code, in relation to Article 29 of Law No. 19.733 on abuse of publicity (*supra* paras. 45 and 47). In the same ruling, the Guarantee Court concluded that the legal problem was the conflict between the right to honor and the right to freedom of expression. Therefore, it was necessary to "determine whether or not there was justification for the legitimate exercise of a right" and noted that the defense failed to prove that the defendant acted in legitimate exercise of a right recognized in Article 10, paragraph 10, of the Criminal Code.<sup>67</sup>

60. The Guarantee Court of Puerto Montt found it proven that, "from May 12 [2004], the defendant, Carlos Baraona Bray, while the Executive Director of CONAF was detained for the offenses of bribery, illicit association and influence peddling, made various statements that were disseminated by a number of media outlets [...] in which he stated that a Senator of the Republic, [SP], acting as a landlord, had pressured the authorities of the Tenth Region, specifically the SEREMI of National Assets [NB], the Regional Director of CONAF [PB], and the Provincial Director of CONAF [LB], to allow the illegal occupation of properties and the illegal logging of alerce trees. It was pointed out that [NB and PB were] faithful servants of Senator [SP], who exerted pressure on the aforementioned officials for the irregular clearance of title

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<sup>64</sup> Article 423 of the Criminal Code states: "The defendant accused of slander or insult, concealed or equivocal, who refuses to give satisfactory explanations about it, will be punished as a defendant accused of libel or slander". Cf. Law 21467, Criminal Code of Chile, Article 423, *supra*.

<sup>65</sup> Cf. Judgment of the Court of Guarantee of Puerto Montt, of June 22, 2004, *supra*.

<sup>66</sup> According to figures of the Internal Revenue Service of Chile, at the time of the events the fine of 20 monthly tax units (MTU) was equivalent to approximately \$594,720.00 Chilean pesos. Cf. Internal Revenue Service of Chile, UTM - UTA - IPC 2004, available at: <https://www.sii.cl/pagina/valores/utm/utm2004.htm>

<sup>67</sup> Article 10, paragraph 10, of the Chilean Criminal Code states: "The following are exempted from criminal liability: Anyone who acts in the fulfillment of a duty or in the legitimate exercise of a right, authority, office or position." Cf. Law 21467, Chilean Criminal Code, Article 10, *supra*.

deeds and the illegal approval of management plans for alerce trees, in response to electoral promises made by the senator during his political campaign, of which [he had] evidence.”<sup>68</sup>

61. The aforementioned judgment concluded that Mr. Baraona acted with the intention to cause injury and “did not express personal opinions, but rather assertions, which in no way represented specialized political criticism.” It added that at no time did his statements focus on a hypothesis, but rather on unproven allegations. Furthermore, the officials who, according to Mr. Baraona, had been pressured, denied such assertions. Thus, the judge did not consider Mr. Baraona’s statements to be sufficiently serious and reasonable. Finally, she stated that the defendant’s accusations against Senator SP were mere conjectures or rumors that disproportionately sacrificed the senator’s right to honor, which was the basis of the seriousness of the injury.<sup>69</sup> The Guarantee Court then decided to suspend the sentence imposed on Mr. Baraona and its effects for a period of 6 months.<sup>70</sup>

### *E.2. Appeal for annulment before the Second Criminal Chamber of the Supreme Court of Chile*

62. The Public Defender’s Office, on behalf of Carlos Baraona Bray, filed an appeal for annulment of the judgment of the Guarantee Court of Puerto Montt, alleging a substantial infringement of the rights to defense, due process and freedom of expression. It also alleged the erroneous application of the law, since the defendant was convicted for an act that did not constitute a crime, because the *animus injuriandi* was not proven and the *exceptio veritatis* was required for the statements that allegedly constituted insults. The appeal was lodged with the Supreme Court of Chile, which, after analyzing the merits of the appeal, rejected it and concluded that, although freedom of opinion by its intrinsic nature could not be characterized as abusive or criminal, the same was not true of freedom of information with respect to conduct or facts that were verifiable, such as those reported in the present case with respect to Senator SP. It established that freedom of information did not include the communication of false facts, since the Constitution does not protect the right to disinformation or insult.<sup>71</sup>

63. In its ruling, the Supreme Court stated that “[Carlos Baraona Bray] reported certain matters, which even though they were public, constituted facts that were not necessarily true, since their veracity was not clearly proven or corroborated by other information or news sources. It [is] evident that the defendant exceeded the reasonable and prudent limits of what he recklessly disclosed as true facts, when they were false, and in this regard he did not [have] the constitutional protection that he require[d], but in addition, he harmed another person, who also had [the right] to honor [...]”<sup>72</sup> In relation to the *animus injuriandi*, the Supreme Court decided that, although for certain criminal offenses the law required the presence of a special intent as a characteristic element, there were already jurisprudential criteria by which this intent to injure was understood as the malice of the crime, consisting in simply in knowing that the expression proffered or the action executed dishonors, discredits or disparages. Therefore, the Supreme Court agreed with the judgment of the Guarantee Court in the sense that Mr. Baraona was aware of the dishonorable tenor of his comments, and that these could not be considered as sufficiently serious and reasonable. Consequently, the Supreme Court denied the appeal for annulment.<sup>73</sup>

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<sup>68</sup> Cf. Judgment of the Court of Guarantee of Puerto Montt, of June 22, 2004, *supra*.

<sup>69</sup> Cf. Judgment of the Court of Guarantee of Puerto Montt, of June 22, 2004, *supra*.

<sup>70</sup> Cf. Judgment of the Court of Guarantee of Puerto Montt, of June 22, 2004, *supra*.

<sup>71</sup> Cf. Judgment of the Supreme Court, of September 9, 2004 (evidence file, folios 134 to 151).

<sup>72</sup> Cf. Judgment of the Supreme Court, of September 9, 2004, *supra*.

<sup>73</sup> Cf. Judgment of the Supreme Court, of September 9, 2004, *supra*.

### *E.3 Dismissal of the case against Carlos Baraona Bray*

64. Once the six-month period of suspension of the sentence had elapsed - counted from the date on which the judgment delivered on June 22, 2004, by the Guarantee Court became final - and in accordance with Article 398 of the Code Criminal Procedure (*supra* para. 49), a hearing was scheduled to decree the definitive dismissal of the case against Carlos Baraona Bray. On August 1, 2005, said court held the hearing and dismissed the case completely and definitively.<sup>74</sup> Said decision is currently final and enforceable. In this regard, the Guarantee Court has indicated that the case is closed<sup>75</sup> and that it was archived on August 10, 2005.<sup>76</sup>

### **F. Events subsequent to the dismissal of the case**

65. In 2006, the Chilean National Television Channel contacted Mr. Baraona to ask him to tell his story and explain the reasons why he had been convicted.<sup>77</sup> As a result, on November 14, 2006, the channel broadcast the program "Piel de Jaguar - Alerce, La Coca Verde," in which the alleged victim recounted what had happened in the criminal proceedings against him. In response, Senator SP filed a new lawsuit for serious insults against Carlos Baraona Bray and the Executive Director of *Televisión Nacional de Chile*. The Guarantee Court decided to acquit both defendants on October 4, 2007.<sup>78</sup>

## **VIII MERITS**

66. This case concerns the alleged international responsibility of the State for the violation of the right to freedom of expression for imposing subsequent criminal liability for the exercise of the right to freedom of expression in matters of environmental protection, as well as the alleged violation of judicial protection for failure to provide an effective judicial remedy. These violations occurred to the detriment of a person who, it is alleged, could be characterized as a defender of the environment. Accordingly, the Court will first consider the arguments related to the alleged victim's status as an environmental defender.

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<sup>74</sup> Cf. Dismissal Hearing - Decision on Case RIT 1283-2004, RUC 0410008047-3, regarding Carlos Baraona Bray, issued by the Guarantee Court of Puerto Montt, on August 1, 2005 (evidence file, folio 2158).

<sup>75</sup> Cf. Certificate of Final Dismissal of Case RIT 1283-2004, RUC 0410008047-3, regarding Carlos Baraona Bray, issued by the Judge of the Guarantee Court of Puerto Montt, January 30, 2020 (evidence file, folio 2200).

<sup>76</sup> Cf. List of cases 90-2005, from the Judicial Management Support System, Court of Guarantee of Puerto Montt, August 10, 2005 (evidence file, folio 2159).

<sup>77</sup> Cf. Statement of Carlos Baraona Bray before the Court, *supra*.

<sup>78</sup> In its judgment the Court of Guarantee of Puerto Montt ruled:

[...] That the statements made by attorney Baraona, both in the television program and in the newspaper *El Llanquihue*, in the context of a matter of public interest, and even more so, what he has done as the attorney for the plaintiff, that is, in compliance with a mandate and in the context of a criminal trial still pending, therefore, public interest must prevail over the private interest.

The same applies to the TVN program, where the duty to report on a subject of national interest must prevail in this case, if the necessary safeguards and measures have been taken for its broadcast, as established by Law 19.733 and in the law of the National Television Council, Articles 1, 12 and 33.

[...] It is hereby declared that: this court did not [...] reach the conclusion that the evidence provided [...] establishes the crime of serious slander with publicity and acquits Carlos Baraona Bray and Daniel Fernández Kpprich, who have already been named, of the charges filed. The plaintiff is not ordered to pay costs, as it is considered that he had a plausible motive to bring the action.

*Cf.* Judgment of the Guarantee Court of Puerto Montt, of October 4, 2007, *supra*.

67. Secondly, the Court deems it pertinent to analyze whether the imposition of a criminal sanction, and its presumed effects, violated the right to freedom of expression of Carlos Baraona Bray. This analysis will be conducted in the following order: a) importance of freedom of thought and expression in a democratic society; b) importance of freedom of thought and expression on environmental matters in a democratic society; c) content of the right to freedom of expression; d) permissible restrictions on freedom of expression and the application of subsequent liability, and e) analysis of the specific case. The Court will first examine the alleged violation of the principle of legality and finally, it will analyze the alleged violations of the right to judicial protection.

68. In relation to the civil complaint filed against Mr. Baraona, the Court finds that neither the Commission nor the representatives presented substantive arguments or inferred any legal consequences from these facts; consequently, it will not rule on this matter in the merits of this case (*supra* para. 36).

### **VIII-1 THE ALLEGED STATUS OF CARLOS BARAONA BRAY AS AN ENVIRONMENTAL DEFENDER**

#### **A. Arguments of the Commission and the parties**

69. The **Commission** pointed out that Mr. Baraona's statements regarding Senator SP referred to the irregular actions of the senator and of certain authorities of the environmental sector in the clearing of properties where it was alleged that illegal logging of alerce trees, an ancient tree protected in the Chilean State, was being carried out (*supra* para. 50). Thus, the Commission characterized Mr. Baraona as an environmental defender. The **representatives** pointed out that Mr. Baraona had an early vocation as an environmental defense attorney and has in fact performed that role. For his part, during the public hearing in this case, the alleged victim stated that, at the time of the events, he was an environmental defense attorney and had been one until 2004; he clarified that he does not currently work as an environmental defense lawyer. On this matter, the **State** indicated that it has profound differences with the position of the Commission and the representatives regarding the assessment of the facts of the case and regarding Mr. Baraona, since "[they] have attempted to present him as an environmentalist," while the correct interpretation is that Mr. Baraona "was a public employee until he later become a lawyer for a forestry company."

#### **B. Considerations of the Court**

70. The **Court** has considered that the status of a human rights defender derives from the work carried out, regardless of whether the person who does it is a private individual or a public official,<sup>79</sup> or whether the defense is related to civil and political rights or economic, social, cultural and environmental rights.<sup>80</sup> The Court has also stated that activities for the promotion and protection of rights may be carried out intermittently or occasionally, so that being a human rights defender is not necessarily a permanent condition.<sup>81</sup>

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<sup>79</sup> Cf. *Case of Luna López v. Honduras. Merits, reparations and costs.* Judgment of October 10, 2013. Series C No. 269, para. 122.

<sup>80</sup> Cf. *Case of Kawas Fernández v. Honduras. Merits, reparations and costs.* Judgment of April 3, 2009. Series C No. 196, para. 147 and 148, and *Case of Human Rights Defender et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2014. Series C No. 283, para. 129.

<sup>81</sup> Cf. *Case of Human Rights Defender et al. v. Guatemala, supra*, para. 129.

71. The definition of the category “human rights defender” is broad and flexible due to the very nature of this activity. Thus, any person who engages in efforts to promote and defend a human right, and who self-identifies or is recognized by society as a defender, should be considered as such. This category obviously includes environmental defenders, also called environmental human rights defenders or human rights defenders in environmental matters.

72. The United Nations General Assembly has also issued a declaration on this matter, which states that “[e]veryone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.”<sup>82</sup>

73. Furthermore, the Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean (hereinafter the “Escazú Agreement”), which Chile recently signed,<sup>83</sup> is the first international instrument to refer expressly to these defenders. The Escazú Agreement contains a general definition of environmental defenders based on the work they perform. It defines them as “persons, groups and organizations that promote and defend human rights in environmental matters.”<sup>84</sup>

74. Similarly, the report on the situation of human rights defenders, issued by the former United Nations Special Rapporteur on this subject, states that the term “environmental human rights defenders” refers to “individuals and groups who, in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights relating to the environment, in particular water, air, land, flora and fauna.”<sup>85</sup> According to the report, environmental human rights defenders “are identified above all by what they do. They are characterized as such through their actions to protect environmental and land rights.”<sup>86</sup>

75. The Court also notes that several international instruments have mentioned the importance of the work carried out by environmental human rights defenders, the situation of vulnerability in which they may find themselves and the need to provide them with special protection. At the regional level, the General Assembly of the Organization of American States (hereinafter “OAS General Assembly”) has recognized and endorsed the work of human rights defenders and their valuable contribution to the promotion, respect and protection of fundamental rights and freedoms in the Americas. In this regard, the OAS General Assembly has urged the States to offer them the necessary guarantees and facilities to continue freely carrying out their work.<sup>87</sup> In addition, the former UN Special Rapporteur on the situation of human rights defenders has warned that the States should “remain alert and protect defenders against intimidation, criminalization and violence, and diligently investigate,

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<sup>82</sup> Cf. UN, General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*. Doc. A/RES/53/144, March 8, 1999.

<sup>83</sup> Chile became a State Party to the Escazú Agreement on June 13, 2022. Cf. Ministry of Foreign Relations of Chile, Decree 209 of July 6, 2022, available at: <https://www.bcn.cl/leychile/navegar?idNorma=1183363&tipoVersion=0>

<sup>84</sup> Cf. The Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), entered into force on April 22, 2021, Article 9(1).

<sup>85</sup> Cf. United Nations, *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, Michel Forst. Doc. A/71/281, August 3, 2016, para. 7.

<sup>86</sup> Cf. United Nations, *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, Michel Forst, *supra*, para. 8.

<sup>87</sup> Cf. OAS General Assembly, *Human Rights Defenders in the Americas: support for the individuals, groups and organizations of civil society working to promote and protect human rights in the Americas*. Doc. AG/RES. 1671 (XXIX-O/99), June 7, 1999.

prosecute and punish the authors of those crimes [...]”<sup>88</sup> and “establish a safe and enabling environment for defenders to act without threats, harassment, intimidation or violence.”<sup>89</sup> This is based on the understanding that defenders cannot properly defend environmental rights if they cannot exercise their own rights of access to information, freedom of expression, assembly and peaceful association, guarantees of non-discrimination and participation in decision-making.<sup>90</sup>

76. For its part, the United Nations Human Rights Council has recognized the importance of the work carried out by human rights defenders, including those involved in environmental issues, to ensure that States comply with their obligations under the Paris Agreement and the implementation of the 2030 Agenda for Sustainable Development. Consequently, it has emphasized the duty to guarantee them “a safe and enabling environment, so that they are able to act free from threat, restriction and insecurity.”<sup>91</sup>

77. Similarly, Article 9 of the Escazú Agreement establishes the obligation of the States Party to guarantee “a safe and enabling environment” so that human rights defenders working on environmental issues “can act free from threat, restrictions and insecurity.” It requires States to take “adequate and effective measures to recognize, protect and promote” all the rights of defenders, including their rights to life, personal integrity, freedom of opinion and expression. The general principles of the Agreement also establish that each party shall ensure that the rights recognized therein are freely exercised (paragraph 2) and shall guarantee an enabling environment for the work of persons, associations, organizations or groups that promote environmental protection, by recognizing and protecting them (paragraph 6). In particular, the Escazú Agreement takes into consideration the 2030 Agenda for Sustainable Development and the Sustainable Development Goals (SDG), reaffirming the commitment to achieve sustainable development, in a balanced and integrated manner, in its three dimensions: economic, social and environmental. It also notes that the outcome document of the 2012 United Nations Conference on Sustainable Development, entitled “The Future We Want,” recognizes that democracy, good governance and the rule of law are essential for sustainable development.<sup>92</sup>

78. The Court considers that respecting and guaranteeing the rights of human rights defenders in environmental matters, in addition to being a commitment acquired by the States party to the American Convention, insofar as they are persons under their jurisdiction, is of special importance because they perform work that is “fundamental to the strengthening of democracy and the rule of law.”<sup>93</sup>

79. This Court has recognized that, given the importance of environmental work, the free and full exercise of this right imposes on the States the duty to create legal and factual

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<sup>88</sup> Cf. United Nations, Human Rights Council: *Right to a clean, healthy and sustainable environment: the non-toxic environment. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*. David Boyd. Doc. A/HRC/49/53, January 12, 2022, para. 49, lit. g.

<sup>89</sup> Cf. United Nations, Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, John Knox. Doc. A/HRC/37/59, January 24, 2018, framework principle 4, para. 11.

<sup>90</sup> Cf. United Nations, *Report of the Special Rapporteur on the situation of Human Rights Defenders*, Michel Forst, *supra*, para. 93.

<sup>91</sup> Cf. United Nations, Human Rights Council, *Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development*. Doc. A/HRC/40/L.22/Rev.1, March 20, 2019.

<sup>92</sup> Cf. Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), entry into force on April 22, 2021, preamble.

<sup>93</sup> Cf. *Case of Valle Jaramillo et al. v. Colombia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C. 192, para. 87, and *Case of Human Rights Defender et al. v. Guatemala, supra*, para. 128.

conditions in which they can freely develop their function.<sup>94</sup> This is particularly important if one takes into account the interdependence and indivisibility between human rights and environmental protection<sup>95</sup> and the difficulties associated with the defense of the environment in the countries of the region, where there are a growing number of reports of threats, acts of violence and murders of environmentalists because of their work.<sup>96</sup>

80. With regard to the State's contention that Mr. Baraona is not a defender of the environment, but rather that he was a public official who later became the lawyer for a forestry company and defended its private interests, it should be recalled that the status of human rights defender should be understood in a broad and flexible manner due to the nature of the activities related to the promotion and protection of rights (*supra* para. 71). In this sense, the Court considers that the defense of human rights is not incompatible with the position of a public official or with the practice of law in the private sphere. In this case, the Court notes that at the time of the facts, Mr. Baraona had experience as a government official in the protection of the alerce tree and had participated in several judicial appeals related to the defense of the environment and had even carried out environmental protection work on a voluntary basis (*supra* para. 53). In this particular case, regardless of his role as a human rights defender, the Court finds that Mr. Baraona's statements made reference to the illegal logging of alerce trees, an issue related to environmental protection, which constituted a debate of public interest at the time of the facts (*infra* para. 118).

## VIII-2 FREEDOM OF THOUGHT AND EXPRESSION, IN RELATION TO THE OBLIGATION TO RESPECT RIGHTS AND THE DUTY TO ADOPT PROVISIONS OF DOMESTIC LAW ESTABLISHED IN THE CONVENTION<sup>97</sup>

### A. Arguments of the Commission and the parties

81. The **Commission** reiterated that the instant case concerns a restriction on freedom of expression for the alleged crime of serious insults, which ended in criminal sanctions against the lawyer Carlos Baraona, and that this situation arose in the context of a public debate in Chile over the illegal logging of alerce trees and irregularities by the public authorities of the environmental sector. The debate was related to a topic of public interest, focusing on the protection of the environment.

82. It argued that, under the provisions of Article 13(2) of the Convention, all restrictions on freedom of expression, in order to be legitimate, must satisfy a strict tripartite test. It held that, although the rules on insults were previously established by law, the ambiguity and breadth of Articles 416 and 417, subparagraphs 3 to 5, of the Criminal Code, imply a breach of the requirement of strict legality in placing restrictions on the rights to freedom of expression of Carlos Baraona Bray.<sup>98</sup> It noted that the crime of "serious insults" for which the

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<sup>94</sup> Cf. *Case of Nogueira de Carvalho et al. v. Brazil. Preliminary objections and merits*. Judgment of November 28, 2006. Series C No. 161, para. 77, and *Case of Digna Ochoa and Family v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2021. Series C No. 447, para. 99.

<sup>95</sup> Cf. *Environment and Human Rights (State obligations in relation to the environment within the framework of the protection and guarantee of the rights to life and personal integrity- interpretation and scope of Articles 4(1) and 5(1), in relation to Articles 1(1) and 2 of the American Convention on Human Rights)*. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 54.

<sup>96</sup> Cf. *Case of Kawas Fernández v. Honduras, supra*, para. 149.

<sup>97</sup> Articles 13(1) and 13(2) of the American Convention, in relation to Articles 1(1) and 2 thereof.

<sup>98</sup> The Commission considered that the articles used against Mr. Baraona are incompatible with the principle of strict criminal legality and the right to freedom of expression, since no clear parameters were established to anticipate the prohibited conduct and its elements.

alleged victim was convicted sought to protect the reputation and honor of Senator SP, so that the second element of the test would be satisfied.<sup>99</sup> The Commission noted that, although the statements made by Carlos Baraona could be considered annoying, disturbing or offensive, they were not expressions of incitement to violence. All of which, according to the standards related to the analysis of necessity and proportionality, does not fall within the hypotheses that make it necessary to use criminal law and custodial sanctions.<sup>100</sup>

83. It further argued that the application of an *exceptio veritatis* in this case should not mean a reversal of the burden of proof that contradicts the evidentiary implications of that principle, since it is sufficient that the challenged assertions are reasonable to exclude liability for statements of current public interest, as occurred in the present case. The Commission concluded that the criminal sanction,<sup>101</sup> as well as the other measures ordered to the detriment of Carlos Baraona Bray, constituted unnecessary and manifestly disproportionate sanctions, because they were excessive. Therefore, it concluded that the State violated freedom of expression and the requirements of strict legality in violation of Articles 13(1) and 13(2) and 9 of the American Convention, in relation to Articles 1(1) and 2 thereof.

84. The **representatives** pointed out that subsequent liability and restrictions cannot hinder the exercise of freedom of expression, for example by using criminal law in cases such as this one, where there is a public interest, in addition to public officials and/or public figures involved. For the same reason, the protection of the right to honor as a basis for criminal prosecution is reprehensible and becomes problematic when it translates into punishing and inhibiting legitimate political criticism and citizen oversight of the authorities.

85. The **State** presented several arguments to substantiate its lack of international responsibility. In the context of the preliminary objection of fourth instance, it argued that it would be pointless for this Court to review the first instance decision, since the case against Mr. Barona Bray was completely and definitively dismissed which, in the Chilean legal system, would be equivalent to a judgment of acquittal that ends the criminal proceedings and has the effect of *res judicata*. Regarding the merits of the case, the State argued that in order to properly understand the case, it is of the utmost importance that "in the assessment carried out by the national courts, the fact that the claims made by Mr. Baraona Bray were not supported by minimum reasonable proof and that he was unable to produce any evidence of their plausibility, even *prima facie*, was decisive." It pointed out that, in the first instance decision of the Guarantee Court, the judge a) recognized that the exercise of freedom of expression in matters of public interest may serve as justification, legitimizing such conduct and thus precluding a criminal sanction and b) considered that the standard for determining whether Mr. Baraona's conduct is justified by the right to freedom of expression is not the truthfulness of the facts, but a much lower threshold: mere "seriousness and reasonableness," equivalent to preventing "reckless disregard" for the truthfulness of the alleged facts. Finally, in the analysis of the case, the judge concluded that "there is no proportionality between the sacrifice of honor and the benefits that could be obtained with the criticism" since "the

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<sup>99</sup> The Commission advised that this element alone does not authorize the use of criminal law in cases such as the one under analysis.

<sup>100</sup> The Commission considered that other alternatives may be used to protect the honor and reputation of persons that are less harmful and restrictive than resorting to criminal law, such as civil proceedings and guaranteeing the right of rectification or reply.

<sup>101</sup> Regarding the use criminal law, the Commission emphasized that if there is indeed an abuse of freedom of expression that causes harm to the rights of others, the least restrictive measures should be used to repair such harm (right of rectification or reply) and that if serious damage is caused with intent to harm or with manifest disregard for the truth, civil liability mechanisms that meet the strict conditions of Article 13(2) of the Convention may be invoked. The purpose of this would be to avoid the chilling effect generated by the existence and application of laws that criminalize freedom of expression. In the instant case, Mr. Baraona refrained from participating in public debate for two years after his conviction. In fact, after he returned to participate in the debate, he was once again prosecuted with the risk of imprisonment due to his possible recidivism.

defendant's statements cannot be regarded as having the required seriousness and reasonableness." The same analysis was adopted by the Supreme Court when hearing the appeal for annulment. Consequently, the State argued that the national judges evaluated the right to freedom of expression in relation to the right to honor, weighing both rights.

86. The State also argued that even if the most stringent standard (actual malice or reckless disregard) were adopted, there would be no violation of Article 13 of the Convention in this case. It emphasized that in the instant case, the standard of actual malice is satisfied since Mr. Baraona was convicted after the judge concluded that he had acted "recklessly" (as the Supreme Court described it) or "at least boldly" (as the trial judge described it), without any plausible grounds to support the accusations he made, claiming to have information that the trial showed he did not have and, according to the lower court, "knowing or must have known" that the information at his disposal only supported some of his allegations.

87. In addition to the tripartite analysis carried out by the Commission, the State pointed out that the domestic courts conducted an analysis of proportionality *stricto sensu* of the measure, explicitly weighing freedom of expression against the right to honor. Furthermore, they analyzed whether in the specific case it was disproportionate to satisfy the right to honor over freedom of expression. On this last point, the State mentioned that a comparison should be made between: a) a substantive infringement of the right to honor of Senator SP, resulting from an accusation, in the media, of unlawful and immoral acts; with b) an act of freedom of expression which, from the background of the case, appears to be unfounded and lacking the minimum basis and, therefore, is not related to the public interest. Regarding this comparison, it was pointed out that in the opinion of the national judiciary, the most affected right should prevail, and in this specific case it was the right to honor. In addition, the State argued that, contrary to the Commission's statement, in this case the use of a criminal measure was justified and was consistent with this Court's case law. Finally, it pointed out that even if the standard indicated by the Commission were correct, it would not apply to this case since the public interest was not at stake. This is because the public discussion on the illegal logging of alerce trees – which is clearly a matter of public interest – must be distinguished from Mr. Baraona's accusations concerning the involvement of Senator SP, a matter that "could not be of public interest, as there is no public interest in the mere accusation of unlawful acts without any evidence that would make this accusation at least plausible."

## **B. Considerations of the Court**

### ***B.1 The importance of freedom of thought and expression in a democratic society***

88. The Court has established that freedom of expression, particularly in matters of public interest, "is a cornerstone upon which the very existence of a democratic society rests."<sup>102</sup> This right must not only be guaranteed with regard to the dissemination of information or ideas that are favorably received or considered harmless or indifferent, but also with regard to those that are unpleasant for the State or any sector of the population.<sup>103</sup> Thus, any condition, restriction or sanction in this matter must be proportionate to the legitimate aim pursued. Without an effective guarantee of freedom of expression, the democratic system is weakened and pluralism and tolerance suffer; monitoring and citizen complaint mechanisms

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<sup>102</sup> Cf. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 70, and *Case of Moya Chacón et al. v. Costa Rica*, *supra*, para. 63.

<sup>103</sup> 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. 69, and *Case of Palacio Urrutia et al. v. Ecuador. Merits, reparations and costs*. Judgment of November 24, 2021. Series C No. 446, para. 87.

can become inoperative, ultimately creating fertile ground for authoritarian systems to take root.<sup>104</sup>

89. The Court recalls that, in a democratic society, the rights and freedoms inherent to the individual, their guarantees and the rule of law constitute a triad, each of whose components is defined, completed and acquires meaning on the basis of the others.<sup>105</sup> In this respect, the Court notes that Articles 3 and 4 of the Inter-American Democratic Charter highlight the importance of freedom of expression in a democratic society, establishing that “essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law; the holding of periodic, free and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people; the pluralistic system of political parties and organizations; and the separation of powers and independence of the branches of government.”<sup>106</sup>

90. Similarly, the collective aspect of freedom of expression, as a fundamental pillar of society, and as a procedural right for the exercise of public participation, allows people to exercise democratic oversight of the state’s administration in order to question, investigate and consider compliance with the fulfilment of public functions. In this sense, it enables citizens to be part of the decision-making process and allows their opinions to be heard. Thus, democratic control by society, through public opinion, promotes the transparency of state activities and accountability among public officials for their public administration.<sup>107</sup> Therefore, States must refrain from engaging in conduct that affects human rights, such as subjecting people to criminal proceedings without guarantees of due process, or carrying out direct or indirect acts that place undue restrictions on freedom of expression.<sup>108</sup>

91. This Court has established that recourse by public officials to the courts to file lawsuits for libel or slander, not with the aim of obtaining a rectification but rather to silence any criticism of their actions in the public sphere, constitutes a threat to freedom of expression. This type of process, known as “SLAPP” (strategic lawsuit against public participation), is an abusive use of judicial mechanisms that should be regulated and controlled by the States, in order to ensure the effective exercise of freedom of expression. In this regard, the United Nations Human Rights Council has expressed its concern over “the strategic use of the courts by business entities and individuals using strategic lawsuits against public participation to pressure journalists and stop them from critical and/or investigative reporting.”<sup>109</sup>

92. Similarly, the Inter-American Democratic Charter recognizes that “the participation of citizens in decisions related to their own development is a right and a responsibility [as well as] a necessary condition for the full and effective exercise of democracy” (Article 6). Precisely

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<sup>104</sup> Cf. *Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of July 2, 2004. Series C No. 107, para. 116, and *Case of Palacio Urrutia et al. v. Ecuador, supra*, para. 87.

