

CASE OF ROCHE AZAÑA ET AL. V. NICARAGUA

JUDGMENT OF JUNE 3, 2020

(Merits and Reparations)

In the case of *Roche Azaña et al. v. Nicaragua*,

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

Elizabeth Odio Benito, President
L. Patricio Pazmiño Freire, Vice President
Eduardo Vio Grossi, Judge
Humberto Antonio Sierra Porto, Judge
Eduardo Ferrer Mac-Gregor Poisot, Judge
Eugenio Raúl Zaffaroni, Judge, and
Ricardo Pérez Manrique, Judge;

also present,

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

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

TABLE OF CONTENTS

I INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE	3
II PROCEEDINGS BEFORE THE COURT	4
III JURISDICTION	4
IV EVIDENCE	5
A. Admission of the documentary evidence.....	5
B. Admission of the testimonial and expert evidence.....	6
V FACTS	7
A. Death of Pedro Bacilio Roche Azaña and injuries of Patricio Fernando Roche Azaña.....	7
B. Criminal proceedings against the State agents involved in the events of April 14, 1996.....	9
VI MERITS	11
VI-1 RIGHT TO LIFE AND PERSONAL INTEGRITY, AND THE DUTY TO ADOPT DOMESTIC LEGAL PROVISIONS	12
A. Arguments of the parties and of the Commission.....	12
A.1 Death of Pedro Bacilio Roche Azaña and injuries caused to Patricio Fernando Roche Azaña	12
A.2 Duty to adopt domestic legal provisions	13
B. Considerations of the Court.....	13
VI-2 RIGHT TO JUDICIAL GUARANTEES AND JUDICIAL PROTECTION	20
A. Arguments of the parties and of the Commission.....	20
A.1 Lack of participation by Mr. Patricio Fernando Roche Azaña and his parents in the criminal proceedings	20
A.2 Obligation to provide grounds for the verdict issued by the jury	21
A.3 Lack of a remedy against the verdict of acquittal	22
B. Considerations of the Court.....	22
B.1 Participation of Mr. Patricio Fernando Roche Azaña and his parents in the criminal proceedings	22
B.2 Obligation to provide grounds for a jury verdict and lack of a remedy against an acquittal	25
VI-3 RIGHT TO PERSONAL INTEGRITY OF THE PARENTS OF THE ROCHE AZAÑA BROTHERS ..	26
A. Arguments of the parties and of the Commission.....	26
B. Considerations of the Court.....	26
VII REPARATIONS	27
A. Injured party.....	28
B. Obligation to investigate the facts and to identify, prosecute and punish, as appropriate, those responsible	28
C. Rehabilitation	28
D. Measures of satisfaction	29
Guarantees of non-repetition.....	29
F. Compensation	30
F.1 Pecuniary damage.....	30
F.2 Non-pecuniary damage.....	31
H. Costs and expenses	31
I. Reimbursement of expenses to the Victims' Legal Assistance Fund of the Court	32
J. Method of compliance with the payments ordered	32
VIII OPERATIVE PARAGRAPHS	34

I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On April 24, 2019, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) submitted to the jurisdiction of the Inter-American Court the case of “Pedro Bacilio Roche Azaña and another” against the Republic of Nicaragua (hereinafter “the State of Nicaragua,” “the State” or “Nicaragua”). According to the Commission, the case relates to the alleged extrajudicial execution of Pedro Bacilio Roche Azaña and the wounding of his brother, Patricio Fernando Roche Azaña, on April 14, 1996, as a result of gunshots fired by State agents against the vehicle in which they were traveling, after it passed through two immigration checkpoints, presumably without heeding the order to stop. Consequently, the Commission concluded that the use of lethal force by State agents was arbitrary, contrary to the principles of legality, absolute necessity and proportionality, and that it violated the rights to life and personal integrity of the alleged victims. This case also relates to the alleged violation of the right to judicial guarantees and judicial protection to the detriment of Patricio Fernando Roche Azaña and his parents. Specifically, the Commission determined violations based on (i) Mr. Patricio Roche Azaña’s alleged lack of participation in the criminal proceedings against the alleged perpetrators, (ii) the lack of reasoning provided in the verdict of the Jury Court that declared the innocence of the defendants, and (iii) the legal impossibility of appealing that verdict.

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

- a) *Petition.* On December 23, 1998, the representative of the alleged victims submitted the initial petition to the Commission.
- b) *Admissibility Report.* On August 7, 2009, the Commission approved Admissibility Report No. 88/09, in which it concluded that the petition was admissible.¹
- c) *Merits Report.* On October 5, 2018, the Commission adopted Merits Report No. 114/18, pursuant to Article 50 of the Convention (hereinafter “the Merits Report” or “Report No. 114/8”), in which it reached a series of conclusions² and made several recommendations to the State.
- d) *Notification to the State.* The Merits Report was notified to the State on January 24, 2019. The Nicaraguan State did not present a response within the period indicated by the Commission.

3. *Submission to the Court.* On April 24, 2019, the Commission submitted all the facts and human rights violations described in the Merits Report to the jurisdiction of the Inter-American Court, “owing to the need to obtain justice and reparation.”³

4. *Requests of the Inter-American Commission.* Based on the foregoing, the Commission asked the Court to declare the international responsibility of the State for the violations set forth in its Merits Report (*supra* para. 2. (c)). In addition, the Commission asked the Court to order the State to adopt certain measures of reparation, which are described and analyzed in Chapter VII of this judgment. The Court notes with concern that more than 20 years have elapsed since the presentation

¹ The parties were notified on September 1, 2009.

² The Commission concluded that the State of Nicaragua was responsible for the violation of the rights to life, personal integrity, judicial guarantees and judicial protection established in Articles 4(1), 5(1), 8(1) and 25(1) of the American Convention in relation to the obligations established in Articles 1(1) and 2 of that instrument, to the detriment of Patricio Fernando Roche Azaña, Pedro Bacilio Roche Azaña, María Angelita Azaña Tenesaca and José Fernando Roche Zhizhingo.

³ The Commission appointed Commissioner Antonia Urrejola and Executive Secretary Paulo Abrão as its delegates before the Court. It also appointed Silvia Serrano Guzmán and Mónica Oehler Toca, then lawyers of the Executive Secretariat, as legal advisers.

of the initial petition before the Commission and the submission of this case before the Court.

II PROCEEDINGS BEFORE THE COURT

5. *Notification to the representative and to the State.* The Court notified the Commission's submission of the case to the representative of the presumed victims⁴ (hereinafter "the representative") and to the Nicaraguan State on June 12, 2019.

6. *Brief with pleadings, motions and evidence.* On August 9, 2019, the representative submitted his brief with pleadings, motions and evidence (hereinafter "pleadings and motions brief") to the Court. The representative agreed substantially with the arguments of the Commission. He asked the Court to declare the State's international responsibility for the violation of the same articles indicated by the Commission and, in addition, for the violation of Articles 22(1), 22(4) and XVII of the American Declaration on the Rights and Duties of Man, in relation to Article 24 of the American Convention, to the detriment of Patricio Fernando Roche Azaña and Pedro Bacilio Roche Azaña. Furthermore, on behalf of the alleged victims, the representative requested access to the Victims' Legal Assistance Fund of the Inter-American Court (hereinafter "the Court's Assistance Fund" or the "Fund").

7. *Answering brief.* On October 11, 2019, the State submitted to the Court its brief answering the submission of the case in the Inter-American Commission's Merits Report, and the brief with pleadings, motions and evidence of the representative (hereinafter "answering brief"). In this brief, the State disputed the violations alleged by the Commission and rejected its proposed measures of reparation.

8. *Public hearing.* In an Order of December 6, 2019,⁵ the President summoned the State, the representative and the Inter-American Commission to a public hearing to receive their final oral arguments and observations on the merits and eventual reparations and costs, together with the statements of two alleged victims proposed by the representative, one expert witness also offered by the representative and an expert witness proposed by the Inter-American Commission. The public hearing took place on February 4, 2020, during the Court's 133rd Regular Session, held at its seat.⁶

9. *Final written arguments and observations.* On March 4, 2020, the representative and the State forwarded their respective final written arguments, and the Commission presented its final written observations.

10. *Deliberation of this case.* The Court deliberated this judgment during a virtual session held on June 2 and 3, 2020.⁷

III JURISDICTION

11. The Inter-American Court has jurisdiction to hear this case pursuant to Article 62(3) of the

⁴ Mr. Luis Patricio Barrera Tello represented the alleged victims in this case.

⁵ *Cf. Case of Roche Azaña et al. v. Nicaragua. Summons to a hearing.* Order of the President of the Inter-American Court, December 6, 2019. Available at: http://www.Courtidh.or.cr/docs/asuntos/roche_azana_6_12_19.pdf

⁶ The following appeared at this hearing:

a) for the Inter-American Commission: the Deputy Executive Secretary, Marisol Blanchard, and the legal advisers

Jorge H. Meza Flores and Christian González;

b) on behalf of the alleged victims: Dr. Patricio Barrera Tello, and

c) for the State of Nicaragua: Grethel Fernández Sánchez, Lenín Soza Robelo and Hernaldo Chamorro Díaz.

⁷ Owing to the exceptional circumstances caused by the COVID-19 pandemic, this judgment was deliberated and approved during the 135th regular session, which was held virtually, using technological means, pursuant to the Rules of the Court.

American Convention, given that Nicaragua has been a State party to this instrument since September 25, 1979, and accepted the contentious jurisdiction of the Court on February 12, 1991.

IV EVIDENCE

A. Admission of the documentary evidence

12. The Court received various documents presented as evidence by the Commission, the representative and the State. As in other cases, the Court admits these on the understanding that they were submitted at the proper procedural moment (Article 57 of the Rules of Procedure).⁸

13. The Court notes that, in its answering brief, the State asked the Court not to admit the newspaper articles dated April 19, 1996, attached to Annex 1 of the pleadings and motions brief, "because they are not from a reliable source." In this regard, the Court has indicated that press reports may be assessed when they contain public and well-known facts or statements made by State officials, or when they corroborate aspects related to the case.⁹ Thus, the Court decides to admit said newspaper articles, given that they are complete, and will assess them taking into account the entire body of evidence, the observations of the parties and the rules of sound judgment.

14. With its brief of final arguments, the State submitted an annotated copy of the Code of Criminal Instruction, which was required by this Court during the public hearing held in this case, as well as a document on "Criminological analysis of the expert evidence contained in the case file offered as evidence."

15. With regard to the annotated copy of the Code of Criminal Instruction submitted by the State, the representative objected to the admission of said document, questioning the commentator's appraisals of the Code and considering that these expressed "views of a purely personal nature and [,] therefore [,] not binding." For its part, the Commission considered that the text of the Code of Criminal Instruction was relevant, as it could provide the Court with information on the regulatory framework applicable at the time of the facts. However, the Commission added that it was an "annotated" document containing an author's views on the legal interpretation of several provisions which could not be included as evidence in the process because it was time-barred. In a brief dated April 22, 2020, the State emphasized that it had submitted the annex in question in response to a request made by the judges in the summons to the public hearing and specified that it did not seek to include those comments as evidence. Thus, as all the parties have indicated, the Court confirms that the State had an obligation to forward a copy of the Code of Criminal Instruction. Consequently, the Court considers that the copy of the Code of Criminal Instruction with the annotations is admissible but only with regard to the articles contained in that legal instrument, excluding, therefore, any assessments made by the commentator concerning its provisions.

16. With respect to the document "Criminological analysis of the expert evidence contained in the case file," the Court notes that the State has not justified its reason for submitting this document with its final written arguments, pursuant to Article 57(2) of the Court's Rules of Procedure, since the

⁸ In general, and pursuant to Article 57(2) of the Court's Rules of Procedure, documentary evidence may be presented together with the briefs submitting the case, of pleadings and motions or with the answering brief, as appropriate. Such evidence is not admissible outside of those procedural opportunities, except in the situations established in Article 57(2) of the Rules of Procedure (namely, *force majeure* or serious impediment) or if it refers to an event that occurred after the procedural moments indicated. Cf. *Case of the Barrios Family v. Venezuela. Merits, reparations and costs*. Judgment of November 24, 2011. Series C No. 237, paras. 17 and 18, and *Case of Azul Rojas Marín et al. v. Peru. Preliminary objections, Merits, reparations and costs*. Judgment of March 12, 2020. Series C No. 402, para. 34.

⁹ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 146, and *Case of J. v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of November 27, 2013. Series C No. 275, para. 41.

proper procedural moment for doing so was with its answering brief. Consequently, said document is inadmissible because it is time-barred.

17. The representative also submitted a number of documents with his brief of final arguments. However, the Court notes that the representative did not submit this evidence at the proper procedural moment and did not cite any exceptional reasons that would allow for the admission of those documents. Consequently, the Court rejects them because they are time-barred.

