

**SEPARATE OPINION OF JUDGE NANCY HERNÁNDEZ LÓPEZ AND
JUDGE RODRIGO MUDROVITSCH
INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF VALENCIA CAMPOS *ET AL.* V. BOLIVIA
JUDGMENT OF OCTOBER 18, 2022
(Preliminary objection, merits, reparations and costs)**

1. The case of Valencia Campos *et al.* v. Bolivia examines the international responsibility of the State for the human rights violations in the context of the house raids and the arrests conducted during the police operation that following an attack on an armored truck, as well as in the context of the subsequent detention and criminal proceedings against the alleged perpetrators and participants.¹

2. We agree fully with the reasoning adopted by the Inter-American Court of Human Rights (hereinafter “the Court”) in the judgment on the preliminary objection and merits, and with the measures of reparation established.²

3. Consequently, this opinion focuses on the specific issue of the nighttime house raids that occurred in this case. The Court rightly considered that those house raids entailed a violation of Articles 11(2) and 17 of the American Convention on Human Rights (“the Convention”), which establish, respectively, the right not to be subjected to arbitrary interference in private life and the home, and the right to protection of the family.³ In addition to the reasons given in the judgment, we believe it important to examine the issue of the violation of those rights further, considering the strictly exceptional nature of nighttime house raids, and the special vulnerability of women and children when this type of measure is executed.

4. We believe that the limitations to this procedural investigative measure should be established by law and should meet the requirements of strict legality and proportionality. We will organize our consideration on the issue as follows: after briefly recapitulating the factual base **(I)**, we will present the arguments that support the non-conformity with the Convention of nighttime house raids – except in absolutely exceptional situations which we will describe in this opinion – stressing the rights to privacy, intimacy and sociability, as well as the duty to protect vulnerable groups **(II)**, to establish the absolute necessity of observing both lawfulness and proportionality in the regulation and execution of nighttime raids of the home **(III)**.

I. Contextualization of the nighttime house raids conducted by state agents

5. According to the judgment, on December 14, 2001, a group of individuals attacked an armored truck in La Paz, and escaped from the scene of the crime.⁴ The same day, the

¹ *Case of Valencia Campos et al. v. Bolivia. Preliminary objections, merits, reparations and costs.* Judgment of October 18, 2022. Series C No. 469 (hereinafter, “the judgment”), para. 109.

² Specifically, the Court concluded that the State was responsible for violating the right to personal liberty; the rights to private and family life and to the inviolability of the home; the right to property; the right to personal integrity; the rights of the child; the right to life; the right to health; the rights to the presumption of innocence and to the protection of honor and dignity; the right to judicial guarantees (in particular, the right of defense and the right not to bear witness against oneself), and the obligation to investigate acts of torture.

³ *Cf.* Judgment, paras. 147 to 157. The arrests made in the context of the raids also supposed a violation of the right to personal liberty (Article 7 of the Convention); however, this opinion focuses on the raids themselves.

⁴ *Cf.* Judgment, paras. 51 and 52.

Eighth Criminal Investigation Court issued Resolution No. 180/2001, ordering a search with seizure powers of two houses⁵ to find the perpetrators.⁶ On December 17, 2001, the same court issued Resolution No. 186/2001, expanding the previous order to include six more properties⁷ and expressly authorizing the execution of the operations during night hours, based on article 118 of the Bolivian Code of Criminal Procedure.⁸

6. Article 118 of the Bolivian Code of Criminal Procedure⁹ establishes the power of the investigating judge to issue warrants outside working hours.¹⁰ However, this article and the resolutions issued by the Eighth Criminal Investigation Court must be situated with the general panorama of the Bolivian legal system. Therefore, it is essential that any analysis is based on the provisions of the Bolivian Constitution¹¹ concerning the inviolability of the home and, at the time of the events, it expressly prohibited nighttime raids in the absence of the resident's consent or *flagrante delicto*.¹²

7. The Code of Criminal Procedure also contained a specific provision that regulated house raids (article 180), establishing that "a raid on a house or private residence during nighttime hours shall be prohibited [...] except in the case of *flagrante delicto*" and defining nighttime hours as "the time between 7:00 p.m. and 7:00 a.m. the following day."¹³ Both provisions required the concept of *flagrante delicto* – defined in article 230 of the Code of Criminal Procedure – to be understood as when the perpetrator of the act was "surprised while attempting to commit an offense, committing it, or immediately afterwards while being pursued [...]."¹⁴

8. Based on Resolutions Nos. 180 and 186,¹⁵ on December 18, 2001, dozens of armed state agents burst into six buildings¹⁶ in El Alto, La Paz and Santa Cruz, and one in Cochabamba to locate and arrest the perpetrators of the attack on the armored vehicle four days previously – in other words, in the absence of a situation of *flagrante delicto*. Women and children were present in the homes raided¹⁷ and, owing to the late hour, most of the residents were in their nightwear.¹⁸

9. In addition to these six nighttime raids, at 8:30 a.m. the state agents also raided the home located at Simón López Avenue (Cochabamba) where Carlos Álvaro Taboada Valencia was found.¹⁹ Bearing in mind the legislative framework resumed above and presented in the judgment (paras. 49 and 50) – in particular, the constitutional paradigm

⁵ No. 55 Virgen de Rosario Street and No. 120 11th Street, in La Paz.

⁶ Cf. Judgment, para. 53.

⁷ Properties identified as: No. 75 Cívica Avenue, Nos. 2525 and 2523 Presbítero Medina Street, No. 2315 Las Rosas Passage, No.6568-B Plaza Liberal, and No. 600 Zarzuela Street.

⁸ Judgment, para. 53.

⁹ Cf. Code of Criminal Procedure, Law No. 1970 of March 25, 1999 (evidence file, folios 2109, 2110, 2118, 2124, 2125, 2137 and 2138).

¹⁰ Cf. Complete text of the article in the judgment, para. 50.

¹¹ Cf. 1995 Constitution of Bolivia, Law No. 1615 of February 6, 1995 (evidence file, folios 2056 and 2058).

¹² Cf. Complete text of the article in the judgment, para. 49.

¹³ Cf. Art. 180 of the Code of Criminal Procedure, complete text in the judgment, para. 50.

¹⁴ Cf. Complete text of the article in the judgment, para. 50.

¹⁵ It is underscored that the addresses of No. 1365 Juan Manuel Cáceres Passage, the Tropical Inn Hotel and Simón López Avenue in Cochabamba were not listed in the resolutions, cf. judgment, paras. 129 and 130.

¹⁶ Home located at No. 2319 Las Rosas Passage, entered at 2:45 a.m.; home located at No. 2525 Presbítero Medina Street, raided at 3:00 a.m.; home located at No. 75 Cívica Avenue, raided at 01:00 a.m.; home located at No. 1365 Juan Manuel Cáceres Passage, raided between 4:00 and 5:00 a.m.; home located in the zone of Iparvi, raided between 6:00 and 6:30 a.m. , and the room of Freddy Cáceres in the Tropical Inn Hotel, raided during the early morning hours, cf. judgment, para. 129.