<sup>105</sup> Cf. *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights)*. Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 26, and *Case of Moya Chacón et al. v. Costa Rica, supra*, para. 64.

<sup>106</sup> OAS General Assembly, Inter-American Democratic Charter, Resolution AG/RES. 1 (XXVIII-E/01) of September 11, 2001, Article 3, and *Case of Moya Chacón v. Costa Rica, supra*, para. 64.

<sup>107</sup> Cf. *Case of Herrera Ulloa v. Costa Rica, supra*, para. 127, and *Case of Moya Chacón, supra*, para. 63.

<sup>108</sup> Cf. *Case of Palacio Urrutia, supra*, para. 93. On this matter, the expert witness Martín Prats pointed out “the importance of creating and consolidating mechanisms for citizen participation and monitoring, in order to safeguard this interest, and to this end, the press and public opinion are fundamental instruments for the control of public administration, transparency of State activities, management of public resources, accountability and holding public officials accountable for their actions.” Cf. Expert opinion of Martín Prats rendered before the Court during the public hearing of June 20, 2022.

<sup>109</sup> United Nations, Human Rights Council. The security of journalists. Resolution approved on October 1, 2020, A/HRC/45/L.42/Rev.1, Preamble, and Cf. *Case of Palacio Urrutia et al. v. Ecuador, supra*, para. 95.

for that reason, this instrument highlights as fundamental components of the exercise of democracy, “transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press.” (Article 4).

93. Freedom of expression is, in fact, a fundamental pillar of the democratic system, as it allows citizens to exercise the control over the government’s actions, to question, investigate and monitor compliance with public functions. Both in its individual dimension and its collective or social dimension, freedom of expression makes it possible for people to take part in the decision-making process and for their opinions to have a real impact on these decisions.

### ***B.2 Importance of freedom of thought and expression on environmental issues in a democratic society***

94. The Court has recognized that the rights specifically linked to the environment can be divided into two groups. On the one hand, rights whose enjoyment is particularly vulnerable to environmental degradation, also identified as substantive rights (for example, the rights to life, personal integrity, health or property). On the other hand, rights whose exercise supports better environmental policymaking, also identified as procedural rights. The latter category includes the freedoms of expression and association, the right to information, participation and to an effective remedy.<sup>110</sup>

95. However, the Court has considered that the procedural obligations in matters of environmental protection also arise from the systematic interpretation of the obligations to respect and guarantee the rights to life and personal integrity, as well as other rights provided for in the American Convention.<sup>111</sup>

96. The Court also recalls that participation is a mechanism for addressing the concerns of citizens and using their knowledge in public policy decisions that affect the environment. It increases the capacity of governments to respond to public concerns and demands in a timely manner, and helps build consensus and improve acceptance of and compliance with environmental decisions.<sup>112</sup> In particular, public participation enables communities to demand accountability from public authorities when taking decisions and, also, improves the efficiency and credibility of government processes. This is because democratic control by society, through public opinion, fosters transparency in State activities and promotes the accountability of State officials in relation to their public activities.<sup>113</sup>

97. In this regard, the Court has reiterated the views expressed by other international bodies for the protection of human rights. The European Court of Human Rights has underlined the importance of public participation in environmental decision-making as a procedural guarantee of the right to private and family life.<sup>114</sup> It has also stressed that an essential element of this procedural guarantee is the ability of individuals to challenge official acts or

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<sup>110</sup> Cf. *Advisory Opinion OC-23/17, supra*, para. 64. The Court has also ruled on procedural rights with respect to the environmental impact of a forest industrialization project, referring both to access to information as well as to public participation. Also see *Case of Claude Reyes et al. v. Chile. Merits, reparations and costs*. Judgment of September 19, 2006. Series C No. 151, para. 86.

<sup>111</sup> Cf. *Advisory Opinion OC-23/17, supra*, para. 125.

<sup>112</sup> Cf. *Advisory Opinion OC-23/17, supra*, paras. 64, 226 and 228, and *Case of Palacio Urrutia et al. v. Ecuador, supra*, para. 87.

<sup>113</sup> Cf. *Case of Claude Reyes et al. v. Chile, supra*, para. 87, and *Advisory Opinion OC-23/17, supra*, para. 226.

<sup>114</sup> Cf. *Advisory Opinion OC-23/17, supra*, para. 229, and ECHR, *Case of Grimkovskaya v. Ukraine*, No. 38182/03. Judgment of July 21, 2011, para. 69.

omissions that affect their rights before an independent authority,<sup>115</sup> and to play an active role in planning procedures for activities and projects by expressing their opinions.<sup>116</sup> For its part, the United Nations Human Rights Council has recognized that the freedoms of opinion, expression, peaceful assembly and association are essential elements for the promotion and protection of human rights and the protection and conservation of the environment.<sup>117</sup>

98. The Court also takes note of the development of international environmental law and, in particular, the close relationship that exists between democracy, freedom of expression and participation, which was embodied in the 1992 Rio Declaration on Environment and Development. According to principle 10 of the Declaration, concerning Environmental Democracy, “environmental issues are best handled with the participation of all concerned citizens, at the relevant level.” To achieve this objective, the principle emphasizes the need to guarantee rights of a procedural nature, known as “access rights.” In addition to the right to participation, the right of access to information and access to justice form part of this category.<sup>118</sup>

99. As a direct development of this principle, on March 4, 2018, the Latin American and Caribbean States adopted an international treaty specifically aimed at guaranteeing access rights: access to public information, public participation and access to justice. To date, it has been signed by 25 States and ratified by 14 others. The Escazú Agreement states in its preamble that the commitments made therein are based on the conviction that “access rights contribute to the strengthening of, *inter alia*, democracy, sustainable development and human rights.” Under this perspective, the treaty aims to contribute “to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development” (Article 1). Article 7 of the Escazú Agreement calls for public participation in the environmental decision-making process. Among other aspects, each party must ensure the public’s right to participation and, for that purpose, commits to implement open and inclusive participation in environmental decision-making processes based on domestic and international normative frameworks (Article 7(1)). In addition, it establishes the obligation to guarantee mechanisms of participation and promote public participation in the different processes related to environmental matters (Article 7(2) and 7(3)).<sup>119</sup>

100. Finally, the Court considers that respect for and the guarantee of freedom of expression in environmental matters is an essential element to ensure citizens’ participation in processes related to such matters and, with it, the strengthening of the democratic system through the application of the principle of environmental democracy.

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<sup>115</sup> Cf. *Advisory Opinion OC-23/17, supra*, para. 229, and ECHR, *Case of Dubetska et al. v. Ukraine*, No. 30499/03. Judgment of February 10, 2011, para. 143; ECHR, *Case of Grimkovskaya v. Ukraine, supra*, para. 69, and ECHR, *Case of Taşkın and Others v. Turkey*, No. 46117/99. Judgment of November 10, 2004, para. 119.

<sup>116</sup> Cf. *Advisory Opinion OC-23/17, supra*, para. 229, and ECHR, *Case of Eckenbrecht and Ruhmer v. Germany*, No. 25330/10. Judgment of June 10, 2014, para. 42.

<sup>117</sup> Cf. UN, Human Rights Council, Recognizing the contribution made by human rights defenders to the enjoyment of human rights, environmental protection and sustainable development. Doc. A/HRC/40/L.22/Rev.1, March 20, 2019.

<sup>118</sup> According to Principle 10: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” Cf. Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Rio de Janeiro, June 3-14, 1992, Doc. UN NCONP.I51/26/Rev.1 (Vol. 1).

<sup>119</sup> Cf. Economic Commission for Latin America and the Caribbean (ECLAC), Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean (LC/PUB.2018/8/Rev.1), Santiago, 2022.

### **B.3 Content of the right to freedom of expression**

101. In its case law, the Court has given ample content to the right to freedom of expression, recognized in Article 13 of the Convention. The Court has indicated that this provision protects the right to seek, receive and disseminate ideas and information of all kinds, as well as the right to receive and know the information and ideas disseminated by others.<sup>120</sup> It has also pointed out that freedom of expression has an individual dimension and a social dimension, from which it has derived a series of rights that are protected in said article.<sup>121</sup> The Court has affirmed that both dimensions are of equal importance and must be fully guaranteed simultaneously, in order to give full effect to the right to freedom of expression, in the terms provided for in Article 13 of the Convention.<sup>122</sup>

102. The first dimension of freedom of expression includes the right to use any appropriate means to disseminate opinions, ideas and information in order to reach the greatest number of recipients. In this sense, expression and dissemination are indivisible, so that a restriction on the possibilities of dissemination represents directly, and to the same extent, a restriction on the right to express oneself freely. Similarly, the Court has pointed out that the social dimension of the right to freedom of expression implies everyone's right to know opinions, stories and news expressed by third parties. For the ordinary citizen, knowledge of the opinions of others or the information available to others, is as important as the right to disseminate one's own. That is why, in light of both dimensions, freedom of expression requires, on the one hand, that no one be arbitrarily undermined or prevented from expressing his or her own thoughts and, on the other hand, it implies a collective right to receive any information and to know the expression of other people's thoughts.<sup>123</sup>

### **B.4 Permissible restrictions on freedom of expression and the application of subsequent liabilities**

103. The Court has reiterated that freedom of expression is not an absolute right. Article 13(2) of the Convention, which prohibits prior censorship, also provides for the possibility of demanding subsequent liability for the abusive exercise of this right, including to ensure "respect for the rights or reputation of others" (paragraph (a) of Article 13(2)). These restrictions are of an exceptional nature and must not limit, beyond what is strictly necessary, the full exercise of freedom of expression and become a direct or indirect mechanism of prior censorship.<sup>124</sup> Thus, the Court has established that such subsequent liabilities can be imposed, only insofar as the right to honor and reputation could have been affected.<sup>125</sup>

104. On this matter, this Court has reiterated in its case law that Article 13(2) of the American Convention establishes that subsequent liability for the exercise of freedom of expression must comply with the following requirements concurrently: (i) be previously

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<sup>120</sup> Cf. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 30, and *Case of Moya Chacón et al. v. Costa Rica*, *supra*, para. 62.

<sup>121</sup> Cf. *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*, *supra*, para. 64, and *Case of Palacio Urrutia et al. v. Ecuador*, *supra*, para. 97.

<sup>122</sup> Cf. *Case of Ivcher Bronstein v. Peru. Reparations and costs*. Judgment of February 6, 2001. Series No. 74, para. 149, and *Case of Palacio Urrutia et al. v. Ecuador*, *supra*, para. 97.

<sup>123</sup> Cf. *Case of Ivcher Bronstein v. Peru*, *supra*, para. 146, and *Case of Palacio Urrutia et al. v. Ecuador*, *supra*, para. 98.

<sup>124</sup> Cf. *Case of Herrera Ulloa v. Costa Rica*, *supra*, para. 120, and *Case of Palacio Urrutia et al. v. Ecuador*, *supra*, para. 100.

<sup>125</sup> Cf. *Case of Mémoli v. Argentina, Preliminary objections, merits, reparations and costs*. Judgment of August 22, 2013. Series C No. 265, para. 123, and *Case of Moya Chacón et al. v. Costa Rica*, *supra*, para. 73.

established by law, both formally and materially;<sup>126</sup> (ii) respond to a purpose permitted by the American Convention (“respect for the rights or reputations of others” or “the protection of national security, public order or public health or morals”), and (iii) be necessary in a democratic society (and therefore comply with the requirements of appropriateness, necessity and proportionality).<sup>127</sup>

105. Regarding the first requirement, (i) strict legality, the Court has established that any restrictions must be previously established by law to ensure that they are not left to the discretion of the public authorities. For this, the criminal definition of a conduct must be clear and accurate, even more so if it concerns convictions under criminal law and not under civil law.<sup>128</sup> The second aspect, (ii) the permitted or legitimate purposes, refers to Article 13(2) of the Convention.<sup>129</sup> Insofar as this case deals with the restriction of the right to freedom of expression due to a complaint filed by a private citizen, the Court will consider only the purpose stated in subparagraph (a) of the aforementioned Article, namely, respect for the rights or reputations of others. Since this is a legitimate purpose, it is necessary for the State to weigh up the right to freedom of expression of the person who communicates and the right to honor of the person affected. Furthermore, the State has the obligation to provide a judicial remedy so that any person who considers that his honor has been harmed can demand protection.<sup>130</sup> Finally, as regards the restrictions imposed on the right to freedom of expression, the Court has understood that they must be (iii) proportionate to the interest that justifies them and closely tailored to the achievement of that legitimate purpose, interfering as little as possible with the effective exercise of that right. Thus, it is not sufficient to have a legitimate purpose; the measure in question must also respect the principles of proportionality and necessity in restricting freedom of expression. In other words, “this last step of the analysis must consider whether the restriction is strictly proportionate, in such a way that the sacrifice inherent therein is not exaggerated or disproportionate in relation to the advantages obtained from such limitation.”<sup>131</sup>

106. At the same time, the Court has established that subsequent liabilities may be imposed if the right to honor and reputation has been affected.<sup>132</sup> 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 every person has the right to be respected, prohibits any unlawful attack against his honor or reputation and imposes on the States the duty to provide the protection of the law against such attacks.” In general terms, it has pointed out that “the right to honor is related to self-esteem and self-worth, while reputation refers to the opinion that others have of a person.”<sup>133</sup> It has also held that, “both freedom of expression and the right to honor, both rights protected by the Convention, are of the utmost importance. Hence, both rights must be guaranteed in a way that ensures they coexist harmoniously.” Every fundamental right must be exercised with respect and

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<sup>126</sup> Cf. *The Word "Laws" in Article 30 of the American Convention on Human Rights*. Advisory Opinion OC-6/86 of May 9, 1986. Series A, No. 6, paras. 35 and 37, and *Case of Moya Chacón et al. v. Costa Rica*, *supra*, para. 71.

<sup>127</sup> 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 Moya Chacón*, *supra*, para. 71.

<sup>128</sup> Cf. *Case of Kimel v. Argentina. Merits*. Judgment of May 2, 2008. Series C No. 177, para. 77, and *Case of Moya Chacón et al. v. Costa Rica*, *supra*, para. 72.

<sup>129</sup> Cf. *Case of Álvarez Ramos v. Venezuela. Preliminary objection, Merits, reparations and costs*. Judgment of August 30, 2019. Series C No. 380, para. 106, and *Case of Palacio Urrutia et al. v. Ecuador*, *supra*, para. 106.

<sup>130</sup> Cf. *Case of Mémoli v. Argentina*, *supra*, para. 125 and *Case of Palacio Urrutia et al. v. Ecuador*, *supra*, para. 107.

<sup>131</sup> Cf. *Case of Kimel v. Argentina*, *supra*, para. 83, and *Case of Moya Chacón et al. v. Costa Rica*, *supra*, para. 72.

<sup>132</sup> Cf. *Case of Mémoli v. Argentina*, *supra*, para. 123, and *Case of Moya Chacón et al. v. Costa Rica*, *supra*, para. 73.

<sup>133</sup> Cf. *Case of Tristán Donoso v. Panama*, *supra*, para. 57, and *Case of Moya Chacón et al. v. Costa Rica*, *supra*, para. 73.

safeguarding other fundamental rights. Therefore, the Court has stated 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.”<sup>134</sup>

107. In this regard, the right to reply or to make a correction, provided for in Article 14 of the Convention, may be an appropriate means to protect the right to honor of a person who believes that he or she has been harmed by inaccurate or offensive information. Thus, the Court has held that “[t]he inescapable relationship between these articles can be deduced from the nature of the rights recognized therein since, by regulating the application of the right of reply or correction, the State Parties must respect the right to freedom of expression guaranteed by Article 13. They may not, however, interpret the right to freedom of expression so broadly as to negate the right of reply proclaimed in Article 14(1).”<sup>135</sup>

108. In this harmonization process, the State has the primary duty to seek to establish the responsibilities and sanctions that may be necessary to achieve this purpose.<sup>136</sup> Without prejudice to the foregoing, it is important to remember that the Court has indicated that in order to determine the compatibility with the Convention of a restriction to freedom of expression that infringes on the right to honor, it is of vital importance to analyze whether the statements made are in the public interest, since in these cases the judge must assess with special care the need to limit freedom of expression.<sup>137</sup> Accordingly, for a given report or information to become part of the public debate, at least three elements must be present, namely: a) a subjective element, that is, that the person is a public official at the time of the complaint made by public media; b) a functional element, that is, that the person has acted in an official capacity in the related events; and c) a material element, that is, that the subject matter is of public relevance. According to the standards established by the Court, access to information on activities and projects that could have an impact on the environment is a matter of clear public interest, and therefore enjoys special protection due to its importance in a democratic society.<sup>138</sup> 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 enjoy greater protection in order to encourage democratic debate.<sup>139</sup>

109. In effect, the use of criminal law to impose subsequent liability for statements made in the media on matters of public interest would directly or indirectly constitute intimidation which, ultimately, would limit freedom of expression and would impede public scrutiny of unlawful conduct, such as acts of corruption, abuse of authority etc. This would undoubtedly weaken public control over the State’s powers, causing grave damage to democratic pluralism. In other words, the protection of honor through criminal law, which may be legitimate in other cases, is not consistent with the Convention in the previously described scenario.<sup>140</sup>

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<sup>134</sup> Cf. *Case of Kimel v. Argentina*, *supra*, para. 51, and *Case of Moya Chacón et al. v. Costa Rica*, *supra*, para. 73.

<sup>135</sup> Cf. *Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights)*. Advisory Opinion OC-7/86 of August 29, 1986. Series A No. 7. para. 25, and *Case of Palacio Urrutia et al. v. Ecuador*, *supra*, para. 103.

<sup>136</sup> Cf. *Case of Kimel v. Argentina*, *supra*, para. 56, and *Case of Tristán Donoso v. Panama*, *supra*, para. 112.

<sup>137</sup> Cf. *Case of Mévoli v. Argentina*, *supra*, para. 145, and *Case of Moya Chacón et al. v. Costa Rica*, *supra*, para. 74.

<sup>138</sup> Cf. *Advisory Opinion OC-23/17*, *supra*, para. 214.

<sup>139</sup> Cf. *Case of Herrera Ulloa v. Costa Rica*, *supra*, para. 128, and *Case of Moya Chacón v. Costa Rica*, *supra*, para. 74.

<sup>140</sup> Cf. *Case of Álvarez Ramos v. Venezuela. Preliminary objection, Merits, reparations and costs*. Judgment of August 20, 2019, para. 122, and *Case of Palacio Urrutia et al. v. Ecuador*, *supra*, para. 118.

110. This does not mean that speech protected by its public interest, such as statements referring to the conduct of public officials in the exercise of their duties, or the honor of public officials or public figures, should not be legally protected. Journalistic conduct could potentially result in liability in another legal sphere, such as in civil law, or could require rectification or public apologies, for example, in cases of possible abuses or excesses of bad faith.

111. The Court has stated that, in a democratic society, individuals who have an impact on matters of public interest are more exposed to public scrutiny and criticism. A different threshold of protection is applied because their activities go beyond the domain of the private sphere and belong to the realm of public debate. Therefore, they have voluntarily laid themselves open to a more intense public scrutiny.<sup>141</sup> This in no way means that the honor of those who take part in matters of public interest should not be legally protected, but that it should be protected in accordance with the principles of democratic pluralism.<sup>142</sup>

112. On this point, the European Court of Human Rights has repeatedly held that public officials must be willing to accept a greater degree of criticism than private individuals. It has also established that, "the limits of acceptable criticism are accordingly wider with regard to a politician acting in his public capacity than in relation to a private individual. The former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible to criticism."<sup>143</sup> According to the European Court, "the limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system, the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to unjustified attacks and criticisms by its adversaries or the media."<sup>144</sup>

113. For its part, the African Court of Human and People's Rights has stated that "freedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate relating to public figures." It has also reiterated that "people who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise, public debate may be stifled altogether."<sup>145</sup>

114. The Court recalls that it considers as topics of public interest those opinions and statements on matters regarding which society has a legitimate interest to be informed, in order to be aware of anything that affects the performance of the State or impacts rights or general interests or anything that has significant consequences.<sup>146</sup> This includes statements on environmental matters. In this regard, the Court believes that the opinions, expressions, ideas and information related to the protection or management of the environment, as well as those on the environmental risks and impact of activities or projects, should be considered

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<sup>141</sup> Cf. *Case of Herrera Ulloa v. Costa Rica*, *supra*, para. 129, and *Case of Moya Chacón et al. v. Costa Rica*, *supra*, para. 75.

<sup>142</sup> Cf. *Case of Herrera Ulloa v. Costa Rica*, *supra*, para. 128, and *Case of Moya Chacón et al. v. Costa Rica*, *supra*, para. 75.

<sup>143</sup> Cf. ECHR, *Case of Oberschlick v. Austria*, No. 11662/85. Judgment of May 23, 1991, para. 59.

<sup>144</sup> Cf. ECHR, *Case of Castells v. Spain*, no. 11798/85. Judgment of April 23, 1992, para. 46; *Case of Fatullayev v. Azerbaijan*, No. 40984/07. Judgment of April 22, 2010, para. 116, and *Otegi Mondragon v. Spain*, No. 2034/07. Judgment of March 15, 2011, para. 58.

<sup>145</sup> Cf. ACHPR, *Case of Lohé Issa Konaté v. Burkina Faso*. Application 004/2013. December 5, 2014; para. 155.

<sup>146</sup> Cf. *Case of Tristán Donoso v. Panama*, *supra*, para. 121, and *Case of Moya Chacón et al. v. Costa Rica*, *supra*, para. 74.

as matters of public interest in terms of the protection of freedom of expression because, as it has recognized in its case law, the respect for and guarantee of human rights cannot be separated from the protection of the environment.<sup>147</sup> The Court has also recognized the undeniable relationship that exists between the protection of the environment and the realization of other human rights, since environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights.<sup>148</sup> Consequently, for this Court there is no doubt that in a democratic society, environmental issues must be considered matters of public interest and that States must protect freedom of expression and promote citizens' participation in these matters.

115. Therefore, considering the need to harmonize the protection of the rights to freedom of expression and to honor and the importance of freedom of expression in a democratic society, the Court reiterates that the imposition of subsequent liabilities for the abusive exercise of the right to freedom of expression is of an exceptional nature.<sup>149</sup> However, in line with international case law and mindful of the importance of public interest discourse and the greater acceptance that criticism of public officials should have, this Court considers that, in the exercise of the right to freedom of expression on matters of public interest, and in particular criticism directed at public officials, a criminal response is contrary to the American Convention. Consequently, States must create alternative mechanisms to criminal proceedings for public officials to obtain a rectification, or a response or civil reparation when their honor or good name has been injured. Such measures must be applied in accordance with the principle of proportionality, since even in those cases where there is an abusive exercise of freedom of expression and where substantial compensation is appropriate, the sanctions to be imposed must be evaluated in accordance with the right to freedom of expression and, therefore, must be proportionate to the reputational damage suffered. Likewise, there must be guarantees that allow for the protection of the person sanctioned against awards for compensation that are disproportionate to the amount established for damage to reputation.

### ***B.5 Analysis of the specific case***

116. The Court will now examine the compatibility of the subsequent liabilities established for the alleged victim in the instant case with the American Convention, taking into account the standards set forth above.

117. This Court finds that Mr. Baraona's statements referred to the actions of Senator SP, in his capacity as a public official who was in exercise of his duties when such statements were made, and that these statements concerned environmental matters, specifically, the illegal logging of alerce trees.<sup>150</sup> In other words, the statements met the subjective, functional

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<sup>147</sup> Cf. *Advisory Opinion OC-23/17, supra*, para. 55.

<sup>148</sup> Cf. *Case of Katas Fernández v. Honduras, supra*, para. 148, and *Advisory Opinion OC-23/17, supra*, paras. 47, 54 and 126.

<sup>149</sup> Cf. *Case of Herrera Ulloa v. Costa Rica, supra*, para. 120, and *Case of Moya Chacón et al. v. Costa Rica, supra*, para. 71 and 72.

<sup>150</sup> Regarding the scale of the logging of alerce trees, Mr. Baraona stated at the public hearing that "in this case 10 hectares of alerce were burned down intentionally, which is fully confirmed by the expert reports; in Chile, no fires are caused by lightning or natural causes, they are all caused by man. There was an irrationality in our country linked to an illegal trade, here millions and millions of dollars were transferred in full view of all the authorities of our country; unfortunately, and I'm even ashamed to say it, this happened in Chile [...]. That was my connection with the alerce trees, in the end it was basically a desperate attempt to do something, someone had to do something. [...] I took part in aerial flights when that fire happened, it reached me, that fire, as you know, traffic had to be stopped between Puerto Montt and Puerto Varas because there was so much smoke that cars could not circulate, there were respiratory problems among the population, it was hellish. The terrible [part] was going to that place after the fire, seeing the scorched earth, burnt pumas, burnt deer, that is what caused this internal rage of wanting to do something

and material criteria required to be relevant to the public debate. Likewise, the Court notes that in the instant case there is no dispute that the comments made were a matter of public interest.<sup>151</sup> Indeed, the Court reiterates that where environmental matters are concerned, the statements in question have a clear public interest, which implies a stricter analysis of the restrictions imposed on the exercise of the right to freedom of expression on environmental matters.

118. In relation to the above, the Court recalls that, in the context of discussion on matters of public interest, the right to freedom of expression not only protects the transmission of statements that are harmless or well received by public opinion, but also those that shock, irritate or disturb public officials or any sector of the population.<sup>152</sup> Thus, although Mr. Baraona Bray's statements were extremely critical of the conduct of Senator SP in relation to the authorities responsible for the conservation of the alerce tree, this does not mean that his speech is unprotected from the perspective of freedom of expression. Expressions that may be shocking or critical are resources or strategies used by human rights and environmental defenders who seek to communicate and raise awareness among the general population. Hence, a statement on a matter of public interest enjoys special protection in view of the importance that this type of discourse has in a democratic society. Given the nature and purpose of the statement, it is inappropriate to require *exceptio veritatis* in court, since the purpose is to point out a situation of public interest that deserves to be investigated by the relevant authorities. It would be an impossible burden to comply with this requirement in every situation involving allegations related to corruption, misuse of public funds or environmental damage, as in the instant case. Therefore, the Court must consider whether the possible subsequent liabilities applied in the present case complied with the requirements established in Article 13(2) of the Convention.

119. The alleged victim was subjected to criminal proceedings, in which he was found responsible for the crime of serious insults to the detriment of the senator. The Guarantee Court of First Instance of Puerto Montt imposed a suspended prison sentence of 300 days, a fine of 20 monthly tax units, and an accessory penalty of suspension from public office for the period of the sentence and with costs, as contemplated in the Chilean Criminal Code and in Law No. 19.733. The Supreme Court upheld the decision based on the infringement of Senator SP's right to honor.

120. In this regard, the Court recalls that criminal prosecution is the most restrictive measure to freedom of expression. Therefore, its use in a democratic society should be exceptional and be reserved for those cases in which it is strictly necessary to protect fundamental legal interests from attacks that damage or endanger them, since to do otherwise would result in the abusive exercise of the punitive power of the State.<sup>153</sup> In other words, from the array of possible measures to claim subsequent liability for the potential abusive exercise of the right to freedom of expression, criminal prosecution will only be appropriate in those exceptional cases where it is strictly necessary to protect a pressing social need.<sup>154</sup>

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[...] those of us who wanted to do something, what we all had in common was having been there, having witnessed this 'ecocide', as they call it nowadays." Cf. Statement rendered by Carlos Baraona Bray before the Court, *supra*.

<sup>151</sup> It should be recalled that illegal logging of the alerce was a subject of strong public debate in Chile and a Commission of Inquiry on illegal logging of the alerce was established in the Chamber of Deputies (*supra* para. 51).

<sup>152</sup> Cf. *Case of Herrera Ulloa v. Costa Rica*, *supra*, para. 126, and *Case of Palacio Urrutia et al. v. Ecuador*, *supra*, para. 115.

<sup>153</sup> Cf. *Case of Kimel v. Argentina*, *supra*, para. 76, and *Case of Palacio Urrutia et al. v. Ecuador*, *supra*, para. 117.

<sup>154</sup> Cf. *Case of Álvarez Ramos v. Venezuela*, *supra*, para. 120, and *Case of Palacio Urrutia et al. v. Ecuador*, *supra*, para. 117.

121. The Court notes with concern that the sanction imposed on Mr. Baraona had a chilling effect on him and was disproportionate to the objective pursued. The Court finds that the application of the criminal offense of serious insults in this case constituted an indirect means of restricting freedom of expression by affecting him both personally and socially.