B. Admission of the testimonial and expert evidence

18. The Court deems it pertinent to admit the statements received at the public hearing,¹⁰ together with the statements provided by affidavit,¹¹ insofar as these are in-keeping with the purpose defined in the Order of the President that required them.¹²

19. With respect to the written expert opinion of Mr. César Francisco Cañizares, proposed by the representative, the Court points out that this was not submitted within the established deadline. The representative subsequently withdrew that opinion, indicating that the subject matter of that expert opinion would now be addressed by the expert Pablo Ceriani, offered by the Commission, and therefore the former expert's analysis would be "redundant." Also, with respect to the expert opinion of Mr. Miguel Eugenio Méndez Rojas, offered by the representative, the Court confirms that it was admitted for presentation at the public hearing. However, on January 30, 2020, the representative reported that, owing to an "unforeseen domestic mishap," the expert would be unable to attend the hearing. Consequently, he submitted his expert opinion by affidavit without requesting the change of modality at the proper procedural moment. In view of the foregoing, and in order to ensure full respect for the adversarial principle, due process and the principle of equality of arms, in a communication dated January 31, 2020, the said expert opinion was declared inadmissible.

20. With respect to the expert opinion of Mr. Pablo Ceriani, proposed by the Commission, the Court notes that on January 28, 2020, the Commission forwarded his expert opinion without responding to the questions submitted by the State and duly admitted. In this regard, on February 3, 2020, the State of Nicaragua sent a communication asking the Court not to admit that expert opinion because "it was not provided in accordance with the adversarial procedure ordered by this Court." Subsequently, on February 4, 2020, the Commission forwarded two briefs stating that it had not received the communication in which this Court transmitted the questions raised by the State. However, the Court finds that said communication was indeed transmitted to the Commission, without any notification of a mailing error, for which reason, in a communication dated February 20, 2020, the Court indicated that the questions raised by the State would not be forwarded again.

21. Considering the foregoing, the Court recalls that the Rules of Procedure establish the possibility that the parties may formulate written questions for the deponents offered by the other party and, as appropriate, by the Commission. This imposes the corresponding obligation on the party that offered the testimony to coordinate and take the necessary steps to forward those questions to the deponents, and ensure that the respective answers are provided.¹³ Nevertheless, the Court considers that failure to provide answers to the counterpart's questions does not affect the admissibility of a statement and is a matter that, according to the extent of a deponent's silence, could affect the potential evidentiary weight of a statement or an expert opinion, an aspect that must be considered

¹⁰ During the public hearing the Court received the statements of Patricio Fernando Roche Azaña and María Angelita Azaña Tenesaca.

¹¹ The Court received the affidavits of the witness Rómulo Elogio Gutiérrez Pesantez and the expert witness Ximena del Carmen Pacheco Paredes proposed by the representative.

¹² The purpose of these statements is established in the Order of the then President of the Inter-American Court, of December 6, 2019. Available at: http://www.Corteidh.or.cr/docs/asuntos/roche_azana_6_12_19.pdf

¹³ Cf. *Case of Díaz Peña v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of June 26, 2012. Series C No. 244, para. 33.

when assessing the merits of the case.¹⁴ Therefore, this Court admits the aforementioned expert opinion.

V FACTS

22. In this chapter, the Court will establish the facts of the case based on the factual framework submitted to the Court by the Inter-American Commission, in relation to (i) the death of Mr. Pedro Bacilio Roche Azaña and the injuries suffered by his brother Patricio Fernando and (ii) the criminal proceedings against those responsible for firing the gunshots at the van.

A. Death of Pedro Bacilio Roche Azaña and injuries of Patricio Fernando Roche Azaña

23. The Roche Azaña brothers lived with their parents in the province of Azuay, in the canton of San Fernando, in Ecuador.¹⁵ At the time of the events of this case, Pedro Bacilio Roche Azaña was 20 years old and his brother Patricio Fernando Roche Azaña was 22.¹⁶ On April 8, 1996, they left their home to begin their journey to the United States of America in search of better opportunities. They first traveled to the city of Guayaquil and from there continued their journey to the Republic of Panama and then on to Nicaragua.

24. On April 14, 1996, the Roche Azaña brothers reached the Nicaraguan capital, Managua, where they met up with around 30 other migrants, with whom they were transported in a van to the city of Chinandega.¹⁷ The van had tinted windows in the front and in the two front doors, as well as in the two small windows at the back.¹⁸

25. At approximately 8.p.m, on the road to Chinandega, the van sped through a first police checkpoint that was set up to intercept vehicles that were allegedly bringing illegal merchandise into Nicaragua.¹⁹ The driver of the van ignored the signal to stop, as indicated by the patrol car, and continued his journey.²⁰ The same happened at the second checkpoint, located three kilometers further along the road, in the direction Somotillo. At that checkpoint the van driver ignored the agents' signals to stop and drove through it "at high speed."²¹ In response, and without any prior order being given, some of the police officers fired several shots at the van. With regard to those shots, the police officer F.S.O.N. stated that he fired two shots into the air.²² The officer R.J.S.O. stated that he fired

¹⁴ Cf. *Case of Díaz Peña v. Venezuela, supra*, para. 33, and *Case Galindo Cárdenas et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of October 2, 2015. Series C No. 301, para. 89.

¹⁵ Merits Report of the Commission, No. 114/18, Case No. 12.722, *Pedro Bacilio Roche Azaña et al. v. Nicaragua*, of October 5, 2012, OEA/Ser.L/V/II.169, Doc. 131 (merits file, folio 10).

¹⁶ Cf. Birth certificate of Pedro Bacilio Roche Azaña (evidence file, folio 2514), and birth certificate of Patricio Fernando Roche Azaña (evidence file, folio 2515).

¹⁷ Cf. Statement *ad-inquirendum* made by M.Q.P. before the First District Criminal Judge of Chinandega, on May 3, 1996, (evidence file, folio 3203).

¹⁸ Cf. Statement of J.F.G.C. to the National Police, of April 19, 1996 (evidence file, folio 449); Statement *ad-inquirendum* made by J.M.R.V. before the First District Criminal Judge of Chinandega, on April 29, 1996 (evidence file, folio 448), and Statement of R.J.S.O. before the National Police, of April 21, 1996 (evidence file, folio 2071).

¹⁹ Cf. Statement of G.P.D to the National Police, of April 18, 1996 (evidence file, folio 418), and Statement *ad-inquirendum* made by J.M.R.V. before the First District Criminal Judge of Chinandega, of April 29, 1996 (evidence file, folio 2073).

²⁰ Cf. Statement *ad-inquirendum* made by S.A.V.B. before the First District Criminal Judge of Chinandega, of April 29, 1996 (evidence file, folio 1110), and Statement *ad-inquirendum* made by N.D.S. before the First District Criminal Judge of Chinandega, on May 3, 1996, (evidence file, folios 2488 to 2493).

²¹ Cf. Statement made by J.F.G.C. to the National Police, of April 19, 1996 (evidence file, folio 448), and statement made by S.A.V.B. to the National Police, of April 21, 1996 (evidence file, folio 479).

²² Cf. Statement *ad-inquirendum* made by F.S.O.N before the First District Criminal Judge of Chinandega, of April 29, 1996 (evidence file, folio 1115), and Order of imprisonment, issued by the First District Criminal Court, on May 6, 1996 (evidence file, folio 3287).

three shots into the air.²³ For his part, officer J.M.R.V. said that he fired three or four shots in the direction of the tires on the right side of the vehicle.²⁴

26. A third police checkpoint was set up at kilometer 169 on the road to Chinandega.²⁵ At this third checkpoint, the van also ignored the police officers' signal to stop, and in response, officer S.A.V.B. admitted having fired a shot into the air.²⁶ According to the statements made by the police officers who took part in the operation, the van was traveling at approximately "160 kilometers per hour" and nearly collided with the officers' patrol car.²⁷ Despite the shots, the driver of the van continued to flee. The police officers pursued the van for approximately one kilometer, after which they lost trace of him.²⁸

27. As a result of the gunshots fired, at least six people were wounded, including the two Roche Azaña brothers.²⁹ Pedro Bacilio Roche Azaña received a gunshot wound to the head,³⁰ while his brother Patricio Fernando received two gunshot wounds, one of which fractured his right hip and the other hit his right thigh.³¹

28. In their statements, the migrants who traveled in the van said they repeatedly asked the driver to stop the vehicle, as some people had been wounded as a result of the gunshots. However, the driver continued on his way to Marimboro, where he turned off onto a dirt road, traveling a distance of approximately nine kilometers until he reached the community of Jucote, where he stopped and got the migrants out of the vehicle, abandoning them there while he continued to flee.³²

29. Some of the migrants then scattered into the scrubland³³ while others remained in place to help the injured reach a nearby farmhouse where local people attended to them and helped them.³⁴ The following day, the injured were first taken to a health center by local people and were then transferred by ambulance to the Hospital España.³⁵

²³ Cf. Statement *ad-inquirendum* made by R.J.S.O. before the First District Criminal Judge of Chinandega, of April 29, 1996 (evidence file, folio 2068), and Order of imprisonment, issued by the First District Criminal Court, of May 6, 1996 (evidence file, folio 3285).

²⁴ Cf. Statement made by J.M.R.V. to the National Police, of April 19, 1996 (evidence file, folio 489).

²⁵ Cf. Statement made by J.F.G.C. to the National Police, of April 19, 1996 (evidence file, folio 448).

²⁶ Cf. Statement *ad-inquirendum* made by S.A.V.B. before the First District Criminal Judge of Chinandega, of April 29, 1996 (evidence file, folio 1110).

²⁷ Cf. Statement *ad-inquirendum* made by J.M.R.V. before the First District Criminal Judge of Chinandega, of April 29, 1996 (evidence file, folio 448), and statement of A.J.V.G. to the National Police, of April 20, 1996 (evidence file, folio 2704).

²⁸ Cf. Statement *ad-inquirendum* made by J.M.R.V. before the First District Criminal Judge of Chinandega, of April 29, 1996 (evidence file, folio 448); statement of J.M.R.V. to the National Police, of April 19, 1996 (evidence file, folio 448); Statement *ad-inquirendum* made by J.M.R.V. before the First District Criminal Judge of Chinandega, of April 29, 1996 (evidence file, folio 448), and statement of F.S.O.N to the National Police, of April 21, 1996 (evidence file, folio 483).

²⁹ The persons who received gunshot wounds were: Pedro Bacilio Roche Azaña, Patricio Fernando Roche Azaña, M.Q.P., N.D.S., A.C.S. and M.C. Cf. Order of imprisonment, issued by the First District Criminal Court, of May 6, 1996 (evidence file, folio 3291).

³⁰ Cf. First medical report on Pedro Bacilio Roche Azaña, Medical Examiner of Chinandega, April 15, 1996 (evidence file, folio 396). See also, Second medical report on Pedro Bacilio Roche Azaña, Medical Examiner of Chinandega, of April 18, 1996 (evidence file, folio 398).

³¹ Cf. Medical report on Patricio Fernando Roche Azaña, Medical Examiner of Chinandega, of April 18, 1996 (evidence file, folio 400).

³² Cf. Statement *ad-inquirendum* made by N.D.S. before the First District Criminal Judge, of May 3, 1996, (evidence file, folio 2489), and statement *ad-inquirendum* made by M.Q.P. before the First District Criminal Judge, of April 30, 1996 (evidence file, folio 3201).

³³ Cf. Statement of Juan Izquierdo Narváez to the National Police, of April 18, 1996 (evidence file, folio 2087), and statement of Rómulo Eulogio Gutiérrez Pezante, of April 18, 1996 (evidence file, folios 2338 and 2339).

³⁴ Cf. Statement of Patricio Fernando Roche Azaña made at the public hearing held before this Court on February 4, 2020, statement rendered by affidavit of R.E.G.P., of January 10, 2020 (evidence file, folio 3563), and statement of H.M.C.R. to the National Police, of April 18, 1996 (evidence file, folio 2341).

³⁵ Cf. Statement *ad-inquirendum* made by M.Q.P. before the First District Criminal Judge of Chinandega, on April 30, 1996, (evidence file, folio 3200), and Statement *ad-inquirendum* made by N.D.S., before the First District Criminal Judge of Chinandega of May 3, 1996 (evidence file, folio 2490). See also, statement of Patricio Fernando Roche Azaña at the public hearing held before this Court on February 4, 2020.

30. At around midnight on April 15, 1996, Mr. Pedro Bacilio Roche Azaña died as a result of the gunshot wound. He was subsequently transferred to the morgue of the Hospital España and, eventually, was repatriated to his country of origin, Ecuador.³⁶ Meanwhile, Mr. Patricio Fernando Roche Azaña was admitted to the Hospital España on April 15, 1996, where he underwent an emergency operation for a perforation of the pelvic floor and an intestinal perforation. He was then moved to the intensive care unit because he was in "imminent danger of death."³⁷ Owing to his serious medical condition and the fact that he also had an ischiorectal hematoma and perforation of the colon, he underwent another surgery to perform a colostomy on April 21, 1996.³⁸ Mr. Roche Azaña spent two months in a coma.³⁹ Approximately seven months after being hospitalized, and after recovering from his injuries, he returned to Ecuador where he had to undergo further surgery as a consequence of the injuries suffered on April 14, 1996.⁴⁰

B. Criminal proceedings against the State agents involved in the events of April 14, 1996

31. As a result of these events, the assistant prosecutor of Chinandega filed charges against three military personnel, two members of the National Police and a volunteer policeman, as the alleged perpetrators of the crimes of culpable homicide to the detriment of Pedro Bacilio Roche Azaña and grievous bodily harm to the detriment of Patricio Fernando Roche Azaña and four other individuals.⁴¹ On April 20, 1996, the accused were detained by the National Police.⁴²

32. On April 30, 1996, the Judge of the First District Criminal Court of the Department of Chinandega (hereinafter, "First District Criminal Judge") visited the Hospital España to take the statements of those injured during the incident of April 14, 1996. The judge also went to the intensive care unit to take a statement from Mr. Roche Azaña. However, given his critical medical condition at the time, and that "his life was in danger," it was not possible to take his statement.⁴³ However, the judge did take the statements of two other migrants who were also injured.⁴⁴

33. On May 6, 1996, the First District Criminal Court issued a formal order for the imprisonment of

³⁶ Cf. First medical report on Pedro Bacilio Roche Azaña, Medical Examiner of Chinandega, of April 15, 1996 (evidence file, folio 396); Second medical report on Pedro Bacilio Roche Azaña, Medical Examiner of Chinandega, of April 18, 1996 (evidence file, folio 398); Procedure for the preparation and preservation of the body, of April 27, 1997 (evidence file, folio 2203); statement of Patricio Fernando Roche Azaña at the public hearing held before this Court on February 4, 2020, and statement of María Angelita Azaña Tenesaca at the public hearing held before this Court on February 4, 2020.