¹⁷ No. 2319 Las Rosas Passage: two women and two children; No. 2525 Presbítero Medina: one woman and one child; No. 75 Cívica Avenue: three women and two children; zone of Iparvi: three women; No. 1365 Juan Manuel Cáceres Passage: one pregnant woman; Tropical Inn Hotel: one woman, Cf. Judgment, para. 127.

¹⁸ Police operations described in the judgment, para. 54, and detailed in paras. 55 to 72.

¹⁹ Cf. Judgment, para. 130.

of the inviolability of the home, the only exceptions to which are consent or *flagrante delicto* – it should be underscored that these raids took place four days after the attack on the truck that was transporting cash. As expert witness María Luisa Piqué stated²⁰ (transcribed in the judgment), “*it is not possible to subsume the situation under any plausible concept of flagrante delicto, especially taking into account the laws of Bolivia in force at the time of the events, which were the most restrictive in the region.*” Therefore, it is evident that the nighttime raids were conducted in violation of domestic law and, consequently, in violation of the principle of legality, the main purpose of this opinion.²¹ This non-compliance is especially serious because, in addition to being a violation of domestic law, it disrespects the country’s Constitution.²²

10. In light of this serious situation, the judgment rightly indicates that the protection of the rights to private life, to family life, and to the inviolability of the home signifies the recognition of a personal sphere that is free and immune from arbitrary interference or invasion by third parties or authorities²³ and the understanding of the home as a space in which private and family life can be freely developed.²⁴ Also, referring specifically to the family unit, the judgment reinforces the State’s duty to protect the family from any arbitrary and unlawful interference.²⁵

11. Based on these essential considerations as premises, we will now examine the two aspects that are the reason for this opinion: the justification of the prohibition of nighttime raids to protect the rights to private life, to a home, and to the protection of the family – with emphasis on the State’s enhanced duty of protection in relation to groups that are especially vulnerable – and a more detailed analysis of the exceptional nature of nighttime house raids and the increased obligation to substantiate the reasons that justify them, including the reasons why the raid cannot be conducted during working hours.

II. The grounds for the restriction of nighttime house raids to safeguard the rights to privacy, to a home, and to protection of the family

12. The place where a family or an individual lives is not an insignificant physical space. To the contrary, it is an essential *locus* for individuals to enjoy their intimacy and sociability, with the heightened expectation of privacy inherent to a home. Therefore, the protection of the home is not merely a defense of the rights related to property against external interference; rather, its protection is a fundamental condition for the enjoyment of the rights to private life and to family life, rights of a special nature and singular relevance, justifying the existence of a specific right for the protection of the home. In addition, in cases such as this one, the obligation to protect the home is based on the specific vulnerability of groups such as women and children, regarding which the State has special obligations of protection.

13. Therefore, any arbitrary incursion of the State into a private home represents a grave threat to those rights, and is aggravated in the case of nighttime police operations. We will now: **(a)** delimit the concepts of privacy, intimacy and sociability, underlining the way in which these values support each other and should be protected in the context of the home; **(b)** emphasize the extreme gravity entailed by nighttime house raids, and **(c)** describe the particular violation on these values in relation to vulnerable groups.

²⁰ Written expert opinion of María Luisa Piqué of June 16, 2022 (evidence file, folio 12550)

²¹ In this case, in addition to the violation of the parameters of lawfulness, the arbitrary nature of the police operation was also proved because it involved acts of violence and torture, including against a pregnant woman and children; all of this covered in the judgment (paras. 175 to 191).

²² Cf. 1995 Constitution of the State of Bolivia, Law No. 1615 of February 6, 1995. Article 21, transcribed in para. 49 of the judgment.

²³ Cf. Judgment, para. 147.

²⁴ Cf. Judgment, para. 147.

²⁵ Cf. Judgment, para. 148.

a. The values of privacy, intimacy and sociability as grounds for the protection of the home

14. The values of **privacy and intimacy** are the natural basis for any discussion on the meaning of the inviolability of the home. Thus, the protection of the home, as this is usually established in national Constitutions, circumscribes a sphere of personal and family intimacy.

15. However, it is not possible to speak of privacy and intimacy without also referring to **sociability**. The usual references to the home as a “fortress” or “castle” within which the inhabitants should benefit from a barrier from the outside world,²⁶ may suggest simple notions of privacy and intimacy as individual rights. It is true that, as asserted by Jean-Paul Demoule, “the home” signifies “the level of autonomy of the group that resides there in relation to the rest of society.”²⁷ However, placing emphasis exclusively on the barriers imposed by the home may neglect its importance as a necessary condition for the establishment and conservation of the ties between individuals.

16. To guarantee the protection of privacy and, therefore, the possibility of creating and maintaining ties, certain legal and social structures are required, including norms that guarantee the rights of an individual in relation to his home. Ultimately, the home is the place where these trust-based relationships – which include dimensions of personal attachment and belonging – typically exists and in which each member of the group that dwells in the home is in a socially comfortable situation in which they are an active and valued member.²⁸ Thus, we underscore that undue intrusion in the home may be profoundly destructive for the underlying relationship at the specific moment of intimacy that is interrupted.²⁹ Such disturbances are capable of eroding the material foundations that support the previous affective relationships between the individuals that live there and add to the violation of the sphere of personal liberty and intimacy.

17. Thus, any disruption of the intimacy of the home represents serious risks for these extremely important rights: privacy, intimacy and sociability. Arbitrary interference in the inviolability of the home by the state apparatus is especially serious because it uses coercive instruments with a high potential impact.

18. Consequently, it is not surprising that the international instruments for the protection of human rights have always reflected a concern for the inviolability of the home. Both the Universal Declaration of Human Rights (Article 12), and the American Declaration of the Rights and Duties of Man (Article 5) had already established the inviolability of the home in 1948. This guarantee was replicated in Article 17 of the International Covenant on Civil and Political Rights (ICCPR) in 1966, in Article 8 of the European Convention on Human Rights in 1950, and in Article 11 (in relation to Article 17) of the American Convention in 1969.

19. The European Court has also recognized that the home is the place where private and family life is usually carried on, and that people have a right to respect for their home, conceived not only as the right to the physical space but also as the right to enjoy it peacefully, so that it should be protected against the entry of unauthorized persons.³⁰ Similarly, the Inter-American Commission has indicated on several occasions that interventions of a State’s law enforcement agents in the family *locus* have violated the

²⁶ Cf. MCCLAIN, L. C. Inviolability and privacy: the castle, the sanctuary, and the body. *Yale Journal of Law & the Humanities*, v. 7, n. 1, pp. 195–242, 1995. pp. 201-202.

²⁷ Cf. DEMOULE, J.-P. Qu’est-ce qu’une maison? *Rue Descartes*, v. 43, n. 1, p. 104, 2004. p. 111.

²⁸ TONER, C. Home and Our Need for It. *Journal of Philosophical Research*, v. 44, pp. 251–272, 2019. p. 264.

²⁹ GERSTEIN, R. S. Intimacy and Privacy. *Ethics*, v. 89, n. 1, pp. 76–81, out. 1978, p. 79.