122. On the one hand, the conviction and fine imposed (*supra* para. 59), despite the subsequent dismissal of the case (*supra* para. 64), had the effect of inhibiting Mr. Baraona from speaking out on matters of general public interest, and from taking part in the public debate in Chile on the alleged acts of corruption and illegal logging of alerce trees. During the two years after his conviction, Mr. Baraona did not make any statements. As a result, he was affected on a personal level, given that his continued participation in these discussions caused him to fear another criminal sanction. In his statement before this Court, Mr. Baraona stated the following:

The crime I was accused of is a crime that in Chile normally carries 40 days of imprisonment, which is the norm. Anyone convicted of slander is sentenced to 40 days in prison, [but] I was given 300 days, because the message is: never again, do not speak out again. Because the message was not for me, it was for everyone who could have cooperated and provided background information. That is silencing, that is what happened to me, 300 days.<sup>155</sup>

123. When Mr. Baraona decided to participate again in the public debate in 2006, by speaking on the "Piel de Jaguar" channel, both he and the program's executive director were again threatened with the punitive power of the State, through the filing of a lawsuit (*supra* para. 65). In this regard, the Court notes that, after being prosecuted twice and criminally convicted, Mr. Baraona abandoned his plan to play an active role in environmental issues and the defense of the alerce and, as he stated in the public hearing, he has faced difficulties in his professional practice.

124. On the other hand, there is no record that the debate has continued with the same force in the public sphere. Mr. Baraona noted that, in 2004, "prominent people in Chile were motivated by the issue"; however, after his interview and criminal prosecution:

They also silenced a part of their inner being, they never again - if you review the press in Chile - they never again participated in any complaint, in any act of environmental protection in the face of abuse by both the State and the private sector, because the private sector can also abuse the environment. So, many other lawyers, many other people that I know, and I myself kept silent.<sup>156</sup>

125. The Court notes that, although the case against Mr. Baraona Bray was definitively dismissed, the conviction judgment negatively affected his right to freedom of expression. Indeed, during the public hearing in this case, Carlos Baraona Bray stated that, from the moment of his conviction, he stopped making statements for approximately two years on the illegal logging of the alerce tree, and on the participation of Senator SP or any other public official in this matter.<sup>157</sup> In addition, the Court considers that, although the State claims that the dismissal of the case would be equivalent to an acquittal that puts an end to the criminal proceedings and has the effect of *res judicata*, Mr. Baraona's conviction had the effect of preventing him from making statements about the logging of alerce trees and the conduct of public officials in relation to this matter.

126. On this point, the Court recalls that international environmental standards emphasize the importance that States adopt adequate and effective measures to protect the rights to freedom of opinion and expression as well as access to information in order to guarantee citizens' participation in environmental issues, since this is of vital importance for the realization

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<sup>155</sup> Statement of Carlos Baraona Bray at the public hearing before the Court, *supra*.

<sup>156</sup> Statement of Carlos Baraona Bray at the public hearing before the Court, *supra*.

<sup>157</sup> Cf. Statement of Carlos Baraona Bray before the Court, *supra*.

and protection of the right to a healthy environment, in accordance with the Escazú Agreement (*supra* para. 100).

127. It is also important to note that Chilean law allowed Senator SP to use judicial mechanisms, namely a strategic lawsuit against public participation, or “SLAPP”, with the intention of silencing an individual who made statements of public interest on potentially irregular actions. The Court considers that, in addition to affecting Mr. Baraona Bray’s freedom of expression, in this case the imposition of the sentence, as well as the use of the criminal mechanism against him, created a chilling effect, since it inhibited the communication of ideas, opinions and information by third parties, which in turn affected the right to freedom of expression.

128. The Court has established that in the case of speech protected by its public interest, such as that referring to the conduct of public officials in the exercise of their duties, the State’s punitive response via the use of criminal law to protect the honor of a public official is not consistent with the Convention.<sup>158</sup> In each specific case, however, the definition of “speech of public interest” depends on the concurrence of three elements –a subjective element, a functional element and a material element - which allows criminal judges a considerable margin of discretion. This means that such an analysis cannot take place before criminal proceedings have been initiated, since a decision of this nature can only be made after a criminal proceeding has begun. Thus, even if the competent judicial authority decides that the criminal sanction is not applicable, the chilling effect that undermines freedom of expression would already have been produced.

129. In view of the foregoing, this Court deems it necessary to continue along the protective path of the right to freedom of expression recognized in Article 13 of the American Convention, on the understanding that, when it comes to crimes against honor that involve insults and the imputation of offensive acts, the prohibition of criminal persecution should not be based on the potential ‘public interest’ classification of the statements that gave rise to the subsequent liability, but rather on the status of the person whose honor has allegedly been affected as a public official or public authority.

130. This approach would prevent the chilling effect caused by filing criminal proceedings, as well as its impact on the enjoyment of freedom of expression, and the weakening and impoverishment of debate on issues of public interest. It would effectively safeguard the right to freedom of expression, because by immediately ruling out the possibility of initiating criminal proceedings, it would prevent the use of this measure to inhibit or discourage dissenting voices or complaints against public officials.

131. At the same time, the Court notes with concern that Article 12(13) of the Chilean Criminal Code establishes as an aggravating circumstance of a crime, “[to] commit it with disparagement or offense against the public authority or in the place where such authority is exercising its functions” (*supra* para. 46). Although this provision was invoked in the complaint, it was not applied, because it was dismissed as an aggravating circumstance. It was stated in the judgment that, “in the case of a crime against honor, such as slander, if this offense is also considered to aggravate criminal liability, Article 63 of the Criminal Code would be violated.”<sup>159</sup> Nevertheless, the Court considers that such rules have the potential, in circumstances similar to those of this case, to have a chilling effect on society with respect to the right to freely express one’s opinion or criticize the actions of public officials.

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<sup>158</sup> Cf. *Case of Álvarez Ramos v. Venezuela*, *supra*, paras. 120 and 122, and *Case of Palacio Urrutia et al. v. Ecuador*, *supra*, paras. 117 and 118.

<sup>159</sup> Cf. Judgment issued by the Court of Guarantee of Puerto Montt, on June 22, 2004, *supra*.

132. Finally, this Court notes that the Chilean legislation in force at the time of the facts did not establish an exception to the application of the crimes of libel and slander in the case of speech of public interest, in accordance with the standards developed in this judgment. Furthermore, Article 29 of Law No. 19.733, cited in the domestic judgment as the basis for Mr. Baraona's criminal liability (*supra* para. 59), stated that unless the speech was specialized commentary or criticism on political, literary, historical, artistic, scientific, technical and sports issues, the exercise of freedom of expression could be punished in matters of public interest, which is contrary to the Convention. For this reason, the Court concludes that the State is responsible for the violation of Article 13(1) and 13(2) of the American Convention, in relation to Articles 1(1) and 2 of the same instrument, to the detriment of Carlos Baraona Bray.

### **B.6. Conclusion**

133. In view of the foregoing, the Court concludes that the State violated the right to freedom of thought and expression enshrined in Article 13(1) and 13(2) of the American Convention, in relation to the obligations established in Articles 1(1) and 2 of the same instrument, to the detriment of Carlos Baraona Bray.

## **VIII-3**

### **LACK OF LEGALITY IN THE RESTRICTIONS IMPOSED ON FREEDOM OF THOUGHT AND EXPRESSION, IN RELATION TO THE OBLIGATION TO RESPECT THE RIGHTS ESTABLISHED IN THE CONVENTION<sup>160</sup>**

#### **A. Arguments of the Commission and the parties**

134. Regarding the incompatibility of the criminal offenses charged in this case with the Convention, the **Commission** argued that under the principle of strict criminal legality (Article 9 of the Convention), the law applied in the instant case did not establish clear parameters that would make it possible to determine the prohibited conduct and its elements. It pointed out that Article 416 of the Criminal Code refers to any expression or action that dishonors, discredits or disparages - a definition that does not establish a clear and unequivocal boundary to decide when it is lawful or not lawful to publicly denounce facts of public interest or issue a critical opinion about a State authority. In this sense, it argued that the vagueness of the rule paves the way for the use of criminal law to create an intimidating environment that inhibits discourse and debate on issues of public interest. It also noted that Article 417 establishes abstract criteria, even leaving it to the discretion of the individual who considers himself offended, or to public opinion; and refers to criteria that can only be defined by the judge *ex post facto* and is does not serve to guide the conduct of individuals, faced with the serious consequence of being deprived of personal liberty. Thus, it concluded that the State violated the right to freedom of expression and failed to comply with the requirements of strict legality in breach of Articles 13(1), 13(2) and 9 of the American Convention, in relation to Articles 1(1) and 2 thereof.

135. The **representatives** referred to the Chilean legislation that contains the criminal definitions of insults and slander of which Mr. Baraona Bray was accused.<sup>161</sup> They pointed out that Mr. Baraona Bray was not convicted of the crime of slander (Article 412 of the Criminal Code), because in this specific case the conditions of the criminal offense were not met, and

<sup>160</sup> Article 9 of the American Convention, in relation to Article 1(1) thereof.

<sup>161</sup> The crime of insult is defined in the Chilean Criminal Code in Articles 416 to 420. The crime of slander is defined in Articles 412 to 415, while the crime of slander with publicity is defined in Article 413. Article 417 specifically addresses the crime of serious insults. Articles 421 to 431, contain provisions common to both criminal definitions.

requested that the Court declare the violation of Articles 13 and 9 of the American Convention. As for Article 9 of the Convention, in their pleadings and motions brief, the representatives merely asked the Court to declare its violation, without providing specific arguments in this regard.

136. The **State** referred to the “vagueness of the Commission’s reproach, without clearly articulating the standard of clarity that that the norm should satisfy.” It argued that, in any case, the law is more precise and definite than the Commission claims, in terms of the criminal offense applied to Mr. Baraona's case, since it is not “a single offense of absolutely indeterminate scope, but rather a set of rules that attempt to specify the scope of the offense of defamation in various cases.” According to the State, these provisions contain the description of the criminal conduct, expressed in Article 416 of the Criminal Code; the characterization of different types of insult; the sanction; the application of the exception of veracity to allegations against public employees for facts concerning the exercise of their duties and when the accusation is made to defend a real public interest; the enumeration of six facts that are considered to be of public interest for the application of the exception of truthfulness; the aspects considered to be relevant to the private sphere of individuals; and the grounds for justification in Article 10 paragraph 10 of the Criminal Code, related to the legitimate exercise of a right, which refers to the right to freedom of expression in Article 19 No. 12 of the Constitution and Article 13 of the American Convention. It also mentioned that experience shows that this type criminal offense has not given rise to indiscriminate criminal prosecution that inhibits the exercise of freedom of expression. Consequently, it concluded that there is clearly no violation of Article 9 of the American Convention or of the requirement of legality provided for in Article 13 of the same treaty.

## **B. Considerations of the Court**

137. In the case of *Kimel v. Argentina*, the **Court** has pointed out that any limitation or restriction of freedom of information must be provided for by law, both in a formal and material sense. However, if the restriction or limitation derives from criminal law, it is necessary to observe the strict requirements characteristic of criminal classification in order to satisfy the principle of legality in this area. Thus, such restrictions must be formulated previously, in an express, accurate, and exhaustive manner.<sup>162</sup> In this regard, the Court reiterates that when drafting criminal definitions, it is necessary to use strict and unambiguous terms that clearly delimit the punishable conduct, giving full meaning to the principle of criminal legality. Ambiguity in the formulation of criminal definitions creates doubts and opens the door to the discretion of the authorities. This is particularly undesirable when a person’s criminal liability is to be determined and punished with sanctions that severely affect fundamental rights, such as life or freedom. Norms that do not strictly delimit criminal conduct may end up violating the principle of legality contained in Article 9 of the American Convention.<sup>163</sup>

138. With respect to strict legality, the Court has stated that restrictions to the exercise of freedom of expression must be previously established by law as a means to ensure that they are not left to the discretion of the public authority. Accordingly, the definition of the conduct must be clear and accurate,<sup>164</sup> particularly if it involves criminal convictions and not those of a civil nature.<sup>165</sup>

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<sup>162</sup> Cf. *Case of Kimel v. Argentina*, *supra*, para. 63.

<sup>163</sup> Cf. *Case of Castillo Petruzzi et al. v. Peru*, *supra*, para. 121, and *Case Kimel v. Argentina*, *supra*, para. 63.

<sup>164</sup> Cf. *Case of Tristán Donoso v. Panama*, *supra*, para. 56, *Case of Moya et al. v. Costa Rica*, *supra*, para. 72.

<sup>165</sup> Cf. *Case of Kimel v. Argentina*, *supra*, para. 77, and *Case Moya et al. v. Costa Rica*, *supra*, para. 72.

139. The Court confirms that Mr. Baraona was prosecuted under Articles 416, 417 and 418 of the Chilean Criminal Code and convicted for the criminal offense of serious insults set forth in Articles 417 and 418 of said Code, as well as Article 29 of Law No. 19.733 on Freedom of Opinion and Information and the Practice of Journalism, in force at the time of the facts. Therefore, the Court deems it necessary to examine the conventionality of the aforementioned articles in light of Articles 9 and 13 of the American Convention.

140. The Court notes that Article 417 of the Criminal Code, which refers to the aggravating circumstances of the crime of insult (*supra* para. 45), mentions different criteria for determining whether or not the insult is serious. One of them is established in paragraph 3 of said provision, which indicates as an aggravating factor the imputation "of a vice or lack of morality whose consequences may significantly harm the reputation, credit or interests of the offended party." Likewise, paragraph 4 of said article states that "insults that by their nature, occasion or circumstances are understood by the public as an affront" are considered serious, while paragraph 5 provides that insults may be classified as serious "considering the status and circumstances of the offended party and of the offender."

141. As stated previously, criminal offenses that restrict the exercise of freedom of expression must be defined in a clear and precise manner. However, in the opinion of this Court, the definition of serious insults set forth in Article 417 of the Criminal Code does not meet this standard. On the one hand, it refers to open-ended and non-specific concepts such as the imputation of a vice or lack of morality (paragraph 3), and on the other, it states that the seriousness of the insult must be classified according to the circumstances of the offended party (paragraph 5), which may be associated with the status of the offended party as a public official and is therefore contrary to the standards previously established in this judgment (*supra* para. 45).

142. Based on the foregoing, the content of the law applied in the instant case does not strictly delimit the conduct defined in Article 417 of the Criminal Code as serious insult, the crime for which Mr. Baraona was convicted. Consequently, the Court considers that the State violated the principle of legality established in Article 9 of the American Convention, in relation to Article 13 thereof and Articles 1(1) and 2 of the same instrument, to the detriment of Carlos Baraona Bray.

#### **VIII-4 RIGHT TO JUDICIAL PROTECTION IN RELATION TO THE OBLIGATION TO RESPECT RIGHTS<sup>166</sup>**

##### **A. Arguments of the Commission and the parties**

143. The **Commission** argued that Mr. Baraona Bray filed an appeal for annulment against the decision of the Guarantee Court of Puerto Montt that violated his right to freedom of expression. However, the Second Chamber of the Supreme Court failed to carry out a control of conventionality by applying inter-American standards and instead ratified the first instance decision, even though the facts and opinions expressed by the alleged victim were related to issues of great public interest in Chile and could be considered credible. The Supreme Court demanded that the alleged victim prove the truth of his statements, despite the fact that Carlos Baraona had specified the sources on which he relied, which led him to reasonably believe, based on the circumstances of the public debate, that the information he had provided regarding the senator's actions was credible. The Commission considered that the Supreme Court did not conduct an analysis in accordance with the standards derived from Article 13 of

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<sup>166</sup> Article 25(1) of the American Convention, in relation to Article 1(1) thereof.

the Convention and did not provide effective judicial protection of the alleged victim's right to freedom of expression. Therefore, the State also violated Article 25(1) of the Convention.

144. Although the **representatives** asked the Court to declare the violation of Article 25(1) of the American Convention, they did not put forward specific arguments in this regard and did not cite this article in their petition.

145. The **State** reiterated its preliminary objection regarding the alleged serious infringement of its right of defense. It indicated that it has complied with its international obligations regarding the right to judicial protection, established in Article 25(1) of the American Convention, in relation to Article 1(1) thereof. It pointed out that the dismissal of an action filed before the domestic courts does not necessarily imply a violation of the right to judicial protection. It considered that the appeal for annulment filed by Mr. Baraona was a suitable mechanism in the Chilean criminal procedural system to invalidate the oral trial and the sentence when there is a substantial infringement of constitutional rights or guarantees related to the formalities of the trial or to the facts that had been considered proven, allowing for a review of the limits to the assessment of the evidence imposed by the rules of sound judgment.

146. It further argued that in this case the Supreme Court "responded to Mr. Carlos Baraona's objections to the first instance judgment on the alleged infringement of freedom of expression, by referring to the inadmissibility of the *exceptio veritatis* [...] The judgment of the Supreme Court demonstrates that it took into account the arguments of the parties, ruled on the conflict of rights, and also gave reasons for its decision by rejecting the appellant's arguments." It also argued that the Supreme Court weighed the right to freedom of expression against the rights of third parties. Therefore, the alleged victim had the appropriate means to defend himself in the criminal proceedings, thus safeguarding the balance afforded by the domestic legal system to protect both rights. In addition, the State considered that the Supreme Court's alleged failure to exercise control of conventionality was inadmissible, because there is no express international obligation in the American Convention, or in any other treaty ratified by Chile, that requires the domestic courts to apply the Inter-American Court's interpretation in cases other than those in which the State has been convicted. The State reiterated that the aforementioned argument regarding control of conventionality is inadmissible for temporal reasons. It also alleged that the Commission confuses freedom of opinion with freedom of information. Thus, it made an error in stating that the information provided by Mr. Carlos Baraona regarding the alleged improper actions of former Senator SP, particularly, the discussion of the illegal logging of the alerce tree in Chile, need not be truthful. Therefore, it argued that freedom of opinion does not require that the statements or expressions be truthful; however, in the case of freedom of information, at least a certain burden of veracity or plausibility is applicable.

## **B. Considerations of the Court**

147. Article 25(1) of the Convention requires that all persons under the jurisdiction of the State be guaranteed an effective judicial remedy against acts that violate their fundamental rights.<sup>167</sup> Such effectiveness presupposes that, in addition to the formal existence of remedies, the latter provide results or responses to the violations of rights established either in the Convention, the Constitution or in the laws.<sup>168</sup> This means that the remedy must be suitable

<sup>167</sup> Cf. *Case of Cuya Lavy et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of September 28, 2021. Series C No. 438. para. 170, and *Case of Mina Cuero v. Ecuador, supra*, para. 116.

<sup>168</sup> Cf. *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*. Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24, and *Case of Mina Cuero v. Ecuador, supra*, para. 116.

to address the violation and that its application by the competent authority must be effective.<sup>169</sup>

148. In particular, the effectiveness of the remedy in terms of the protection of Article 25, implies the real possibility of having access to a judicial remedy so that a competent authority capable of issuing a binding decision may determine whether or not there has been a violation of a right that the person claiming the right believes he or she has.<sup>170</sup> The effectiveness of the judicial remedy implies that the analysis by the competent authority cannot be reduced to a mere formality, but must examine the reasons invoked by the complainant and expressly state them.<sup>171</sup> Likewise, the Court considers that the effectiveness of the remedies must be assessed in each specific case, taking into account whether “there were domestic mechanisms that guaranteed real access to justice to claim reparation for the violation.”<sup>172</sup> This Court does not assess the effectiveness of the remedies filed on the basis of an eventual resolution favorable to the victim’s interests.<sup>173</sup>

149. In the instant case, the Court confirms that Mr. Baraona Bray had access to the judicial remedy of annulment of the first instance ruling issued by the Guarantee Court of Puerto Montt. In its second instance decision, the Supreme Court referred to the infringement of freedom of expression, to “the limits and counterbalances” that this right has in relation to other values at stake, and to the right of recourse of the person affected by the opinion or information expressed, and considered that Mr. Baraona “did not make personal appraisals, but rather assertions, which in no way represented specialized political criticism.” However, the Supreme Court did not consider the scope that the right to freedom of expression has under the American Convention, in accordance with the interpretation provided by this Court.

150. Thus, the Court considers that the decision on the appeal did not include an analysis of the domestic laws that regulate slander and libel in light of the requirements for subsequent liability for the exercise of freedom of expression. In particular, this Court advises that the conventional limits to restrictions on public interest speech were not properly considered. Moreover, the ruling did not take into account that the limits on the criticism of public officials, in the exercise of their duties are broader than the limits of criticism of private individuals. On the contrary, Article 29 of Law No. 19.733, which states that the exercise of freedom of expression could be punished unless it was specialized commentary on political, literary, historical, artistic, scientific, technical and sports criticism, served as a basis for the criminal conviction of Mr. Baraona.

151. On the other hand, the Supreme Court affirmed in its ruling that Carlos Baraona “reported certain aspects, which although public, were a narration of facts that were not reasonably truthful, since they were clearly not proven or corroborated by other information or news sources. It was evident that the defendant exceeded the reasonable and prudent limits of what he recklessly disclosed as true facts - which were false - and in this respect he did not have the constitutional protection that he required, but in addition, he harmed another person, who also had [the right] to honor [...]”<sup>174</sup> As for the *animus injuriandi*, the Supreme

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<sup>169</sup> Cf. Advisory Opinion OC-9/87, *supra*, para. 24, and *Case of Mina Cuero v. Ecuador*, *supra*, para. 116.

<sup>170</sup> Cf. Advisory Opinion OC-9/87, para. 24, and *Case of Pavez Pavez v. Chile. Merits, reparations and costs.* Judgment of February 4, 2022. Series C No. 449, para. 157.

<sup>171</sup> Cf. *Case of López Álvarez v. Honduras. Merits, reparations and costs.* Judgment of February 1, 2006. Series C No. 141, para. 96, and *Case of Habbal et al. v. Argentina. Preliminary objections and merits.* Judgment of August 31, 2022. Series C No. 463, para. 109.

<sup>172</sup> Cf. *Case of Former Employees of the Judiciary v. Guatemala. Preliminary objections, merits and reparations.* Judgment of November 17, 2021. Series C No. 445, para. 78.

<sup>173</sup> Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits.* Judgment of February 16, 2021. Series C No. 421, para. 101, and *Case of Habbal et al. v. Argentina*, *supra*, para. 109.

<sup>174</sup> Cf. Judgment of the Supreme Court, of September 9, 2004, *supra*.

Court established that, although for certain criminal offenses the law required the concurrence of specific intent as a legal component, which normally occurred with comments made maliciously or knowingly, there were already jurisprudential criteria by which this intent to injure was understood as the malice of the crime, consisting simply in knowing that the expression proffered or the action executed was dishonorable, discrediting or demeaning. For the above reasons, the Supreme Court agreed with the judgment of the Guarantee Court in the sense that Mr. Baraona was aware of the dishonorable nature of his statements, and that these could not be considered sufficiently serious and reasonable. Consequently, the Supreme Court denied the appeal for annulment (*supra* para. 63).

152. Consequently, the Court considers that, in the absence of an adequate assessment of the scope of the right to freedom of expression, the appeal for annulment cannot be deemed to have been an effective remedy in the case under study. Therefore, the State is responsible for the violation of Article 25(1) of the American Convention, in relation to Article 1(1) of the same instrument, to the detriment of Carlos Baraona Bray.

153. The Court further notes that, despite the fact that the sentence was suspended and that the Judiciary later dismissed the criminal case against Mr. Baraona on August 1, 2005 and filed it on August 10 of the same year, without imposing any sanction, Mr. Baraona was the victim of the imposition of a sentence that remained in force until the date of the dismissal.

## IX REPARATIONS

154. Based on the provisions of Article 63(1) of the American Convention, the Court has held 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.<sup>175</sup>

155. Reparation for the harm caused by the breach of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of reestablishing the situation prior to the violation.<sup>176</sup> If this is not feasible, as occurs in the majority of cases of human rights violations, the Court may order measures to protect the rights that have been violated and repair the harm caused.<sup>177</sup> Accordingly, the Court has considered the need to provide different types of reparation in order to fully redress the damage; thus, in addition to pecuniary compensation, other measures such as satisfaction, restitution, rehabilitation, and guarantees of non-repetition have special relevance owing to the severity of the harm caused.<sup>178</sup>

156. The Court has also established that reparations must have a causal nexus with the facts of the case, the violations declared, the damage proven, and the measures requested to

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<sup>175</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Leguizamón Zaván v. Paraguay, supra*, para. 91.

<sup>176</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, para. 26, and *Case of Aroca Palma et al. v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of November 8, 2022, para. 121.

<sup>177</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, para. 26, and *Case of Aroca Palma et al. v. Ecuador, supra*, para. 121.

<sup>178</sup> Cf. *Case of the 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 Aroca Palma et al. v. Ecuador, supra*, para. 121.

redress the respective harm. Consequently, the Court must analyze the concurrence of these factors in order to rule appropriately and according to the law.<sup>179</sup>

157. Therefore, taking into account the violations declared in the previous chapters, the Court will now examine the claims presented by the Commission and the representatives, as well as the arguments of the State, in light of the criteria established in its case law regarding the nature and scope of the obligation to make reparation, for the purpose of ordering measures to redress the harm caused to the victim.<sup>180</sup>

158. International case law, and in particular that of the Court, has repeatedly established that the judgment constitutes *per se* a form of reparation.<sup>181</sup> Nevertheless, given the circumstances of this case and the violations committed against the victim, the Court finds it pertinent to order other measures.

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<sup>179</sup> Cf. *Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Leguizamón Zaván v. Paraguay, supra*, para. 91.

<sup>180</sup> Cf. *Case of Andrade Salmón v. Bolivia. Merits, reparations and costs*. Judgment of December 1, 2016. Series C No. 330, para. 189, and *Case of Leguizamón Zaván v. Paraguay, supra*, para. 92.

<sup>181</sup> Cf. *Case of Neira Alegría et al. v. Peru. Reparations and costs*. Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of Romero Ferris v. Argentina. Merits, reparations and costs*. Judgment of October 15, 2019. Series C 391, para. 180.

## A. Injured party

159. Pursuant to Article 63(1) of the Convention, this Court reiterates that it considers as injured party anyone who has been declared a victim of the violation of any right recognized therein. Therefore, this Court considers Carlos Baraona Bray as the “injured party.”

## B. Measures of restitution

160. The **Commission** requested that the State be ordered to annul the criminal conviction against Carlos Baraona Bray, as well as all the consequences derived therefrom. The **representatives** requested that all records of the criminal proceedings against the victim be expunged.

161. The **State** argued that said measure is inadmissible, since from the background certificate that has been offered as evidence, it is clear that Mr. Baraona has no criminal record whatsoever. It emphasized that this document is suitable and legally valid to know whether a person has been convicted of a crime or a simple offense, or for the misdemeanors contemplated by law. According to Chilean law, Mr. Baraona cannot be considered a recidivist, either for crimes of the same nature or of a different type. Furthermore, it pointed out that it would be inappropriate to annul the criminal conviction imposed on Mr. Baraona Bray, since the case was definitively dismissed. The conviction in the case under discussion lost all its effects from the moment that Article 398 of the Code of Criminal Procedure was applied. In addition, since the dismissal was issued, the criminal proceedings for the crime of slander were irrevocably terminated.

162. The **Court** notes that both the representatives in their arguments and the victim at the public hearing, affirmed that it is possible for any person to access the lawsuits filed against him in the case search registry of the Virtual Judicial Office, through the Judicial Branch portal. In this regard, the representatives pointed out that the Chilean legal system establishes rules of disclosure of judicial proceedings,<sup>182</sup> with the exception of proceedings that are kept confidential, such as those involving family matters. Article 2(c), final paragraph of Law No. 20.886, in general, establishes that judicial cases are accessible to the public through an online platform provided by the Judiciary.<sup>183</sup> In this regard, the State explained that in order to consult cases, it is necessary to have certain precise background information to identify the case to be reviewed.<sup>184</sup> It added that the criminal record containing Mr. Baraona’s conviction is not easily accessible via a search on the website of the Chilean Judiciary, given that, as of April 1, 2015,<sup>185</sup> the Supreme Court of Chile annulled judicial cases filed under the unique taxpayer identification number (hereinafter “RUT”)] in order to protect the privacy of individuals who are parties to civil, criminal and labor proceedings conducted

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<sup>182</sup> Law No. 20.886, Article 2(c) final paragraph, states: “Search of cases. The Judiciary shall make available to the public, in its internet portal, a case search system that guarantees full access by all persons to the electronic file in conditions of equality.”

<sup>183</sup> According to the representatives, information on judicial proceedings is treated as public under the legal mandate granted to the judicial archivists and the certifying officer of the corresponding record, according to the provisions of Article 453 and following articles of the Organic Code of the Courts. The publication of judicial proceedings is a legal mandate that even the Supreme Court itself has provided for in Resolution No. 85-2019, which establishes the Consolidated Text of the Order for the application of Law No. 20.886 in the Judiciary.

<sup>184</sup> Such as: jurisdiction of the court, jurisdiction to which the court belongs, court in which the case is located, and the file number and year of the case. In addition, it is possible to search using other information, such as the name of the parties to the case (natural or legal person), the date on which the case was filed in the court, or the unique tax identification number (RUT) of the legal person that is a party to the case.

<sup>185</sup> Record No. 72-2009 of the Plenary of the Supreme Court, available at: <https://www.pjud.cl/institutional/download/1506>

in the national courts. Finally, it stated that the Judiciary has taken steps to limit access to judicial records via search engines hosted on its website using only the person's RUT number and name.<sup>186</sup>

163. The Court has confirmed that, according to the evidence, Mr. Baraona's background certificate does not show a criminal record. Nevertheless, the guide provided by the parties has made it possible to access the case search registry in the Virtual Judicial Office via the Judicial Branch portal, and to access the records of the criminal proceeding in which Mr. Baraona was convicted. Consequently, the representatives and the victim have requested that the records of the criminal proceedings be expunged. However, during the public hearing, Mr. Baraona stated that one solution would be to maintain the case history, but with a record of the ruling issued in the judgment of the Inter-American Court.<sup>187</sup>

164. In view of the foregoing and considering that in the instant case the Court determined, among the rights violated, the violation of freedom of expression to the detriment of the victim, the Court considers that the State must adopt, within six months from notification of this judgment, the measures necessary to ensure that an annotation appears in the judicial file of the case and the sentence handed down against Mr. Baraona, indicating that the criminal case and the sentence imposed was the subject of an analysis in a judgment issued by the Inter-American Court of Human Rights, in which it declared the international responsibility of the State of Chile. If necessary, the State must attach this annotation in the files of any other public entity in which the aforementioned case and conviction appear.