³⁷ Cf. Medical report on Patricio Fernando Roche Azaña, Medical Examiner of Chinandega, of April 17, 1996 (evidence file, folio 400); Medical report on Patricio Fernando Roche Azaña, Medical Examiner of Chinandega, of April 26, 1996 (evidence file, folio 1124).

³⁸ Cf. Medical report on Patricio Fernando Roche Azaña, Medical Examiner of Chinandega, of April 26, 1996 (evidence file, folio 1124). See also, statement of Patricio Fernando Roche Azaña at the public hearing held before this Court on February 4, 2020.

³⁹ Cf. Statement of Patricio Fernando Roche Azaña at the public hearing held before this Court on February 4, 2020.

⁴⁰ *Idem*.

⁴¹ Cf. Statement of F.A.C.P. to the National Police, of April 19, 1996 (evidence file, folio 2410); Statement *ad-inquirendum* made by J.M.R.V. before the First District Criminal Judge of Chinandega, on April 29, 1996 (evidence file, folio 2073); Statement *ad-inquirendum* made by R.J.S.O before the First District Criminal Judge of Chinandega, on April 29, 1996 (evidence file, folio 2066); Statement *ad-inquirendum* made by S.A.V.B. before the First District Criminal Judge of Chinandega, on April 29, 1996 (evidence file, folio 2419); Statement *ad-inquirendum* made by F.S.O.N. before the First District Criminal Judge of Chinandega, on April 29, 1996 (evidence file, folio 2414), and Statement *ad-inquirendum* made by J.R.P.S. before the First District Criminal Judge of Chinandega, on April 25, 1996 (evidence file, folio 2424). The other parties to the proceedings were M.Q.P., N.D.S., A.C.S. and M.C.R. Cf. Order of imprisonment, issued by the First District Criminal Court, on May 6, 1996 (evidence file, folio 3291).

⁴² Cf. Record of arrest of F.A.C.P., J.M.R.V., R.J.S.O., S.A.V.B., F.S.O.N. and J.R.P.S (evidence file, folios 2744 to 2762).

⁴³ Cf. Record prepared by the First District Criminal Judge of Chinandega, of April 30, 1996 (evidence file, folio 3199), and Order of imprisonment, issued by the First District Criminal Court, on May 6, 1996 (evidence file, folio 3291).

⁴⁴ Cf. Statement made by M.Q.P. to the First District Criminal Judge, of April 30, 1996 (evidence file, folios 3200 to 3207), and statement *ad-inquerendum* made by N.D.S, before the First District Criminal Judge, on May 3, 1996 (evidence file, folios 2488 to 2493).

the defendants F.A.C.P., J.M.R.V., R.J.S.O., S.A.V.B., and F.S.O.N., considering them responsible for the crimes of culpable homicide and grievous bodily harm during the events of April 14, 1996; it also dismissed the charges against the volunteer police officer.⁴⁵

34. On August 28, 1998, the Criminal Chamber of the Appeals Court, Western Region, upheld the imprisonment of the defendants, except for F.A.C.P., against whom charges were dismissed.⁴⁶

35. The case was then submitted to a Jury Court, pursuant to Article 22 of the Code of Criminal Procedure, in force at the time of the facts.⁴⁷ Thus, once the case had progressed to the plenary stage and the pertinent evidence had been gathered,⁴⁸ the Jury Court was constituted.⁴⁹ On February 24, 1997, the judge of the First District Criminal Court called a hearing to select jury members from a list of ten citizens. After the first election, one of the selected jurors was rejected by the attorney of one of the defendants, and was substituted by another person. Next, a judge of law from the Second District Civil and Labor Court was appointed to form part of the Jury Court and the public

⁴⁵ Cf. Order of imprisonment issued by the First District Criminal Court on May 6, 1996 (evidence file, folios 3279 to 3291).

⁴⁶ Cf. Judgment issued by the Criminal Chamber of the Court of Appeals on August 28, 1996 (evidence file, folios 3365 to 3372).

⁴⁷ This article states that "Common offenses that warrant more severe punishment than merely corrective measures, shall be submitted to the consideration of a jury court, which shall issue its verdict based on firm conviction, ruling on the responsibility of the accused, declaring him innocent or guilty. Based on this verdict, the district judge shall issue a judgment, acquitting him or imposing punishment." (evidence file, folio 3613).

⁴⁸ The case file contained numerous items of evidence, including: 31 statements from the migrants traveling in the van, the statements of 8 witnesses, 21 statements made by State agents who witnessed the facts, 6 statements of the defendants, visual inspection reports of the vehicle, medical reports on the death of Mr. Pedro Bacilio Roche Azaña and on the individuals injured, together with several expert, ballistic, chemical and forensic reports. Cf. Statements of: S.J.I. (evidence file, folios 2086 to 2088); M.V.Q. (evidence file, folio 2272); E.D.S. (evidence file, folios 2273 to 2274); C.S.S. (evidence file, folios 2275 to 2277); G.T.C. (evidence file, folios 2278 to 2282); L.M.T.N. (evidence file, folios 2283 2285); E.R.A.T. (evidence file, folios 2286 to 2288); N.Q.F. (evidence file, folios (2289 to 2291); M.I.Y.Q. (evidence file, folios 2292 to 2294); J.M.P.R. (evidence file, folios 2295 to 2297); R.H.P. (evidence file, folio 2298); E.F.C.P. (evidence file, folios 2299 to 2303); C.A.P. (evidence file, folios 2304 to 2307); L.A.P.D. (evidence file, folios 2308 to 2309); M.C.C.A. (evidence file, folios 2310 to 2312); L.P.M. (evidence file, folio 2313); T.C.P. (evidence file, folio 2314); M.P.C.P. (evidence file, folios 2315 to 2316); A.C.S. (evidence file, folios 2317 to 2318); A.V.C. (evidence file, folios 2319 to 2320); A.M.Y. (evidence file, folios 232 to 2322); D.H.S.A. (evidence file, folios 2323 to 2324); F.J.V.A. (evidence file, folios 2325 to 2326); M.R.J.G. (evidence file, folios 2327 to 2328); P.J.M.S. (evidence file, folios 2329 to 2330); R.S.R. (evidence file, folios 2331 to 2332); A.B.T. (evidence file, folios 2333 to 2334); M.Q.P. (evidence file, folios 2335 to 2336); R.E.G.P. (evidence file, folios 2337 to 2339); H.M.C.R. (evidence file, folios 2340 to 2341); N.D.S. (evidence file, folios 2192 to 2194); Statements of: A.A.L.R. (evidence file, folios 2343 to 2344); J.A.M.G. (evidence file, folio 2346); R.M.M. (evidence file, folio 2205); R.G.Z. (evidence file, folio 2348); M.A.R.R. (evidence file, folio 2207); J.R.C. (evidence file, folio 2209); R.L.M. (evidence file, folio 2211); R.I. (evidence file, folios 2350 to 2351); Statements of: G.P.D. (evidence file, folio 2053); J.D.P.C. (evidence file, folio 2353); A.J.V.G. (evidence file, folios 2355 to 2357); F.A.C.P. (evidence file, folios 2410 to 2412); C.A.A.L. (evidence file, folios 2359 to 2360); I.M.R. (evidence file, folios 2362 to 2363); R.J.V. (evidence file, folios 2365 to 2366); M.R.R.P. (evidence file, folios 2368 to 2370); J.A.S.L. (evidence file, folios 2372 to 2373); M.A.S. (evidence file, folios 2375 to 2376); S.O.R.A. (evidence file, folios 2378 to 2380); J.E.M. (evidence file, folios 2382 to 2383); J.A.M.D. (evidence file, folios 2385 to 2386); W.A.R.S. (evidence file, folios 2388 to 2389); J.F.G.C. (evidence file, folios 2391 to 2394); R.R.G.H. (evidence file, folios 2396 to 2397); W.J.N.R. (evidence file, folios 2399 to 2400); E.H.L. (evidence file, folio 2402); M.J.P.G. (evidence file, folio 2404); E.M.V.R. (evidence file, folio 2406); A.R.M. (evidence file, folio 2408); Statements of: J.C.P. (evidence file, folios 2058 to 2064); F.S.O.N. (evidence file, folios 2414 to 2417); R.J.S.O. (evidence file, folios 2066 to 2071); S.A.V.B. (evidence file, folios 2419 to 2422); J.M.R.V. (evidence file, folios 2073 to 2079); J.R.P. (evidence file, folios 2424 to 2429); Visual inspection record of vehicle, of April 18, 1996 (evidence file, folio 2051); First medical report on Pedro Bacilio Roche Azaña, Medical Examiner of Chinandega, April 15, 1996 (evidence file, folio 396); Medical reports on: Patricio Roche Azaña (evidence file, folio 2213); M.Q.P. (evidence file, folio 2215); N.D.S. (evidence file, folio 2217); A.C.S. (evidence file, folio 2219); M.C.R. (evidence file, folio 2221); Chemical ballistic tests (evidence file, folios 2437 to 2438); expert ballistics report on 22 AK weapons (evidence file, folios 2240 to 2445); expert report on chemical tests of 12 AK weapons (evidence file, folios 2447 to 2448); expert report related to chemical test of metal fragments folios 2450 to 2451); expert report on chemical testing of paint (evidence file, folios 2453 to 2455); expert ballistics report on 6 AK weapons (evidence file, folios 2457 to 2458); ballistic tests on 6 AK weapons (evidence file, folios 2460 to 2463); chemical tests of gunshot residues from 6 AK weapons (evidence file, folios 2465 to 2468); chemical tests of 14 AK weapons (evidence file, folios 2470 to 2471); ballistic tests 14 AK weapons (evidence file, folios 2473 to 2474); expert report on 5 bullet casings (evidence file, folios 2476 to 2479), and expert report on blood and hair (evidence file, folios 2481 to 2486).

⁴⁹ Argument of the State not challenged by the representative or the Commission. Cf. Answering brief of the State (merits file, folio 157).

hearing was scheduled for that same day.⁵⁰

36. At 2 p.m. on February 24, 1997, the judge, in the presence of the assistant prosecutor and the defense attorneys of the accused, proceeded to confirm the jury, selecting the four citizens who, together with the appointed judge of law, would constitute the Jury Court. The judge granted the parties involved in the proceedings an opportunity to veto any of the jurors if they so wished. However, no juror was vetoed by the assistant prosecutor or by the two defense attorneys. Once the jury members had been “installed” and sworn in, they were instructed to elect a president and a secretary. The judge of the First District Criminal Court then passed on the case file to the president of the Jury Court.⁵¹

37. That same day at 6.50 p.m., February 24, the Jury Court declared the defendants innocent of the crimes of culpable homicide and grievous bodily harm.⁵² As a result of that verdict, the First District Criminal Court of Chinandega acquitted the defendants on February 27, 1997.⁵³ Specifically, the ruling stated the following:

“Having been declared innocent in the verdict delivered by the Honorable Jury Court that heard this case, the defendants J.M.R.V., R.J.S.O., S.A.V.B. and F.S.O.N. [...] are hereby ACQUITTED of the crimes of CULPABLE HOMICIDE and GRIEVOUS BODILY HARM committed against PEDRO BACILIO ROCHE AZAÑA, [PATRICIO FERNANDO ROCHE AZAÑA], M.Q.P., N.D.S., A.C.S. and M.C.R., [...] for which they are subject to an order of formal imprisonment. This Court hereby orders their immediate release and requires that the appropriate authorities of the national penitentiary system be notified in order to comply with this ruling.”⁵⁴

38. Mr. Patricio Fernando Roche Azaña and his parents initially learned of the decision to acquit the defendants in August 1998, when Mrs. María Angelita Azaña Tenesaca, mother of the Roche Azaña brothers, informally received a copy of the judgment issued by the Chinandega District Jury Court from an official of the Ecuadorian Foreign Ministry.⁵⁵

VI MERITS

39. This case concerns the death of Mr. Pedro Bacilio Roche Azaña and the injuries caused to his brother, Patricio Fernando Roche Azaña, on April 14, 1996, as a consequence of the gunshots fired by State agents against the vehicle in which they were traveling and which crossed three immigration checkpoints, after the driver had ignored the order to stop. The case is also related to the alleged failings in the legal proceedings brought against the State agents who fired the shots.