³⁰ Cf. ECHR. *Halabi v. France* n. 66554, Judgment of May 16, 2019, §54; and *Sabani v. Belgium*, n. 53069/15, Judgment of March 8, 2022, §41.

right to the inviolability of the home,³¹ a right that constitutes a guarantee of the right to privacy and to due process of law.³²

b. The enhanced gravity of nighttime home raids

20. Historically, in different cultures, nighttime has been perceived as “man’s first necessary evil, our oldest and most haunting terror.”³³ Indeed, the risks to human integrity are magnified between sunset and sunrise, a commonly held perception, even with all the technological progress made over time that has facilitated human life during the night.

21. This perception is correct in relation to the specific circumstances of nighttime raids because – owing to the hour – this time is more advantageous than daytime for the perpetration of human rights violations, owing to the reduced circulation of persons and less possibility of help or eyewitnesses. Such conditions are demonstrably favorable to the abuse of authority in state operations. An example of abusive state practices in these circumstances can be found in *Vinks and Ribicka v. Latvia* (2020), in which the European Court of Human Rights indicated that “[t]he risk of abuse of authority and violation of human dignity is inherent in a situation such as the one which arose in the present case, where the applicants were confronted in their home early in the morning by a number of specially trained policemen.”³⁴

22. Our continent is no stranger to this problem. Historically, nighttime police and military operations have resulted in the perpetration of gross human rights violations. It is sufficient to recall, for example, the case of *Juan Humberto Sánchez v. Honduras* (2003), which took place in the context of the forced disappearances and extrajudicial executions in that country in the 1980s. In that case, the victim was twice arrested in his parent’s home during the night, in the absence of an arrest warrant or a situation of *in flagrante*, in violation of the 1982 Honduran Constitution, article 99 of which prohibited house raids between 6:00 p.m. and 6:00 a.m. – and this led the Court to conclude that such raids violated the Convention.³⁵

23. Another reason for the special gravity of nighttime raids is the heightened and reasonable expectation of intimacy during those hours.³⁶ In general, the most private family activities take place at night, so that the unlawful entry of police authorities into the home during the night hours produces more anxiety and is interpreted as more threatening, as recognized by the Supreme Court of the state of Minnesota in *State v. Jackson*.³⁷ In addition, the residents are in a more vulnerable situation if they are sleeping,

³¹ Cf. IACHR. Report on Citizen Security and Human Rights, OEA/Ser.L/V/II. Doc. 57, December 31, 2009. Available at: https://www.cidh.oas.org/countryrep/seguridad_eng/citizenssecurity.toc.htm. §176

³² Cf. IACHR. Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II.124 Doc. 5 rev.17, March 2006. Available at: https://www.cidh.oas.org/countryrep/Defenders/DEFENDERS_ENGLISH.pdf. § 97.

³³ EKIRCH, A. R. *At Day’s Close: Night in Times Past*. New York: Norton, 2006. p. 3. Regarding the night, Borges wrote: “*Nadie puede contemplarla sin vértigo.*” BORGES, Jorge Luís. *Historia de la noche*. In: *Obras completas, 1975-1985*. Buenos Aires, Emecé, 1989, p. 201.

³⁴ Cf. ECHR. *Vinks and Ribicka v. Latvia*, n. 28926/10, Judgment of January 30, 2020, para. 114.

³⁵ Cf. *Case of Juan Humberto Sánchez v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of June 7, 2003. Series C, No. 99, para.79.

³⁶ “The reason for the prohibition is that at night the home is a particularly sensitive place in terms of private life, and the time when people generally carry out the most intimate activities, such as sleeping, bathing, dining, watching television, reading, and discussing personal matters. It is the time for family reunions, when the children are at home, when people are in their nightwear or even sleeping. Therefore, there is a very high expectation of privacy.” Written expert opinion of María Luisa Piqué of June 16, 2022 (evidence file, folio 12550).

³⁷ Cf. Supreme Court of Minnesota. *State of Minnesota v. Jackson*, No. A05-247 (2007).

because when asleep their alertness and ability to defend themselves are substantially reduced.³⁸

24. The vulnerability of individuals and families to violations during nighttime house raids is exacerbated when women and children are present in the home, an issue we will examine in the following section.

c. The special impact of the violation of the rights to privacy, intimacy and family life on vulnerable groups

25. The judgment recognizes that the negative effects of house raids are especially prejudicial for vulnerable groups, such as women and children.³⁹ The duty of due diligence and of enhanced protection in relation to the rights of members of vulnerable groups is widely recognized in this Court's case law.⁴⁰ However, we believe it necessary to include some specific considerations on the differentiated impact on vulnerable groups, as occurred in this case.

26. Regarding **women**, one of the factors that reveal this vulnerability is the greater risk of violence, including sexual violence. As the Court has repeatedly asserted, the American Convention and the Convention of Belém do Pará⁴¹ oblige States to adopt measures to prevent gender-based violence and to act with due diligence to investigate and punish those responsible, as well as to redress any violations that occur.⁴² In the case of house raids – as explained above (see II.a), these are already permeated by a high level of intrusion and risk – States have the obligation to adopt reinforced measures to prevent the violation of women's rights. In this regard, it is worth mentioning the position expressed by expert witness Guzmán Rodríguez:

In the context of raids, arrests and deprivations of liberty, the gender approach should be implemented by a comprehensive range of measures that should include, at least, the following: (i) prior identification of those potentially affected by the said measures in order to plan the corresponding actions; (ii) prevention of the risk of gender-based violence, for example, by the prior training of those who take part in criminal procedures and the adoption of specific verification measures during such procedures; (iii) early identification of possible cases of gender-based violence (GBV); (iv) elimination of risk factors that could result in GBV; (v) investigation of all the facts that could constitute some form of GBV, and (vi) attention to and reparation for the victims of GBV.⁴³

27. It is also possible to note the presence of gender stereotyping during the house raids and this had a negative impact on the conduct of the state authorities. As the Court has recognized in, among others, the case of *González et al. ("Cotton Field") v. Mexico* (2009), the subordination of women to practices based on gender stereotypes is exacerbated when it is reflected in the thinking and language of police authorities.⁴⁴ In the instant case, it is conspicuous that the women victims indicated on several occasions that they were subjected to extremely misogynistic and discriminatory language by the state

³⁸ For example, "At the same time, the reason for limiting nighttime searches — preventing abrupt intrusions on sleeping residents in the dark." US Court of Appeals for the First Circuit. *United States v. Young*, 877 F.2d 1099, 1104 (1st Cir.1989) (BREYER, J.).

³⁹ Cf. Judgment, para. 153.

⁴⁰ For example: *Case of Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149, para. 103.

⁴¹ Likewise, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (1979), ratified by Bolivia in 1990.

⁴² *Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 16, 2009. Series C No. 205, para. 258

⁴³ Expert opinion provided by affidavit by Diana Guzmán on June 16, 2022 (evidence file, folio 12765).