### C. Measures of satisfaction

165. The **Commission** asked the Court to order the State to adopt measures of satisfaction. In particular, it requested that Report No. 52/19 be disseminated in the Chilean Judiciary, without referring to this point in its final written observations.

166. The **representatives** requested that the Court order the State to ensure the effective dissemination, within the Judiciary, of the Commission's Merits Report No. 52/19 and of the Court's judgment in this case. In their final written arguments they noted that, as regards the dissemination of said report, this measure has not been fully complied with, since it has had no effect in the place where Mr. Baraona lives and practices his profession and his defense.

167. The **State** stressed that it has fully complied with the dissemination of Report No. 52/19, since the Judiciary has published the Commission's report on this case by various means, both on its internal system (intranet) and via its website and all official digital media and social networks.

168. In relation to the dissemination of the Commission's Report No. 52/19, the Court confirms that the State disseminated it via the different media of the Judiciary, including its internal system and its website. This information was not disputed by the Commission or by the representatives, although the latter claimed that it had not been disseminated in Mr.

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<sup>186</sup> Due to the entry into force of Law No. 20.285 on Access to Public Information, the Plenary of the Supreme Court issued Order No. 72-2009, which states that "In no case will it be permitted to carry out a search by RUT or by name."

<sup>187</sup> Mr. Baraona stated the following: "Perhaps the solution would be to keep the case history so that anyone who looks back can say that I was convicted for insulting a senator of the Republic, but then the Chilean State can clearly say that in compliance with the judgment of the Inter-American Court, we were wrong about Mr. Baraona, he exercised his legitimate right and therefore that record remains, because that would allow me to say that I was unfairly convicted. It's not enough for me that they erase all that - I prefer that they keep it because that's how I recover the activist in me, then I could answer your question, I could stand up calmly and resume my environmental litigation activities." Statement of Carlos Baraona Bray rendered before the Court, *supra*.

Baraona's place of residence. Thus, the Court concludes that the State did disseminate the Commission's Merits Report No. 52/19 to the Judiciary and to various media outlets, and therefore considers that it has complied with this request.

169. Regarding the publication of this judgment, as it has done in other cases,<sup>188</sup> the **Court** orders the State to publish, within six months from notification of this judgment, in a legible and appropriate font size, the following: a) the official summary of this judgment prepared by the Court, once, in the Official Gazette; b) the official summary of this judgment prepared by the Court, once, in a newspaper with wide national circulation, and c) this judgment in its entirety, available for one year on an official website of the Judiciary, in a manner accessible to the public from the home page of the website. The State shall immediately inform the Court once it has made each of the publications ordered, regardless of the one-year term to submit its first report as provided for in the thirteenth operative paragraph of this judgment.

#### **D. Guarantees of non-repetition**

##### ***D.1 Adoption of legislation***

170. The **Commission** requested the State be ordered to adapt its domestic criminal legislation in accordance with the State's obligations under the American Convention on freedom of expression, by decriminalizing the crimes of defamation, libel and slander in those cases where the offended person is a public official, a public figure or a private individual who has been involved in matters of public interest. In relation to the third recommendation on the adaptation of domestic legislation, the Commission noted that "there is no dispute over the fact that the draft Criminal Code which, according to the State, would enable compliance with the recommendation to adapt its criminal law, has not yet been discussed in the National Congress."

171. The **representatives** requested that domestic criminal legislation on freedom of expression be amended, requiring the State to repeal the crimes of defamation, libel and slander, in cases in which the right to freedom of expression is exercised to make political criticism against individuals, public officials or public authorities, so that the State is ordered to comply effectively with the obligations arising from the American Convention on freedom of expression. They pointed out that there has been no change in domestic criminal law. The State's attempt to issue a new Criminal Code that includes the "doctrine of legitimate criticism," complementing the second paragraph of Article 29 of Law No. 19.733, has failed to materialize as a valid regulation, because the draft Criminal Code that the government presented in 2018 has not made any progress since the time of its presentation, thus failing to comply with the third recommendation made by the Commission.

172. The **State** argued that not every criminal definition of slanderous conduct constitutes *per se* a violation of the Convention. In the Chilean legal system, the entire spectrum of crimes against honor (libel and slander) constitute crimes of private criminal action. Therefore, the procedural initiative is the responsibility of the respective plaintiff, without any intervention by the Public Prosecutor's Office. Moreover, the procedural practice of the Chilean courts has determined that the criminalization of such conduct is the *ultima ratio*, and therefore it must be applied in the strictest sense possible. With respect to the Commission's third recommendation, it specified that the current draft of the 2018 Criminal Code crystallizes the concept of the "doctrine of legitimate criticism," regulated in domestic law in the second paragraph of Article 29 of Law No. 19.733. In the draft bill that will soon be submitted to the

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<sup>188</sup> Cf. *Case of Cantoral Benavides v. Peru. Reparations and costs*. Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of Leguizamón Zaván v. Paraguay, supra*, para. 107.

National Congress for discussion, the weighing of interests that may exist will be examined on a case-by-case basis, which is necessary to guarantee the right to the protection of honor and dignity recognized in Article 11 of the Convention. The State has made efforts, which are still ongoing, to bring its domestic criminal law into line with inter-American standards on freedom of expression.

173. The **Court** reiterates that it is not only the suppression or issuance of norms in domestic law that guarantee the rights enshrined in the American Convention, in conformity with the obligation contained in Article 2 of said instrument. It also requires the establishment of State practices conducive to the effective observance of the rights and liberties enshrined therein. Consequently, the existence of a standard does not in itself guarantee its correct application. It is necessary that the application of the norms or their interpretation, as jurisdictional practices and manifestations of the State's public order, be consistent with the purpose pursued by Article 2 of the Convention.<sup>189</sup>

174. By virtue of the violations declared and as a guarantee of non-repetition, the Court orders the State to adopt, within a reasonable time, legislative measures for the classification of the crime of slander in accordance with the parameters established in this judgment. As part of its compliance with this measure, the State must establish alternatives to criminal proceedings to protect the honor of public officials with respect to opinions related to their actions in the public sphere.

175. In this regard, the Court recalls that the different national authorities, including those involved in the process of adopting the stipulated legal provisions, have an obligation to exercise *ex officio* a control of conventionality within the framework of their respective jurisdictions and the corresponding procedural regulations. Thus, in order to effectively comply with the measures ordered, said authorities must take into account not only the content of the American Convention, but also the interpretation thereof provided by the Inter-American Court in its case law and, in particular, the standards set forth in this judgment.<sup>190</sup> Therefore, while the regulations referred to in the preceding paragraph of this judgment are being adopted, it is necessary that the interpretations of cases involving slander complaints, in application of Articles 12 paragraph 13, 416, 417, 418 and 420 of the Criminal Code, as well as Article 29 of Law No. 19733, conform to the principles established in the Court's case law on freedom of expression, which have been reiterated in the instant case.

176. Finally, this Court has learned, based on information provided by the parties and the Commission, that there is a preliminary draft of the Criminal Code that would allow compliance with the third recommendation of the Commission regarding the adaptation of criminal legislation, insofar as it complements the second paragraph of Article 29 of the Law on Freedom of Opinion and Information in the Practice of Journalism, Law No. 19.733. However, according to the representatives, "it has not come into force as a valid regulation, because the draft Criminal Code that the government presented in 2018 continues without progress since the time of its presentation." In this regard, the Court notes that it does not have sufficient elements to rule on this matter.

## **D.2 Training measures**

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<sup>189</sup> Cf. *Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2009. Series C No. 209, para. 338, and *Case of Moya Chacón et al., supra*, para. 70.

<sup>190</sup> Cf. *Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs*. Judgment of September 26, 2006. Series C No. 154, para. 124, and *Case of Casierra Quiñonez et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of May 11, 2022. Series C No. 450, para. 202.

177. Although the Court notes that no training measures have been requested, given the importance of the exercise of the right to freedom of expression on environmental issues, this Court deems it pertinent to order the implementation of specific programs to educate and train public officials on the rights of access to information and public participation in environmental matters, based on the aspects addressed in the judgment. Accordingly, the Court orders the State to implement, within one year, education and training programs aimed at public officials, for a period of three years. Specifically, these programs should cover the contents established in this Court's case law, particularly in Advisory Opinion OC-23/17 on access to public information and participation in environmental matters and access to environmental justice, among other topics.

#### **E. Other measures requested**

178. As a measure of satisfaction, the **representatives** requested that the State be ordered to acknowledge that in this case Mr. Baraona issued his statements in exercise of his right to freedom of expression. In response, the **State** argued that said measure is not appropriate since the facts claimed by Mr. Baraona are not sufficiently important nor are they related to attacks on life and personal integrity.

179. The **Court** considers that the reparation measures ordered in this judgment are sufficient and adequate to remedy the violations suffered by the victim. Consequently, it does not find it necessary to order additional measures of reparation.

#### **F. Compensation**

180. The **Commission** requested that the Court order the State to provide comprehensive reparation, both pecuniary and non-pecuniary, for the human rights violations declared in the Merits Report.

181. The **representatives** requested that the State be ordered to pay Mr. Baraona the sum of USD \$100,000 (one hundred thousand United States dollars) for all the expenses,<sup>191</sup> time and harm, both professional and personal, caused by the sentence imposed on him and of which he was a victim.

182. The **State** argued that it bears no responsibility whatsoever for the charges made against it. It pointed out that no background information has been provided to demonstrate the amount of expenses and damages caused and accounted for. It noted that Mr. Baraona has continued to practice his profession and remains a known figure in environmental matters. It emphasized that neither the Commission nor the representatives have proven that Mr. Baraona suffered any pecuniary or non-pecuniary damage as a result of the lawsuit brought against him by a private citizen. It argued that the Court, in order to establish the amount of compensation in equity, has evaluated the anguish and suffering in situations involving the violation of the right to freedom of expression. However, none of these situations occurred as a consequence of the criminal case involving Mr. Baraona Bray, whose case was definitively dismissed within a short period of time without further prejudice, and therefore this claim is inappropriate.

##### *F.1. Pecuniary and non-pecuniary damage*

183. The **Court** has established in its case law that pecuniary damage encompasses the loss of or detriment to the victims' income, the expenses incurred as a result of the facts and

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<sup>191</sup> The costs will be analyzed in the corresponding section of this judgment.

the consequences of a pecuniary nature that have a causal nexus with the facts of the case.<sup>192</sup> It has also established that non-pecuniary damage may include both the suffering and distress caused to the direct victims and their next of kin, the impairment of values that are very significant to them, as well as changes of a non-pecuniary nature in the living conditions of the victim or his family.<sup>193</sup>

184. In the instant case, the representatives have requested a lump sum, without providing evidence to show the pecuniary damage suffered by the victim. This Court presumes that Mr. Baraona Bray incurred a series of pecuniary expenses and that he suffered non-pecuniary damage as a consequence of the facts of this case. Consequently, the Court deems it appropriate to establish, in equity, a joint amount for pecuniary and non-pecuniary damage, and awards the sum of USD \$60,000.00 (sixty thousand United States dollars) in favor of Carlos Baraona Bray.

### G. Costs and expenses

185. The **representatives** requested that the State be ordered to pay costs as part of the compensation requested, without indicating a specific amount.

186. The **State** rejected a possible award of costs, since there was no basis to justify it, in view of the factual and legal precedents set forth above.

187. The **Court** reiterates that, in accordance with its case law, costs and expenses form part of the concept of reparation, because the activities carried out by the victims in order to obtain justice, both at the national and the international level, imply expenditures that must be compensated when the international responsibility of the State is declared in a judgment. Regarding the reimbursement of costs and expenses, it is for the Court to prudently assess their scope, including the expenses incurred before the authorities of the domestic jurisdiction, as well as those generated during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be made based on the principle of equity and taking into account the expenses indicated by the parties, provided that their *quantum* is reasonable.<sup>194</sup>

188. The Court has indicated that the claims of victims or their representatives with regard to costs and expenses, and the supporting evidence, must be presented to the Court at the first procedural opportunity granted to them, that is, in the pleadings and motions brief, without prejudice to such claims being subsequently updated, in accordance with the new costs and expenses incurred in the proceedings before this Court.<sup>195</sup> In the instant case, the representatives did not submit any supporting evidence of the disbursements made by the victim in the domestic proceedings or before the organs of the inter-American System.

189. Consequently, given that the victim incurred expenses related to the processing of the case before the domestic jurisdiction and before the inter-American system, the Court establishes, in equity, the sum of USD \$20,000.00 (twenty thousand United States dollars),

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<sup>192</sup> Cf. *Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Leguizamón Zaván v. Paraguay, supra*, para. 132.

<sup>193</sup> *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 Aroca Palma et al. v. Ecuador, supra*, para. 144.

<sup>194</sup> 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 Leguizamón Zaván v. Paraguay, supra*, para. 142.

<sup>195</sup> Cf. Article 40(d) of the Court's Rules of Procedure. See also, *Case of Garrido and Baigorria v. Argentina, supra*, paras. 79 and 82, and *Case of Mina Cuero v. Ecuador, supra*, para. 167.

for costs and expenses incurred in the proceedings before the domestic jurisdiction. Said amount shall be paid directly to Mr. Baraona Bray. Furthermore, at the stage of monitoring compliance with this judgment, the Court may order the State to reimburse the victim or his representatives for reasonable expenses incurred at that procedural stage.

#### **H. Method of compliance with the payments ordered**

190. The State shall pay the compensation ordered in this judgment for pecuniary and non-pecuniary damage, and to reimburse costs and expenses, directly to the victim, within one year of notification of this judgment, or it may bring forward the complete payment in accordance with the following paragraphs.

191. If the beneficiary should die before he receives the respective compensation, this shall be delivered directly to his heirs, in accordance with the applicable domestic law.

192. The State shall comply with its monetary obligations through payment in United States dollars or the equivalent in national currency, using for the respective calculation the market exchange rate published or calculated by the relevant banking or financial authority on the date closest to the day of payment.

193. If, for reasons that can be attributed to the beneficiary of the compensation or his heirs, it is not possible to pay the amounts established within the period indicated, the State shall deposit said amounts in his favor in an account or certificate of deposit in a solvent Chilean financial institution, in United States dollars, and on the most favorable financial terms 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 accrued interest.

194. The amounts awarded in this judgment as compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses shall be paid in full directly to the person indicated, in accordance with the terms of this judgment, without any deductions arising from possible taxes or charges.

195. If the State should fall into arrears, it shall pay interest on the amount owed corresponding to banking interest on arrears in the Republic of Chile.

### **X OPERATIVE PARAGRAPHS**

196. Therefore,

**THE COURT,**

**DECIDES:**

Unanimously,

1. To dismiss the preliminary objection regarding the control of the legality of the submission of the case by the Commission, pursuant to paragraphs 23 to 27 of this judgment.

2. To dismiss the preliminary objection regarding the fourth instance, pursuant to paragraphs 31 and 32 of this judgment.

**DECLARES:**

Unanimously, that:

3. The State is responsible for the violation of the rights to freedom of thought and expression, established in Articles 13(1) and 13(2) of the American Convention on Human Rights, in relation to Articles 1(1) and 2 of the same instrument, to the detriment of Carlos Baraona Bray, pursuant to paragraphs 116 to 133 of this judgment.

By four votes in favor and two against, that:

4. The State is responsible for the violation of the principle of legality established in Article 9 of the American Convention on Human Rights, in relation to Article 13 of the American Convention and Articles 1(1) and 2 of the same instrument, to the detriment of Carlos Baraona Bray, pursuant to paragraphs 137 to 142 of this judgment.

Dissenting, Judge Humberto Antonio Sierra Porto and Judge Nancy Hernández López.

Unanimously, that:

5. The State is responsible for the violation of the right to judicial protection, established in Article 25(1) of the American Convention on Human Rights, in relation to Article 1(1) of the same instrument, to the detriment of Carlos Baraona Bray, pursuant to paragraphs 147 to 153 of this judgment.

**AND ESTABLISHES:**

Unanimously, that:

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

Unanimously, that:

7. The State shall adopt, within six months of notification of this judgment, the necessary measures to ensure that an annotation appears in the judicial file of the case and in the conviction handed down against Mr. Baraona, pursuant to paragraphs 162 to 164 of this judgment.

Unanimously, that:

8. The State shall issue the publications indicated in paragraph 169 of this judgment.

By four votes in favor and two against, that:

9. The State shall adopt the legislative measures related to the definition of the crime of insults in accordance with the parameters established in this judgment, pursuant to paragraphs 173 to 176 of this judgment.

Dissenting, Judge Humberto Antonio Sierra Porto and Judge Nancy Hernández López.

Unanimously, that:

10. The State shall implement training and education programs aimed at public officials, pursuant to paragraph 177 of this judgment.

Unanimously, that:

11. The State shall pay the amount stipulated in paragraphs 184 and 189 of this judgment as compensation for pecuniary and non-pecuniary damage, and for the reimbursement of costs and expenses, in accordance with paragraphs 190 to 195 of this judgment.

Unanimously, that:

12. The State, within one year from the notification of this judgment, shall provide the Court with a report on the measures adopted to comply with it, without prejudice to the provisions of paragraph 169 of this judgment.

Unanimously, that:

13. The Court will monitor full compliance with this judgment, in exercise of its authority and in fulfillment of its obligations under the American Convention on Human Rights, and will close this case when the State has complied fully with its provisions.

Judges Ricardo C. Pérez Manrique, Eduardo Ferrer Mac-Gregor Poisot and Rodrigo Mudrovitsch advised the Court of their concurring opinion. Judge Humberto Antonio Sierra Porto and Judge Nancy Hernández López advised the Court of their partially dissenting opinion.

DONE, at San José, Costa Rica, on November 24, 2022, in the Spanish language.

I/A Court HR. Case of *Baraona Bray v. Chile*. Preliminary objections, merits, reparations and costs. Judgment of November 24, 2022.

Ricardo C. Pérez Manrique  
President

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Nancy Hernández López

Verónica Gómez

Rodrigo Mudrovitsch

Romina I. Sijniensky  
Deputy Registrar

So ordered,

Ricardo C. Pérez Manrique  
President

Romina I. Sijniensky  
Deputy Registrar

## CONCURRING OPINION OF JUDGES

**RICARDO C. PÉREZ MANRIQUE, EDUARDO FERRER MAC-GREGOR POISOT  
AND RODRIGO MUDROVITSCH**

### **CASE OF BARAONA BRAY V. CHILE**

**JUDGMENT OF NOVEMBER 24, 2022  
(PRELIMINARY OBJECTIONS, MERITS, REPARATIONS AND COSTS)**

#### **I. Preliminary considerations**

1. In recent years, the Inter-American Court has followed an important approach aimed at gradually restricting access to the criminal justice system in order to confer the necessary scope to the Convention's protection of the right to freedom of expression. This has been a successful process that began more than two decades ago with the judgment of the case of *Olmedo Bustos (The Last Temptation of Christ) v. Chile*. Within this context of enhancing the scope of protection under Article 13 of the American Convention on Human Rights ("Convention"), the judgment in the case of *Baraona Bray v. Chile* builds on the progress already achieved in the cases of *Álvarez Ramos v. Venezuela* and *Palacio Urrutia v. Ecuador*, in which the Inter-American Court established the standard that criminal protection is not a conventionally appropriate mechanism for subsequent liability for affronts to subjective honor materialized in speech on matters of public interest.
2. The judgment resulting from the cited cases is inspired by the conventional duty to strengthen the safeguarding of public debate against undue interference by the State and the undesirable effects of criminal prosecution, which compromise the pluralism of ideas, the guarantee of dissent and social control over the public power.
3. The instant case is noteworthy in this trajectory because it raises the standards of the Inter-American Court to a new level, notably in paragraphs 128 to 130 of the judgment, as reflected in the recognition that the criminal protection of the honor of public officials against insults and the imputation of offensive acts has no support in the Convention.<sup>1</sup>
4. By defining the status of the alleged offended party as a public official as a criterion for the conventional prohibition on the prosecution of crimes against honor, and not the public interest nature of the statements considered offensive, the Court immediately sought to rule out the possibility of initiating criminal proceedings against those who engage in public criticism, an activity that is essential for the healthy functioning of democracies. The *a priori* exclusion of the drastic response provided by criminal law- the most severe facet of the State's punitive power - is intended to ensure that dissenting voices and social control of the actions of State agents are not discouraged by the chilling and intimidating effects of *ius puniendi*.

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<sup>1</sup> It should be noted that the standard defined by the Court in paragraphs 128 to 130 of the judgment on the limits of criminal protection for the subjective honor of public officials, does not involve subsequent criminal liability for offenses that include the false imputation of crimes. This situation would require a more cautious analysis in its own jurisdiction, because the case in question refers only to the prosecution of the victim by claiming damage to the honor of the offended party. In cases involving the false imputation of a crime, it is still necessary to determine whether or not the supposedly criminal statements were considered to be in the public interest, as defined in the cases of *Palacio Urrutia v. Ecuador* and *Álvarez Ramos v. Venezuela*.

5. The progress achieved in the case of *Baraona Bray v. Chile* reaffirms the recent standards consolidated in the jurisprudence of the Inter-American Court, especially when they are aimed at strengthening the protection of public interest speech. Accordingly, the previous standards and the parameters derived from them are added to the current ones, and should be read as part of a conventional hermeneutic intended to give maximum scope to Article 13 of the Convention.
6. In light of these considerations, we issue this opinion in order to explain the reasons why we concur with the judgment and also to discuss in greater detail the basis of this significant development in the Court's case law, especially regarding the limits set on criminal liability as a means of protecting the honor of public officials.
7. To this end, the course of argument will be developed in the following chapters: presentation of the relevant facts of the case (II); analysis of the possibility of applying criminal measures as appropriate means of protecting honor (III); the reasons that justify the inapplicability of criminal measures to protect the honor of public officials (IV); and finally, the defects in the legality and specificity of the criminal provisions analyzed in this case (V).

## **II. Presentation of the relevant facts of the case**

8. The case in question focuses on the international responsibility of the Chilean State arising from the criminal conviction of the lawyer and environmental defender, Carlos Felipe Baraona Bray ("Mr. Baraona Bray," "victim" or "petitioner"), due to public statements he made through various media outlets in May 2004, where he mentioned the then Senator SP in the context of a public debate on the illegal logging of alerce trees in the country.
9. Senator SP filed a complaint against Mr. Baraona Bray for serious insults and slander because the latter had allegedly accused him of "moral vice," a conduct further aggravated because the alleged offense was committed against a public official, as established in Art. 12 (13) of the Criminal Code. Mr. Baraona Bray was criminally convicted only for serious insult, pursuant to Articles 417(3), and 418, first paragraph, of the Chilean Criminal Code, together with Article 29 of Law N°19.733. He was sentenced to 300 days imprisonment, a fine of 20 monthly tax units (MTU) and the suspension of the right to hold public office for the duration of the sentence. Although the judgment was appealed, the conviction was upheld in second instance.<sup>2</sup>
10. This is, therefore, another occasion in which the Inter-American Court has been called upon to rule on the provision and application of criminal measures to establish subsequent liability for speech that allegedly oversteps the limits of the legitimate exercise of the right to freedom of expression, thereby affecting the honor of third parties. This case marks an important development in the standards established up until the case of *Moya Chacón v. Costa Rica*, so we will formulate some considerations on the circumstances in which the use of criminal measures is contrary to the Convention, in order to avoid excesses in the imposition of restrictions on freedom of expression.
11. In this case, however, unlike what happened in the case of *Moya Chacón v. Costa Rica*, beyond the mere existence of regulations that established a criminal response to certain types of speech, the criminal law was effectively applied to the specific

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<sup>2</sup> Inter-American Court. *Case of Baraona Bray v. Chile. Preliminary objections, merits, reparations and costs*. Judgment of November 24, 2022. Series C. No. 481. (Hereinafter, "Judgment"), §§58-63.

case,<sup>3</sup> so that Mr. Baraona Bray was not only subjected to criminal proceedings, but was also criminally convicted, even though the sentence was suspended.

12. Another aspect of the instant case that differs from *Moya Chacón* is that the petitioner is not a journalist, but a lawyer and environmental advocate. The statements that led to his conviction were made in the exercise of these professions, as recognized in the judgment,<sup>4</sup> due to his technical and legal expertise in forestry matters, especially with regard to the alerce reserves. With regard to Mr. Baraona Bray's status as an environmental defender, it is pertinent to cite an excerpt from his testimony at the public hearing held in this case on June 20, 2022:

[T]hey were multidisciplinary groups, I worked with biologists, forestry engineers, we all tried to cooperate on this issue and we all had the spirit of protecting the environment. And we did it *pro bono*. We were in groups that included journalists who worked *pro bono*, they published press releases, they informed the community, so we were very involved with the community and we believed the story; the truth is, we wanted to believe that we were improving the world.<sup>5</sup>

13. Taking into account the role played by the petitioner, it is important to highlight the fact that the Inter-American Court has placed the actions of environmental defenders on a par with those of human rights defenders, which means that the former enjoy the same protections as the latter. This position is in line with the precedent established in the case of *Lhaka Honhat v. Argentina*, according to which environmental rights are included in the realm of human rights.<sup>6</sup> This standard is also consistent with recent guidance from other international bodies. In this regard, it is worth recalling the landmark decision of the United Nations Human Rights Council in October 2021, which recognized the right to a clean, healthy and sustainable environment as a human right,<sup>7</sup> and which was subsequently confirmed by a UN General Assembly resolution adopted unanimously in July 2022.<sup>8</sup>
14. These specific features of the case highlight the essential role of a truly pluralistic debate on issues of public interest for democratic societies.
15. As for understanding the meaning of "public interest" and the importance of ensuring discussion of such matters within the public arenas of dissent, we refer to the words of the expert witness Martín Prats at the public hearing held on June 20, 2022:

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<sup>3</sup> In the Case of *Moya Chacón v. Costa Rica*, the victims were subject to civil and criminal proceedings due to a journalistic report that implicated police officers. The criminal action was dismissed, so that they were only convicted under civil law. Inter-American Court. *Case of Moya Chacón et al. v. Costa Rica. Preliminary objections, merits reparations and costs*. Judgment of May 23, 2022. Series C. No. 451. §82.

<sup>4</sup> Judgment, §§70-80.

<sup>5</sup> Statement of Carlos Baraona Bray before the Inter-American Court in public hearing of June 20, 2022.

<sup>6</sup> Inter-American Court. *Case of the Indigenous Communities Members of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs*. Judgment of February 6, 2020. Series C. No. 400. On previous occasions, even before it recognized the justiciability of environmental rights, the Court had already discussed the relationship between human rights and environmental rights. See the judgment in the case of *Salvador Chiriboga v. Ecuador* of 2008: "Moreover, this Court emphasizes, in relation to the deprivation of the right to property, that a legitimate or general interest based on the protection of the environment such as the one seen in this case, represents a cause of legitimate public utility" Inter-American Court. *Case of Salvador Chiriboga v. Ecuador. Preliminary objection and merits*. Judgment of May 6, 2008. Series C. No. 179. (§76).

<sup>7</sup> UN Human Rights Council. Resolution A/HRC/RES/48/13, of October 8, 2021. available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/289/53/PDF/G2128953.pdf?OpenElement>

<sup>8</sup> UN General Assembly. Resolution A/76/L.75, July 26, 2022. Available at: <https://digitallibrary.un.org/record/3982508?ln=en>

Speeches that can be understood to be of public interest are those about which society, by being aware of them and being informed about them, can better defend its rights, and also encourage democratic debate about them. Criminalizing opinions, information, and ideas that may somehow involve this type of interest inhibits democratic discussion, inhibits the person who wants to express it, so that, for fear of being subject to criminal liability he remains silent, inhibits himself, and does not act. But this also affects the rest of society, which, seeing how a person was held criminally liable for speaking out on certain issues, also refuses to do so. Therefore, failure to protect speech of public interest may lead to a general impairment of the quality of democracy in a country.

16. With regard to statements and comments made in the context of activities in defense of the environment, imbued with the highest level of public interest, the Inter-American Court has once again recognized that expressions related to this objective should enjoy greater protection, with a view to fostering democratic debate.<sup>9</sup>
17. However, the judgment handed down in the present case breaks new ground by going beyond the standards currently in force in the inter-American sphere regarding the use of criminal law to safeguard honor at the expense of freedom of expression, particularly where statements concerning matters of public interest are at stake.
18. Its contribution lies in establishing truly objective criteria that make it possible to immediately rule out the use of criminal measures in situations involving the protection of the honor of public officials against the imputation of offenses or offensive acts.<sup>10</sup> As the Inter-American Court has recognized since 2004 with the judgment in the case of *Herrera Ulloa v. Costa Rica*, the chilling effect of criminal law is a significant limitation to the exercise of freedom of expression.<sup>11</sup>
19. In this regard, the inhibiting or intimidating effect – also known as the chilling effect<sup>12</sup> – is observed not only when there is a conviction, but also when there is the mere possibility of prosecution owing to the existence of a criminal offense in the domestic legislation, which worsens as the criminal proceeding progresses.
20. It is therefore imperative to minimize, as far as possible, the chilling effect in these cases, thus ensuring proper protection of the right to freedom of expression, which is fundamental for the democratic rule of law. As stated in the judgment in the present case, the protection of honor through criminal measures is not in keeping with the Convention when matters of public interest are at stake.<sup>13</sup>
21. To this end, it is essential to define objective criteria that allow for the immediate elimination of the applicability of criminal measures when seeking to establish subsequent liability for statements on issues of public interest, in order to prevent them from being used to discourage the free exercise of the right to freedom of

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<sup>9</sup> Judgment, §108.