40. Bearing in mind the arguments of the parties and of the Commission, the Court will first examine the circumstances and manner in which Mr. Pedro Bacilio Roche Azaña died and his brother Patricio Fernando Roche Azaña was injured, as well as the scope of the State’s international responsibility for those facts. The Court will then determine whether the criminal proceedings brought against the accused in this case are compatible with inter-American standards with regard to the rights to judicial guarantees, judicial protection and access to justice.

⁵⁰ Cf. Record of jury selection, February 24, 1997 (evidence file, folio 3468).

⁵¹ Cf. Record of jury selection, February 24, 1997 (evidence file, folio 3471).

⁵² Cf. Verdict of the Jury Court in the case against J.M.R.V., R.J.S.O., S.A.V.B. and F.S.O.N. (evidence file, folio 3473).

⁵³ Cf. Ruling of the First District Criminal Judge of Chinandega acquitting the defendants J.M.R.V., R.J.S.O., S.A.V.B. and F.S.O.N., of February 27, 1997, (evidence file, folios 3479 to 3483).

⁵⁴ Cf. Ruling of the First District Criminal Judge of Chinandega acquitting the defendants J.M.R.V., R.J.S.O., S.A.V.B. and F.S.O.N., of February 27, 1997, (evidence file, folio 3482).

⁵⁵ Cf. Statement of Patricio Fernando Roche Azaña at the public hearing held before this Court on February 4, 2020, in which he indicated that he had “no knowledge of the trial.” Merits Report of the Commission, no. 114/18, Case 12.722, *Pedro Bacilio Roche Azaña et al. v. Nicaragua*, of October 5, 2012, OEA/Ser.L/V/II.169, Doc. 131 (merits file, folios 14 and 21).

VI-1
RIGHTS TO LIFE AND PERSONAL INTEGRITY, AND THE DUTY TO ADOPT DOMESTIC LEGAL PROVISIONS⁵⁶

41. In this chapter, the Court will examine the arguments related to the violation of the rights to life and personal integrity of the Roche Azaña brothers, as a result of the shots fired by State agents at the van in which they were traveling on April 14, 1996.

A. Arguments of the parties and of the Commission

A.1. Death of Pedro Bacilio Roche Azaña and injuries caused to Patricio Fernando Roche Azaña

42. The **Commission** argued that the death of Pedro Roche Azaña and the injuries caused to Patricio Roche Azaña resulted from the unlawful and disproportionate use of force by State agents. It alleged that, despite the police officers' claims that all the shots were fired into the air or at the tires of the vehicle, the visual inspection revealed that none of the shots hit the vehicle's tires or the motor in an effort to stop it, but rather, that the gunshots were aimed at the upper part of the vehicle, hitting the individuals inside the van. The Commission added that, even accepting the police officers' account regarding the use of less lethal means to stop the vehicle, the use of firearms should have been avoided at all costs and other types of preventive measures used, especially considering the constant flow of illegal merchandise and human trafficking in that area.

43. The Commission also pointed out that the use of lethal weapons at police or immigration checkpoints will always prove to be arbitrary and contrary to the principles of legality, absolute necessity and proportionality when a vehicle tries to flee, unless aggression is involved or there are indications that someone's life is in danger, which did not occur in this case. It added that the argument of using lethal force solely to prevent flight does not satisfy the requirement of legitimate purpose or absolute necessity that authorizes the use of force. In its final written observations, the Commission also noted that the events took place in a border area between Nicaragua and Honduras; therefore, while the purpose of the police operation was to control and prevent illegal contraband activity, the police officers should have been familiar with the area and known that there was a constant flow of migrants and illegal human trafficking there. According to the Commission, the agents should have been sufficiently well trained to deal with situations such as the one that arose in this case and should have used alternative mechanisms for stopping cars without needing to fire weapons.

44. Based on the foregoing, the Commission concluded that the State of Nicaragua is responsible for the violation of the rights to life and personal integrity established in Articles 4(1) and 5 (1) of the American Convention, in relation to the obligations established in Articles 1(1) and 2 thereof.

45. The **representative** added that there was no reason for the State agents to fire "indiscriminately" against migrants who were completely unarmed. He pointed out that, once the vehicle had passed the first checkpoint, the police agents, anticipating the route that it would follow, prepared the "criminal event" by positioning themselves at the sides of the road and then proceeded to fire directly at the height of the bodies of those traveling in the vehicle. In his final written arguments, the representative emphasized that the "attack" on the van was planned and coordinated with the aim of "ensuring the result." According to the representative, the police had the time and space necessary to use alternative methods to stop the vehicle, such as "by placing barricades or blocking access to the bridge where the van crossed." He also emphasized that the weapons used by the police were AK rifles, that is, weapons of war that should not be carried by the National Police,

⁵⁶ Articles 4, 5 and 2 of the American Convention on Human Rights.

considering that they are a preventive force, not a military force.

46. The **State** argued that the use of force was justified and proportional. In particular, it indicated that the use of firearms was justified because: (i) the events took place late at night; (ii) the area where the incident occurred was unpopulated (border between Nicaragua and Honduras); (iii) the characteristics of the speeding vehicle (closed with tinted windows) which was traveling at excessive speed; (iv) the use of full beam headlights to minimize visibility and make it difficult to identify the driver, together with the driver's reckless driving, and (v) the driver's attempt to "ram" the police officers and his subsequent escape. The State argued that these factors, taken as a whole, demonstrated the van driver's refusal to obey the police officers' signals to stop, thereby endangering their life and physical integrity. According to the State, the vehicle became a potentially lethal weapon, considering the combination of speed, mass and power. The State added that the criminal investigation did not find any direct or indirect proof that the police officers acted with full knowledge of the facts or that they were aware that people were being transported inside the vehicle that refused to stop. In its final written arguments, the State emphasized that, according to internal police and judicial inquiries, the action of the officers involved in the operation was not aimed at controlling immigration, but at intercepting customs contraband. Lastly it argued that, faced with the specific circumstances of the case, the police agents tried to "minimize, to the extent possible," the use of lethal force.

A.2 Duty to adopt domestic legal provisions

47. The **Commission** indicated that, at the time of the facts, the Organic Law of the National Police, published on August 28, 1996, was not yet in force in Nicaragua. It specified that, at that time, the duties and organization of the National Police were regulated by Executive Decree No. 45-92, which established that police officers could use weapons only when there was a serious risk to their life or physical integrity or that of third parties, or when there was a grave risk to public order. The Commission added that, notwithstanding that regulation, the State had not proven that, at the time of the facts, it had clear regulations and a policy for the prevention of the use of force consistent with its international obligations in this regard. It added that the file did not contain any information regarding the existence of protocols for the supervision or control of police operations requiring a valid use of force.

48. The **representative** endorsed the arguments of the Commission.

49. The **State** indicated that the legal framework on police action was regulated by: (i) Articles 97 and 144 of the Constitution; (ii) Law No. 144, "Law on the Functions of the National Police in Legal Assistance Matters," published on March 25, 1992; (iii) Decree No. 45-92 "Organic Law of the National Police," published on September 7, 1992; (iv) the Code of Conduct for Law Enforcement Officers, and (v) and Resolution No. 169/34 of the United Nations General Assembly.

B. Considerations of the Court

50. The Court will now analyze the facts of this case in light of its constant case law on the rights to life and personal integrity in relation to the general obligation to respect and guarantee rights⁵⁷ and to adopt domestic legal provisions on the use of force,⁵⁸ in order to rule on the alleged violation of those rights. The Court will not analyze the possible violation of Articles 22(1), 22(4) and 24 of the American Convention alleged by the representative, given that no arguments or evidentiary

⁵⁷ Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 144, and *Case of Uzcátegui et al. v. Venezuela. Merits and reparations*. Judgment of September 3, 2012. Series C No. 249, para. 132.

⁵⁸ Cf. *Case of Zambrano Vélez et al. v. Ecuador. Merits, reparations and costs*. Judgment of July 4, 2007. Series C No. 166, paras. 67 et seq., and *Case of Uzcátegui et al. v. Venezuela, supra*, para. 132.

elements were presented to demonstrate and prove those violations.

51. The Court notes that there is no dispute regarding the fact that, on April 14, 1996, at approximately 8 p.m., State agents (members of the National Police and at least one soldier) fired several shots at a van with the aim of stopping it, after it had failed to stop at a first checkpoint set up to control contraband activity.

52. The Court also observes that there is no dispute over the fact that, as a result of the shots fired by State agents, at least six people were wounded and one died.⁵⁹ More specifically, regarding the victims in this case, Pedro Bacilio Roche Azaña received a gunshot wound to his head which caused his death,⁶⁰ while his brother Patricio Fernando received several gunshot wounds, one to his right hip and another on his right thigh,⁶¹ from which he still suffers significant effects today.⁶²

53. Therefore, the question in this case is whether or not the force used in attempting to intercept the van conformed to inter-American standards. The Court recalls that the use of force by State security forces must be based on the existence of exceptional circumstances and must be planned and proportionally limited by the government authorities. In this regard, the Court has established that force or coercive means can only be used once all other methods of control have been exhausted and failed.⁶³ In cases where the use of force is essential, the principles of legality, legitimate purpose, absolute necessity and proportionality must be observed:

i. Legality: exceptional use of force must be defined by law and a regulatory framework established for its use.⁶⁴

ii. Legitimate purpose: the use of force must be aimed at achieving a legitimate objective.⁶⁵

iii. Absolute necessity: it is necessary to determine whether other less lethal means are available to protect a person's life and integrity, according to the circumstances of each case.⁶⁶ The use of firearms and lethal force against individuals by law enforcement officials -which must be forbidden as a general rule- is only justified in even more extraordinary cases. The exceptional circumstances under which firearms and lethal force may be used shall be determined by the law and restrictively construed, so that they are used to the minimum extent possible in all cases and never exceed the use which is "absolutely necessary" in relation to the force or threat to be repealed.⁶⁷

⁵⁹ The following persons received gunshot wounds: Pedro Bacilio Roche Azaña, Patricio Fernando Roche Azaña, M.Q.P., N.D.S., A.C.S. and M.C. Cf. Order of imprisonment, issued by the First District Criminal Court on May 6, 1996 (evidence file, folio 3291).

⁶⁰ Cf. First Medical Report on Pedro Bacilio Roche Azaña, Medical Examiner of Chinandega, April 15, 1996 (evidence file, folio 396). See also, Second Medical Report on Pedro Bacilio Roche Azaña, Medical Examiner of Chinandega, April 18, 1996 (evidence file, folio 398).

⁶¹ Cf. Medical Report on Patricio Fernando Roche Azaña, Medical Examiner of Chinandega, April 18, 1996 (evidence file, folio 400).

⁶² Cf. Statement of Patricio Fernando Roche Azaña at the public hearing held before this Court on February 4, 2020,

⁶³ Cf. *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela. Preliminary objection, merits, reparations and costs. Judgment of July 5, 2006. Series C No. 150*, para. 67, and *Case of the Barrios Family v. Venezuela. Merits, reparations and costs. Judgment of November 24, 2011. Series C No. 237*, para. 49.

⁶⁴ Cf. *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs. Judgment of October 24, 2012. Series C No. 251*, para. 85, and *Case of Díaz Loreto et al. v. Venezuela. Preliminary objections, merits, reparations and costs. Judgment of November 19, 2019. Series C No. 392*, para. 63.

⁶⁵ Cf. *Case of the Landaeta Mejías Brothers et al. v. Venezuela. Preliminary objections, merits, reparations and costs. Judgment of August 27, 2014. Series C No. 28*, para. 134, and *Case Díaz Loreto et al. v. Venezuela. supra*, para. 63.

⁶⁶ Cf. *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra*, paras. 67 to 68; *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 85 and *Case of the Landaeta Mejías Brothers et al. v. Venezuela, supra*, para. 134. See also, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (hereinafter, "Basic Principles on the Use of Force"), adopted by the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders held in Havana, Cuba, from August 27 to September 7, 1990, Principle No. 4.

⁶⁷ Cf. *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra*, para. 68, and *Case of Zambrano Vélez et al. v. Ecuador, supra*, para. 84.

iv. *Proportionality*: The level of force used must be in keeping with the level of resistance offered.⁶⁸ This implies striking a balance between the situation that the agent is facing and his response, considering the potential harm that could be caused. Thus, agents must apply a standard of differentiated use of force, determining the level of cooperation, resistance, or aggressiveness of the person involved and, on this basis, use tactics of negotiation, control or use of force, as appropriate.⁶⁹ To determine the proportionality of the use of force, the severity of the situation that the agent faces must be assessed. To this end, among other circumstances, it is necessary to consider: the level of intensity and danger of the threat; the attitude of the individual; the conditions of the surrounding area; and the means available to the agent to deal with the specific situation.⁷⁰

54. In relation to the first requirement *-legality-* the State argued that the legal framework for the State's action is regulated by Articles 97 and 144 of the Constitution.⁷¹ The legal framework is also regulated by Law No. 144, "Law on the Functions of the National Police in Legal Assistance Matters," published on March 25, 1992;⁷² Decree No. 45-92 "Organic Law of the National Police," published on September 7, 1992;⁷³ the Code of Conduct for Law Enforcement Officials, and Resolution 169/34 of the United Nations General Assembly.⁷⁴

55. The Court recalls that the States must establish an appropriate regulatory framework to prevent any threat to the right to life. Hence, their domestic legislation must set sufficiently clear guidelines on the use of lethal force and firearms by State agents.⁷⁵ The Court notes that, neither the constitutional provisions mentioned by the State, nor the "Law on the Functions of the National Police in Legal Assistance Matters," contain specific regulations regarding the use of force.