⁴⁴ Cf. *Case of González et al. ("Cotton Field") v. Mexico. supra*, para. 401.

agents who participated in the raids, who referred to them as “bitches,”⁴⁵ among other degrading terms.⁴⁶

28. In addition to the generalized verbal attacks, most of the women suffered some type of sexual violence at the time of the nighttime raid of their home, in clear contravention of the international precepts that require their protection against any form of violence or discrimination, including that based on sex,⁴⁷ especially when they are in the custody of the State.⁴⁸ The statements received by this Court are horrific, indicating an extreme level of violation of the privacy and intimacy of the women, reflected in part in the judgment (paras. 184 to 190). It should be recalled that the Court has underscored the particularly serious and reprehensible nature of rape committed by law enforcement agents against women prisoners,⁴⁹ and that this type of violation is never admissible.⁵⁰

29. The gender-based violence in this specific case was exacerbated, as described above (see II.b), because it occurred at night, a time when women are most vulnerable. In this regard, the statements received by the Court are appalling. For example, one of the victims recounted that, at the time of the raid on her home, she was wearing pajamas (shorts and a t-shirt), and she begged the police who were arresting her to allow her to put on a pair of trousers.⁵¹ They denied her request and began to insult and humiliate her even more.⁵²

30. As the Court’s case law has crystallized and as is established in the judgment,⁵³ the State’s enhanced duty of protection also exists in relation to **children**, based on the principle of the best interests of the child. This is manifested in the specific context of house raids and searches in which the vulnerability of children is intensified owing to the rupture of the protection of the home and the witnessing of the arrest of adults with whom they have developed trust-based family relationships. With good reason, article 16 of the Convention on the Rights of the Child (1989), ratified by Bolivia in 1990, expressly guarantees the protection of children against arbitrary or unlawful interference with their privacy, family and home.⁵⁴ Therefore, States have the strict duty to consider and, insofar as possible, mitigate the risk of a violation of their rights.

31. In particular, in the case of nighttime raids, the police authorities are able to foresee that children will be present on the site of the operation, and should therefore consider the trauma to which they will be exposed when their belief that their home is a place of protection and refuge is called into question. Consequently, it is essential, insofar as possible, to conduct police operations (if they are necessary and lawful) during the day when their impact on children can be mitigated. This obligation is in keeping with the understanding that children are especially vulnerable to different forms of violence and that any state action that may have a negative impact on them requires enhanced protection and diligence.⁵⁵

⁴⁵ For example, affidavit made by Patricia Gallardo Ardúz, (evidence file, folio 12719).

⁴⁶ For example, one female victim indicated that the police used “profanities” when speaking to her daughters. Statement made during the oral trial by Victoria Gutiérrez de Lulleman (evidence file, folio 9638).

⁴⁷ Cf. *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs*. Judgment of November 25, 2006. Series C No. 160, para. 303.

⁴⁸ *Ibid.*, para. 311.

⁴⁹ *Ibid.*, para. 311.

⁵⁰ Cf. *Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2014. Series C No. 289, para. 303.

⁵¹ Cf. Affidavit made by Patricia Gallardo Ardúz (evidence file, folio 12719).

⁵² *Ibid.*

⁵³ Judgment, paras. 214 and 215.

⁵⁴ UNICEF. Convention on the Rights of the Child (1989).

⁵⁵ Cf. ECHR, *Dokukiny v Russia*, n. 1223/12, Judgment of May 24, 2022. Similarly, ECHR. *A. v. Russia*, n. 37735/09, Judgment of November 12, 2019, para. 67.

32. The European Court of Human Rights, when examining the issue in the case of *Dokukiny v. Russia* (2022), in which the father of a 4-year-old child was arrested in her presence, deplored the fact that the police paid no heed to her presence and did not take her interests into consideration. The court underscored that seeing her father being taken away by the police had been hurtful and traumatic.⁵⁶ It also emphasized its concern owing to “the absence of any specific guidelines and instructions in respect of planning and carrying out arrests and other police operations in situations involving the presence of children, in order to avoid or minimize their exposure to violent scenes and the risk of their falling victim to physical abuse.”⁵⁷ Precisely in this regard, the European Court underlined that, in the planning and carrying out of police operations against adults, the interest of any children present should be taken into consideration.⁵⁸

33. All these principles were violated during the operations that took place in the case of *Valencia Campos et al. v. Bolivia*. During the nighttime raids, the children were exposed to scenes of violence against their parents (including scenes of sexual violence).⁵⁹ As if the trauma of witnessing this type of violence were not enough, some children also suffered direct physical violence at the hands of state agents.⁶⁰ In a video of the operation presented as evidence in this case, the image of a little girl in bed, in her pajamas, being accosted by law enforcement agents is heartbreaking.⁶¹

34. We were shocked by the testimony of one of the victims, who was a minor at the time of the events, in which the two types of violence to which the children were subjected are revealed:

I saw my mother bleeding and the dining room table full of blood; I saw my father lying on the floor with blood on his face and the floor full of blood, they put something over his head; the police hit him all the time [...]; I began to cry, but silently because I didn't want them to hit me like they were hitting him. One of the police agents told me that he would stop hitting my father if I told him where money was kept, but I didn't know [...] and the policeman hit me again and again with the butt of his rifle; this went on for half an hour more; then he told me that he would stop hitting my father if I told him where El Camba lived (he was referring to Eladio Cruz) and he took me out of the house in my pajamas and slippers, without asking my parent's permission; they didn't let me put on a coat, they didn't let me take anything from my house; they left me standing in the street in Las Rosas Passage for a long time.⁶²

35. Therefore, consideration of the special vulnerability of these groups reinforces the understanding of the European Court, in *Gustanovi v. Bulgaria* (2014), that the presence of family members at the scene of an arrest was a factor to be taken into consideration in planning and carrying out police operations in order to safeguard the legitimate interests of vulnerable third parties who are not the objective of the arrest warrant, and to consider the special impact on women and children.⁶³ Thus, having called attention to the solid grounds for the imperative of the inviolability of the home, to the particularly intrusive nature of nighttime house raids, and to the negative effects of such police operations that are especially disproportionate for vulnerable groups, in Part III we will examine the strict conditions under which, exceptionally, nighttime raids can be justified.

III. The evaluation of the conformity with the Convention of nighttime raids based on the duties of strict lawfulness and proportionality

⁵⁶ *Ibid.*, para. 28

⁵⁷ *Ibid.*, para. 28.

⁵⁸ In this regard, ECHR. *A. v. Russia*, 2019, para. 67.

⁵⁹ As described in the judgment (paras. 187 and 188).

⁶⁰ Judgment, para. 216.

⁶¹ Cf. VHS video of the police operation attached to the evidence file, minute 10:15.

⁶² Cf. Affidavit made by Alexis Eduardo Valencia Alarcón, evidence file folios 12619 and 12620.

⁶³ ECHR, *Gustanovi v. Bulgaria*, n. 34529/10, Judgment of October 15, 2013.