<sup>10</sup> Judgment, §§129-131.

<sup>11</sup> Inter-American Court. *Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits reparations and costs*. Judgment of July 2, 2004. Series C. No. 107. §133.

<sup>12</sup> Inter-American Court. *Case of Moya Chacón et al. v. Costa Rica. Preliminary objections, merits reparations and costs*. Judgment of May 23, 2022. Series C No. 451. Concurring opinion of Judge Rodrigo Mudrovitsch, §4.

<sup>13</sup> Judgment, §115.

expression and avoid subjecting to public scrutiny conduct that undermines the population's interests.

22. It should be noted that Mr. Baraona Bray was acquitted of the crime of slander, which was also the subject of the complaint filed against him, since, according to the judgment of the Guarantee Court of Puerto Montt, Mr. Baraona did not accuse Senator SP of a criminal act.<sup>14</sup>
23. In comparative law, there are several models for the criminal protection of honor. Two basic models can be identified: the tripartite model, which combines the criminal offenses of libel, defamation and slander; and the bipartite model, which differentiates only between libel and slander. Attention should be paid to the fact that the *nomen juris* of the criminal offenses does not always express the same content. For example, what constitutes defamation in one legal system may be libel in another.<sup>15</sup>
24. Thus, the considerations in this opinion do not cover crimes against honor based on the attribution of a criminal act to another person - regardless of the nomenclature adopted to refer to such criminal offenses in the various legal systems that make up the Inter-American system - but only those that, in the words of the Inter-American Court, involve the attribution of offenses and offensive acts.<sup>16</sup> And the fact is that, aside from not being included in the factual framework of the case, the behaviors that imply false attribution of crimes represent a more serious infringement on the honor of individuals and would require a more profound reflection by this Court, in the circumstances of a specific contentious case.
25. We will first present some general considerations on the current limits to the provision and use of criminal measures to restrict freedom of thought and expression in the domestic legal systems, in order to analyze the parameters already established by the Inter-American Court, and then present the advances embodied in the new step in the development of the Court's jurisprudence achieved in this case.
26. We will now examine some particularly problematic aspects - and therefore worthy of reform- of the Chilean legal system related to criminal measures that have the power to restrict freedom of expression in the name of protecting the honor of others, beyond the lack of clarity, precision and specificity of the components of the criminal offense of serious insult already highlighted in the judgment.<sup>17</sup> We refer to (i) the existence of an aggravated modality when the injured party is a public official or authority and (ii) the existence of an aggravated modality when the statements in question are made through the media.

### **III. The possibility of applying criminal measures in defense of honor, according to the parameters already established by the Inter-American Court of Human Rights**

27. As we have tried to explain, the standard established in the judgment in *Baraona Bray v. Chile* builds on the long tradition and foundations of the Inter-American Court's case law, which is committed to seeking a conventionally appropriate solution to the tensions arising from the interaction between the exercise of freedom of expression and criminal law as a mechanism for the protection of honor. As a product of this fertile area of debate, the Inter-American Court has been

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<sup>14</sup> Judgment of the Court of Guarantee of Puerto Montt, of June 22, 2004 (evidence file, folio 11).

<sup>15</sup>Cf. Pablo Serrano, Alejandro. *La protección penal del honor y el conflicto con las libertades informativas - Modelos del Common Law, continental europeo y del Convenio Europeo de DDHH*, Buenos Aires, 2017.

<sup>16</sup> Judgment, §129.

<sup>17</sup> Judgment, §§137-142.

careful to identify cases and circumstances in which the existence of a legal provision of a criminal nature, or the effective application of criminal measures in defense of honor, would be incompatible with the American Convention.

28. In the case of *Álvarez Ramos v. Venezuela*, in order to evaluate a possible violation of Article 13 in that specific case, the Inter-American Court divided its analysis into two parts: first, it classified the statements made by Mr. Álvarez as expressions of public interest, and only then did it analyze the subsequent criminal liability attributed to the petitioner. Then, to determine whether or not the content of the petitioner's statements to the detriment of the former Venezuelan congressman were of public interest, the Inter-American Court invoked three different criteria or elements, namely: (i) the subjective element, in other words, whether the person whose honor was allegedly damaged was a public official, (ii) the functional element, that is, the person was acting in an official capacity at the time the facts and, finally, (iii) the material element, that is, the subject matter of the discussion was of public interest.<sup>18</sup>
29. The subjective element is simpler to apply and allows for immediate identification, leaving little margin for discretion when defining whether or not a given individual was a public official at the time of the facts. The functional element, on the other hand, leaves some room for discretion,<sup>19</sup> as it requires a more in-depth analysis of the facts to determine whether the conduct in question is related to the functions of a particular office or whether it occurred in the private life of the public official. Finally, the material element presupposes a greater margin of interpretation, since there are no objective parameters for establishing whether or not a given issue is of public interest; in other words, the identification of what would be publicly relevant varies not only from one person to another, but also according to the temporal, social and geopolitical circumstances in which the case is inserted.
30. A few years later, with the judgment in the case *Palacio Urrutia et al. v. Ecuador*, the Inter-American Court consolidated the jurisprudential advances achieved in *Álvarez Ramos*. In addition to adopting the criteria established therein to identify speech circumscribed in public debate, it also affirmed that the use of criminal laws to punish the dissemination of such expressions is not compatible with the Convention and highlighted the existence of less harsh alternatives and, therefore, of preferred use.<sup>20</sup> On that occasion, the Inter-American Court noted the chilling effect caused by the sanctions imposed on Mr. Palacio Urrutia and on the newspaper *El Universo*, which ultimately affected all media professionals linked to it.<sup>21</sup>
31. From these valuable pieces of case law related to freedom of expression, it follows that, in the case of speech concerning matters of public interest, the provision and application of criminal measures aimed at subsequent liability would not be compatible with the American Convention. It is undeniable that the Court's rich jurisprudence in this area has been a great achievement for the defense of freedom of expression, the result of an advanced and contemporary interpretation of Article 13 of the Convention, intended to offer a more favorable approach and a broader scope to the right to freedom of expression.<sup>22</sup>

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<sup>18</sup> Inter-American Court. *Case of Álvarez Ramos v. Venezuela. Preliminary objection, Merits, reparations and costs*. Judgment of August 30, 2019. Series C. No. 380. §§112-117.

<sup>19</sup> Judgment, §128.

<sup>20</sup> Inter-American Court. *Case of Palacio Urrutia v. Ecuador. Merits, reparations and costs*. Judgment of November 24, 2021. Series C. No. 446. §§118-119.

<sup>21</sup> Inter-American Court. *Case of Palacio Urrutia v. Ecuador. Merits, reparations and costs*. Judgment of November 24, 2021, Series C. No. 446. §§123-124.

<sup>22</sup> Inter-American Court. *Case of Palacio Urrutia v. Ecuador. Merits, reparations and costs*. Judgment of November 24, 2021. Series C. No. 446. Concurring opinion of Judges Eduardo Ferrer Mac-Gregor Poisot and Ricardo C. Pérez Manrique, §32.

32. At this point, we stress once again the vital importance of safeguarding debate on issues of public interest, which is only possible by ensuring a fertile and conducive environment for discussion and maintaining the free exchange of ideas in a democratic society. Bearing in mind that a truly pluralist debate is an essential instrument not only for the control of public administration and resources, but also for the transparency of State activities, it fosters accountability and responsibility among public officials for their actions in the popular arena, as was emphasized by the expert witness Martín Prats at the public hearing held on June 20, 2022.<sup>23</sup>
33. However, in light of the standards and criteria in force until then in the inter-American sphere, it was not possible to determine *a priori* whether or not the subject of an individual's statements was of public interest. This is because such a judgment depends on factors that cannot be determined in an objective analysis, and requires the interpretation of subjective concepts, which is usually made by a judicial authority at a procedural moment after the filing of a complaint. Thus, in the absence of other criteria that we will define below, it is not possible to conclude, prior to the filing of the criminal complaint, whether or not a particular case may give rise to the application of criminal measures to hold accountable the person who made the statement.
34. This situation allows actors such as human rights defenders and journalists, along with any citizen wishing to discuss public issues, to be subjected to the burden and harm—both financial and social—of having criminal proceedings brought against them, only to later receive a response from the State as to whether or not criminal prosecution is appropriate in their case, or whether the speech in question would enjoy special protection under the mantle of freedom of expression on matters of public interest. And even if in practice there is no criminal prosecution, the mere possibility that this could occur is often sufficient for those who venture into public criticism to be constantly haunted—even maliciously - by the risk of having to face the criminal justice system if they decide to engage in public debate.
35. As the Inter-American Court has acknowledged on more than one occasion, the possibility of being subjected to a criminal proceeding can, in itself, constitute a means of restricting freedom of expression, since it has a chilling effect on members of society.<sup>24</sup> In 2012, in the case of *Uzcátegui et al. v. Venezuela*, the Inter-American Court reaffirmed what it had already stated in the case of *Ricardo Canese v. Paraguay*, namely, that the existence of criminal proceedings *per se* generates a chilling and inhibiting effect that hinders the exercise of freedom of expression and, therefore, is contrary to the State's obligation to guarantee the free and full exercise of freedom of expression in a democratic society.<sup>25</sup>
36. This so-called chilling effect raises concerns about the guarantee of the right to freedom of expression -essential for any truly democratic society- which is closely linked to the existence of an authentic institutional 'comfort zone' for its exercise, free from pressures derived from the exercise of the punitive power of the State. In the instant case, in his intervention during the public hearing held on June 20, 2022, the petitioner pointed out that after his conviction in 2004 –and because of it– he stopped acting in environmental cases that had repercussions in the media, opting to remain anonymous in the few cases in which he participated.

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<sup>23</sup> Expert opinion of Martín Prats at the public hearing before the Court on June 20, 2022.

<sup>24</sup> Inter-American Court. *Case of Ricardo Canese v. Paraguay. Merits, reparations and costs*. Judgment of August 31, 2004. Series C. No. 111, §107; *Case of Kimel v. Argentina. Merits, reparations and costs*. Judgment of May 2, 2008. Series C. No. 177, §85; and *Case of Uzcátegui et al. v. Venezuela. Merits and reparations*. Judgment of September 3, 2012. Series C. No. 249, §189.

<sup>25</sup> Inter-American Court. *Case of Uzcátegui et al. v. Venezuela. Merits and reparations*. Judgment of September 3, 2012. Series C. No. 249. §189.

37. In fact, this effect is prior to -and, to a certain extent, independent of - the actual initiation of a criminal proceeding, and stems from the mere possibility of being embroiled in a criminal offense as a result of the existence of a legal provision that establishes possible subsequent liabilities for abuses in the exercise of the right to freedom of expression.
38. However, as mentioned previously, the Inter-American Court's case law has been structured to create, *a priori*, hypotheses in which the existence and application of criminal measures would be contrary to the Convention. This development is crystalized in the judgment in the *Baraona Bray v. Chile* case and is the qualitative leap made by the Inter-American Court, which will be analyzed in greater detail in the next chapter.
39. Certainly, the *a priori* creation of hypotheses is a recurring jurisdictional practice, which has great value in different scenarios and makes it possible to address a wide range of human rights violations. However, when specifically addressing the guarantee of freedom of expression, it must be borne in mind that the mere normative provision of criminal liability may inhibit the legitimate exercise of this right. Thus, the option of delegating to the judges the task of defining *a posteriori* whether or not a given conduct - because it concerns matters of public interest- would fall under the hypothesis of prohibition of criminal measures is insufficient to ensure the full enjoyment of freedom of expression, thereby becoming a less effective approach for dealing with cases such as the present one.
40. In the classification proposed by Winfried Hassemer, concepts such as "public interest" are among those requiring complementary assessment by the judge, giving him a greater margin of semantic freedom and, furthermore, mitigating the predictability of his decision. In circumstances in which the restrictive element of freedom of expression lies in the exercise of the criminal jurisdictional function itself, the predictability of the decision-making process becomes indispensable to guarantee the rights of the accused. It is, therefore, precisely from the ability to better delimit the interpretative framework of the Judiciary that the significance of the decision issued by the Inter-American Court derives, as will be explained below.

#### **IV. The inapplicability of criminal measures to protect the honor of public officials**

41. In order to sufficiently minimize the chilling effect -and, therefore, effectively safeguard freedom of expression - it is essential to carry out an immediate analysis of the applicability, or not, of criminal measures in defense of honor. This is because the *a priori* exclusion of criminal *ius puniendi* to promote the defense of honor in certain cases prevents individuals from feeling intimidated, inhibited or dissuaded from contributing to public debate by being constantly subject to the possibility - albeit theoretical - of incurring criminal liability or even being subject to criminal prosecution.
42. Mr. Baraona Bray's statement at the public hearing aptly summarizes the democratic risk that criminal prosecution entails for public debate, since it produces silencing effects that extend beyond the individuals who are directly prosecuted. On that occasion, the victim acknowledged that not only he, but also other lawyers and environmental defenders had remained silent after his conviction.<sup>26</sup>

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<sup>26</sup> Statement of Carlos Baraona Bray before the Court at the public hearing on June 20, 2022: "I admire them, but they have also silenced a part of their inner being, they never again - if you review the press in Chile- they never again participated in any complaint, in any act of environmental protection in the face of abuse from both the State and the private sector, because the private sector can also abuse the environment. And so, many other lawyers, many other people that I know, and I myself kept silent."

43. Finally, both the Inter-American Commission on Human Rights<sup>27</sup> and the petitioner's representatives<sup>28</sup> advocated before the Inter-American Court for the amendment of Chile's criminal legislation on crimes against honor when the offender is a public official or authority. The former requested the repeal of the criminal offenses of defamation, libel and slander, while the latter requested the decriminalization of all three criminal offenses.<sup>29</sup>
44. This progressive displacement of the legal protection of honor from the criminal sphere to other spheres has increasingly gained ground at the international level. By way of illustration, consider Argentina which only imposes a fine for the offense of false attribution of a crime<sup>30</sup> and does not impose a prison sentence for insult. In fact, the Argentine legal system has promoted the true decriminalization of crimes against honor, and went even further by declaring that statements on matters of public interest shall in no case constitute a crime against honor.<sup>31</sup> Similarly, in 2009, Uruguay exempted from criminal liability those who criticize or make statements against public officials.<sup>32</sup> That same year, the United Kingdom decriminalized defamation and other honor crimes through the Coroners and Justice Act,<sup>33</sup> following the common law tradition already adopted by the United States, whereby offenses against honor— known as libel, slander and defamation— are not criminalized at the federal level.
45. Such objective solutions are preferable because they modulate the chilling effect to its minimum level, so that it can no longer weaken the institution of freedom of expression.
46. As the Inter-American Court acknowledges in paragraphs 129 and 130 of the judgment, establishing the absolute inapplicability of criminal measures when their purpose is subsequent liability for statements involving public officials – except in situations where they are falsely accused of a crime – is an alternative that satisfactorily safeguards the right to freedom of expression, since it would reduce the chilling effect from the first moment in which it could begin to affect the enjoyment of this right and thus weaken and impoverish public debate.
47. However, this is only possible when the analysis of the (in)applicability of criminal law is based on clear and objective criteria that reduce the judge's margin of interpretation and that can be easily analyzed to eliminate fear of a criminal punishment that could preemptively silence voices and opinions.

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<sup>27</sup> Merits Report (evidence file, folio 35).

<sup>28</sup> Brief with pleadings, motions and evidence (evidence file, folio 108).

<sup>29</sup> The expert witness Martin Prats, offered by the petitioner's representatives, presented a report that addressed, among other questions, the drawbacks of using criminal law to settle conflicts on freedom of expression and establish subsequent criminal liabilities. In this context, he declared himself in favor of the decriminalization of crimes against honor. Expert opinion of Martin Prats at the public hearing before the Court on June 20, 2022.

<sup>30</sup> Cf. Article 109 of the Criminal Code of Argentina – "The slander or false accusation of a specific natural person of the commission of a specific and circumstantial crime that gives rise to public action, will be punished with a fine of three thousand pesos (\$ 3.000.-) to thirty thousand pesos (\$ 30.000. -). In no case will expressions referring to matters of public interest or those that are not assertive constitute the crime of slander."

<sup>31</sup> Cf. Art. 109 of the Criminal Code of Argentina *supra*, and Art. 110 of the Criminal Code of Argentina - In no case will expressions referring to matters of public interest or those that are not assertive constitute the crime of slander. Neither will the qualifying words harmful to honor constitute a crime of insults when they are related to a matter of public interest.

<sup>32</sup> Cf. Law 18.515, of July 15, 2009, Art 4 of which amended Art. 336 of the Uruguayan Criminal Code, to the following wording: "ARTICLE 336. (Exemption from liability and proof of the truth). - The following shall be exempt from liability: A) anyone who makes or disseminates any kind of statement on matters of public interest, referring both to public officials and to persons who, by reason of their profession or trade, have a social exposure of relevance, or to any person who has voluntarily become involved in matters of public interest (...)."

<sup>33</sup> Article 73 of the Coroners and Justice Act: "Abolition of common law libel offences: The following offenses under the common law of England, Wales and the common law of Northern Ireland are abolished: (a) the offenses of sedition and seditious libel; (b) the offense of defamatory libel; (c) the offense of obscene libel."

48. In this regard, it should be recalled that international case law –reiterated in the instant case– has consolidated a standard according to which the exercise of freedom of expression enjoys an extra level of protection when it concerns discussions on matters of general or political interest.<sup>34</sup> More specifically, there is a noticeable trend in international jurisprudence concerning the conflict between freedom of expression and the protection of the honor of public officials, which gives precedence to freedom of expression.
49. Such precedence, even if it definitively rules out the applicability of criminal measures, does not imply that the honor of public officials is left entirely unprotected by the law. It only means that its safeguarding and the possible limitations to freedom of expression, in situations involving the attribution of offenses or offensive acts, should be restricted to areas other than criminal law. In this sense, the decision to rectify the information and guarantee the right of reply emerge as doubly beneficial alternatives, contemplated in Article 14 of the Convention<sup>35</sup> because, in addition to not causing the silencing of opinions, they encourage debate, promoting the pluralism of ideas, opinions and information.
50. In the instant case,<sup>36</sup> the Court has reinforced the previous standard, indicating that public figures are exposed to a more demanding public scrutiny of their conduct.<sup>37</sup> It should be emphasized, once again, that this does not mean in any way that the honor of public officials and public figures should not be protected, but rather that (i) criminal prosecution, in certain circumstances, is not suitable for this purpose and (ii) that measures of greater accountability must conform to the basic principles of democratic pluralism, which require that the State and its agents be open to public criticism and to accountability in the exercise of their public functions.<sup>38</sup>
51. In the European sphere, the main precedent for the debate on offenses against public officials and the protection of honor is to be found in the case of *Lingens v. Austria*.<sup>39</sup> Briefly, this case involved the conviction of a journalist for defamation, following his harsh criticism of politicians with a past linked to Nazism and his use of expressions such as “vile opportunism,” “immoral” and “unworthy.” The European Court of Human Rights (“ECHR”) decided that the conviction of a journalist by the Austrian courts constituted a violation of Article 10 of the European Convention, ruling that the limits of acceptable criticism are significantly more flexible in the case of political agents, as opposed to private individuals.
52. According to the ECHR, politicians knowingly lay themselves open to close scrutiny of their every word and deed by both journalists and the public at large; they must therefore, display a greater degree of tolerance of criticism and adverse opinions. According to the ruling, this does not mean that the reputation of a political agent should not be protected, even in cases where he acts within the sphere of his public

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<sup>34</sup> Judgment, §108.

<sup>35</sup> Judgment, §107. In this regard, see the *Case of Moya Chacón et al. v. Costa Rica. Preliminary objections, merits reparations and costs*. Judgment of May 23, 2022. Series C No. 451. Concurring opinion of Judge Ricardo C. Pérez Manrique. §19-22.

<sup>36</sup> Judgment, §111.

<sup>37</sup> Inter-American Court. *Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits reparations and costs*. Judgment of July 2, 2004. Series C. No. 107, §129; *Case of Tristán Donoso v. Panama. Preliminary objection, Merits, reparations and costs*. Judgment of January 27, 2009. Series C. No. 193; *Case of Moya Chacón et al. v. Costa Rica. Preliminary objections, merits reparations and costs*. Judgment of May 23, 2022. Series C No. 451. §75.

<sup>38</sup> Inter-American Court. *Case of Moya Chacón et al. v. Costa Rica. Preliminary objections, merits reparations and costs*. Judgment of May 23, 2022. Series C. No. 451. Concurring opinion of Judge Rodrigo Mudrovitsch, §12.

<sup>39</sup> ECHR. *Case of Lingens v. Austria*. Judgment of July 8, 1986.

functions. However, in such cases, this protection must be weighed against the public interest in openly discussing political matters.<sup>40</sup>

53. It is worth citing an excerpt from another ECHR decision on the precedence of the right to freedom of expression over the honor of public officials, this time in the well-known case of *Lopes Gomes da Silva v. Portugal*:<sup>41</sup>

As to the limits of permissible criticism, they are wider with regard to a politician acting in his public capacity than in relation to a private individual. A politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible to criticism. He is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of open discussion of political issues, since exceptions to freedom of expression must be interpreted narrowly.<sup>42</sup>

54. It should be noted that the petitioner's representatives alleged that the Chilean State has repeatedly used criminal offenses against honor to punish political criticism, opinions and accusations against public figures – and even mentioned some cases in this regard.<sup>43</sup>

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<sup>40</sup> Using a similar reasoning, the ECHR reached the same conclusion in the case of another Austrian journalist who made harsh criticisms and accusations against political agents. In one of his criticisms, the journalist used the direct insult of "idiot" (Trottel). In this case, the Court clarified that insults cannot be read out of context, which in this instance involved political criticism of a public matter involving controversial statements by the offended party. Cf. ECHR. *Oberschlick v. Austria*. N° 11662/85. Judgment of May 23, 1991; *Oberschlick v. Austria*. N° 20834/92. Judgment of July 1, 1997. In the same vein, the ECHR ruled in the case of a citizen who insulted the then President Sarkozy of France, and was convicted for the specific crime of 'insulting the President of the Republic', art. 26, of the Law of July 29, 1881 on Freedom of the Press. Repeating the line of reasoning used in previous cases, the ECHR in addition ruled that imposing a criminal penalty for such conduct (the individual had insulted the President with the phrase "Casse toi pov'con" something like "Get lost, you sad prick") could have a chilling effect on satirical forms of expression, which can play a very important role in the free discussion of questions of public interest, an essential feature of a democratic society. Cf. ECHR. *EON v. France*. No. 26118/10. Judgment of March 15, 2013.

<sup>41</sup> ECHR. *Case of Lopes Gomes da Silva v. Portugal*. No. 37698/9. Judgment of September 29, 2000. See also MOTA, Francisco T. da. Or, *Tribunal dos Direitos do Homem and a Liberdade of Expressão: Os casos portugueses*, Coimbra Editora: Coimbra, 2009, p. 40 sbsq; (critically, from the methodological perspective). COSTA, José de Faria. *A informação, a honra, a crítica and a pós-modernidade (ou os equilíbrios instáveis do nosso desassossego)*, *Revista Portuguesa de Ciência Criminal*, 11 (2001), p. 131 and sbsq.

<sup>42</sup> Similarly, Baciagalupo affirms that the right to freedom of expression shall prevail when the expression or information is aimed at participation in the formation of public opinion. BACIGALUPO, Enrique. *Delitos contra el honor*. Madrid: Hamurabi, 2006. p. 48.

<sup>43</sup> **Convictions:** Raúl Quintana with Javier Rebolledo, Eighth Court of Guarantee of Santiago, RUC N° 1810018991-3, RIT N°3187-2018 (2018); the citizen with Miodrag Marinovic, 3° Court of Guarantee of Santiago. RUC N°1310027365-3, RIT N°6389-2013 (2013); Gaspar Rivas with Andronico Luksic, Eighth Court of Guarantee of Santiago. RUC N°1610015512-9, RIT N°3799-2016 (2016); "Gonzalo Cornejo with Daniel Jadue, Fourth Trial Court in Criminal Matters. RUC N 1710019007-9, RIT N°599-2017 (2017); Fidel Meléndez with Claudio Pucher, Guarantee Court of Licantén. RUC N°1610017451-4, RIT N°272-2016 (2016).

**Acquittals:** Andrés and Adolfo Zaldivar with Marcel Claude", Court of Appeals of Santiago. No. 62.720-2002 (2002); Pedro Sabat with Danae Mlynarz, Eighth Court of Guarantee of Santiago. RUC N°0810010361-4, RIT N° 4093-2008 (2008); Rodolfo Carter with Marcela Abedrapo, Fourteenth Court of Guarantee of Santiago. RUC N° 1710025106-k, RIT N°4581-2017 (2017); Raúl Quintana with Javier Rebolledo Eighth Court of Guarantee of Santiago. RUC N° 1810018991-3, RIT N° 3187-2018 (2018).

**Dismissals:** Ramón Galleguillos Castillo et al. v. Hugo Gutiérrez Galvez, Court of Guarantee of Iquique. RUC N° 1310013817-9, RIT N° 5629-2013 (2013); Franco Parisi with Evelyn Matthei, Eighth Court of Guarantee of Santiago. RUC N° 1310033640-k, RIT N° 9913-2013 (2013); Michelle Bachelet with *Revista Qué Pasa* RUC N° 1610019481-7, RIT N° 6028-2016 (2016); Sebastián Dávalos with Tomás Mosciatti Eighth Court of Guarantee of Santiago. RUC N° 1310012252-3, RIT N°3787-2013 (2013).

Information withdrawn from the Pleading and Motions Brief, Evidence file, folios. 103-104

55. In response, the Chilean State argued that the criminal offense of serious insult does not lead to indiscriminate criminal proceedings that inhibit the legitimate exercise of freedom of expression. Moreover, only a small proportion of these cases end in a conviction and, even when they do, the penalties imposed are "minor" and in no case are custodial sentences imposed on account of the suspension of the sentence.<sup>44</sup> In this regard, we believe it is necessary to make some observations on the response given by the Chilean State.
56. First, even if a conviction only occurs in a minority of cases, it means that there are still cases in which it does occur. The fact that such cases are supposedly in a minority does not only not mean that they are few, but also does not diminish the alarming nature of the situation, being sufficient to create a chilling effect and thus silence voices, impoverishing public debate in a democratic society.
57. Secondly, it is important to emphasize once again that the mere possibility of prosecution – due to the existence of a provision that criminalizes conduct that impugns the honor of others - is sufficient to cause a chilling effect.
58. Thirdly, the use of criminal prosecution further increases the chilling effect that weakens freedom of expression, especially in the context of crimes against honor, which are usually prosecuted through private lawsuits by the offended party, which is both troubling and problematic. Given that the mere filing of a criminal complaint is sufficient to initiate criminal proceedings, it is far easier to use the force of the criminal justice system to discourage criticism, whistleblowing and the disclosure of information of relevance to public opinion.
59. In this regard, it is important to recall the concern expressed by the Inter-American Court –including through the judgment in this case- about the fact that public officials often resort to the courts to file lawsuits for crimes of slander or libel in order to silence or suppress criticism of their actions in the public arena, by means of the so-called "SLAPP proceedings" (Strategic Lawsuit Against Public Participation).<sup>45</sup>
60. The strategy of a SLAPP lawsuit is to burden the defendants with litigation costs so high that they desist, cease or retract their speech, producing an effect of self-censorship.<sup>46</sup> Thus, legislative measures that prevent or limit the access of public officials to the courts as spaces to silence their critics also provide excellent opportunities for States to review their procedural mechanisms in order to adopt anti-SLAPP provisions.<sup>47</sup>
61. Finally, with respect to crimes against honor, even if a possible custodial sentence is suspended, the individual will continue to have the status of a convicted criminal, and may have other rights restricted. In this regard, we would like to emphasize some excerpts from the petitioner's statements during public hearing held on June 20, 2022:<sup>48</sup>

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<sup>44</sup> Answering brief (evidence file, folios 204-207).

<sup>45</sup> Inter-American Court. *Case of Palacio Urrutia et al. v. Ecuador. Merits, reparations and costs*. Judgment of November 24, 2021. Series C. No. 446. §95.

<sup>46</sup> Inter-American Court. *Case of Palacio Urrutia et al. v. Ecuador. Merits, reparations and costs*. Judgment of November 24, 2021. Series C. No. 446. Concurring opinion of Judges Eduardo Ferrer Mac-Gregor Poisot and Ricardo Pérez Manrique, §14.

<sup>47</sup> Inter-American Court. *Case of Palacio Urrutia et al. v. Ecuador. Merits, reparations and costs*. Judgment of November 24, 2021. Series C. No. 446. Concurring opinion of Judges Eduardo Ferrer Mac-Gregor Poisot and Ricardo Pérez Manrique, §22.

<sup>48</sup> Statement of Carlos Baraona Bray before the Inter-American Court at the public hearing of June 20, 2022.