56. With respect to Decree No. 45-92, "Organic Law of the National Police," the Court observes that these regulations contain a single clause of a general nature regarding the use of weapons, indicating that their use must be governed by the principles of consistency, appropriateness and

⁶⁸ Cf. *inter alia*, *Case of Zambrano Vélez et al. v. Ecuador*, *supra*, para. 85; *Case of Nadege Dorzema et al. v. Dominican Republic*, *supra*, para. 85 iii), and *Case of the Landaeta Mejías Brothers et al. v. Venezuela*, *supra*, para. 134. See also, *Basic Principles on the use of force*, *supra*, Principles No. 5 and 9.

⁶⁹ Cf. *Case of Nadege Dorzema et al. v. Dominican Republic*, *supra*, para. 85 iii), and *Case of the Landaeta Mejías Brothers et al. v. Venezuela*, *supra*, para. 134. See also, *Basic Principles on the use of force*, Principles No. 2, 4, 5 and 9.

⁷⁰ Cf. *Case of the Landaeta Mejías Brothers et al. v. Venezuela*, *supra*, para. 136.

⁷¹ These articles state the following:

Article 97. The National Police is an armed force of a civilian nature. Its mission is to guarantee public order and the security of citizens, prevent and prosecute crime and carry out other tasks established by law. The National Police is professional, apolitical, nonpartisan, hierarchical and non-deliberative. The National Police shall operate in strict adherence to the Political Constitution, to which it shall pay respect and defer. It shall be subject to the civilian authority which shall be exercised through the corresponding ministry.

Article 144. The Executive Power is exercised by the President of the Republic, who is Head of State, Head of Government, and Supreme Head of the Army of Nicaragua.

⁷² Available at: https://web.oas.org/mla/en/G_Countries_MLA/Nica_ajm_leg_esp_2.pdf

⁷³ Available at: [http://legislacion.asamblea.gob.ni/normaweb.nsf/\(\\$All\)/5622C7C6B447C28A062570A10057D770?OpenDocument](http://legislacion.asamblea.gob.ni/normaweb.nsf/($All)/5622C7C6B447C28A062570A10057D770?OpenDocument)

Article 12 states the following:

[...]

4. a) In the exercise of their professional duties, they shall avoid any attitude that entails abuse, arbitrariness or discrimination, as well as any act of physical or moral violence;

4. c) In the exercise of their duties they shall act with the necessary decisiveness, and without delay, to prevent immediate grave and irreparable harm, being governed by the principles of consistency, opportunity and proportionality in the use of the means at their disposal.

5) Use of weapons. These shall be used only in situations where there is a serious threat to their life or physical integrity or to that of third parties; or in circumstances that may pose a grave risk to public order and in accordance with the principles set forth in section 4, paragraph c) of this article.

⁷⁴ Code of Conduct for Law Enforcement Officials, Adopted by the General Assembly in Resolution 34/169, of 17 December 1979, available at:

<https://www.ohchr.org/SP/ProfessionalInterest/Pages/LawEnforcementfficials.aspx>

⁷⁵ Cf. *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*, *supra*, para. 75.

proportionality, and only “in situations in which there is a serious threat to the life or physical integrity [of members of the National Police] or to third parties; or in circumstances that could pose a grave risk to public order.”⁷⁶ In this regard, the Court considers that the phrase “circumstances that could pose a grave risk for public order” contains vague wording that could open the door to a wide margin of discretion in the interpretation of that enabling law, particularly when the body of evidence contains no additional regulation specifying these types of situations. The Court also considers that the use of force must be regulated within the framework of a system that provides effective guarantees against arbitrary and excessive use of force,⁷⁷ something that did not occur in this case.

57. As to the effects of the United Nations General Assembly Resolution 169/34, the Court advises that the binding nature of such resolutions is limited and, as a general rule, these take the form of a recommendation.⁷⁸ Finally, with regard to the “Code of Conduct for Law Enforcement Officials” mentioned by the State, the Court notes that this was not provided by the State and, therefore, cannot be assessed by this Court. The Court likewise observes that soldiers and members of the voluntary police also took part in the operation in which Mr. Pedro Bacilio Roche Azaña was killed and his brother Patricio Fernando was wounded. (*supra* para. 31). The State has not provided any evidence of the specific regulation of the use of force by those security forces.

58. In view of the foregoing, the Court considers that in the instant case the requirement of legality was not met. Furthermore, it considers that the State did not fulfill its obligation to guarantee the rights to life and personal integrity through adequate legislation on the use of force, in violation of Article 2 of the American Convention.

59. Notwithstanding the considerations set forth in the preceding paragraphs, in this case the Court deems it pertinent to continue with its analysis of the use of force and the State’s compliance with the other requirements.

60. Thus, with respect to the second requirement, the Court will analyze the *legitimate purpose* pursued with the use of force, stressing that, in principle, the use of force does not necessarily imply

⁷⁶ Article 12.- The action and efficacy of members of the National Police shall be guided by the following basic principles:

1) Absolute respect for the Constitution and the Laws of the Republic. In no case may such obedience serve as cover for the execution of orders or actions that manifestly constitute a crime or are contrary to the law;

[...]

4) Community Relations.

Specifically:

a) In the exercise of their professional duties, avoid attitudes that are abusive, arbitrary or discriminatory, as well as any act of physical or moral violence;

b) At all times observe correct and diligent treatment in their relationships with citizens, whom they shall seek to assist and protect, whenever circumstances advise or require this. [...];

c) In the exercise of their duties they shall act with the necessary decisiveness, and without delay to prevent serious immediate and irreparable harm, being governed by the principles of consistency, opportunity and proportionality in the use of the means at their disposal.

5) Use of arms. Weapons shall be used only in situations in which there clearly exists a serious threat to their life, their physical or moral integrity or that of third parties; or in circumstances that could pose a grave risk for public order, in accordance with the principles set forth in section 4, paragraph c) of this Article.

⁷⁷ See, *mutatis mutandis*, ECHR, *Case of Makaratzis v. Greece* (GS), no. 50385/99, Judgment of December 20, 2004, para.58, and *Case of Hilda Hafsteinsdóttir v. Iceland*, no. 40905/98, Judgment of June 8, 2004, para. 56.

⁷⁸ Cf. International Court of Justice, *Cases of South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, *Second Phase*, Judgment of July 18, 1966, para. 98. See also, Divac Öberg, Marko, “The Legal Effects of Resolutions of the Security Council and the General Assembly in the Jurisprudence of the ICJ,” *The European Journal of International Law* Vol. 16 no. 5, pages 883 and 884.

the use of firearms. Indeed, the State's agents and security forces may resort to the use of force in various situations in which it is not necessary to use firearms, for example, when arresting a person subject to a judicial order, or to prevent the commission of a crime or to maintain order in public events where people are congregated in order to ensure their safety. Accordingly, in this section the Court will analyze, in general terms, whether or not a legitimate purpose existed regarding the use of force. It will then analyze the nature and manner of the force used in the subparagraphs on necessity and proportionality. Having clarified this point, the Court finds that, based on the evidence in the case file, it is clear that the shots fired by the State agents were intended to cause harm, both to the van and, especially, to the people traveling inside it. Thus, although the State argued that its agents did not know that the van was transporting people, the fact is that they had no reason to rule out, with certainty, the presence of persons inside the vehicle, especially as the van was traveling through a border area, characterized by the likely presence of migrants or persons in need of international protection. Furthermore, once the van had crossed the first checkpoint, the State's agents proceeded to notify the officers at the second checkpoint of the imminent arrival of the van and, when it crossed the second checkpoint at great speed, the agents fired at least eight shots against it. Therefore, it is clear that the purpose of that action was not legitimate, since it resulted in the death of Pedro Bacilio Roche Azaña, the serious wounding of his brother Patricio Fernando, and the injuries caused to four other people.

61. As to the *necessity* of the means used, first of all, the Court notes that when the van refused to stop at the first checkpoint, the State agents proceeded to warn the officers at the next checkpoints so that they could stop the van.⁷⁹ To this end, the police officers decided to station a patrol car in front of these checkpoints to block the road⁸⁰ and then positioned themselves at the sides⁸¹ and in the middle of the road⁸² waiting for the van to cross the respective checkpoint. As the van approached the checkpoint, the agents, who were wearing vests, and were equipped with whistles and road lamps,⁸³ used these to signal to the driver to stop the van.⁸⁴ In this case, it was proved that, faced with the driver's refusal to heed their repeated signals and stop the van, the agents fired several shots against it.

62. The Court emphasizes that, aside from the light and sound signals made by the agents, the State did not demonstrate that the use of firearms was necessary to achieve the objective pursued. The Court recalls that it is not possible to conclude that the requirement of "absolute necessity" for the use of force against people who do not pose a direct threat is proved, "even when the lack of the use of force would result in the loss of the opportunity to capture them."⁸⁵ Thus, although a patrol car was stationed to block the path of the vehicle, the fact is that the van drove through the checkpoints at high speed without those blocking devices having any effect. The Court also notes that the deficient placement of elements to impede the passage of the van, was compounded by the failure to use other less harmful mechanisms, such as speed bumps or tire puncturing devices. To summarize, the Court finds that in this case, less harmful methods could have been employed to stop the van and, therefore, the use of force did not meet the requirement of necessity.

63. As to the analysis of *proportionality*, the Court has already stated that prior to an intervention

⁷⁹ Cf. Statement of J.M.R.V. to the National Police, of April 19, 1996 (evidence file, folio 488).

⁸⁰ Cf. Statement *ad-inquirendum* made by F.A.C.P. before the First District Criminal Judge of Chinandega, of April 29, 1996 (evidence file, folio 1132).

⁸¹ Statement of R.J.S.O. to the National Police, of April 29, 1996 (evidence file, folio 2068), Statement *ad-inquirendum* made by F.A.C.P. before the First District Criminal Judge of Chinandega, of April 29, 1996 (evidence file, folio 2063).

⁸² Cf. Statement of J.M.R.V. to the National Police, of April 19, 1996 (evidence file, folio 488).

⁸³ Cf. Order of imprisonment, issued by the First District Criminal Court, of May 6, 1996 (evidence file, folio 3284).

⁸⁴ Cf. Statement *ad-inquirendum* made by M.Q.P. before the First District Criminal Judge of Chinandega, on April 30, 1996 (evidence file, folios 3200 and 3204).

⁸⁵ Cf. *Case of Nadege Dorzema et al. v. Dominican Republic*, *supra*, para. 85 ii), and ECHR, *Case of Kakoulli v. Turkey*, No. 38595/97, Judgment of November 22, 2005, para. 108.

by the authorities,⁸⁶ the States have an obligation to adequately plan the actions taken by their agents in order to minimize, to the extent possible, the use of force and any fatalities that may result from it.⁸⁷

64. First of all, the Court reiterates that the place where the checkpoint was set up was near an international border. In this regard, it is important to emphasize that respect for human rights must be at the heart of all border protection measures.⁸⁸ Thus, the Court considers that the State agents should have taken into account these circumstances when using force, especially as they could not see inside the van or rule out the possibility that it was carrying people who were in a situation of special risk.

65. In addition, the Court finds it necessary to analyze the type of weapons used, as well as the manner and direction in which the shots were fired. The Court notes that the State's checkpoints were manned by members of the National Police, soldiers and at least one volunteer police officer.⁸⁹ In that regard, the Court recalls that in the *Case of Montero Aranguren et al. v. Venezuela* it established that, although States parties to the Convention may deploy their armed forces to perform tasks other than those specifically related to armed conflicts, such actions must be limited to the maximum extent. They must also adhere to strict standards of exceptionality to address situations of criminality or domestic violence, since military forces are trained to fight against enemies and not to protect and control civilians, which characterizes the training provided to police forces.⁹⁰

66. The Court recalls that, having determined that the van driver intended to ignore their signals to stop, the police agents proceeded to fire shots at the vehicle. The Court points out that those shots were fired indiscriminately, without an express order to do so from a superior officer.⁹¹ Also, although the officers who fired the shots claimed in their statements that they either fired "into the air" or at the tires, their statements contradict the evidence in the case file. According to the visual inspection of the vehicle, six bullet holes were found: one bullet entrance hole at a height of "one meter thirty centimeters from the top" of the van; a second bullet hole on the left side, at a height of "one meter and forty-one centimeters from the top;" a third bullet hole in the rear, at a height of "one meter and ten centimeters from the rear bumper;" a fourth bullet hole in the right front wheel; a fifth bullet hole in the rear end of the van, at a height of "one meter;" and a sixth bullet hole "at a distance of one meter and ten centimeters [from] the first bullet hole."⁹² The Court notes that all the bullet holes on the van, except for one of them, were found on the upper part of the vehicle; therefore, the shots were not aimed at the tires.⁹³ In addition, two individuals who were traveling at the front of the vehicle said that they noticed that some of the shots were aimed directly at the front

⁸⁶ Cf. Basic Principles on the Use of Force and Firearms for Law Enforcement Officials, *supra*, Principle No. 9.