36. The discussion regarding the conformity of nighttime raids with the Convention should be situated at the intersection between criminal procedure, constitutional law, and international human rights law. The tension between individual rights and collective or State interests is revealed with greatest intensity in the context of criminal proceedings. The way in which the State manages this tension is one of the main indicators of the level of protection of individual rights and guarantees provided by the respective legal and constitutional order. In this regard, Roxin and Schünemann state that criminal procedural law is the “seismograph of the State’s Constitution.”⁶⁴

37. This tensional relationship between individual rights and criminal prosecution, the compass of which is the constitutional order, may be examined from a twofold perspective. On the one hand, the national constitutions together with the Convention and other international legal instruments contain a series of “fundamental procedural rights,” such as the right to due process of law, the right to adversarial proceedings, and to a complete defense, the right to the presumption of innocence, and the right to remain silent.

38. However, from another perspective, criminal proceedings consist of interventions or restrictions of the “common” fundamental rights – although not of the rights that are specifically related to criminal proceedings such as those mentioned in the preceding paragraphs. For example, wiretapping represents an intervention in the right of the inviolability of communications; arrests *in flagrante delicto* and pre-trial detention are (severe) restrictions of the right to freedom of movement, sureties are an intervention in the right to property, etc. Also, home searches entail an intervention in the right to the inviolability of the home (particularly during nighttime), and in the right to intimacy and privacy. Thus, the coercive measures used against the accused during criminal proceedings (in the broadest sense, including the investigation stage), such as a home searches (at night),⁶⁵ are not merely criminal procedural tools available to the State, but constitute real interventions in fundamental rights and should be legally examined as such.⁶⁶ This means that the constitutional (and conventional) law apparatus should be used to verify the legitimacy of such restrictions of the individual’s most basic and essential rights. The criminal procedure should, therefore, be conceived using a pre-established standard, such as applied constitutional law (and, let it be said, convention-based law).⁶⁷

39. Intervention or restrictions of rights are not synonymous with violations of rights.⁶⁸ Restrictions of rights may be justified provided they meet two basic and essential

⁶⁴ ROXIN, Claus; SCHÜNEMANN, Bernd. *Strafverfahrensrecht*, 30th ed., Munich: C.H. Beck, 2022, § 2 Nm. 1. Regarding the relationship between Constitution and Criminal Procedure, see also, FIGUEIREDO DIAS, Jorge de. A Nova Constituição e o processo penal, *Revista da Ordem dos Advogados*, ano 36. I-III, 1976, pp. 103 ff; BARREIROS, José António. A Nova Constituição Processual Penal, *Revista da Ordem dos Advogados*, Lisboa, ano 48, v. 2, sept. 1988, pp. 425 ff; TASLITZ, Andrew; PARIS, Margaret; HERBERT, Lenese. *Constitutional Criminal Procedure*, 3rd ed., New York: Foundation Press, 2007, pp. 2 ff.

⁶⁵ Regarding the level of intervention in basic rights (severe) of home searches, cf. PARK, Tido. *Durchsuchung und Beschlagnahme*, 5th ed., Munich: H. Beck, 2022, § 1 No. 23.

⁶⁶ Cf. SCHMIDT, Eberhard. Von Sinn und Notwendigkeit wissenschaftlicher Behandlung des Strafprozeßrechts, *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1953, p. 169 (“sensitive point of every criminal system”); AMELUNG, Knut. Zur dogmatischen Einordnung strafprozessualer Grundrechtseingriffe, *Juristenzeitung* 1987, pp. 737 ff; WOLTER, Jürgen. Verfassungsrecht im Strafprozeß- und Strafrechtssystem. Zugleich ein Beitrag zur Verfassungsmäßigkeit der Norm und zum rechtsfreien Raum “vor dem Tatbestand,” *Neue Zeitschrift für Strafrecht*, 1993, pp. 1 ff.

⁶⁷ Cf. GRECO, Luís. Introdução – O inviolável e o intocável no direito processual penal: Considerações introdutórias sobre o processo penal alemão (e suas relações com o direito constitucional, o direito de polícia e o direito dos serviços de inteligência) in WOLTER, Jürgen. *O Inviolável e o Intocável no Direito Processual Penal: Reflexões sobre dignidade humana, proibições de prova, proteção de dados (e separação informacional de poderes) diante da persecução penal*. Translated by Luís Greco, Alao Leite, Eduardo Viana. 1st Edición. São Paulo: Marcial Pons, 2018, p. 30. Cf. also NEGRI, Daniele. Agli albori di un paradigma dell’Italia repubblicana: il processo penale come “diritto costituzionale applicato,” in *Diritti individuali e processo penale nell’Italia repubblicana*, Milan, 2011, pp. 13 ff.

⁶⁸ Cf., similar distinction between “infringements” and “violations” in HUSAK, Douglas. Lifting the Cloak: Preventive Detention as Punishment, *San Diego Law Review*, vol. 48, 2011, p. 1191, “(...) rights are infringed when an action implicates rights justifiably, and rights are violated when an action implicates rights unjustifiably.”

requirements: the restriction must be based on a specific legal provision⁶⁹ and be applied proportionately.⁷⁰ In other words, the State may restrict rights justifiably if it observes the principle of legal reserve – formal justification⁷¹ – and the principle of proportionality – material justification. It is important to emphasize that those requirements should be complied with accumulatively.⁷² It is not sufficient to refer back to a norm that provides express authorization in order to certify the legitimacy of a specific intervention or restriction; rather, it is necessary to verify that the principle of proportionality was respected in the specific case. Conversely, it is not sufficient to demonstrate the proportionality of the restriction without being able to indicate specific legal grounds.⁷³ In this regard the UN Human Rights Committee has also indicated that it is necessary for any interference in the home not only to be lawful, but also not to be arbitrary, observing the particular circumstances of each case.⁷⁴

40. The first condition to justify a restriction of a fundamental right is observance of the principle of legal reserve.⁷⁵ Aharon Barak reminds us that “[i]n a constitutional democracy, a constitutional right cannot be limited unless such a limitation is authorized by law.”⁷⁶ The principle of legal reserve also requires that the law authorizing the intervention in a fundamental right be clear and decisive. As Greco has stated, “without a specific law that establishes the intervention with relative clarity and imposes material and procedural limits, the intervention in a fundamental right will not be lawful.”⁷⁷ In cases such as this one, compliance with this principle is even more important because it relates to an exception to a categorical prohibition: the general prohibition of nighttime house raids. Therefore, not only the normal intervention consisting in a house raid should be established by law,⁷⁸ but also, and with special rigor and care,⁷⁹ the limited exceptions to the prohibition of nighttime raids.

41. At first sight or in the abstract, this requirement relating to the principle of legal reserve is met in the case examined, given that, as already mentioned, the exceptions allowing nighttime raids were established in the Bolivian Constitution and in the infra-constitutional legal order, following the example of most of the domestic legal systems of the Americas.⁸⁰ However, the principle of legal reserve means not only that the intervention must be established by law; it is also necessary that the norm be applied within the strict limits of the authorizing law. In other words, it is essential that the law

⁶⁹ Cf., for example, Advisory Opinion 6/86. *The Word "Laws" in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86, May 9, 1986. Series A No. 6, para. 24

⁷⁰ Cf., for example, *Case of Jenkins v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of November 26, 2019. Series C, No. 397, para. 76.

⁷¹ Cf. MICHAEL, Lothar; MORLOK, Martin. *Grundrechte*, 8th ed., Baden-Baden: Nomos, 2023, p. 330.