Now, (regarding) the definitive dismissal (of the case), many people interpret it as: "there was no trial," that is to say, "it does not have any consequences for the convicted person because this procedural benefit was applied. The problem is that there was a conviction. And, what is my problem as a lawyer? That anyone who wants to check the records on the Judiciary's website, can simply type my name and my RUT (number), and the conviction appears. Someone put my name all over Google, "Baraona sentenced to 300 days," "new lawsuit against Carlos Baraona," "now Baraona will go to jail" (...)

In Chile, you can see any record, the police have special records, the prosecutors have special records, they enter my name and the conviction appears. I stand up in front of a court to plead and the judges have their records and they know that I was convicted. Look, I'm going to tell you something, something personal, I don't want to say too much. In 2008, the clinic of the ... invited me to Washington, to the United States, because this case was heard, in 2008 there was a hearing for this case in Washington. I had obtained funds to pay for my air tickets, and when I was faced with the visa form to enter the United States, there is a section that says: "have you been convicted, yes or no." Of course, I wanted to say that there is a mechanism in Chile, the 398, but I don't have that option, I have to say I was convicted or I was not convicted. If I lie to the United States, I prefer not to know what the consequences would be ... so I tore up the paper, I did not request the visa and I did not go to the United States. I have never been to the United States. In other words, as long as there is no judgment stating that the 2004 trial was unfair, that the Chilean government made a mistake, I continue to be a convicted person. I have even endured mockery, as a convicted man, "officer, how can you believe him if he has been convicted?" That is the reality. What did I do as a defense mechanism? I focused on the private sector, my clients are from the private sector, a rental lawsuit between Mr. A and Mr. B. That is what I do. I stopped handling these public trials, because I'm always exposed to the fact that I was convicted (...)

All these years, of course, I've had to bear the stigma of having lied, of damaging the honor of a senator. For me... I don't know if the word is rage, but I feel angry, powerless.

62. It is clear that even if the sentence is suspended, the cost is too high. And not only for the accused, but also for a democratic society as a whole, owing to the impoverishment of the debate on issues of public interest and the weakening of control over public administration.
63. Suspended sentences are only possible in the absence of a criminal record and if the individual does not reoffend. Moreover, suspension is an option available to the court and is not a mandatory procedure if certain requirements are met. This means that, although it is a possibility, there is no guarantee that persons convicted of honor crimes will never be imprisoned.

64. In light of the foregoing, the restriction of criminal prosecution in cases of statements of public interest already constitutes a notable advance as promoted in the cases of *Álvarez Ramos v. Venezuela* and *Palacio Urrutia v. Ecuador*. The standards established therein and reiterated by the judgment in the instant case continue to be applicable to cases involving the offense of falsely accusing an individual of a crime.
65. For other crimes against honor involving insults and the attribution of offensive acts, which entail less damage to individual rights, the prohibition of criminal prosecution should not be based on the possible characterization of the statements that gave rise to the subsequent liability as being of “public interest”, but rather on the status of public official of the person whose honor was allegedly affected.
66. The decision on the absolute suppression of criminal measures when their objective is to hold persons accountable for statements involving public officials and which do not include a false accusation of a crime, constitutes one of the most important advances in the defense of the right to freedom of expression promoted by the Inter-American Court. By adopting this criterion, it is no longer necessary to determine the public interest nature of the statement that allegedly attributes offenses or offensive acts. The new standard, by avoiding the mere suggestion of criminal action, serves to mitigate the chilling effect from the first moment in which the enjoyment of this right is affected and, therefore, prevents the weakening and impoverishment of public debate.

**V. Defects in the legality and specificity of the criminal provisions analyzed in this case**

**a. The criminal offense of insult in the Chilean legal system vis-à-vis the Convention and the jurisprudence of the Inter-American Court**

67. In addition to establishing the standard of absolute incompatibility of the criminal measures of subsequent liability to protect the honor of public officials against the attribution of offenses and offensive acts, the Inter-American Court recognized that the criminal offenses applied in the instant case were not compatible with Article 9 of the Convention.
68. In this regard, we recall that the petitioner’s representatives argued that the criminal offense of insult would not meet the standards of legality established in the American Convention. On this point, a fragment of the petitioner’s statement during the public hearing held on June 20, 2022 is noteworthy:<sup>49</sup>

In my case, slander and insult were invoked, slander is basically to accuse someone of a crime, currently to impugn their position, according to our Criminal Code, and that was dismissed because there was never any talk of influence peddling and of unlawful association, it was the press that said that. And slander is what we call a ‘slippery’ concept, which can be used for anything, it is like a void and each judge gives it the content he wants, according to the circumstances.

69. The Commission maintains that, due to its ambiguous wording, the criminal offense is incompatible with the principle of strict legality and with the right to

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<sup>49</sup> Statement of Carlos Baraona Bray before the Inter-American Court at the public hearing on June 20, 2022.

freedom of expression, since it does not establish clear parameters to define the prohibited conducts and their elements.<sup>50</sup>

70. The Chilean legal system— more specifically the Criminal Code— differentiates between slander (Articles 412 to 415) and insults (Articles 416 to 420), and also contains provisions common to both offenses (Articles 421 to 431). Note that the crime of insult is actually composed of two criminal offenses, namely: minor insults, provided for in Article 416 and whose penalty is established in Article 419; and serious insults, established in Article 417 and whose penalty is established in Article 418.
71. This does not mean that conduct which in other legal systems could be classified as defamation is not criminalized. In fact, it is contemplated in the criminal offense of insult,<sup>51</sup> more specifically in the offense of serious insult (Article 417).<sup>52</sup> Considering that the Chilean court convicted the petitioner for the latter offense, it is important to analyze the wording of the provision:

ARTICLE 417.

Serious insults consist of:

1. The imputation of a crime or simple offense that does not give rise to *ex officio* proceedings.
2. The imputation of a punishable or prescribed crime or simple offense.
3. The imputation of a vice or lack of morality whose consequences may significantly harm the reputation, credit or interests of the victim.
4. Insults that by their nature, occasion or circumstances are understood by the public as affronts.
5. Those that rationally deserve the classification of serious due to the status, dignity and circumstances of the offended party and the offender.

72. The Inter-American Court considers that the criminal offense in question suffers from a high degree of imprecision, especially Article 417, paragraphs 4 and 5, since the circumstances that would make the insult “serious” or an “affront” are not specified. The same is true of paragraph 3, given the vagueness of the expression “vice or lack of morality.” These criminal definitions are also problematic because, in theory, they allow for the punishment of the attribution of true facts.
73. This is also the technical-legal opinion issued by Martín Prats, the expert witness offered by the petitioner’s representatives, who stated the following during the public hearing held on June 20, 2022:<sup>53</sup>

Regarding the principle of legality, the provisions cited and on which the judgments of the Chilean courts were based, namely, Articles 416 and 417(3) of the Criminal Code, do not meet the requirements of clarity and accuracy in defining the proscribed conduct that would allow the defendant to know and understand the prohibition and thus to anticipate it. This is also similar to the Court’s ruling in the case of *Canese v. Paraguay* of 2004, where it expressly stated that laws that establish

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<sup>50</sup> Merits Report (evidence file, fl. 28-30)

<sup>51</sup> On this legislative option cf. MONTT, Mario Garrido. *Derecho Penal Parte Especial*, Tome III, Third ed., Santiago: Editorial Jurídica de Chile, 2007, p. 187.

<sup>52</sup> “Defamatory insult” even includes conduct that in other legal systems falls within the criminal definition of defamation, since it is defined as “the imputation of a crime or simple offense that does not give rise to an *ex officio* proceeding” (Art. 417, para. 1) and “imputation of a punishable or prescribed crime or simple offense” (Art. 417, para. 2). This differentiation occurs because the crime of slander consists of the “imputation of a specific but false crime that may currently be prosecuted *ex officio*.” (Art. 412).

<sup>53</sup> Statement of Martín Prats before the Court at the public hearing on June 20, 2022.

subsequent liabilities must be sufficiently explicit to guarantee individuals a margin of certainty regarding the possible liability of their expressions. (...)

I believe that the rules of the criminal code are excessively ambiguous and broad and do not clearly establish the components of the crime, because they do not specify the intent required of the active subject, allowing the subjectivity of the offended party to determine the existence of the crime. (...)

There is a principle of legality with respect to the articles, but in this case they do not comply with the requirement of clarity because the criminal definitions applied were too broad and vague, making it impossible to anticipate the conduct. So, there is no correspondence with the principle of legality in the norms applied in this specific case.

74. The case law of the Inter-American Court has long been consolidated in the sense that the definitions of criminal law must not only be formulated prior to the criminal act, but also in an express, accurate and exhaustive manner, using precise and unequivocal terms that identify the criminalized conduct.<sup>54</sup> This requirement of certainty or principle of specificity is one of the corollaries of the principle of legality<sup>55</sup> in criminal law, also known by its Latin formulation *nulla poena sine lege*, coined by Anselm Von Feuerbach, who derived it from his theory of psychological coercion. In order for a penalty to fulfill the function of encouraging citizens not to commit crimes, it is necessary that they know in advance precisely what the criminal law prohibits.<sup>56</sup> However, the principle of legality is not limited to this teleological or consequentialist argument<sup>57</sup> - it also has a political-democratic basis, of a deontological nature: the executive and judicial powers are bound by abstract laws that protect the individual from the arbitrariness of the State. Moreover, restrictions on the freedom of citizens - such as criminal laws *par excellence* - should only be determined by the democratically empowered legislator.<sup>58</sup> Thus, the requirement of certainty, derived from the principle of legality, means that criminal law must be sufficiently clear and precise so that those involved can know and understand the prohibited conduct, guaranteeing them a margin of legal certainty as to the possible liability for their statements. In a State governed by the rule of law, the predictability and reliability of the exercise of state power in the criminal sphere are values linked to the principle of legality. This means that a judge must be able to extract from the criminal law reliable guidance for its application in a specific case, while citizens must be able to clearly visualize the limits of permissible behavior and the nature and severity of the sanction that awaits them if they infringe those limits.<sup>59</sup>

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<sup>54</sup> Cf. *Case of Ricardo Canese v. Paraguay. Merits, reparations and costs*. Judgment of August 31, 2004. Series C. No. 111, §174; *Case of Kimel v. Argentina. Merits, reparations and costs*. Judgment of May 2, 2008. Series C. No. 177, §63 and *Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2009. Series C No. 207, §55.

<sup>55</sup> Beside the others: *nulla poena sine lege scripta* (prohibition of basing punishment on customary or natural law), *praevia* (prohibition of retroactivity), and *stricta* (prohibition of analogy).

<sup>56</sup> Further references SCHÜNEMANN, Bernd. *Nulla poena sine lege*, Berlin/New York: Walter de Gruyter, 1978, p. 2; GRECO, Luis. *Lo vivo y lo muerto en la teoría de la pena de Feuerbach*, Madrid/Barcelona/Buenos Aires/São Paulo: Marcial Pons: 2015, p. 55.

<sup>57</sup> For a critique of the purely teleological basis of the principle of legality, cf. GRECO, Luis. *Conveniencia and respeto: sobre lo hipotético y lo categórico en la fundamentación del derecho penal*, Indret 4/2010, p. 5 sbsq.

<sup>58</sup> GARCIA PÉREZ, Octavio. *El principio de legalidad y el valor de la jurisprudencia*, Indret 4/2018, p. 8; ROXIN, Claus/GRECO, Luis. *Strafrecht Allgemeiner Teil*, Band I, 5<sup>th</sup> ed., 2020, p. 219.

<sup>59</sup> URBINA GIMENO, Iñigo Ortiz de, *¿Leyes taxativas interpretadas libérrimamente? Principio of legality and interpretation of the derecho penal*, in: MONTIEL, Juan Pablo (ed.). *La crisis del principio de legalidad en el*

75. Recalling Hassemer's lesson, the indiscriminate use of vague concepts in criminal law, or concepts that rely on complementary assessments, often require judges to make decisions based on their own moral convictions to complete the semantic scope of the norm, giving them ample room to act without the guidance of the law.<sup>60</sup> According to the author, "the possibilities of binding the judge to the law (and verifying this fact) depend on the law itself. Generic and imperfect rules are much less likely to be binding on the judge than those that fully and precisely say what they mean."<sup>61</sup>
76. Thus, the failure to clearly define the criminal offense not only undermines the principle of legality as a corollary of the requirement of certainty or specificity, but also, reflexively, violates the right to freedom of expression, since it restricts the range of statements and publications that a citizen can make without fear of being criminally sanctioned.
77. Based on the above reasons, we agree with the judgment in recognizing that the aforementioned provisions violate Article 9 of the Convention. However, there are two elements of the legal system that constitute the factual framework of the case which deserve a closer look and are inextricably related to the mechanisms of containment of the right to freedom of expression analyzed here: (i) the criminal aggravating factor consisting of the use of the media, provided for in Article 29 of Law N°19.733 and (ii) the aggravating factor related to the offended party's status as a public official, provided for in Article 12 (13) of the Chilean Criminal Code.

**b. Incompatibility with the American Convention and the case law of the Inter-American Court, and the aggravating factor of "use of the media" in Law No. 19.733**

78. In convicting the petitioner, the domestic court invoked not only the criminal offense of serious insults, but also the aggravating factor of use of the media<sup>62</sup> to disseminate the allegedly defamatory statements, as provided for in Article 29 of Law N°19.733, the Chilean Press Law. It is therefore important to make some observations on this aggravated modality.<sup>63</sup>
79. First of all, it should be noted that Article 418, which establishes the penalty applicable to the offense of serious insults, provides for two different types of penalties. The first – a minimum to medium imprisonment term, plus a fine of 11 to 20 MTU- is applicable to allegedly injurious statements made in writing and with publicity;<sup>64</sup> the second –minor imprisonment, in its minimum degree, and a fine of 6 to 10 MTU- is applicable to allegedly injurious statements not made in writing and without publicity. However, under Article 29 of the Chilean Press Law, when the offense is committed through any means of social communication, the penalty for minor insults shall be 20 to 50 MTU and for serious insults from 20 to 150 MTU. In other words, under Chilean law, when statements that allegedly harm the honor of

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*nuevo derecho penal: ¿decadencia o evolución?* Madrid: Marcial Pons, 2012, p. 173 ss.; TEIXEIRA, Adriano. *Teoria da aplicação da pena*, São Paulo: Marcial Pons, 2015, p. 109.

<sup>60</sup> HASSEMER, Op. Cit., p. 265

<sup>61</sup> Ibid. p. 242. Our translation.

<sup>62</sup> According to Article 2 of the Chilean Press Law, for all legal purposes, "social communication media" shall be understood as those capable of transmitting, disseminating, divulging or propagating, in a stable and regular manner, texts, sounds or images intended for the public, regardless of the support or instrument used.

<sup>63</sup> Judgment, §59.

<sup>64</sup> According to Article 422 of the Chilean Criminal Code, "in writing and with publicity" shall be understood to mean statements propagated by means of posters or papers posted in public places; for printed papers, not subject to the law of printing, lithographs, engravings or manuscripts communicated to more than five persons, or for allegories, cartoons, emblems or allusions reproduced by means of lithography, engraving, photography or any other process.

another person are made through the media, the fines imposed are increased and the prison terms of the Criminal Code remain unchanged.

80. By establishing a more severe penalty for those who use the media, the Press Law punishes them more harshly for the same offenses than citizens who are not linked to newspapers or the media in general.
81. It is true that the same provision establishes that "political criticism" does not constitute slander, unless it has a specific intent, approximating the doctrine of *real malice*.<sup>65</sup> However, this exception allows broad discretion to attribute an *animus injuriandi* to any political criticism, which may nullify the effects of the aforementioned legal exemption. Hence the importance, analyzed at the beginning of this opinion, of adopting objective and clear criteria on the exceptions to the application of criminal law, in order to limit, to the extent possible, the scope of the judge's interpretation.
82. It is also true that Article 30 of the same law, although it does not generally accept the *exceptio veritatis* argument, paves the way for it to be accepted by providing for the suspension of the proceedings or the acquittal of the accused when the speech is in defense of a real public interest or when the offended party performs public duties and the alleged accusation refers to facts related to the exercise of his office. Thus, although exceptionally, Chilean legislation establishes some important safeguards to protect speech of public interest.
83. However, even with such safeguards, the above provisions of the Chilean Press Law impose a harsher penalty on an activity pertaining to the exercise of freedom of the press, placing an excessive burden of proof on the accused to demonstrate not only the truthfulness of the facts but also the absence of a "manifest intent to injure." They also contain unclear wording that may hinder the definition of speech of public interest in the exceptions regarding the illegality of the offense.
84. It could be argued that the intention of the legislator was to ensure a more rigorous criminal protection due to the greater scope of the damage to a person's honor when it is perpetrated by the media. However, in practice, by instituting a more restrictive sanction solely and exclusively for exercising a basic human right, the law ends up causing a direct violation of the right to freedom of expression. This is why the legal protection afforded to those who use the media cannot be lessened, but, on the contrary, should be increased due to its collective importance in a democratic society.<sup>66</sup>
85. Not surprisingly, Article 1 of the Chilean Press Law itself establishes that freedom of opinion and information, without prior censorship, constitutes a fundamental right of all persons. It also recognizes that people have the right to be informed about events of general interest. However, it not only criminalizes, but even punishes more severely statements made through the media. An obvious contradiction.
86. Therefore, there is no pressing social need –a term used previously by the Inter-American Court- to justify the imposition of a more severe penalty for crimes against honor committed through the media. Nor did the investigation of this case

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<sup>65</sup> This doctrine has its origin in the case law of the United States Supreme Court, in the case of *The New York Times v. Sullivan* (376 U.S. 254 - 1964), which held that, in order for a public official to claim compensation for damage to his honor caused by defamatory statements, it is necessary to prove that said statements were made with actual malice, i.e. with knowledge of or indifference to the falsehood of the opinion or information disclosed.

<sup>66</sup> Inter-American Court. *Case of Moya Chacón et al. v. Costa Rica. Preliminary objections, merits reparations and costs*. Judgment of May 23, 2022. Series C. No. 451. Concurring opinion of Judge Rodrigo Mudrovitsch, §61- 63.

reveal the presence of such justification. Considering the existence of a general criminal offense to repress these crimes, the aggravation of the criminal sanction for the exercise of a fundamental right seems, in this context, to depart from the principle of strict necessity established by this Court's case law. It would also assume an unacceptable anti-isonomic character, since the fact that an individual serves as a source for journalistic investigations and thus makes viable, at the collective level, the informative aspect of freedom of expression, would in fact be a reason to increase its levels of protection, and not to subject it to stricter controls of criminal protection.<sup>67</sup>

87. It is also worth noting that an eventual repeal of the aggravating criminal factor would not exclude, by itself, the possibility that the Judiciary might decide to impose a more severe penalty due to certain characteristics of the individual or of his conduct, observing, of course the principle of legality. It is imperative that the domestic courts, which also have the duty to adapt their interpretative power, refrain from adopting any decision that imposes harsher penalties for crimes against honor merely because these offenses are committed in the exercise of freedom of the press, regardless of whether or not the laws of that State expressly provide for such aggravation.<sup>68</sup>

88. Thus, identifying the potentially offensive aspects for human rights in the wording of that provision is only one of the steps needed to address the issue. A further step is the need to adjust the possible interpretations to be established by the domestic courts.

**c. The inapplicability of aggravated penalties established for crimes against honor derived from the offended party's status as a public official**

89. In sentencing the petitioner, the Chilean court did not expressly invoke the aggravating factor provided for in Article 12(13) of the national Criminal Code in order to increase the penalty established therein. However, during the public hearing held on June 20, 2022, the petitioner pointed out that the sentence imposed on him was far more severe than that usually applied by the Chilean courts in similar cases.<sup>69</sup> In its judgment, the Inter-American Court, in turn, reiterated its concern about the possible increase in the chilling effect produced by norms such as this.<sup>70</sup>

90. There is a consensus in international jurisprudence -not only in the Inter-American Court, but also in other regional human rights courts - that the exercise of freedom of expression should be covered by an additional layer of protection when it relates to discussions on matters of general or political interest. In this context, judicial responses should be handled with the utmost caution when dealing with crimes

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<sup>67</sup> Inter-American Court. *Case of Moya Chacón et al. v. Costa Rica. Preliminary objections, merits reparations and costs*. Judgment of May 23, 2022. Series C. No. 451. Concurring opinion of Judge Rodrigo Murovitsch, §68.

<sup>68</sup> Inter-American Court. *Case of Moya Chacón et al. v. Costa Rica. Preliminary objections, merits reparations and costs*. Judgment of May 23, 2022. Series C. No. 451. Concurring opinion of Judge Rodrigo Murovitsch, §74.

<sup>69</sup> Statement of Carlos Baraona Bray before the Court at the public hearing of June 20, 2022: "I don't want to go into greater details because they are of a technical-legal nature, but the judge can say 'for me, honor means this, for me honor means that, or that we must protect the honor of this person more because he has a high public position.' So that is what happened to me. The crime that I was accused of is a crime that in Chile normally carries 40 days of imprisonment- that is the rule. Any person convicted of slander is sentenced to 40 days in prison, [but] I was given 300 days, because the message is: never again, do not speak out again, because the message was not for me, it was for everyone who could have cooperated and given background information. That is silencing, that is what happened to me, 300 days."

<sup>70</sup> Judgment, §122.

against public officials, a concern that is reflected in the innovative approach advocated by the Inter-American Court.

91. Rules that establish a heavier penalty because of the public duties performed by the complainant are diametrically opposed to international jurisprudence, which provides for greater tolerance of criticism against public authorities, even if it is considered offensive. Such is the case of the precedents of *Lingens v. Austria*, and *Lopes Gomes da Silva v. Portugal*, cited at the beginning of this opinion.
92. Although the purpose of the Inter-American Court's decision on reparations was to reform Articles 416, 417, 418 and 420 of the Chilean Criminal Code, as well as Article 29 of Law 19733, the elimination of criminal proceedings as a mechanism for protecting the honor of public officials in the terms proposed in the judgment has major implications for the analysis of Article 12(13) of the Criminal Code. In other words, if criminal liability for insulting or accusing State agents of offensive acts is clearly incompatible with the Convention, as a logical consequence, the increased penalty imposed when their honor is harmed is equally incompatible with the Convention. Rules such as those contained in Art. 12(13), therefore, directly contravene the guidelines established in *Baraona Bray v. Chile*.
93. We believe that further clarification is necessary on this point, in line with recent standards issued by the Court. In analyzing aggravated criminal liability for use of the media in light of the American Convention, we are not referring solely and exclusively to the specific wording of Article 12(13) of the Chilean Criminal Code: in terms of conventionality control, we should take into account any interpretation promoted by the courts that results in similar effects or that adopts the same rationale cited above. Please refer to the considerations of the Inter-American Court in the judgment on reparation measures, which reiterates the standard established in the case of *Palacio Urrutia v. Ecuador*:<sup>71</sup>

173. The Court reiterates that it is not only the suppression or issuance of norms in domestic law that guarantee the rights enshrined in the American Convention, in conformity with the obligation contained in Article 2 of said instrument. It also requires the establishment of State practices conducive to the effective observance of the rights and liberties enshrined therein. Consequently, the existence of a standard does not in itself guarantee its correct application. It is necessary that the application of the norms or their interpretation, as jurisdictional practices and manifestations of the State's public order, be consistent with the purpose pursued by Article 2 of the Convention.<sup>72</sup>

94. It should be noted that, even if this provision were to be modified, repealed or interpreted as invalid by the domestic courts, this would not be equivalent *per se* to eliminating the possibility of increasing the penalty for specific reasons to protect the honor of public officials or authorities with greater severity than if they did not hold such a position. To this end, it is necessary that the interpretation made by the State's jurisdictional organs be adjusted to the conventional guidelines developed by the Inter-American Court in its case law.

## **VI. Final considerations**

95. As we have tried to demonstrate throughout this opinion, the judgment handed down in the case of *Baraona Bray v. Chile* introduced one of the most important

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<sup>71</sup> Inter-American Court. *Case of Palacio Urrutia et al. v. Ecuador. Merits, reparations and costs*. Judgment of November 24, 2021. Series C. No. 446. §179.

<sup>72</sup> Judgment, §173.

advances made by the Inter-American Court in recent years in guaranteeing the right to freedom of expression. This notable development is based on the recognition that the protection through criminal law of the honor of public officials against slander and the imputation of offensive acts, except in the case of the false attribution of a crime, which was not discussed in this case, is not compatible with the Convention. It expands the scope of the protection established by the Inter-American Court in the cases of *Álvarez Ramos v. Venezuela*, and *Palacio Urrutia v. Ecuador*, in which it declared the inadmissibility of the *persecutio criminis* aimed at suppressing expression on matters of public interest.

96. By linking the inapplicability of criminal measures to the offended party's status as a public official, and not only to an *a posteriori* judgment on the "public interest" of speech considered harmful, the Court's decision contributes decisively to mitigating the chilling effect of criminal laws from the first moment in which they could affect the enjoyment of freedom of expression, thereby preventing the weakening and impoverishment of debate on matters of public interest.
97. As we have explained in this opinion, we believe that this judgment represents a significant step forward in the line of jurisprudence that aims to reduce the use of criminal law to establish subsequent liabilities in the exercise of the right to freedom of expression. Thus, in relation to public officials, the standard is that it is not possible to invoke and bring a criminal action for subsequent liabilities to protect their right to honor against the attribution of offenses and offensive acts. An action brought by a public official would be inadmissible *ab initio* under this standard. This does not imply a lack of protection for this right, but rather the need to resort to other non-criminal remedies in order to demand its protection.
98. Finally, let us remember that the standards developed by the Inter-American Court not only have an impact on the specific case (*res judicata*) but also provide a jurisprudential input for other States that can be validly applied in their domestic systems, regardless of whether the State has been a party to the international litigation (*res interpretata*). Therefore, the decision in this case that the criminal protection of the honor of public officials against offenses and the imputation of offensive acts, except in the case of false attribution of a crime, is not compatible with the American Convention, constitutes a new guideline to be used at the domestic level to evaluate such cases through the control of conventionality.

Ricardo C. Pérez Manrique  
Judge

Eduardo Ferrer Mac-Gregor Poisot  
Judge

Rodrigo Mudrovitsch  
Judge

Romina I. Sijniensky  
Deputy Registrar

**VOTO CONCURRENTES Y PARCIALMENTE DISIDENTE DEL  
JUEZ HUMBERTO ANTONIO SIERRA PORTO y LA JUEZA NANCY HERNÁNDEZ  
LÓPEZ**

**CORTE INTERAMERICANA DE DERECHOS HUMANOS**

**CASO BARAONA BRAY VS. CHILE**

**SENTENCIA DE 24 DE NOVIEMBRE DE 2022**

**(Excepciones Preliminares, Fondo, Reparaciones y Costas)**

1. Con el acostumbrado respeto por las decisiones de la Corte Interamericana de Derechos Humanos (en adelante "la Corte" o "el Tribunal"), el presente voto tiene por objeto presentar nuestra divergencia con las razones utilizadas para establecer la responsabilidad internacional del Estado de Chile (en adelante "el Estado" o "Chile") por la violación del derecho a la libertad de expresión del señor Carlos Baraona Bray. Si bien, compartimos plenamente el contenido del punto resolutivo tercero, debemos manifestar desacuerdo con el cambio de precedente que la mayoría de la Corte decidió en este caso por sus profundas implicaciones jurídicas. Asimismo, queremos dejar expresa manifestación de nuestra disidencia frente al punto resolutivo cuarto, en el que se declaró la responsabilidad internacional del Estado de Chile por la violación del principio de legalidad (artículo 9).

2. Desde luego nos unimos al voto de mayoría del Tribunal en destacar la importancia que el ejercicio amplio y libre de la libertad de expresión tiene para el desarrollo de los Estados democráticos. Coincidimos en que esta libertad adquiere un valor y relevancia particular, cuando se la emplea para cuestionar, controlar y criticar la labor de los funcionarios públicos (y en general los actos de los detentadores del poder). Esa especial protección debe ser lo suficientemente amplia y efectiva para asegurar que los cuestionamientos y las ideas disidentes respecto del devenir en el ámbito público, no sean acalladas. Las voces concordantes -aprobando o negando todas al unísono- son el sueño de cualquier totalitarismo y lo opuesto a una sociedad realmente democrática.

3. El artículo 13 de la Convención Americana Sobre Derechos Humanos plasma esta idea y la Corte ha tenido ocasión de conocer y resolver decenas de casos, apoyando la consolidación de la enorme importancia de la libertad de expresión. Ahora bien, como lo recoge la propia Convención y lo ha desarrollado el Tribunal, esa libertad no es absoluta y los límites a su ejercicio deben construirse con la misma seriedad y claridad, para impedir que a través del abuso en su ejercicio se afecten gravemente otros derechos y libertades del mismo rango o bien que se desnaturalice su finalidad, utilizándola para socavar el propio régimen democrático que la sostiene y justifica.

4. El citado artículo 13.2 establece que el ejercicio de la libertad de expresión estará sujeto a: "*responsabilidades ulteriores, las que deben estar expresamente fijadas por la ley y ser necesarias para asegurar: a) el respeto a los derechos o a la reputación de los demás, b) la protección de la seguridad nacional, el orden público o la salud o la moral públicas.*" Como puede apreciarse, la redacción del texto convencional es amplio y se ha dejado en manos de los Estados miembros la elección de la naturaleza jurídica de las responsabilidades ulteriores, así como los instrumentos mediante los cuales han de determinarse en los casos concretos. Asimismo, resulta un hecho evidente que los Estados se han decantado por el establecimiento de responsabilidades ulteriores tanto de carácter civil como penal y han establecido los respectivos procesos a través de los que se realizará su fijación.