⁸⁷ Cf. *Case of Nadege Dorzema et al. v. Dominican Republic*, *supra*, para. 88.

⁸⁸ Cf. OHCHR, Recommended Principles and Guidelines on Human Rights at International Borders, Principle no. 2.

⁸⁹ Cf. Order of imprisonment, issued by the First District Criminal Court on May 6, 1996 (evidence file, folio 3289).

⁹⁰ Cf. *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*, *supra*, para. 78, and *Case of Alvarado Espinoza et al. v. Mexico. Merits, reparations and costs*. Judgment of November 28, 2018. Series C No. 370, para. 179. Also, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, after his mission to Mexico noted that: "[...] in any country, soldiers involved in policing are notoriously unable to relinquish the military paradigm. Their training often leaves them unsuited for law enforcement. [...] The primary objective of the military is to subdue the enemy through the use of superior force." Cf. U.N. Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns*, A/HCR/26/36/Add.1, April 28, 2014, para. 21.

⁹¹ Cf. Statement of J.F.G.C to the National Police, of April 19, 1996 (evidence file, folio 448); Statement of F.S.O.N to the National Police, of April 21, 1996 (evidence file, folio 483); Statement *ad-inquirendum* made by F.S.O.N before the First District Criminal Judge of Chinandega, of April 29, 1996 (evidence file, folio 1115); Statement of R.J.S.O. to the National Police, of April 21, 1996 (evidence file, folios 2070 and 2071); Statement *ad-inquirendum* made by J.M.R.V. before the First District Criminal Judge of Chinandega, of April 29, 1996 (evidence file, folio 448); Statement of J.M.R.V. to the National Police, of April 19, 1996 (evidence file, folio 489, and statement of F.A.C.P. to the National Police, of April 19, 1996 (evidence file, folio 2412). See also, Order of imprisonment, issued by the First District Criminal Court on May 6, 1996 (evidence file, folio 3289).

⁹² Cf. Record of visual inspection of vehicle, of April 18, 1996 (evidence file, folio 2051).

⁹³ *Idem*.

of the van.⁹⁴

67. This Court also takes note of the observation made by the First District Criminal Court, which issued the formal order of imprisonment, on May 6, 1996, stating that the van “show [ed] signs of having had some type of paint material (filler) applied, in an effort by the [then] defendants to avoid presumptions of guilt.”⁹⁵

68. Finally, it is also noteworthy that AK-type weapons were used, that is, weapons of war.⁹⁶ Indeed, Pedro Bacilio Roche Azaña’s death was caused by a bullet compatible with a projectile from an AK weapon.⁹⁷ The Court considers that, in the instant case, the use of this type of assault rifle was incompatible with the functions of control alleged by the State, since it did not adhere to the principle of proportionality. Furthermore, from the body of evidence it is clear that there was a lack of planning and training – especially, training that was appropriate to deal with an administrative offense, such as a possible customs infraction in this case⁹⁸- and organization prior to the intervention, which resulted in a total lack of proportionality in the response by the State authorities.⁹⁹

69. According to the State, the use of force was justified and proportional, since the objective was to prevent the van from causing harm to the officers’ life and physical integrity in its attempt to run over the State agents. In this regard, the Court recalls that in its jurisprudence it has considered that in any case involving the use or deployment of force by State agents, which results in the death or injury of a person, it is necessary to analyze the legitimate use of force, given that “the State has an obligation to provide a satisfactory and convincing explanation of the events and rebut the allegations related to its liability, by means of adequate evidence.”¹⁰⁰ Based on the body of evidence in this case, the Court considers that the State has not proved the existence of an imminent danger of such magnitude as to justify the use of firearms, much less the use of weapons of war. Moreover, this argument is also contradicted by the statements of certain State agents, who did not mention the

⁹⁴ Cf. Order of imprisonment, issued by the First District Criminal Court on May 6, 1996 (evidence file, folio 3290). See also, statement of N.D.S., who indicated the following: “I don’t remember how many shots there were, and I say, how could they have fired at the tires, if the bullets hit the kid’s head [Pedro Bacilio Roche Azaña], and there were shots in the windshield, and they fired from the front.” Cf. Statement *ad-inquirendum* made by N.D.S., before the First District Criminal Judge of Chinandega, of May 3, 1996, (evidence file, folio 2492).

⁹⁵ Cf. Order of imprisonment, issued by the First District Criminal Court on May 6, 1996 (evidence file, folio 3289).

⁹⁶ Cf. Statement *ad-inquirendum* made by J.M.R.V. before the First District Criminal Judge of Chinandega, of April 29, 1996 (evidence file, folio 448); Statement *ad-inquirendum* made by R.J.S.O. before the First District Criminal Judge of Chinandega, of April 29, 1996 (evidence file, folio 2068); Statement of S.A.V.B. to the National Police, of April 21, 1996 (evidence file, folio 479), and Statement *ad-inquirendum* made by S.A.V.B. before the First District Criminal Judge of Chinandega, of April 29, 1996 (evidence file, folio 1111). See also, medical report on Patricio Fernando Roche Azaña, Medical Examiner of Chinandega, of April 26, 1996 (evidence file, folio 1124); Order of imprisonment, issued by the First District Criminal Court on May 6, 1996 (evidence file, folio 3283).

⁹⁷ Cf. Medical report on Patricio Fernando Roche Azaña, Medical Examiner of Chinandega, of April 26, 1996 (evidence file, folio 1124), and Second medical report on Pedro Bacilio Roche Azaña, Medical Examiner of Chinandega, April 18, 1996 (evidence file, folio 398).

⁹⁸ Cf. *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 81.

⁹⁹ Cf. *Case of the Caracazo v. Venezuela. Reparations and costs*. Judgment of August 29, 2002. Series C No. 95, para. 143.1., and *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra*, para. 78. See also, ECHR, *Case of McCann et al. v. United Kingdom (GS)*, No. 18984/91, Judgment. September 27, 1995, para. 151, and *Case of Kakoulli v. Turkey, supra*, paras. 109 and 110.

¹⁰⁰ Cf. *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra*, para. 80, and *Case of Díaz Loreto et al. v. Venezuela, supra*, para. 92.

fact that any danger existed,¹⁰¹ and even denied such a situation.¹⁰²

70. In conclusion, the Court considers that the State has not proved the legality, legitimate purpose, absolute necessity or proportionality of the use of force in this case. Indeed, the situation was the outcome of a disproportionate use of force, attributable to the State, because of the actions of its law enforcement officers.

71. The Court has established that the unlawful, excessive or disproportionate use of force by State agents that results in loss of life, as it did in this case, may amount to an arbitrary deprivation of life.¹⁰³ Consequently, the death of Mr. Pedro Bacilio Roche Azaña was an arbitrary deprivation of life attributable to the Nicaraguan State, in violation of Article 4(1) of the American Convention, in relation to Article 1(1) thereof. Also, the injuries caused to his brother, Patricio Fernando Roche Azaña, constituted a violation of Article 5 (1) of the American Convention, in relation to Article 1(1) thereof.

72. Furthermore, the Court recalls that, based on the facts of the case and the evidence provided during the proceedings before this Court, it is clear that at the time of the facts, Nicaragua did not have specific legislation establishing the parameters for the use of force by State agents and law enforcement officials. Therefore, the State did not fulfil its obligation to ensure the rights to life and personal integrity through adequate legislation on the use of force, in violation of Article 2 of the American Convention, in relation to Articles 4(1) and 5(1) thereof.

VI-2 RIGHT TO JUDICIAL GUARANTEES AND JUDICIAL PROTECTION¹⁰⁴

73. In this chapter, the Court will analyze specifically (i) the alleged lack of participation by Patricio Fernando Roche Azaña and his parents in the criminal proceedings against the State agents accused of firing the shots, (ii) the alleged failure to provide grounds for the verdict of acquittal, as well as (iii) the alleged legal impossibility of appealing the acquittal of the State agents, in violation of Articles 8 and 25 of the American Convention, in relation to Article 1(1) thereof.

A. Arguments of the parties and of the Commission

A.1 Lack of participation by Mr. Patricio Fernando Roche Azaña and his parents in the criminal proceedings

74. The **Commission** considered that, although it is true that was not possible to take Mr. Patricio Roche Azaña's statement within the ten-day period established by Nicaraguan law owing to his medical condition, it is also true that he would have been able to participate in the proceedings later on, a situation that was not taken into account by the domestic courts. To the contrary, he was never notified of the existence of the proceedings, or informed how he could participate, or of the

¹⁰¹ The agent R.J.S.O. stated that when the van was approaching "I saw that the vehicle did not slow down, and I realized that it was not going to stop, it forced me off the road; I had an AK [weapon], so I fired three shots into the air." Cf. Statement of R.J.S.O. to the National Police, of April 21, 1996 (evidence file, folio 2068). For his part, the agent S.A.B. stated that, when he saw the van traveling at high speed, "at about one hundred meters [he] fired a warning shot into the air" Cf. Statement *ad-inquirendum* made by S.A.V.B. before the First District Criminal Judge of Chinandega, of April 29, 1996 (evidence file, folio 2420). See also, statement of J.M.R.V. who never mentioned that he feared that his life was in danger. Cf. Statement *ad-inquirendum* made by J.M.R.V. before the First District Criminal Judge of Chinandega, of April 29, 1996 (evidence file, folio 448).

¹⁰² Cf. Statement *ad-inquirendum* made by F.S.O.N. before the First District Criminal Judge of Chinandega, of April 29, 1996 (evidence file, folio 1116). See also, Order of imprisonment, issued by the First District Criminal Court on May 6, 1996 (evidence file, folio 3287).

¹⁰³ Cf. *Case of the Barrios Family v. Venezuela, supra*, para. 49, and *Case of the Landaeta Mejías Brothers et al. v. Venezuela, supra*, para. 142.

¹⁰⁴ Articles 8 and 25 of the American Convention on Human Rights.

repercussions that this could have for him, even after he emerged from his coma. At the public hearing held before this Court, the Commission pointed out that the State did not offer any explanation as to why Mr. Roche Azaña was not notified of the proceedings after he emerged from the coma, or why his mother and father were not informed. The Commission added that migrants face considerable disadvantages in defending their rights owing to different barriers they encounter in gaining access to justice, particularly their lack of knowledge of the country's laws and legal system. Consequently, the right to receive information regarding such proceedings takes on special importance since it could affect the migrants' access to justice.

75. The **representative** endorsed the Commission's observations. In his final written arguments, he pointed out that Mr. Patricio Fernando Roche Azaña was hospitalized for nearly seven months, but was in a coma only during the first month. He stressed that although the verdict of acquittal was delivered nearly one year after the events, the investigating judge in the case made no attempt to take Mr. Roche Azaña's statement.

76. The **State** held that the legislation in force in 1996 established a legal requirement regarding the duration of the investigation phase: 10 days if a defendant was detained, as occurred in this case. It explained that during this period, an investigation is conducted and evidence is gathered of procedural relevance to the parties and to the purposes of the proceedings. The State added that on April 30, 1996, the judge of the First District Criminal Court of Chinandega visited the hospital to take the statement of Mr. Patricio Roche Azaña, but was unable to do so because of the victim's critical health condition. However, considering that other legal procedures were carried out, on May 6, 1996, the judge issued an interim judgment, in which he set forth the necessary grounds and legal reasoning to establish the crime of culpable homicide committed to the detriment of Patricio Roche Azaña, thereby ensuring effective judicial protection. According to the State, although the judge was unable to take Patricio Fernando Roche Azaña's statement, he was authorized to base his decision on any other type of evidence that would provide certainty regarding the facts under investigation, thereby ensuring effective judicial protection in favor of Mr. Roche Azaña through the interim judgment.

77. The State added that during the plenary phase only some of the offended parties were notified of the procedural acts; however, all of these acts were notified to the criminal prosecutor who carried out the pertinent and necessary inquiries to clarify the facts and punish those responsible. Furthermore, during the public hearing before this Court, the State pointed out that there were various communications between the judge in charge of the criminal proceedings and the Ecuadorian embassy and consulate in Nicaragua.

A.2 Obligation to provide grounds for the verdict issued by the jury

78. The **Commission** argued that, given the total absence of grounds for the jury's verdict of acquittal, it was not possible to establish whether the proceedings and the final decision sought to determine whether the use of lethal force was legitimate according to the standards of legitimate purpose, necessity and proportionality, which also amounted to a denial of justice. It concluded that the State violated the rights to judicial guarantees and judicial protection, enshrined in Articles 8(1) and 25 of the Convention, in relation to Article 1(1) thereof. In its final written observations, the Commission stressed that although jury verdicts based on firm conviction do not *per se* violate the Convention, it is important to ensure that the result is not arbitrary and that the individual who considers the verdict can review, in light of the evidence and the arguments presented at the hearing, the logic followed in reaching the decision. The Commission considered that the jury's decision to acquit the defendants did not meet this standard, since there were no safeguards against the arbitrariness of the verdict. This view was based on three reasons: (i) it applied the same Code of Criminal Instruction of 1897 which the Court had already analyzed in the *Case of V.R.P. and V.P.C. et al. v. Nicaragua* and declared contrary to the Convention; (ii) the jury only had one day to examine

and assess all the statements and technical evidence in the case file and (iii) the fact that Mr. Patricio Fernando Roche Azaña did not participate in the process was “yet another factor confirming that the victims could not understand the result of the proceedings.”