⁷² Cf., for example, *Case of Gangaram Panday v. Suriname. Merits, reparations and costs*. Judgment of January 21, 1994. Series C No. 16, §47, and *Case of Servellón García et al. v. Honduras*. Judgment of September 21, 2006. Series C No. 152, §90.

⁷³ Cf. GRECO, *op. cit.*, p. 48.

⁷⁴ Cf. Human Rights Committee, ICCPR. Communication No 687/1996, Rojas García v. Colombia (2001). Available at: <https://digitallibrary.un.org/record/450059>. para. 10.3.

⁷⁵ Especially with regard to legal reserve in criminal proceedings, cf. ROGALL, Klaus. Informationseingriff und Gesetzvorbehalt im Strafprozeßrecht, *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol. 103, 1991, pp. 907 ff.

⁷⁶ BARAK, Aharon. *Proportionality: Constitutional Rights and Their Limitations*, Cambridge, 2012, p. 107. Regarding the relationship between the principle of legality and human rights, cf. GARIBALDI, Oscar. General Limitations on Human Rights: The Principle of Legality, *Harvard International Law Journal*, vol. 17, 1976, pp. 503 ff.

⁷⁷ GRECO, *op. cit.*, p. 37.

⁷⁸ Cf. GENTZ, Manfred. *Die Unverletzlichkeit der Wohnung – Artikel 13 des Grundgesetzes*, Duncker & Humblot: Berlin, 1968, p. 74; CABEZUDO BAJO, *op. cit.*, p. 37.

⁷⁹ Regarding the importance of the clarity and limited scope of the law that authorizes intervention in a fundamental right, cf. KINGREEN, Thorsten; POSCHER, Ralf. *Grundrechte – Staatsrecht II*, 38th ed., C. F. Müller: Heidelberg, 2022, p. 111. And, specifically in relation to home raids, PARK, *cit.*, § 1 No. 26.

⁸⁰ Judgment, footnote 223.

authorizing the intervention in the fundamental right be interpreted and applied rigorously, especially in the case of an exception to a prohibition, as in the case of nighttime house raids. As in substantive criminal law, the prohibition of the analogy remains intact.⁸¹

42. Neither the judge nor the law enforcement agents are granted discretionality to instigate an intervention in the fundamental rights outside the scenarios demarcated by the semantic limits of the authorizing law. In this specific case, as already mentioned and correctly identified in the judgment there was a patent failure to respect the authorizing law when the raids were conducted subsequent to the situation of *flagrante delicto*.⁸²

43. In addition to being justified from a formal point of view, in light of the principle of legal reserve, a coercive measure such as a house raid (during the night), which supposes a restriction of a fundamental right, must have a substantive justification. This should be verified in keeping with the principle of proportionality. Further explanations are unnecessary concerning this principle, widely recognized by doctrine and the international courts.⁸³ Sufficient to say that, according to this principle, once the sphere of protection of any specific fundamental right has been breached, the State intervention will be proportionate if it complies with the following criteria or steps: suitability, necessity and strict proportionality. The measure taken by the State will be suitable if it is appropriate to achieve a constitutionally legitimate purpose, and necessary if there is no other measure that is as effective as the one adopted to achieve the aim pursued and that is less restrictive of the fundamental right involved. In addition to these criteria, according to the strict notion of proportionality – also known as “the prohibition of excess,” a translation of the German expression (*Übermaßverbot*) – it is necessary to consider whether, despite the suitability and necessity of the measure, it has too great an impact on the fundamental right concerned in relation to the importance of achieving the purpose sought. At this last stage of the analysis, it is necessary to weigh the antagonistic rights and interests involved.⁸⁴ This examination of proportionality has been adopted by the Court, for example, in *Wong Ho Wing et al. v. Peru* (2018), which refers to the issue of arbitrary detentions:

[N]otwithstanding the lawfulness of a detention, in each case an analysis must be made of the law's compatibility with the Convention, in the understanding that the law and its application must respect the following requirements to ensure that the deprivation of liberty is not arbitrary: (i) that the purpose of the measures that deprive or restrict liberty are compatible with the Convention; (ii) that the measures adopted are appropriate to achieve the purpose sought; (iii) that they are necessary, in the sense that they are absolutely essential to achieve the purpose sought and that there is no less onerous measure, with regard to the right affected, among all those with the same ability to achieve the proposed purpose - which is why the Court has asserted that the right to personal liberty presumes that any restriction of this right must be exceptional and (iv) that the measures are strictly proportionate, so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or excessive in relation to the advantages obtained from its restriction and achievement of the purpose sought.

⁸¹ Cf. KUDLICH, Hans, in *Münchener Kommentar zur StPO*, 1st ed., C.H. Beck: Munich, 2014, Einleitung Nm. 602.

⁸² Regarding the concept of *flagrante delicto* for the purposes of house raids, cf. CABEZUDO BAJO, *op. cit.*, pp. 261 ff.

⁸³ *Inter alia* SCHLINK, Bernhard. Proportionality in Constitutional Law: why everywhere but here? *Duke Journal of Comparative & International Law*, vol. 22, 2012, pp. 291 ff.; BARAK, *op. cit.*, pp. 131 ff.; BERNAL PULIDO, Carlos. The Migration of Proportionality across Europe, *New Zealand Journal of public and international law*, vol. 11, 2013, pp. 483 ff.; ALEXU, Robert. Proportionality and Rationality, in JACKSON; TUSHNET (org.), *Proportionality: New Frontiers, New Challenges*, Cambridge, 2017, pp. 13 ff.; GREENE, Jamal. Rights as Trumps? *Harvard Law Review*, vol. 132, 2018, pp. 28, 56 ff.; POSCHER, Ralf. Proportionality and the Bindingness of Fundamental Rights, in: BILLIS/KNUST/PETTER RUI (org.), *Proportionality in Crime Control and Criminal Justice*, Hart Publishing: Oxford, 2021, pp. 49, 51 ff.

⁸⁴ ALEXU, *op. cit.*, pp. 14 ff.; KINGREEN; POSCHER, *op. cit.*, pp. 101 ff.