5. Al igual que para la mayoría del Tribunal, estimamos que resulta central tratar de definir de la forma más justa el alcance de esta libertad, interpretando sus restricciones en clave democrática, esto es, acentuando el derecho a la libre expresión, pero sin desproteger otros derechos de las personas y otros bienes jurídicos vitales para las sociedades democráticas, según lo previeron los redactores de la Convención. Para esto, es preciso retomar del voto de mayoría el concepto de ejercicio abusivo del derecho a la libertad de expresión (v. párrafo 115) que debe servir de guía necesaria para valorar la convencionalidad de las respuestas estatales para la fijación de responsabilidades ulteriores derivadas del ejercicio del derecho a la libertad de expresión.

6. En este aspecto, la mayoría de la Corte sostiene que: "*considerando la necesidad de armonizar la protección a los derechos a la libertad de expresión y el derecho a la honra y la importancia de la libertad de expresión en una sociedad democrática, la Corte reitera que la imposición de responsabilidades ulteriores por el ejercicio abusivo del derecho a la libertad de expresión es de carácter excepcional [...]'*"<sup>1</sup>.

7. Respetuosamente discrepamos de esa posición por entender que aunque las restricciones a la libertad de expresión deben tener carácter restringido, una vez que estemos frente a un constatado ejercicio abusivo de la libertad de expresión, no puede sostenerse excepcionalidad alguna en la fijación de responsabilidades ulteriores. Al contrario, los ordenamientos jurídicos estatales deben tener los mecanismos apropiados y suficientes para determinar cabalmente si ha existido un ejercicio abusivo de la libertad de expresión y establecer responsabilidades de la magnitud necesaria para sancionarlos y corregirlos en la medida de lo posible de acuerdo a las circunstancias de cada caso concreto. Para esta tarea se han empleado tanto la vía civil como la penal, muchas veces de manera unificada, sin que a esta altura puedan afirmarse por esta Corte, prácticas generalizadas de desbordamiento por parte de los Estados miembros del sistema, que hagan pensar en algún problema relacionado con la existencia misma y el empleo de un sistema sancionatorio penal para reprimir los usos abusivos de la libertad de expresión.

8. Como se explicará en este voto, estimamos que la posición que asumió la mayoría en la sentencia tiene al menos tres dificultades a las que corresponde hacer mención. Primero, la prohibición del uso del derecho penal para imponer responsabilidades ulteriores por el ejercicio abusivo de la libertad de expresión en ciertos casos, lo cual a

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<sup>1</sup> Caso Baraona Bray Vs. Chile. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 24 de noviembre de 2022. Serie C No. 481. Párr. 115.

nuestro juicio erosiona el principio de tutela judicial efectiva y reduce el núcleo de protección de los derechos de los funcionarios públicos en cuanto al derecho al honor y; genera un estándar de difícil cumplimiento para los Estados de la región. Segundo, la aplicación de estándares de defensores de derechos humanos al caso, a pesar de la falta de precisión fáctica sobre si el señor Baraona Bray ostentaba esa calidad. Y, finalmente, la falta de la violación del principio de legalidad en los tipos penales aplicados en su caso.

## I. LA JURISPRUDENCIA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS EN MATERIA DE RESPONSABILIDADES ULTERIORES

9. En la sentencia, la Corte declaró que la sanción penal impuesta al señor Baraona Bray por sus declaraciones sobre las supuestas presiones políticas ejercidas por el senador SP con el objetivo de evitar la suspensión de actividades de tala ilegal, en sí misma resultó contraria a la Convención Americana sobre Derechos Humanos (en adelante "CADH" o "Convención"), por tratarse de un discurso de interés público (protección ambiental), dirigido a un funcionario público (senador). Además, la Corte precisó, que lo ocurrido tuvo un alcance particular dada la alegada condición de defensor de derechos humanos del señor Carlos Baraona y el carácter abierto del tipo penal de injurias graves que le fue aplicado.

10. Para llegar a esta conclusión, el Tribunal reiteró algunos de los estándares jurisprudenciales en la materia. Destacó el rol del derecho a la libertad de expresión en el marco de una sociedad democrática, la obligación de los Estados de limitarlo solo en los eventos admitidos por la Convención, y la necesidad especial de proteger los discursos de interés público, entre ellos el relacionado con el medio ambiente, para evitar que las medidas punitivas los desestimulen.

11. La Corte sostuvo que el derecho a la libertad de expresión no es absoluto, y explicó que como consecuencia, el artículo 13.2 de la Convención prevé la posibilidad de establecer responsabilidades ulteriores en casos de ejercicio abusivo, para alcanzar "*el respeto a los derechos o la reputación de los demás*", (Párrafo 103). En este sentido, reiteró su posición jurisprudencial según la cual la sanción penal o civil puede ser utilizada para lograr la coexistencia armónica entre los derechos (Párrafos 106 y 108). No obstante, con fundamento en dos decisiones jurisprudenciales emitidas en años recientes **Caso Álvarez Ramos vs. Venezuela y Caso Palacio Urrutia vs. Ecuador**<sup>2</sup>, concluyó que el ejercicio de la sanción penal resultaba en sí mismo contrario a la Convención por tratarse de discursos de interés público, dado el efecto amedrentador de medidas de dicha naturaleza. Concretamente señaló,

En efecto, el uso de la ley penal para interponer responsabilidades ulteriores por declaraciones en los medios de comunicación social sobre temas de interés público produciría directa o indirectamente, un amedrentamiento que, en definitiva, limitaría la libertad de expresión e impediría someter al escrutinio público conductas que

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<sup>2</sup> Cfr. Caso Palacio Urrutia y otros Vs. Ecuador. Fondo, Reparaciones y Costas. Sentencia de 24 de noviembre de 2021. Serie C No. 446; y Caso Álvarez Ramos Vs. Venezuela. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 30 de agosto de 2019. Serie C No. 380.

infrinjan el ordenamiento jurídico, como, por ejemplo, hechos de corrupción y abusos de autoridad entre otros, etc. En definitiva, lo anterior debilitaría el control público sobre los poderes del Estado, con notorios perjuicios al pluralismo democrático. En otros términos, la protección de la honra por medio de la ley penal que puede resultar legítima en otros casos no resulta conforme a la Convención en la hipótesis previamente descrita.

Esto no significa que, en el supuesto antes señalado, es decir respecto de un discurso protegido por su interés público, como son los referidos a conductas de funcionarios públicos en el ejercicio de sus funciones, el honor de los funcionarios públicos o de las personas públicas no deba ser jurídicamente protegido. Eventualmente la conducta periodística podría generar responsabilidad en otro ámbito jurídico, como el civil, o la rectificación o disculpas públicas, por ejemplo, en casos de eventuales abusos o excesos de mala fe <sup>3</sup>.

12. Con esto la Corte retoma una posición que bien había sido corregida en el caso ***Moya Chacón vs. Costa Rica***, de despenalización absoluta de las conductas de “injuria” y “calumnia” frente a temas de interés público o relacionados con funcionarios públicos. Como explicaremos a continuación, consideramos que esta es una lectura equivocada del precedente de esta Corte.

13. El desarrollo de los estándares sobre responsabilidades ulteriores, en casos como ***Palamara Iribarne Vs. Chile (2005)***, ***Kimel Vs. Argentina (2008)***, ***Valle Jaramillo Vs. Colombia (2008)*** ***Tristán Donoso Vs. Panamá (2009)***, ***Fontevicchia y D`Amico Vs. Argentina (2011)***, ***Memoli Vs. Argentina (2013)*** y ***Lagos del Campo Vs. Perú (2017)***, se había dado en dos direcciones. Por una parte, en relación con el principio de legalidad, por la generalidad, ausencia de certeza y falta de claridad de las conductas que podrían generar responsabilidad penal. De otra parte, en determinar los criterios que debe utilizar el juez para establecer la procedencia de la sanción penal, esto es, definir si en un caso concreto, debe prevalecer la libertad de expresión o el derecho a la honra y buen nombre de un ciudadano o funcionario público.

14. El alcance de estos criterios, según los precedentes citados, dependen en primer lugar del contenido de la información, opinión o expresión. En este sentido, la Corte ha señalado que si estamos ante información o temas de interés público, debe prevalecer el derecho del periodista o ciudadano en tanto tiene un peso mayor en la dimensión objetiva de la libertad de expresión. Se trata de una consideración dirigida a preservar el impacto que tiene la información y la opinión libre en el pluralismo, en la tolerancia, en la dinámica discursiva del sistema democrático que solo permite una evolución con la crítica, con las opiniones divergentes frente al gobierno y en general en la sociedad.

15. En segundo lugar, se ha establecido que resulta relevante considerar la condición de funcionario público que puede tener el sujeto pasivo de las conductas de injuria o difamación. La condición de servidor público, sobre todo cuando se trata de máximos dirigentes o responsables, incluyendo a los funcionarios de elección popular, pero no única o exclusivamente, genera la necesidad de tener una mayor tolerancia cuando se

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<sup>3</sup> Caso Palacio Urrutia y otros Vs. Ecuador. Fondo, Reparaciones y Costas. Sentencia de 24 de noviembre de 2021. Serie C No. 446. Párr. 118. En el mismo sentido Caso Álvarez Ramos Vs. Venezuela. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 30 de agosto de 2019. Serie C No. 380. Párrs. 118, 122 y 124.

dirigen improprios, opiniones ofensivas o en general conductas que cuestionan su honorabilidad o buen nombre. Analizado el caso concreto, los jueces, por regla general, deben proteger a los periodistas y a los ciudadanos que hacen uso de su libertad de expresión contra funcionarios públicos. Solo en casos extremos se podría acudir a responsabilidades ulteriores de carácter sancionatorio.

16. Por ejemplo, en el caso ***Kimel Vs. Argentina***, se concluyó que, si bien la aplicación de una sanción penal contra el señor Kimel perseguía un fin legítimo, esto es proteger el honor de un funcionario público, dicha sanción resultó innecesaria debido a la repercusión que tuvo sobre los bienes jurídicos del querellante, y además resultó desproporcionada. En relación con este último punto, la Corte consideró el grado de afectación de los bienes jurídicos del querellante, la importancia de la satisfacción del bien contrario, y si la satisfacción del primero justificaba la restricción del otro. Es en este análisis que consideró que *"en algunos casos la balanza se inclinará hacia la libertad de expresión y en otros a la salvaguarda del derecho a la honra"*. Al realizar el análisis concreto la Corte tomó en consideración que los funcionarios públicos están más expuestos a la crítica, que el umbral de protección a la libertad de expresión es más amplio en debates de interés público, y que las declaraciones del señor Kimel constituyeron opiniones. De esta forma, la Corte concluyó que en el caso la aplicación de una sanción penal resultaba evidentemente desproporcionada<sup>4</sup>.

17. Por el contrario, en el caso ***Memoli Vs. Argentina***, la Corte concluyó que la imposición de una sanción penal por el delito de injurias no derivó en la violación al derecho a la libertad de expresión, puesto que dichas sanciones están previstas en la ley, cumplían una finalidad legítima (la protección de la reputación de los demás) y fueron proporcionales. Como parte del análisis de proporcionalidad, la Corte tomó en cuenta el análisis realizado por las autoridades judiciales internas que habían calificado que los dichos materia de análisis habían excedido el espectro de la opinión para alcanzar el propósito de desprestigiar, y que existió un animus injuriandi o dolo. Asimismo, el Tribunal advirtió que la ponderación realizada por las autoridades internas entre la libertad de expresión y el derecho al honor fue adecuada, justificando la imposición de la sanción penal<sup>5</sup>. Cabe destacar que este caso no se refería a opiniones vertidas sobre la acción de funcionarios públicos, ni sobre asuntos de interés público, sino en un actuar entre particulares.

18. Los distintos estándares establecidos en la jurisprudencia de la Corte Interamericana pueden ser apreciados dentro de una constante de protección de la libertad de expresión, en particular a los periodistas, como personas dedicadas profesional o vitalmente a este ejercicio. La jurisprudencia ha considerado que la profesión de periodista por su importancia y relación con la dimensión objetiva de la libertad de expresión debe ser protegida, por ello debe dársele un peso específico en el proceso de ponderación que permite decidir si hay o no lugar a sanciones ulteriores, en particular sanciones penales o civiles. El discurso sobre temas de interés público y respecto de personas que ejercen funciones públicas, también había sido objeto de

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<sup>4</sup> Cfr. Caso Kimel Vs. Argentina. Fondo, Reparaciones y Costas. Sentencia de 2 de mayo de 2008. Serie C No. 177. Párr. 68-94.

<sup>5</sup> Cfr. Caso Memoli Vs. Argentina. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 22 de agosto de 2013. Serie C No. 265. Párrs. 129-149.

amplia protección por parte de la Corte, sobre todo dada la importancia del debate público y el acceso a la información para la consolidación del estado democrático. Analizar los elementos fácticos y jurídicos en cada caso concreto, y establecer el alcance de las limitaciones de los derechos a través del juicio de proporcionalidad, tomando en cuenta todos estos criterios había sido la postura de la Corte. Como se explicará a continuación, recientemente ha habido un cambio en la interpretación de este Tribunal, el cual no sobra decir, no ha sido anunciado como tal, con la consecuente fundamentación de la variación, según se explicará de seguido.

## **II. EL CAMBIO EN LA LÍNEA JURISPRUDENCIAL SOBRE RESPONSABILIDADES ULTERIORES Y LA FALTA DE CERTEZA SOBRE EL ESTÁNDAR VIGENTE**

19. En el año 2019 la Corte conoció el **Caso Álvarez Ramos Vs. Venezuela**, en el marco del cual se declaró la responsabilidad internacional del Estado por la violación del artículo 13.2 en relación con el artículo 1.1 de la Convención; fundada en la condena penal impuesta al señor Tulio Álvarez Ramos por la comisión del delito de difamación agravada continuada en contra de un exdiputado. Para llegar a esta conclusión, la Corte reiteró su jurisprudencia según la cual, aunque el margen de maniobra de los periodistas o personas que circulan información es más amplio frente a casos de interés público, el derecho al honor de los funcionarios debe ser igualmente protegido. Adicionalmente señaló que, aunque la Convención permite el uso del derecho sancionador ante tales circunstancias, la utilización del derecho penal debe estar reservada a los casos más graves.

20. No obstante, cambiando su postura expresada en decisiones anteriores, la Corte sostuvo que dicha aplicación restringida del derecho penal no resultaba aplicable a casos en los cuales la información u opinión se refiera a funcionarios públicos en ejercicio de sus funciones, pues en su consideración el uso de medidas de tal naturaleza en casos de interés público es contraria a la Convención. Concretamente la Corte dispuso en esa oportunidad,

Se entiende que en el caso de un discurso protegido por su interés público, como son los referidos a conductas de funcionarios públicos en el ejercicio de sus funciones, la respuesta punitiva del Estado mediante el derecho penal no es convencionalmente procedente para proteger el honor del funcionario.

En efecto, el uso de la ley penal por difundir noticias de esta naturaleza, produciría directa o indirectamente, un amedrentamiento que, en definitiva, limitaría la libertad de expresión e impediría someter al escrutinio público conductas que infrinjan el ordenamiento jurídico, como, por ejemplo, hechos de corrupción, abusos de autoridad, etc. En definitiva, lo anterior debilitaría el control público sobre los poderes del Estado, con notorios perjuicios al pluralismo democrático. En otros términos, la protección de la honra por medio de la ley penal que puede resultar legítima en otros casos, no resulta conforme a la Convención en la hipótesis previamente descrita<sup>6</sup>.

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<sup>6</sup> Caso Álvarez Ramos Vs. Venezuela. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 30 de agosto de 2019. Serie C No. 380. Párrs. 121 y 122.

21. Como consecuencia, el Tribunal consideró que la condena penal impuesta al señor Álvarez violaba la CADH, en tanto las opiniones que se constituían como conductas típicas en el orden interno se referían al desempeño de labores de funcionarios públicos, sin analizar la proporcionalidad de la medida impuesta en el caso. Esta posición representó un evidente giro en la línea jurisprudencial de la Corte en materia de responsabilidades ulteriores, pues como se explicó antes el estándar estaba basado en el principio de legalidad, el criterio de *ultima ratio* y la exigencia de aplicar el juicio de proporcionalidad. No obstante, en este caso se consideró contrario a la Convención la imposición de una sanción penal en sí misma, sin considerar su proporcionalidad en el caso concreto.

22. Este razonamiento fue reiterado en el caso **Palacio Urrutia Vs. Ecuador**, en el que la Corte declaró la responsabilidad del Estado por una serie de violaciones al debido proceso ocurridas en el marco de un proceso penal que derivó en la condena del periodista Emilio Palacio Urrutia y de los directivos del diario El Universo, por la publicación de un artículo de opinión sobre la crisis política de septiembre de 2010. No sobra decir que, en este caso, Ecuador había reconocido responsabilidad por la violación del artículo 13 de la Convención, y como consecuencia la reiteración de la posición jurisprudencial se hizo sin considerar los contrargumentos que hubiere podido esgrimir el Estado. La Corte dispuso que,

Al respecto, el Tribunal recuerda que en el caso Álvarez Ramos Vs. Venezuela, sostuvo que, en el caso de un discurso protegido por su interés público, como son los referidos a conductas de funcionarios públicos en el ejercicio de sus funciones, la respuesta punitiva del Estado mediante el derecho penal no es convencionalmente procedente para proteger el honor del funcionario. En razón de lo anterior, dado que en el presente caso se sancionó penalmente a las presuntas víctimas con motivo de la publicación del artículo "NO a las mentiras", el cual era un artículo de opinión que criticó la actuación del entonces Presidente en el ejercicio de sus funciones, y que abordó una cuestión de interés público, el Tribunal considera que el Estado es responsable por la violación al derecho a la libertad de expresión en términos del artículo 13 de la Convención Americana<sup>7</sup>.

23. Así, la Corte parecía consolidar un estándar nuevo que pretendía proteger más ampliamente la libertad de expresión a través de la despenalización absoluta de conductas que atenten contra la honra y el buen nombre de funcionarios públicos (atipicidad de la conducta), aunque sin anunciarlo como tal. Quizás esto se debió a que el cambio de jurisprudencia o la creación del nuevo estándar se debe a un aspecto semántico, de alcance de expresiones. Según la posición de la mayoría de la Corte, cuando en las sentencias Álvarez Ramos se dijo "*la vía penal es inconvencional para asuntos de interés público*", lo que se quiso decir no es que debe haber una condena luego de analizar el caso concreto, sino que no puede iniciarse, del todo, un proceso penal en ese tipo de casos. Es decir, que debe entenderse que todo tipo penal de injuria esta incurso en una inconvencionalidad por omisión, que debe ser resuelta adicionando un texto o un mandato de excepción cuando esté presente un asunto de interés público y cuando quien presuntamente sea víctima de ese ilícito sea un funcionario público. Así,

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<sup>7</sup> Caso Palacio Urrutia y otros Vs. Ecuador. Fondo, Reparaciones y Costas. Sentencia de 24 de noviembre de 2021. Serie C No. 446. Párr. 120.

se deja a un lado la posición según la cual la determinación de los límites de la libertad de expresión respecto del derecho al honor en un caso concreto la hace el juez mediante un juicio de proporcionalidad, como se había sentado en la extensa línea jurisprudencial de la Corte, para afirmar que en asuntos de interés público o frente a funcionarios públicos estas conductas deben ser consideradas atípicas, sin que pueda activarse el ejercicio de la acción penal.

24. Como había advertido el Juez Sierra en su oportunidad, este cambio jurisprudencial resulta profundamente problemático porque ignora el alcance del artículo 13, que únicamente prohíbe la censura previa, y deja a un lado la interpretación sistemática de la Convención, que exige brindar el mayor grado de protección posible frente a todos los derechos convencionales, dentro de los cuales se encuentra el derecho a la honra. Concretamente había dicho que,

Los precedentes de la Corte previo al caso Álvarez Ramos han sido consistentes respecto a que la tipificación del delito de injurias y calumnias debe cumplir con el principio de legalidad y de intervención mínima y de ultima ratio del derecho penal. Además, que se debe analizar con especial cautela el uso del derecho penal para la protección de otros derechos, tomando en consideración el dolo de quien emitió las opiniones, las características del daño que se produjo, y el grado de protección a determinadas expresiones (por ejemplo, aquellas de interés público que involucran los actos de autoridades) para así calificar si el uso del derecho penal es legítimo. Estas condiciones son analizadas al momento de evaluar la necesidad de la medida y cuando se califica la proporcionalidad de la sanción. También se ha reconocido que la carga de la prueba la tiene quien formuló la decisión. De esta forma, la Corte ha podido dar una mayor protección a los discursos de opinión, que tienen un interés público, y que se refieren a las autoridades, sin establecer una regla absoluta que prohíba la imposición de dichas sanciones<sup>8</sup>.

25. Ahora bien, más recientemente la Corte publicó el caso ***Moya Chacón Vs. Costa Rica***, en el que declaró la responsabilidad del Estado al considerar que la sanción civil impuesta a los señores Moya Chacón y Parrales Chaves, por realizar una publicación periodística en la que se comunicaba la existencia de una investigación contra un policía por presunto contrabando, no fue necesaria ni proporcional al fin legítimo perseguido de proteger la honra y, por tanto, contravino los artículos 13.1 y 13.2 de la Convención Americana. Así, a pesar de tratarse de circunstancias similares a las de los *casos Álvarez Ramos y Palacio Urrutia*, procesos penales por publicaciones o declaraciones deshonorosas en contra de funcionarios públicos, la Corte optó por retomar su posición jurisprudencial anterior, es decir permitió la utilización de la vía penal, aunque no la pena impuesta.

26. Reafirmó que el análisis de la procedencia de responsabilidades ulteriores por ejercicios abusivos de la libertad de expresión debía ser analizada bajo el tamiz del juicio de proporcionalidad, sin importar si se trataba de una sanción civil o penal, ni tampoco si el discurso era de interés público. Puntualmente la Corte dispuso que,

Así, la Corte ha señalado que, en una sociedad democrática, aquellas personas que influyen en cuestiones de interés público están más expuestas al escrutinio y la crítica

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<sup>8</sup> Voto concurrente del Juez Humberto Antonio Sierra Porto. Párr. 12. Caso Palacio Urrutia y otros Vs. Ecuador. Fondo, Reparaciones y Costas. Sentencia de 24 de noviembre de 2021. Serie C No. 446.

del público. Este diferente umbral de protección se explica porque sus actividades salen del dominio de la esfera privada para insertarse en la esfera del debate público y, por tanto, se han expuesto voluntariamente a este escrutinio más exigente. Esto no significa, de modo alguno, que el honor de las personas participantes en asuntos de interés público no deba ser jurídicamente protegido, sino que éste debe serlo de manera acorde con los principios del pluralismo democrático.

Por otro lado, en relación con el carácter necesario y el riguroso análisis de proporcionalidad que debe regir entre la limitación al derecho a la libertad de expresión y la protección del derecho a la honra, se deberá buscar aquella intervención que, siendo la más idónea para restablecer la reputación dañada, contenga, además, un grado mínimo de afectación en el ámbito de la libertad de expresión<sup>9</sup>.

27. No obstante, en este caso la Corte tampoco hizo mención al valor de su precedente, no indicó que se trataba de una modificación, ni tampoco señaló las razones que justificaban aplicar una regla distinta en este caso, v.gr. diferencias fácticas. El Tribunal simplemente utilizó como parte de la argumentación de su decisión, sentencias previas al *Caso Álvarez Ramos vs. Venezuela* y retomó su postura según la cual, la procedencia de responsabilidades ulteriores de naturaleza penal debe analizarse caso a caso, dentro de los límites que imponen el principio de *ultima ratio* y el juicio de proporcionalidad.

28. Así, no se puede pasar esta oportunidad sin señalar que la presente sentencia parece consolidar un cambio en la jurisprudencia de la Corte sobre el alcance de la figura de responsabilidades ulteriores. No obstante, la mayoría considera que no es necesario reconocerlo como tal porque este cambio ya se hizo en los casos *Álvarez Ramos* y *Palacio Urrutia*. Olvidan que en el caso *Moya Chacón*, nuevamente se había variado la postura.

29. Esta lógica de actuación representa profundas dificultades al menos en dos direcciones. Por una parte, en la defensa de los Estados, que consolidan sus argumentos y demuestran el cumplimiento de sus obligaciones internacionales en el marco del proceso internacional tomando en cuenta la jurisprudencia de la Corte. Por otra, frente al ejercicio del control de convencionalidad, pues cuando la Corte no ofrece claridad sobre los estándares que deben ser acogidos por los Estados, no existe para ellos seguridad jurídica sobre el alcance y contenido de sus obligaciones internacionales. La exigencia de que todas las autoridades del orden interno apliquen la Convención Americana siguiendo los criterios de la Corte Interamericana, obliga a que el Tribunal tenga constancia y razonabilidad argumentativa en las decisiones que emite. Los cambios intempestivos de postura, como los de los últimos años en materia de responsabilidades ulteriores, ponen en duda la consistencia de su criterio. Esto no significa que el Tribunal no pueda variar su postura, sino que al hacerlo tiene unas cargas argumentativas y exigencia de transparencia, que deben ser respetadas para garantizar su legitimidad, y los principios de seguridad jurídica e igualdad que inspiran su labor como Tribunal internacional.

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<sup>9</sup> Caso *Moya Chacón y otro Vs. Costa Rica. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 23 de mayo de 2022. Serie C No. 451. Párrs. 75 y 76.*

### III. LA EROSIÓN DEL PRINCIPIO DE TUTELA JUDICIAL EFECTIVA Y DEL ESTADO DE DERECHO. LA DEGRADACIÓN DEL DERECHO AL HONOR DE LOS FUNCIONARIOS PÚBLICOS COMO UN DERECHO DE SEGUNDA CATEGORÍA.

30. Como se explicó en el acápite anterior, la posición que asume la Corte en esta decisión conduce a una despenalización absoluta (para cualquier persona, sean o no periodistas) de conductas que desconozcan el derecho al honor de funcionarios públicos o de personas relacionadas con asuntos de interés público, cuando estas se adelantan en ejercicio de la libertad de expresión. Este modelo de respuesta estatal, al que la Corte espera que migren los Estados de la región, reduce los mecanismos a través de los cuales se previenen y protegen los derechos convencionales. Con esto el derecho al honor de los funcionarios públicos adquiere un grado de protección menor, como si fuera de segunda categoría tratándose de un derecho convencionalmente protegido.

31. Esta postura, de despenalizar automáticamente toda controversia en que medie un funcionario público y un discurso de interés público, lejos de ampliar el margen de protección del derecho a la libertad de expresión, y fortalecer el debate público, agudiza la crisis de legitimidad de los sistemas democráticos de la región. Desproteger a los funcionarios públicos impidiendo que puedan exigir la protección de sus derechos y la prevención de acciones que los vulneren (especialmente en casos de evidente mala fe), debilita aún más la institucionalidad de los frágiles sistemas de nuestra región y es particularmente preocupante, por ejemplo, en el caso de los jueces por el rol que juegan en el Estado de derecho.

32. Ahora bien, la Corte parece considerar que los elementos antes explicados como regla general, no tienen suficiente relevancia pues el ejercicio de la acción penal en casos de manifestaciones referidas a funcionarios públicos o a asuntos de interés público tiene un efecto amedrentador (Párr. 109). Es justamente esto lo que históricamente había justificado, con base en el artículo 13 de la Convención, el uso obligatorio del juicio de proporcionalidad para la determinación de la procedencia de sanciones penales en casos de presunto uso abusivo del ejercicio de la libertad de expresión. No obstante, la Corte ahora asume una posición distinta e incluso dispone que el ejercicio de la acción penal en este caso, por tratarse de un asunto de interés público, es en sí misma, una amenaza frente a la libertad de expresión que se encuentra prohibida por la Convención,

Una vez que en el ámbito social se decidió retomar el debate en el 2006, a través del canal "Piel de Jaguar", tanto el señor Baraona como el director ejecutivo del programa **fueron nuevamente amenazados por el poder punitivo del Estado**, por la presentación de una querrela [...]. Al respecto, la Corte advierte que después de ser querrellado en dos oportunidades y condenado penalmente, el señor Baraona abandonó su proyecto de participar activamente en el tema ambiental y la defensa del alerce, y como lo afirmó en la audiencia pública ha enfrentado dificultades para su ejercicio profesional<sup>10</sup>. (Énfasis fuera del texto original).

33. En un Estado de Derecho y en un sistema democrático, donde se ha resaltado la importancia que tiene el ejercicio de la libertad de expresión, las conductas abusivas,

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<sup>10</sup> Caso Baraona Bray Vs. Chile. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 24 de noviembre de 2022. Serie C No. 481. Párr. 123.

deben ser controlados por la Administración de Justicia. Por eso resulta problemático que en esta sentencia, la Corte exprese una visión represora de la administración de justicia y desconozca que el ejercicio de la acción penal tiene como propósito prevenir y sancionar las violaciones de derechos convencionales. En efecto, desde su primera sentencia el Tribunal consideró que *“los Estados deben prevenir, investigar y sancionar toda violación de los derechos reconocidos por la Convención y procurar, además, el restablecimiento, si es posible, del derecho conculcado y, en su caso, la reparación de los daños producidos”*<sup>11</sup>, como consecuencia *“si el aparato del Estado actúa de modo que tal violación quede impune y no se restablezca, en cuanto sea posible, a la víctima en la plenitud de sus derechos, puede afirmarse que ha incumplido el deber de garantizar su libre y pleno ejercicio a las personas sujetas a su jurisdicción”*<sup>12</sup>.