79. The **representative** endorsed the Commission’s observations. In his final written arguments he stated that it was inexplicable that all the evidence gathered during the investigation – approximately 100 testimonies, together with expert tests on the vehicle, tests related to the reconstruction of the events and of the crime scene, and an abundance of other documents included as evidence – could be analyzed by the jury in just three and a half hours.

80. The **State** argued that the Commission and the representative were seeking to force the Court to act as a “fourth instance,” using the argument of lack of reasoning for the decision. It added that the Jury Court had issued its verdict in strict adherence to judicial guarantees and guarantees of due process. Therefore, the Court could not determine whether the verdict was mistaken or unfair, given that its role is to ensure that the States parties observe their obligations under the Convention, and not to act as some type of court of appeal. In this case, the jury’s lack of an explanation regarding the grounds for its decision was based on the fact that, under domestic and continental law, juries assess the evidence according to their “firm conviction.” It added that the Jury Court was previously instructed on how to assess the evidence, on the guarantees of the defendants and on procedural matters. It stressed that there is no requirement for a Jury Court to provide reasoning or grounds for its verdict of innocence, given that lay judges cannot provide such grounds (because they are not technically trained for this) and should not do so (since the jury system, based on common law, does not provide grounds for its decisions, has never done so, and that is precisely one of its distinctive features).

A.3 Lack of a remedy against the verdict of acquittal

81. The **Commission** held that, under Nicaraguan legislation, it was not possible to appeal the verdict issued by the Jury Court, and therefore the proceeding did not offer sufficient guarantees to scrutinize the decision and ensure that it was not arbitrary or did not violate a person’s rights to judicial guarantees and judicial protection.

82. The **representative** agreed with the considerations of the Commission.

83. The **State** argued that a review of the verdicts delivered by lay juries is objectively impossible since their decision is not based on reasoning. It added that persons accused of a crime, particularly those declared guilty, have a right to appeal, pursuant to the American Convention, so that access to that jurisdiction does not necessarily imply the right to exercise review mechanisms. It also emphasized that, as a legitimate act of administration of justice by the people, a jury verdict is unappealable and its decision cannot be reviewed by a court of law in an appeal procedure, since it emanates from the only ones who exercise sovereignty in the Republic: the people.

B. Considerations of the Court

B.1 Lack of participation by Mr. Patricio Fernando Roche Azaña and his parents in the criminal proceedings

84. The Court has established that, under the American Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Article 25). Such remedies must be substantiated in accordance with the rules of due process of law (Article 8(1)), all in keeping with the general obligation of States to guarantee the free and full exercise of

the rights recognized by the Convention to all persons subject to their jurisdiction (Article 1(1)).¹⁰⁵ Likewise, the Court has stated that States must ensure, within a reasonable time, the right of victims or their next of kin to learn the truth about what happened and to ensure that those responsible are investigated, tried and, if appropriate, punished.¹⁰⁶

85. This Court has also developed the concept of the right to a hearing, recognized in Article 8(1) of the Convention, in the general sense of understanding that everyone has the right to have access to a court or an organ of the State responsible for determining his rights and obligations.¹⁰⁷ The Court has also indicated that the right to a hearing encompasses two aspects: on the one hand, a formal and procedural aspect that ensures access to the competent body to determine the right that is claimed, respecting due procedural guarantees (such as the presentation of arguments and proposals, and the provision of evidence). On the other hand, this right includes a material aspect of protection which means that the State must guarantee that the decision reached in the proceedings satisfies the end for which it was conceived.¹⁰⁸

86. The Court observes that Mr. Patricio Fernando Roche Azaña, the victim in the criminal proceedings against the State agents who fired at the van on April 14, 1996, was not a party to those proceedings and was not granted an opportunity to participate. Neither were his parents, who could have acted in representation and on behalf of their son, Pedro Bacilio Roche Azaña, who died as a result of the aforementioned events.

87. The Court notes that the formal proceedings began on April 18, 1996, when a complaint was filed for the death of Mr. Pedro Bacilio Roche Azaña¹⁰⁹ and for the injuries caused to the other migrants, and ended on February 27, 1997, when the First District Criminal Court of Chinandega acquitted the defendants.¹¹⁰

88. However, as Mr. Patricio Fernando Roche Azaña stated during the public hearing held before this Court, he never had any knowledge of the existence of those proceedings.¹¹¹ According to the Commission's claim—which has not been refuted by the State— it was not until August 1998 that his mother informally received a copy of the judgment issued by the District Criminal Jury Court of Chinandega from an official of the Ecuadorian Foreign Ministry.¹¹² Although the State alleged, during the public hearing held before this Court, that the judge in charge of the criminal proceedings sent communications to the Ecuadorian embassy and consulate in Nicaragua, the Court notes that it has not produced any evidence to prove this point.

89. At the same time, the Court recalls that, according to the Criminal Code in force at the time of the facts, the first steps in a criminal inquiry, aimed at gathering evidence to determine whether or not a crime had been committed and establishing whether or not the defendants were responsible,

¹⁰⁵ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections, supra*, para. 91, and *Case of Azul Rojas Marín et al. v. Peru, supra*, para. 173.

¹⁰⁶ Cf. *Case of Bulacio v. Argentina. Merits, reparations and costs. Judgment of September 18, 2003. Series C No. 100*, para. 114, and *Case of Azul Rojas Marín et al. v. Peru, supra*, para. 86.

¹⁰⁷ Cf. *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela, supra*, para. 72, and *Case of Rosadio Villavicencio v. Peru. Preliminary objections, merits, reparations and costs. Judgment of October 14, 2019. Series C No. 388*, para. 146.

¹⁰⁸ Cf. *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs, supra*, para. 72, and *Case of Rosadio Villavicencio v. Peru, supra*, para. 146.

¹⁰⁹ Cf. Complaint filed by J.S.O.N., of April 18, 1996 (evidence file, folio 836).

¹¹⁰ Cf. Ruling of the First District Criminal Judge of Chinandega acquitting the defendants J.M.R.V., R.J.S.O., S.A.V.B. and F.S.O.N., of February 27, 1997, (evidence file, folios 3479 to 3483).

¹¹¹ Cf. Statement of Patricio Fernando Roche Azaña at the public hearing held before this Court on February 4, 2020, indicating that he had "no knowledge of the trial." Merits Report No. 114/18 of the Commission, Case 12.722, *Pedro Bacilio Roche Azaña et al. v. Nicaragua*, of October 5, 2012, OEA/Ser.L/V/II.169, Doc. 131 (Merits file, folios 14 and 21).

¹¹² Cf. Merits Report of the Commission, no. 114/18, Case 12.722, *Pedro Bacilio Roche Azaña et al. v. Nicaragua*, of October 5, 2012, OEA/Ser.L/V/II.169, Doc. 131 (merits file, folios 14 and 21).

had to be completed within a peremptory period of 10 days from the date on which the order to open criminal proceedings was issued; otherwise, the accused should be released on grounds of illegal detention.¹¹³ For this reason, as part of the investigation, it was ordered *ex officio* that statements be taken from the individuals hospitalized and that they be notified that they could participate in the proceedings. In this context, two of those individuals -M.Q.P. and N.D.S. - provided their respective statements and joined in the proceedings. However, when the authorities went to the hospital to take the statement of Patricio Roche Azaña, they were unable to do so because he was in a coma. The State justified Mr. Roche Azaña's non-participation by arguing that the legislation required that all evidence be collected within ten days after the order to open criminal proceedings was issued. However, the Court notes that the requirement to collect evidence within a specific period should not have prevented the authorities from notifying Mr. Roche Azaña of all subsequent stages of the proceedings, thereby enabling him to participate in these, if he considered it appropriate.

90. The State also pointed out that all the records of the criminal proceedings were notified to the criminal prosecutor, who acted on behalf of the Public Prosecutor's Office and carried out all the pertinent and necessary procedures to clarify the facts and punish those responsible. The Court considers that the public action by a criminal prosecutor should not have prevented the alleged victim or injured party from participating in the criminal proceedings, especially when Nicaraguan legislation allowed this. In this regard, the Court observes that the Code of Criminal Instruction permitted the prosecution or the injured party to intervene in the plenary stage of the trial,¹¹⁴ provide evidence¹¹⁵ and examine witnesses.¹¹⁶ However, neither Mr. Roche Azaña - once he emerged from the coma-¹¹⁷ nor his parents, were able to carry out any of these actions, owing to their complete ignorance of the existence of these proceedings. Thus, Mr. Roche Azaña and his parents were unable to attend the initial jury selection process and the public hearing, which would have allowed them to reject some jury members, had they considered it appropriate.¹¹⁸ In this regard, the Court has indicated that the guarantees established in Article 8 of the American Convention suppose that victims should have ample possibilities of being heard and acting in their respective proceedings,¹¹⁹ so that they can make their claims and present evidence, and that these will be fully analyzed in a serious manner by the authorities before a decision is taken on the facts, responsibilities, punishments and reparations.¹²⁰ The Court also notes that, according to the body of evidence in this case, more than seventeen months elapsed from the time that the acquittal verdict was issued¹²¹ until the mother of the Roche Azaña brothers, Mrs. María Angelita Azaña Tenesaca, was informed of that decision. Consequently, the passive attitude of the State, which reduced the victims' guarantees to the actions of the criminal prosecutor, seriously impaired the right of Mr. Roche Azaña and his parents to participate in the criminal proceedings.

¹¹³ Cf. Code of Criminal Instruction, Article 177 (evidence file, folio 3655). This article stipulated the following:

The preliminary investigative procedures [...] shall be completed within ten days, at most, if the accused is detained, in which case, the local judges that have investigated shall immediately notify the judge of the respective District Criminal Court of their progress, placing at his disposal the detainee and any property that may have been seized.

¹¹⁴ Cf. Code of Criminal Instruction, Articles 208 and 220 (evidence file, folios 3664 and 3667).

¹¹⁵ *Idem*.

¹¹⁶ Cf. Code of Criminal Instruction, Article 211 (evidence file, folio 3664).

¹¹⁷ Mr. Patricio Fernando Roche Azaña was in a coma for two months after the events of April 14, 1996. Cf. Statement of Patricio Fernando Roche Azaña at the public hearing held before this Court on February 4, 2020.

¹¹⁸ During the plenary stage, the judge selected from a list of ten citizens who would constitute the Jury Court; each party had the right to reject one juror without giving any reason. Cf. Articles 274 and 275 of the Code of Criminal Instruction (evidence file, folio 3682). See also, Article 277 of the Code of Criminal Instruction (evidence file, folio 3683).

¹¹⁹ Cf. *Case of the Constitutional Court v. Peru. Merits, reparations and costs*. Judgment of January 31, 2001. Series C No. 71, para. 81, and *Case of Wong Ho Wing v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of June 30, 2015. Series C No. 297, para. 228.

¹²⁰ Cf. *Case of Baldeón García v. Peru. Merits, reparations and costs*. Judgment of April 6, 2006. Series C No. 147, para. 146, and *Case of Wong Ho Wing v. Peru, supra*, para. 228. See also the Brasilia Rules Regarding Access to Justice for Vulnerable People, Rules No. 3, 4 and 13.

¹²¹ Cf. Ruling of the First District Criminal Judge of Chinandega acquitting the defendants J.M.R.V., R.J.S.O., S.A.V.B. and F.S.O.N., of February 27, 1997, (evidence file, folios 3479 to 3483).

91. Furthermore, given the characteristics of this case, special consideration must be given to the fact that Mr. Patricio Fernando Roche Azaña was a migrant who was clearly in a vulnerable situation.¹²² The Court recalls that due legal process is a right that must be guaranteed to everyone, regardless of their migratory status.¹²³ The Court also considers that States have a duty to ensure that all those who have suffered human rights violations or abuses as a result of border governance measures have equal and effective access to justice, access to effective remedies, adequate, effective and prompt reparation for the harm suffered, and access to relevant information concerning violations and reparation mechanisms.¹²⁴ In the context of operations in border zones, States have a duty to investigate and, where warranted, prosecute human rights violations and abuses, impose penalties commensurate with the seriousness of the offence, and take measures to ensure non-repetition.¹²⁵

92. The Court observes that, in this case, Mr. Roche Azaña's status as a migrant had a major impact on his lack of participation in the process. In this regard the Court notes that, once Mr. Roche Azaña regained consciousness, he remained in the country for at least five more months until his final return to Ecuador (*supra* para. 30). The Court notes that during the five months that Mr. Roche Azaña remained in Nicaragua, the State failed to inform him of the existence of criminal proceedings against those who fired the shots, and did not provide him with any kind of technical assistance to compensate for his lack of knowledge of a legal system -foreign and alien to him - that supposedly protected him. Such information would have enabled Mr. Patricio Fernando Roche Azaña to claim his rights and defend his interests effectively and on equal procedural terms with other litigants.