44. In the specific case of house raids – particularly during the night, which are only permitted exceptionally – the principle of proportionality requires that the magistrate or judge must justify the need for the measure and specify when it should take place⁸⁵ and, in the cases of strict necessity mentioned above, that it should be conducted during night hours.⁸⁶ In addition, the official must expressly substantiate why it is not possible to conduct the raid during daytime hours. Among the criteria that should support this analysis, we underscore, without prejudice to other considerations, those listed by the European Court of Human Rights in its judgment in *Buck v. Germany* (2005): “the severity of the offence in relation to the police operation; the manner and circumstances in which the order was issued; the content and scope of the order, having particular regard to the nature of the premises searched and the safeguards taken.”⁸⁷ It should also be taken into account that, in the case of nighttime raids, specific justification must be provided for the necessity for the police to enter the homes in the early morning hours while the residents are in bed.⁸⁸ Also, other important factors should be assessed, such as the presence of children and women in the home. As the International Committee of the Red Cross has indicated in its International Rules and Standards for Policing, it is important “that planned police operations are prepared carefully and with all possible precautions being taken to protect uninvolved people, and also the person to be arrested.”⁸⁹

45. It is important to consider, however, that the weighing between the interests of the State and the rights of the citizen should only occur if and after previous adequate steps have been taken to verify the justification of the restriction of the fundamental right. The weighing is not a substitute for either the decision on suitability and necessity or, above all, the principle of legal reserve or legality. When the judge authorizes a specific intervention (as in the case of the judicial authorization of a nighttime raid), it is not incumbent on him to weigh, freely and directly, the interests of the criminal prosecution and the individual rights; rather, his decision is related to the principles of legality and proportionality in the broad sense. In other words, when applying the law that authorizes an intervention in a fundamental right, the judge must make a strict subsumption of the factual substratum of the law. Over and above the semantic contours of the authorizing law and without the decisions on suitability and necessity, any consideration is proscribed.⁹⁰

46. Therefore, it should be indicated that the reserve of jurisdiction does not substitute or supplant the legal reserve, and especially the principle of proportionality; rather it defines them and supplements them, as the ECHR has indicated: “the fact that a search is based on a warrant issued by a judge does not necessarily amount to a sufficient safeguard. It also matters whether that prior judicial scrutiny was properly carried out (...): whether the judge duly examined the existence of a reasonable suspicion justifying the search.”⁹¹

47. In summary, it is fair to say that the case examined reveals the importance of conceiving coercive measures in criminal proceedings as restrictions of the fundamental rights that require justification, from both the formal point of view, by an authorizing law

⁸⁵ Cf. CABEZUDO BAJO, *op. cit.*, p. 215.

⁸⁶ As expressly required by German legal doctrine, *cf.* with further references PARK, *cit.*, § 2 No. 197.

⁸⁷ Cf. ECHR, *Buck v. Germany*, n. 41604/98, Judgment of April 28, 2005, §45.

⁸⁸ Cf. ECHR, *Keegan v. The United Kingdom*, n. 28867/03, Judgment of July 18, 2006, §33.

⁸⁹ Cf. ICRC. International Rules and Standards for Policing (2016). Available at: <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0809.pdf> p. 40.

⁹⁰ See SCHAUER, Frederik. Balancing, Subsumption, and the Constraining Role of Legal Text, *Law & Ethics of Human Rights*, vol. 4, 2010, pp. 35 *ff.*, 40, 44, who states: “the typical subsumption inquiry is largely constrained, largely textually interpretive, and largely characterized by the way in which the constraints of a moderately clear text, when one exists, exclude numerous factors and considerations that would not only otherwise be relevant, but would also, typically, be relevant were the methodology to be one of balancing or proportionality rather than subsumption.”

⁹¹ ECHR, *Posevini v. Bulgaria*, n. 63638/14, Judgment of January 19, 2017, §70.

that should be interpreted within its intrinsic semantic limits, and the substantive viewpoint, with strict respect for the principle of proportionality and its components (suitability, necessity and proportionality *stricto sensu*). It is the legislator's task to establish categorically the prohibition of nighttime raids and to clearly define the restricted exceptions to this prohibition, and it is for the judge, in turn, to interpret strictly the authorizing law, granting or rejecting the measure in light of its suitability, necessity and proportionality *stricto sensu*, indicating the reasons that prevent the procedure from being conducted outside nighttime hours.

48. As a result of the scenarios analyzed above, it is important to define the specific situations that would justify the exceptionality of the inviolability of the home, in relation to the analysis of the proportionality of the measure, particularly during the night, which is what is claimed in this case. In other words, once it has been verified that there is a need to establish expressly in domestic law the prohibition of nighttime raids, and having verified the non-conformity with the Convention of such measures, it is necessary to establish the exceptions to this prohibition, so that they are also expressly established by law.

49. Consequently, the possibility of entering a home without a court order is an express exception to the general rule in the case of *flagrante delicto*, as established in the laws of Bolivia examined above, and also in those of countries such as Portugal, Spain, Paraguay and Brazil:

Constitution of Portugal: Article 34: Inviolability of the home

1. The home and the privacy of correspondence and other means of private communication are inviolable.
2. The entry into the home of citizens against their will may only be ordered by the competent judicial authority in the cases and in the way established by law.
3. No one may enter the home of anyone, with or without their consent, during the night, except in a situation of *flagrante delicto* or with a court order in the case of especially violent or highly organized crime, including terrorism or people-, arms-, or drug-trafficking, in the terms set forth in the law.

Constitution of Spain: article 18:

2. The home is inviolable. It cannot be entered or searched without the consent of the owner or a court order, except in cases of *flagrante delicto*.

Constitution of Paraguay: article 34:

Any private area is inviolable. It may only be raided or closed by order of the court and subject to the law. Exceptionally, it may be raided, also, in case of *flagrante delicto* or to prevent its imminent perpetration, or to avoid harm to people or property.

Constitution of Brazil: article 5:

XI. The home is an inviolable refuge for the individual and no one may enter it without the consent of the inhabitant except in case of *flagrante delicto* or catastrophe, or to provide assistance or, during the day, by a court order.

50. However, the issue of *flagrante delicto*, which is expressly established in numerous domestic laws, acquires special relevance in light of the need to establish parameters that go beyond the lawfulness of the measure. In other words, police agents cannot be allowed to enter the homes of third parties based on the simple allegation that there is information that a crime is underway, in supposed compliance with the legal provision, because this would weaken and undermine the guarantee of the inviolability of the home that we are examining.

51. Accordingly, the right to the inviolability of the home, given its importance and protagonism, can only be breached when the *flagrante delicto* reveals the legitimate

urgency to enter the home of another, duly justified and protected by reasons *de facto* and *de iure*, in order to avoid the smooth flow of the proceedings and the lawfulness of the evidence eventually obtained being compromised, and also undue restrictions of the right.

52. Consequently, it is necessary to go further proposing an interpretation that guarantees the inviolability of the home and that, at the same time, establishes clear parameters that guide the actions of law enforcement agents in exceptional situations. To this end, Article 11(2) of the Convention should be used as an interpretation standard. This article establishes the protection of the home from "arbitrary or abusive interference."

53. This reveals that a criterion that must obligatorily be observed in the case of the exception derived from *flagrante delicto* is the *de facto* existence of a **prior justification under the law** that permits the raiding of a home. This means that the verification of *in flagrante delicto* should precede the entry into the home and cannot be justified subsequently. To the contrary, it would be an **arbitrary measure** prohibited by the Convention.

54. Despite the possibility of prescinding with the judicial control prior to the entry into someone's home in this situation, allowing it to take place without a warrant, a rigorous analysis *a posteriori* is required by the respective magistrate or judge to verify whether or not the individual guarantees were violated during the raid specifically examined,⁹² as the Federal Supreme Court of Brazil, for example, has already decided. Subsequent judicial control is extremely important to examine the reasons that justified the house raid and whether elements truly existed that indicated the presence of *flagrante delicto*; in other words, whether the analysis of proportionality made by the law enforcement agents was coherent and whether minimum grounds existed for the adoption of the measures that restricted rights.