34. Precisamente por eso no es de recibo el argumento según el cual el efecto disuasivo del derecho penal, que según considera la Corte se genera con el mero ejercicio de la acción penal, sea en sí mismo contrario a la Convención. Por el contrario, es protegido por esta cuando se ejerce de manera legítima y bajo los límites establecidos por la propia CADH. En este sentido, si bien es cierto que en materia de libertad de expresión hay un especial ámbito de protección y que la imposición de responsabilidades ulteriores debe cumplir criterios específicos con el fin de no generar un efecto amedrentador, eso no significa que el ejercicio abusivo de este derecho no deba ser sancionado y prevenido.

35. Por lo anterior, consideramos que es equivocado asumir una postura según la cual, el ejercicio del poder punitivo del Estado únicamente tiene por objeto limitar los derechos de los ciudadanos, periodistas o defensores de derechos humanos, que en todos los casos pretenden fortalecer el debate democrático sobre asuntos de interés público. En un Estado de Derecho no pueden existir ámbitos de actuación no susceptibles de control que pueden conducir a actuaciones arbitrarias, frente a los cuales los jueces no pueden hacer uso de sus competencias. Mucho menos puede afirmarse que la protección que brinda el ejercicio de la acción penal y los efectos de la imposición de la sanción penal, que como ha sido la posición de esta Corte son necesarios para garantizar los derechos convencionales, solo se prediquen respecto de algunos habitantes del territorio interamericano, y no de aquellos que ejerzan funciones públicas o estén vinculados con asuntos de interés público.

36. Además, es claro que excluir del control judicial los abusos a la libertad de expresión como regla general, puede afectar otros derechos en juego. No se debe olvidar que el ejercicio de la libertad de expresión puede generar profundas afectaciones a otros derechos convencionales, no solo la honra, sino incluso la vida o integridad personal cuando se trata de discursos de odio o apología al terrorismo.

37. En este sentido, se debe tomar en cuenta que la Convención para la Prevención y la Sanción del Delito de Genocidio, artículo III y la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial, artículo 4, señalan como obligaciones de los Estados la sanción de las conductas de instigación al genocidio, la

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<sup>11</sup> Caso Velásquez Rodríguez Vs. Honduras. Fondo. Sentencia de 29 de julio de 1988. Serie C No. 04. Párr. 166.

<sup>12</sup> Ibid. Párr. 176.

superioridad o en el odio racial y toda incitación a la discriminación racial. Concretamente, el Plan de Acción de Rabat sobre la prohibición de la apología del odio señala, “en relación con la imposición de sanciones, que es esencial hacer una cuidadosa distinción entre formas de expresión que deberían constituir delito, y formas de expresión que no deberían ser perseguidas penalmente, pero que podrían justificar una demanda civil, y formas de expresión que no deberían dar lugar a sanciones, pero que en todo caso suscitan preocupación en términos de tolerancia, civismo y respeto hacia las convicciones de terceros”<sup>13</sup>. Con lo cual reconoce que hay conductas que corresponden a la esfera del derecho penal.

38. Por su parte, el Tribunal Europeo de Derechos Humanos ha considerado que el ejercicio de la acción penal no solo es permitido en algunos casos, sino que lo ha considerado necesario. Así en casos como *Radio France and others v. France* o *Lindon, Otchakovsky-Laurens and July v. France*, ha dispuesto que la respuesta criminal frente a la difamación no puede ser considerada *per se* desproporcionada. Por esto la discusión no se ha centrado en la imposibilidad de utilizar el derecho penal, sino, como antes lo hacía la Corte con el test de proporcionalidad, en el grado en que este puede ser aplicado, v.gr. tipo de sanción o duración de la pena,

El Tribunal presta considerable atención a la severidad de una sanción penal en casos de difamación, particularmente cuando se trata de un asunto de interés público. En este sentido, la imposición de una pena de prisión por un delito de prensa será compatible con la libertad de expresión de los periodistas garantizada por el artículo 10 del Convenio sólo en circunstancias excepcionales, en particular cuando otros derechos fundamentales hayan sido seriamente lesionados, como, por ejemplo, en el caso de discurso de odio o incitación a la violencia<sup>14</sup>.

39. Por otra parte, no cabe duda de que la decretada deslegitimación general del sistema penal para la fijación de responsabilidades ulteriores recogidas por el artículo 13.2 de la Convención, tendrá una amplia incidencia en todos los Estados miembros del Sistema Interamericano de Derechos Humanos, sin que nada se diga sobre cuál es la situación particular en ellos, a lo largo del continente, con base en un estudio de derecho comparado ni sobre sus efectos. Tampoco nos informa sobre los criterios para descartar y estimar insuficiente el uso de cualquier medida intermedia, tal como sería la promoción de medidas correctivas o de ajuste al sistema penal sustantivo y adjetivo, para lograr el importante objetivo de proteger adecuadamente los discursos de interés público, sin generar una clara desprotección de los derechos humanos ubicados en el otro extremo de la balanza. Una cosa es establecer configuraciones legales o procesales para enfrentar los efectos nocivos del *chilling effect*, como podría ser la decisión de la Corte Constitucional Colombiana<sup>15</sup>, sobre carga de la prueba, o bien la posibilidad de introducir una fase de admisibilidad en sede penal para este tipo de delitos, con el fin de descartar demandas sin mérito que sólo buscan amedrentar -como en efecto las hay-, y otra, es

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<sup>13</sup> Informe Anual. Alto Comisionado de Naciones Unidas para los Derechos Humanos. A/HRC/22/17/Add.4

<sup>14</sup> Tribunal Europeo de Derechos Humanos. Caso *Ruokanen and Others v. Finland*, párr. 50; Caso *Balaskas v. Greece*, párrafo 51; Caso *Fatullayev v. Azerbaijan*, párrs. 129 y 177.

<sup>15</sup> *Cfr.* Corte Constitucional de Colombia. Sentencia C-135/21. MP Gloria Stella Ortiz Delgado. Expediente D-13891.

renunciar al análisis del contexto particular para ponderar derechos en juego en un caso concreto.

40. Consideramos que, no es posible afirmar que, en todos los casos, el proceso civil representa menos riesgos para el ejercicio de la libertad de expresión que el proceso penal, que es además aquel en el que se ofrecen mayores garantías a los presuntos autores. No se ha medido por ejemplo el efecto del embargo preventivo en vía civil, la duración del proceso, los distintos estándares probatorios, el costo del litigio, que a la larga pueden resultar igual o peor que el proceso penal en sí, según el país de que se trate. En ese sentido, no encontramos razones para suponer que el efecto disuasivo (*chilling effect*) hará presencia solamente en el caso de la existencia y funcionamiento del sistema penal, mas no en el caso de las vías de resarcimiento civil. Por ejemplo, en el caso concreto planteado, la mayoría recoge las declaraciones de la víctima quien afirmó que -en vista de la condena recibida- se había abstenido de continuar su labor de defensa del medio ambiente y de denuncia de actos que estimaba incorrectos por parte de funcionarios públicos; empero nada en el expediente permite concluir que su abstención hubiera sido diferente si hubiera sido condenado a sufrir consecuencias económicas en vía civil por su actuación en defensa de los derechos humanos.

41. Por lo demás, los efectos disuasorios -de la sede penal o la civil- serán deseables y beneficiosos cuando se trata de desestimular los ejercicios abusivos de la libertad de expresión, tanto los realizados por las vías tradicionales, como principalmente los surgidos de nuevas modalidades de abuso propiciadas por las nuevas tecnologías globales de comunicación e información. A estas alturas del desarrollo global, es innegable que las sociedades democráticas no pueden descuidar sus mecanismos de protección frente a individuos, grupos o incluso Estados que a través de medios tecnológicos que apenas vislumbramos, ya están intentando sacar provecho de comunicación global y en general de la libertad de expresión para imponer temáticas y postverdades. Tales grupos no tendrán reparos en emplear la libertad de expresión para desprestigiar sistemáticamente nuestras democracias, a sus actores e instituciones, si ello llega a ser conveniente para sus intereses. Frente a lo anterior, una deslegitimación pura y simple del sistema penal, representa para el sistema democrático y en especial para quienes asumen posiciones públicas, una disminución grave en su capacidad de vindicar su dignidad y honor, con un efecto peligroso también para la legitimidad de la institucionalidad democrática, ya que cuando de mala fe se lesiona el honor de un funcionario público, el efecto no es sólo a nivel individual sino de la legitimidad del cargo que ostenta, tema de especial preocupación en el caso de la judicatura según se indicó supra.

42. Como ya lo mencionamos *supra*, desde nuestra perspectiva, el caso planteado puede resolverse adecuadamente si utilizamos el test de proporcionalidad, tal y como lo ha desarrollado y ha venido aplicando el Tribunal en este y otros tipos de casos. De hecho, este test fue aplicado por el Tribunal en la sentencia para establecer la responsabilidad internacional del Estado de Chile (Párrafo 120 y siguientes), usando argumentos que compartimos a plenitud y que hubieran sido suficientes para fundamentar la vulneración del derecho a la libertad de expresión en el caso.

43. Con la flexibilidad de ese instrumento de análisis, se logra un pronunciamiento bien fundamentado y se puede acentuar -conforme a cada caso- el grado de importancia que tiene para la Corte, la protección de la libertad de expresión en el funcionamiento apropiado de un sistema democrático; siempre con atención de las condiciones de cada Estado y tomando en cuenta sus específicas sensibilidades, según pueda plasmarse apropiadamente en cada controversia. Debe recordarse que este Tribunal, por su particular condición de Tribunal Internacional, debe transitar por una vía particularmente angosta, para evitar, por una parte convertirse en una nueva instancia que sustituya a las autoridades estatales en su labor de juzgamiento de los casos sometido a su conocimiento; y por otra parte debe evitar realizar una excesiva generalización cuando valora y juzga los mecanismos instaurados por los Estados en su labor equilibrar el ejercicio de los diferentes derechos e intereses legítimos de las personas.

44. Así, pues, las válidas inquietudes de la mayoría, originadas en los hechos comprobados de ese caso, pueden ser reconducidas entonces a la frontera donde se encuentran, de un lado los ejercicios válidos y de otro los ejercicios abusivos de la libertad de expresión y es esa frontera la que resulta objeto de constante replanteo y nueva demarcación. Pero para cumplir esta importante tarea estimamos que no es requerido ni aconsejable despojar de legitimidad en forma total, alguno de los medios que cada Estado ha decidido emplear como mecanismo apropiado para la determinación de las responsabilidades ulteriores. Es por estas razones que disentimos de la decisión tomada en relación con la declaración amplia y contundente tomada por la mayoría que busca deslegitimar *per se*, el empleo de la respuesta penal para lidiar con la temática de la libertad de expresión cuando están de por medio declaraciones, expresiones y manifestaciones de interés público o referidos a funcionarios públicos.

#### **IV. EL PRINCIPIO DE LEGALIDAD. AUSENCIA DE RESPONSABILIDAD DEL ESTADO DE CHILE POR LA VIOLACIÓN DEL PRINCIPIO DE TIPICIDAD.**

45. En la sentencia de mayoría se analizan los alegatos de la Comisión sobre la indeterminación de los artículos 416 y 417 de la Ley 21467 que contiene el Código Penal chileno. En consideración de la Comisión, estas disposiciones que consagran el delito de injurias contienen expresiones indeterminadas y abstractas, que solo pueden ser definidas por el juez *ex post facto* y por tanto desconocen el principio de legalidad del artículo 9 de la Convención.

46. Tomando en cuenta lo anterior, la Corte reiteró su posición relacionada con el alcance del artículo 9 de la Convención, que en materia penal implica que "*en la elaboración de los tipos penales es preciso utilizar términos estrictos y unívocos, que acoten claramente las conductas punibles, dando pleno sentido al principio de legalidad penal*"<sup>16</sup>. Como consecuencia, señaló que "*conductas delictuosas pueden llegar a vulnerar el principio de legalidad contenido en el artículo 9 de la Convención Americana*"<sup>17</sup> cuando desconocen los citados requisitos de certeza y especificidad.

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<sup>16</sup> Caso Baraona Bray Vs. Chile. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 24 de noviembre de 2022. Serie No. 481. Párr. 137.

<sup>17</sup> Ibid.

47. En lo que refiere al caso concreto, la mayoría consideró que el artículo 417 del Código Penal, por el cual fue condenado el señor Baraona, tiene un carácter indeterminado y por tanto el Estado violó el principio de legalidad. Puntualmente dispuso,

Como se señaló previamente los tipos penales que restringen el ejercicio de la libertad de expresión deben ser formulados de manera clara y precisa, y para este Tribunal el tipo penal de injurias graves establecido en el artículo 417 del Código Penal no cumple el anterior estándar. En efecto, por una parte hace referencia a conceptos abiertos e indeterminados tales como la imputación de un vicio o falta de moralidad (inciso 3°). Por otra parte, señala que la gravedad de la injuria sea calificada atendiendo las circunstancias del ofendido (inciso 5°), lo que puede estar asociado a carácter de funcionario público de la persona agraviada y resulta contrario a los estándares previamente establecidos en la presente sentencia [...]¹⁸.

48. No compartimos esta conclusión, ni tampoco los argumentos utilizados por la Corte. Si bien es cierto que el principio de tipicidad exige que las normas penales tengan un grado de precisión suficiente, que les permita a los ciudadanos entender el alcance y contenido de las conductas sancionables; esto no es igual a señalar que una norma de naturaleza penal no pueda incluir términos que tengan algún grado de abstracción. En ese sentido, es equivocado afirmar que la referencia a cualquier término de carácter amplio o complejo conlleve automáticamente a una violación del principio de legalidad, pues este debe ser leído en el contexto del tipo en el que se enmarca y del lugar en el que se pretende aplicar. Precisamente por esta razón, en materia penal donde rige un estricto principio de legalidad se admite la existencia excepcional de tipos de amplio espectro y en blanco, que tienen cláusulas con términos relativamente indeterminados, y que incluso remiten a normas de otras materias o regulaciones especializadas para determinar su alcance.

49. Es cierto como lo afirma el voto de mayoría, que para validar, convencionalmente, cualquier tipo de prohibición y sanción, se debe garantizar que el administrado pueda deslindar las acciones y modalidades de comisión que se encuentran en el precepto legal, de las acciones que no son consideradas ilícitas, o, de aquellas que son sancionadas de diferente forma, para evitar un escenario eventual, donde las personas no puedan determinar su actuar, por las dudas, sobre cuál es la acción o modalidad de comisión, que es sujeción de una sanción.

50. Por otra parte, el principio de estricta legalidad implica, que cualquier tipo de prohibición y sanción, no puede presentar falencias legislativas de tal nivel, que posteriormente deban de ser solventadas arbitrariamente por la autoridad jurisdiccional. En ese sentido, a la hora de aplicar un juicio de tipicidad sobre un determinado hecho, la labor interpretativa de la norma que realiza la persona juzgadora, o, el operador del derecho tiene sus límites en el principio de estricta legalidad, y otros principios Convencionales, que son propios de Estados de Derecho.

51. Entre dichas garantías institucionales, que se erigen como límites de la labor interpretativa de la persona juzgadora, cabe citar los principios de División de Poderes, Legalidad, Reserva de Ley, y, de Seguridad Jurídica. Lo anterior implica, que el juzgador

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¹⁸ Ibid. Párr. 141.

a la hora de aplicar determinada norma sobre un supuesto de hecho no puede suplantar al legislador mediante la utilización de la labor interpretativa, ni siquiera ante un escenario de mala técnica legislativa; ya que dicho acto produciría un estado de indefensión en detrimento de la persona, quién no sabría sí atenerse al mandato legislativo, o, al acto jurisdiccional establecido por un juez a la hora de resolver un caso particular de otra persona.

52. Pese a lo anterior, no es posible sostener la existencia única, o, estándar de una técnica legislativa para la construcción de tipos penales. La dinámica de las diversas formas delictivas que afronta la sociedad no permite que la política de persecución penal que elija un Estado pueda reducirse a una forma exclusiva de construcción, y de selección de acciones típicas y merecedoras de una sanción. Por ejemplo, las diversas formas de violencia que pueden sufrir las mujeres por su condición de género, dejaría -eventualmente- sin protección a dicha población, ante una dinámica social que vaya progresivamente concientizando y reprochando conductas sociales que previamente eran aceptadas, pero que no se encontraban tipificadas a suerte de un catálogo de conductas de comisión. Es cierto, que lo esperable es que los tipos penales se construyan con ese estilo de catálogo de modalidades de comisión, pero también es cierto, que ante determinadas conductas criminales, es válido para los Estados la construcción de tipos penales, que consignent modalidades de comisión de amplio espectro, sin que esto implique per se una violación a la Convención.

53. A partir de lo anterior, es necesario diferenciar entre un tipo penal ambiguo, inexacto, o abierto, que *per se* es inconventional, de aquellos tipos penales llamados en Blanco, o de amplio espectro, que, a nuestro criterio, sí superan el test de Convencionalidad. En primera instancia, los tipos penales abiertos son inconventionales, por cuanto su imprecisión, respecto a su contenido factico, permite la libre interpretación discrecional de la persona juzgadora -sin que el principio de legalidad le pueda contener- por carecer el precepto legal parámetros y de contenido.

54. Por otra parte, en el caso de los tipos penales en Blanco, la conformación total de la sanción y de los hechos que merecen reproche, se desarrollan y son de comprensión para las personas, a partir del análisis de los preceptos legales que interactúan entre sí. En ese sentido, una norma puede desarrollar el contenido de las modalidades típicas, y al mismo tiempo referir a otra norma, para el desarrollo y contenido de la sanción.

55. Por otra parte, los tipos penales de amplio espectro describen acciones que implican amplios escenarios de cobertura, que de cierta forma son claramente reconocidos y de comprensión sencilla para las personas; es decir, son normas que la sociedad reconoce, comprende y legitima, mediante la labor legislativa (principio de representación), sin dejar de lado, que, cualquier persona puede encuadrar determinada acción dentro del precepto legal genérico. Ante dichas normas, la labor de la persona juzgadora se limita, a realizar el ejercicio de tipicidad del hecho acusado, partiendo del "encuadre" de la acción dentro del precepto genérico, cuando la conducta es ampliamente, y claramente reconocida por la sociedad, como una de las acepciones o especies del concepto genérico.

56. Sobre el particular, es relevante acotar, que en los diferentes Códigos Penales de los Estados que conforman nuestro sistema regional, podemos encontrar tipos penales que, mediante un concepto genérico de amplio espectro, permiten el juicio de tipicidad de múltiples acciones u omisiones. Por ejemplo, en el caso del delito de Peculado en Costa Rica, la sustracción o distracción de fondos públicos, se puede realizar mediante infinidad de formas (al igual que sucede con los delitos que sancionan la violencia contra las mujeres, o, los incumplimientos de los deberes que se originan del ejercicio de la patria potestad), que haría imposible su codificación total. En ese sentido, declarar inconvencional el uso de modalidades de comisión genéricas de amplio espectro, sobre acciones que son claramente reconocidas por la sociedad, provocaría que los Estados reformen constantemente sus cuerpos normativos, quedando por fuera de la tutela estatal, bienes jurídicos de relevancia social.

57. Sin embargo, en el evento que se pretenda aprobar una norma que contemple un concepto normativo con un desproporcionado espectro de ambigüedad, y de nulo conocimiento, y reconocimiento social, el Estado deberá describir de forma total y por más compleja que esta sea, los supuestos de hecho que su concepto normativo pretende abarcar, porque es la única forma, en primera instancia, de no ceder su competencia a la persona juzgadora. La anterior garantía pretende evitar que las personas sean puestas en una condición de desventaja, que le harán vulnerables a ser perseguidos por el despliegue de acciones, que, en principio, nunca le fueron claramente advertidas como merecedoras de reproche penal, ya sea, porque no formaban parte de las conductas que el legislador pretendía prohibir o tutelar, o, porque no se relacionan con los bienes jurídicos a tutelar.

58. En el caso concreto, el tipo penal que la mayoría dispuso como inconvencional, es precisamente un tipo penal de amplio espectro o cobertura. Consideramos que no se explican en el voto de mayoría las razones por las cuales las modalidades de comisión son abiertas a tal punto, que violentan el principio de estricta legalidad. La mayoría reconoce que las modalidades de comisión son genéricas, es decir, no se desarrollan como un catálogo, o reglamentación detallada de acciones; sin embargo, más allá de lo anterior, no desarrollan cómo esa generalidad puede provocar un escenario de libre discrecionalidad y arbitrariedad de la labor jurisdiccional o de las personas operadoras del Derecho. En ese sentido, como lo indicamos anteriormente, debemos diferenciar si esa generalidad de las modalidades de comisión del tipo penal en estudio, provocan un desproporcionado espectro de ambigüedad, y de nulo conocimiento, y reconocimiento social, porque de lo contrario, estaríamos reduciendo la eficiencia estatal para generar tutela sobre los intereses de las personas.

59. Para efectos de este análisis, corresponde reiterar que las disposiciones cuestionadas señalan,

ART. 416. Es injuria toda expresión proferida o acción ejecutada en deshonra, descrédito o menosprecio de otra persona.

ART. 417.

Son injurias graves:

1.º La imputación de un crimen o simple delito de los que no dan lugar a procedimiento de oficio.

- 2º La imputación de un crimen o simple delito penado o prescrito.
- 3.º La de un vicio o falta de moralidad cuyas consecuencias puedan perjudicar considerablemente la fama, crédito o intereses del agraviado.
- 4.º Las injurias que por su naturaleza, ocasión o circunstancias fueren tenidas en el concepto público por afrentosas.
- 5.º Las que racionalmente merezcan la calificación de graves atendido el estado, dignidad y circunstancias del ofendido y del ofensor.

60. Consideramos que ninguna de estas dos normas configura una violación al principio de tipicidad. De una parte, la redacción del tipo de injuria grave, que encuadra dentro de esta categoría "*La de un vicio o falta de moralidad cuyas consecuencias puedan perjudicar considerablemente la fama, crédito o intereses del agraviado*" consagra un criterio con un cierto grado de abstracción "*vicio o falta de moralidad*", que en el ámbito del derecho al honor fácilmente puede ser determinado, y que además debe leerse junto con el elemento "*perjudicar considerablemente*" al agraviado. Es decir, que no cualquier declaración sobre la falta de moralidad de una persona, es considerado como injuria grave, sino solo aquella que le perjudique considerablemente su fama, crédito o interés, y como consecuencia no puede afirmarse que la disposición desconoce el principio de tipicidad.

61. En efecto, respecto al artículo 416, queda claro que la injuria se puede realizar por cualquier persona, mediante palabra o acción que implique la comunicación de expresiones tendientes a conseguir la deshonra, descrédito o menosprecio de otra persona. Cabe mencionar que, por ejemplo, el avance en las tecnologías de la información y de la comunicación son de tal envergadura, que hoy en día es imposible catalogar de forma finita o definitiva las formas mediante las cuales se puede atacar arbitrariamente sobre la honra, crédito o integridad moral de una persona. Lo anterior permite el uso de modalidades de comisión amplias, que implican sencillamente cualquier comunicación de expresiones tendientes a conseguir la deshonra, descrédito o menosprecio.

62. *Prima facie*, no es posible cuestionar, que se puede comunicar a terceras personas una opinión arbitraria sobre un tercero, mediante diversas formas, ni mucho menos pretender que no exista aceptación social respecto a que toda forma que tenga la eficacia y eficiencia de propalar expresiones arbitrarias que atenten contra terceras personas, puedan ser abordadas desde el derecho penal, civil, o administrativo, entre otros. Para los efectos, existe aceptación social respecto al reproche que merece la propalación de expresiones injuriosas, y también sobre las diversas formas y medios por los cuales se pueden llevar a cabo. En ese sentido, estimamos que no es razonable que una persona alegue un estado de indefensión, bajo el argumento que le es imposible comprender el carácter arbitrario de una expresión tendiente a destruir de forma arbitraria la honra de un tercero, basado en el hecho, que dicha forma de propalación no estaba tipificada específicamente en una norma.

63. Igualmente ocurre con las modalidades agravadas que describe el artículo 417, que a diferencia del artículo 416, realiza mayores precisiones sobre la acción típica que agrava la pena. Nótese, que, en el caso de las circunstancias agravantes, se precisa, por ejemplo, que será injuria la imputación de un crimen o simple delito, o la propalación de expresiones tendientes a adjudicar a una tercera persona vicios de moralidad que

puedan perjudicar considerablemente la fama, crédito o intereses de la persona afectada-aquí incluso se exige un juicio de lesividad-.

64. En este sentido, no se debe dejar de mencionar que cuando la Corte señaló como violatorio del principio de legalidad el artículo 417, que tipifica como injuria grave “[/]*as que racionalmente merezcan la calificación de graves atendido el estado, dignidad y circunstancias del ofendido y del ofensor*”, no analizó el alcance de la redacción. Por eso corresponde aclarar que en nuestra opinión es equivocado considerar, como lo hizo la mayoría, que se desconoce el principio de legalidad cuando una norma del ámbito interno prevé un mayor grado de reproche frente a conductas eventualmente cometidas contra funcionarios públicos. Esta es una decisión de política criminal, que corresponde exclusivamente a los Estados y que no puede asumirse que siempre, en todo caso, vulnera, *per se*, el mandato de precisión y determinación que exige el artículo 9 de la CADH. Distinto es que, por la posición que asumió la mayoría en relación con el derecho a la libertad de expresión, no haya lugar a consagrar una disposición de esta naturaleza en la legislación interna, lo cual no es en realidad una violación del principio de legalidad sino del derecho a la libertad de expresión en los términos que lo planteó la Corte en esta sentencia.

65. Por las razones anteriores, consideramos que no existían elementos para determinar que el Estado de Chile violó el principio de legalidad, y por eso votamos en contra del punto resolutivo cuarto.

## **V. EL CARÁCTER DE DEFENSOR DE DERECHOS HUMANOS DEL SEÑOR CARLOS BARAONA. FALTA DE PRECISIÓN EN LA DETERMINACIÓN DEL ESTÁNDAR Y SU APLICACIÓN AL CASO CONCRETO.**

66. La Comisión alegó que el señor Baraona era un defensor ambiental. Esto se correspondió con la declaración que él mismo dio en audiencia. El Estado rechazó dicha afirmación y señaló que la víctima fue un funcionario público y abogado de una empresa forestal<sup>19</sup>, hechos no controvertidos por las partes.

67. A partir de este alegato la Corte decidió hacer una presentación de las implicaciones que la condición de defensor en materia ambiental tiene, respecto de la protección del derecho a la libertad de expresión, sin hacer un adecuado análisis de la prueba, ni descartar argumentativa o fácticamente los alegatos del Estado sobre los presuntos intereses privados que podrían estar involucrados en el caso. Tampoco se analizó en qué momento ni con cuáles elementos de juicio, se considera que el señor Baraona pasó de abogado de una compañía forestal a asumir un rol de defensor ambiental con base en la experiencia sufrida.

68. Dispuso la Corte que,

En este sentido, la Corte considera que la defensa de los derechos humanos no es incompatible con el cargo de un funcionario público o con el ejercicio de la abogacía en el ámbito privado. En el presente caso, este Tribunal advierte que al momento

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<sup>19</sup> Cfr. Caso Baraona Bray Vs. Chile. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 24 de noviembre de 2022. Serie No. 481. Párr. 69.

de los hechos el señor Baraona contaba con experiencia como funcionario estatal en la protección del alerce y había participado en diversos recursos judiciales vinculados con la defensa del medio ambiente e incluso había realizado labores voluntarias en pro de la protección del medio ambiente [...]. En este caso en particular, con independencia de su calidad de defensor de derechos humanos, la Corte encuentra que las declaraciones del señor Baraona hacían referencia a la tala ilegal del alerce, tema que está relacionado con la protección del medio ambiente y que constituía un debate de interés público al momento de los hechos [...] <sup>20</sup>.

69. Además, resulta que los estándares que construyó en abstracto, dentro de los cuales incluso consagró un criterio propio para determinar la condición de defensor de derechos humanos, no tuvieron incidencia en la determinación de la responsabilidad del Estado de Chile, porque finalmente la Corte concluyó que el criterio relevante al analizar la violación de las obligaciones del Estado fue el carácter de interés público de las declaraciones del señor Baraona. De manera que, no es clara la razón por la cual la Corte incluyó este acápite en la decisión, y no son precisos los elementos de juicio que consideró para referirse a las circunstancias del caso concreto.

## **VI. CONCLUSIÓN**

70. Para concluir, reiteramos que, sin duda alguna, en una sociedad democrática, la persecución judicial por la crítica a los gobernantes o funcionarios públicos resulta ilegítima. No obstante, cuando la libertad de expresión y el derecho al honor entran en conflicto, existen múltiples aristas y variables de solución según las particularidades de cada caso concreto, con vista de todas las circunstancias, lo que requiere un juicio de ponderación que pasa por un test de razonabilidad y proporcionalidad ya desarrollado ampliamente por la Corte en su jurisprudencia. Despojar automáticamente de tutela judicial efectiva de primer nivel la protección del honor de los funcionarios públicos, frente a los supuestos señalados en la sentencia de mayoría, sin la oportunidad de valorar las circunstancias del caso concreto, es un debate que nos parece requiere mayor reflexión, especialmente frente al fenómeno de la post verdad de las redes sociales y su capacidad expansiva de generar daños irreparables al honor, así como frente a la erosión democrática que vive la región. En ese sentido, nos apegamos a los antecedentes jurisprudenciales clásicos de esta Corte que permitían un juicio de ponderación equilibrado caso por caso en supuestos de colisión entre ambos derechos.

Humberto Antonio Sierra Porto  
Juez

Nancy Hernández  
Jueza

Romina I. Sijniensky  
Secretaria Adjunta

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<sup>20</sup> Caso Baraona Bray Vs. Chile. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 24 de noviembre de 2022. Serie No. 481. Párr. 80.