55. More specifically, in relation to the limits to the analysis made by the judge, we can mention that, for example, unlawful evidence, anonymous complaints, and statements made by unidentified "informers" cannot be used to undermine the inviolability of the home, especially during the nighttime, so that the police can raid it in an alleged situation of *flagrante delicto*. In such cases, the evidence eventually obtained should be considered unacceptable, owing to its evident unlawfulness, without prejudice to the possible liability of the law enforcement agents who took part in the unlawful operation.

56. This issue should be highlighted in light of crimes of an ongoing nature, where *flagrante delicto* extends over time – and in which the understanding adopted regarding the possibility of a violation of the home without a warrant should be limited to scenarios in which there is sufficient evidence that a crime has probably been committed; that is, substantial grounds for the entry into the home to be considered regular and lawful. Only in those circumstances in which the factual situation before the raid allows it to be concluded that, beyond any reasonable doubt, criminal acts are being committed in the home, is it possible to speak of the plausibility and lawfulness of the raid.

57. In such cases of ongoing offenses, it is usual that house raids occur merely when information exists (often from an unidentified informer or an anonymous report) that a specific offense is being committed. Evidently, based on the previous considerations, this information is not sufficient to suggest the situation of *flagrante delicto* necessary for

⁹² In this regard, the Federal Supreme Court of Brazil has recently decided, in light of Article 11(2) of the American Convention and Article 17(1) of the International Covenant on Civil and Political Rights, that the absence of judicial control before or after home raids, even in situation of *flagrante delicto*, removed "the fundamental core of the guarantee of the inviolability of the home (...)" and would cease to protect against arbitrary interference in the home." Federal Supreme Court, Special Appeal No. 603.615/RO. Judgment of November 5, 2015.

conducting a house raid, owing to either the source of the information or its content, if no evidence exists regarding the alleged conduct that gives rise to a well-founded suspicion.

58. Another issue that should be evaluated is the possible exception to the prohibition of house raids in the event of the "consent of the resident," which is included in some domestic laws. This situation merits greater attention because it evidently ignores the unequal relationship between the citizen and the public agent, especially in this situation in which the agent seeks to take a measures to restrict the guarantee of the inviolability of the home.

59. The lack of confidence in the consent of the resident is mentioned by the Supreme Court of the United States in *Amos v. United States* (1921),⁹³ in which it was held that the consent to enter a home without a warrant was not a waiver of the constitutional privilege against unreasonable search and seizure. In another decision, the Supreme Court established that the consent of the resident "must be unequivocal, specific and intelligently given, uncontaminated by any duress or coercion" (*United States v McCaleb*⁹⁴).

60. In the absence of a reasonable suspicion that the situation constitutes *flagrante delicto*, such consent should not be considered arbitrarily to allow the house raid owing to the fact that the citizen, within this unequal relationship with the public agent who possesses authority and power, has permitted the agent to enter his home. It is worth emphasizing that a raid without a warrant is only possible when there has been prior substantiated verification that a crime is being committed, with specific and objective evidence that, together with an analysis of proportionality, permits the action.

61. This requirement cannot be excluded alleging the consent of the residents. The fact is that the said consent, to be legally valid, must be voluntary and free of coercion. It is evident, therefore, that, for the resident to allow entry into his home, no coercion by the police authority is allowed.

62. Although the possibility of expressly establishing this exception is not denied, even with the safeguards described, consent, as in the case of *flagrante delicto*, also requires subsequent careful judicial analysis. In this case, the judge must first verify the evidence that the law enforcement agents had in order to be able to adopt this measure and then, what evidence there is that the resident consented to the entry, freely and spontaneously. In case of doubt, for example, if the versions of the agents and that of the resident differ, the version should prevail of the person whose right was violated: the citizen. This is because the State has the burden of proving that consent was truly free and voluntary. To guarantee the lawfulness of the measure, the French Code of Criminal Procedure requires express consent in a written statement by the interested party, as follows:

Article 76: Searches, home visits and the seizure of incriminating evidence or items whose confiscation is established in article 131-2 of the Criminal Code may not be carried out without the express consent of the person in whose home the operation takes place.

This consent shall be recorded in a handwritten statement by the interested party or, if he or she cannot write, it shall be noted in the record, as well as his or her consent.⁹⁵

63. Nevertheless, even if an express declaration of consent exists, the State must prove that this was given freely, and that there are no indications that it was obtained by coercion. This requirement is fundamental to avoid arbitrariness and abuse of authority when conducting a house raid.

⁹³ Cf. Supreme Court of the United States. *Amos v. US*, 255 US 313 (1921), judgment of February 28, 2021.

⁹⁴ US Court of Appeals. Sixth Circuit. *US v. McCaleb*. 552 f.2d 717 (1977), judgment of April 11, 1977.

⁹⁵ French Code of Criminal Procedure, article 76.

64. In addition, it is essential to examine the subjective characteristics of the individual who has expressed his consent, such as age, level of education, and intellectual capacity among other conditions that could possibly interfere in his free acquiescence.

65. Lastly, free consent cannot be conditioned to any peripheral circumstance, as when the authority makes "promises" if the individual authorizes the house raid.

66. In light of the preceding considerations and arguments, we conclude that any intervention in the fundamental right of the inviolability of the home, which encompasses many other intrinsic rights to intimacy and privacy, should be limited by the observance of two basic precepts: the principles of legal reserve and of proportionality, which together legitimize a specific coercive measure taken by the police authorities.

67. In light of the importance and magnitude of this issue, specific parameters should be determined for authorizing the entry of state agents into private homes, especially in situations of *flagrante delicto*. The authorities must be guided by the fact that there is a need to carefully examine the situation of *flagrante delicto a posteriori* to ensure that the occurrence of a crime within the residence was verified before the raid took place. Also, in relation to the resident's consent to the entry into his home of state agents, it is mandatory that this consent be spontaneous and free of coercion.

68. The foregoing is aimed at regulating and establishing standards for the actions of public agents related to house raids, seeking to put an end to abuses, particularly those that occur during police operations, and also to regulate the lawful entry into a private home to ensure that measures are not taken that violate fundamental human rights, especially those of women and children.

Conclusion

69. The judgment delivered by the Court in the instant case makes an in-depth examination of the international responsibility of the State in light of the Convention for the violations committed in the context of the criminal prosecution of the victims.

70. The purpose of this opinion has been to show that nighttime house raids are incompatible with the Convention and with this Court's standards, and are admissible only in absolutely exceptional situations and, above all, when they are clearly and distinctly established in the Constitution or the law. Furthermore, they require enhanced substantiation justifying why the measure cannot be conducted during the daytime. In other words, States should not consider that nighttime raids are routine criminal prosecution procedures, freely available to operators of justice; rather, they are instruments that constitute one of the most serious interventions in the sphere of individual rights. Therefore, nighttime raids can only be justified by strict observance of the requirements of both lawfulness and proportionality in all their dimensions.

Nancy Hernández López
Judge

Rodrigo Mudrovitsch
Judge

Pablo Saavedra Alessandri
Registrar