93. Consequently, Mr. Patricio Fernando Roche Azaña found himself in a situation of real inequality owing to his migratory status. This required the State to adopt certain special measures to help reduce or eliminate the obstacles and deficiencies that impaired or diminished his ability to effectively defend his interests because of the mere fact of being a migrant.¹²⁶ When such measures do not exist to ensure effective and equal access to justice for all persons in a situation of vulnerability,¹²⁷ it is difficult to affirm that those who face disadvantages enjoy a true opportunity for justice and the benefit of due legal process equal to those who do not have those disadvantages.¹²⁸

94. For all the aforementioned reasons, the Court concludes that the State did not ensure the right of access to justice and, therefore, violated the right to judicial guarantees and judicial protection enshrined in Articles 8(1) and 25 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Patricio Fernando Roche Azaña, and of his parents, María Angelita Azaña Tenesaca and José Fernando Roche Zhizhingo.

B.2 The duty to provide grounds for a jury verdict and lack of a remedy against a verdict of acquittal

95. With respect to the arguments concerning the supposed violation of judicial guarantees in the context of the jury trial conducted in this case, the Court has already had an opportunity to rule on

¹²² In this regard, the Court has stated that "Migrants are generally in a vulnerable situation as subjects of human rights; they are in an individual situation of absence or difference of power with regard to non-migrants." *Cf. Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 112.

¹²³ *Cf. Juridical condition and rights of undocumented migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 121.

¹²⁴ *Cf. OHCHR, Recommended Principles and Guidelines on Human Rights at International Borders*, Principle no. 13.

¹²⁵ *Idem*.

¹²⁶ *Cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, paras. 117 and 119.

¹²⁷ *Cf. Case of Vélez Loor v. Panama. Preliminary objections, Merits, reparations and costs*. Judgment of November 23, 2010. Series C No. 218, para. 254.

¹²⁸ *Cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, *supra*, para. 117 and 119.

this matter in the *Case of V.R.P., V.P.C. et al. v. Nicaragua*.¹²⁹ In that ruling, the Court emphasized that although the American Convention does not establish a specific model for criminal trials, the design of the procedural system should provide the guarantees required under the American Convention. In its analysis of trial by jury under the Nicaraguan system and its compatibility with inter-American standards, the Court also stressed that the fact that juries are not required to present reasoning for their verdicts does not, *per se*, violate the guarantee of a reasoned decision, since there are always reasons behind every verdict, even though, in accordance with the essential nature of the jury, these are not expressed. Thus, the Court considered that it should analyze whether the criminal proceedings as a whole offered mechanisms of protection against arbitrariness that allowed the reasons for the verdict to be understood – not merely by the accused, but also by the victim and the plaintiff.¹³⁰

96. As indicated previously, in this case the Court finds that neither Mr. Patricio Fernando Roche Azaña nor his parents had an opportunity to participate in the trial that resulted in the acquittal of the accused. To that extent, the Court does not consider it necessary to analyze or rule specifically on the alleged lack of reasoning of the jury's verdict or on the victims' alleged inability to appeal the acquittal given that, since they were not even notified of the existence of the trial, they were prevented from participating in the proceedings in order to obtain justice. Thus, the State's failure to adopt measures to guarantee that migrants and their families have access to justice and can effectively participate in the investigation and criminal trial for actions that threatened their life and personal integrity, constitutes, *per se*, a violation of Articles 8(1) and 25 of the Convention. This, together with the situation of impunity that has prevailed during these 24 years, means that the State bears international responsibility.

97. In view of the foregoing, the Court considers that, in this case, it is not necessary to analyze or rule on these specific points.

VI-3

RIGHT TO PERSONAL INTEGRITY OF THE PARENTS OF THE ROCHE AZAÑA BROTHERS¹³¹

A. Arguments of the parties and of the Commission

98. The **Commission** argued that the State violated the right to personal integrity established in Article 5(1) of the American Convention, in relation to the obligations established in Article 1(1) thereof, to the detriment of the mother and father of the Roche Azaña brothers.

99. Neither the **representative** nor the **State** commented on this point.

B. Considerations of the Court

100. The Court has repeatedly affirmed that the relatives of victims of human rights violations may, in turn, be victims.¹³² This Court has considered that a violation of the right to psychological and moral integrity may be declared in the case of "direct next of kin" or others with close ties to the victims for the additional suffering they have endured as a result of the particular circumstances of the violations perpetrated against their loved ones, and the subsequent actions or omissions by the

¹²⁹ Cf. *Case of V.R.P., V.P.C. et al. v. Nicaragua. Preliminary objections, merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 35.

¹³⁰ Cf. *Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, para. 263. See also, ECHR, *Case of Taxquet v. Belgium* [GS], No. 926/05. Judgment of November 16, 2010, paras. 90 to 92.

¹³¹ Article 5 of the American Convention on Human Rights.

¹³² Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala, supra*, para. 176, and *Case of Diaz Loreto et al. v. Venezuela, supra*, para. 136.

State authorities in this regard,¹³³ considering, among other aspects, the steps taken to obtain justice and the existence of close family ties.¹³⁴

101. The Court observes that, during the public hearing held before this Court, Mrs. María Angelita Azaña Tenesaca, the mother of the Roche Azaña brothers, stated that the death of one of her sons, his repatriation and subsequent burial, as well as the injuries inflicted on her other son, caused her "great" suffering and "pain." She added that Mr. José Fernando Roche Zhizhingo, the father of the Roche Azaña brothers, "became ill from all the suffering of [his] sons,"¹³⁵ a comment also made by Patricio Fernando Roche Azaña at the same public hearing.¹³⁶ Therefore, based on the evidence and information contained in the case file, and on the particular circumstances of this case, this Court considers that, as a direct consequence of (i) the death of Mr. Pedro Bacilio Roche Azaña and the subsequent transfer of his body to Ecuador, and (ii) the injuries caused to Patricio Fernando Roche Azaña, together with their lifelong effects, the parents of the Roche Azaña brothers experienced deep suffering and anguish to the detriment of their psychological and moral integrity.

102. Accordingly, the Court concludes that the State violated the right to personal integrity established in Article 5 (1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of María Angelita Azaña Tenesaca and José Fernando Roche Zhizhingo.

VII REPARATIONS

103. Based on the provisions of Article 63(1) of the American Convention, the Court has indicated that any violation of an international obligation that has produced harm entails the obligation 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.¹³⁷

104. The reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of the re-establishment of the previous situation. If this is not feasible, as occurs in most cases of human rights violations, the Court will determine measures to guarantee the rights that have been violated and redress the consequences of those violations.¹³⁸ Accordingly, the Court has considered it necessary to grant different measures of reparation in order to redress the harm comprehensively; thus, in addition to pecuniary compensation, measures of restitution, rehabilitation and satisfaction, and guarantees of non-repetition have special relevance for the harm caused.¹³⁹

105. The Court has also established that reparations must have a causal nexus with the facts of the case, the violations declared, the harm proved, and the measures requested to redress the respective damages. Therefore, the Court must observe the concurrence of these factors in order to rule appropriately and according to the law.¹⁴⁰

¹³³ Cf. *Case of Blake v. Guatemala. Merits*. Judgment of January 24, 1998. Series C No. 36, para. 114, and *Case of Ruiz Fuentes et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of October 10, 2019. Series C No. 385, para. 188.

¹³⁴ Cf. *Case of Bámaca Velásquez v. Guatemala. Merits*. Judgment of November 25, 2000. Series C No. 70, para. 163, and *Case of Ruiz Fuentes et al. v. Guatemala, supra*, para. 188.

¹³⁵ Cf. Statement of María Angelita Azaña Tenesaca at the public hearing held before the Court on February 4, 2020.

¹³⁶ Cf. Statement of Patricio Fernando Roche Azaña at the public hearing held before the Court on February 4, 2020.

¹³⁷ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Azul Rojas Marín et al. v. Peru, supra*, para. 224.

¹³⁸ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, paras. 25 and 2, and *Case of Noguera et al. v. Paraguay. Merits, reparations and costs*. Judgment of March 9, 2020. Series C No. 401, para. 88.

¹³⁹ 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 Noguera et al. v. Paraguay, supra*, para. 88.

¹⁴⁰ Cf. *Case of Ticona Estrada v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Azul Rojas Marín et al. v. Peru, supra*, para. 224.

106. Taking into account the violations of the American Convention declared in the preceding chapters, and the criteria established in its case law regarding the nature and scope of the obligation to provide reparation,¹⁴¹ the Court will now analyze the claims presented by the Commission and the representative, as well as the arguments of the State, for the purpose of ordering measures aimed at redressing the damage caused by those violations.

A. Injured party

107. Under the terms of Article 63(1) of the Convention, this Court considers as injured party anyone who has been declared a victim of the violation of any right recognized therein. Therefore, the Court considers as “injured party” the brothers Pedro Bacilio Roche Azaña and Patricio Fernando Roche Azaña, as well as their mother María Angelita Azaña Tenesaca and their father José Fernando Roche Zhizhingo¹⁴² who, as victims of the violations declared in Chapter VI, shall be considered as beneficiaries of the reparations ordered by the Court.

B. Obligation to investigate the facts and identify, prosecute and punish, as appropriate, those responsible

108. The **Commission** asked the Court to order the State to reopen the criminal investigation, diligently, effectively and within a reasonable time, in order to fully clarify the facts, identify those responsible and impose appropriate penalties for the human rights violations committed. In this regard, it emphasized that the State should not use the argument that the guarantees of *ne bis in idem*, *jus cogens* or statutes of limitation justify a failure to comply with that measure.

109. Similarly, the **representative** requested that the Court order the State to conduct the pertinent investigation.

110. The **State** argued that the criminal process conducted by the administrative-police and jurisdictional authorities concluded with a verdict of innocence delivered by the Jury Court. It added that this demonstrates the State’s diligent, professional and timely action in relation to the facts of this case, regardless of the individuals involved.

111. The **Court** considers that, in light of the particular circumstances of this case, an eventual reopening of the criminal trial is not appropriate; nevertheless, the suffering caused by the violation of the rights to judicial guarantees and judicial protection declared in this case may be duly assessed in the section on compensation.

C. Rehabilitation

112. The **Commission** asked the Court to order measures of physical and mental health care for the rehabilitation of Mr. Patricio Roche Azaña and his parents, if they so wish, and in consultation with them.

113. The **representative** endorsed the Commission’s request.

114. In response, the **State** pointed out that since the date on which the events of this case took place, the victims’ next of kin have never requested any physical or psychological care, nor have they advised the State of any impediment to their physical or psychological recovery.

¹⁴¹ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, *supra*, paras. 25 to 27, and *Case of Azul Rojas Marín et al. v. Peru*, *supra*, para. 225.

¹⁴² Mr. José Fernando Roche Zhizhingo died eight years after the events of April 14, 1996 (Cf. Statement of María Angelita Azaña Tenesaca at the public hearing held before the Court on February 4, 2020).

115. The **Court** considers it pertinent to order a measure of reparation in the form of adequate care to address the victims' psychological and physical suffering, taking into account their specific needs and background. Therefore, in order to contribute to the reparation of the physical, psychological and/or psychiatric harm suffered by Patricio Roche Azaña and María Angelita Azaña Tenesaca, and considering that they do not live in Nicaragua, the Court orders the State to pay, once, the sum of USD\$ 20,000 (twenty thousand United States dollars) to Patricio Fernando Roche Azaña, and USD\$ 10,000 (ten thousand United States dollars) to María Angelita Azaña Tenesaca, for medical, psychological and/or psychiatric treatment, and for medicines and other related expenses, so that they may receive this treatment at the place where they reside. The State has one year from notification of this judgment to make this payment to each of the victims.

D. Measures of satisfaction

116. The **Commission** requested, in general terms, that the Court order measures of satisfaction as reparation for the human rights violations declared.

117. Neither the **representative** nor the **State** submitted any arguments on this point.

118. The **Court** decides, as it has in other cases,¹⁴³ that the State must publish, within six months of notification of this judgment: a) the official summary of this judgment prepared by the Court, once, in the Official Gazette, in an appropriate and legible font; b) the official summary of this judgment prepared by the Court, once, in a newspaper with widespread national circulation, in an appropriate and legible font, and c) this judgment in its entirety, available for one year, on an official website of the State. The State must advise this Court immediately when it has issued each of the publications ordered, regardless of the one-year time frame for presentation of its first report, as established in the eleventh operative paragraph of this judgment.

E. Guarantees of non-repetition

119. The **Commission** asked the Court to order the State to adopt mechanisms of non-repetition, including training courses for the authorities on the use of force, in keeping with the standards described in its merits report, as well as training on the human rights of migrants.

120. The **representative** endorsed the Commission's request, and also asked the Court to order the State to adopt pertinent measures to rectify its negligence in relation to the facts of this case by providing appropriate mechanisms to prevent acts that cause harm to those who transit through Nicaragua.

121. The **State** pointed out that the National Police authorities have already incorporated human rights as a "cross-cutting issue" into the academic curriculum of police training courses, specialized courses, post graduate certificates and masters programs, including the principles related to the use of force and use of firearms in police work.

122. In this case, the **Court** notes that the State did not submit evidence to support its arguments regarding the education and training courses provided to members of the National Police and the Nicaraguan Army. Therefore, given that the Court established in Chapter VI of this judgment that the State agents used excessive force in this case, the Court deems it pertinent to order the State to design and implement a training plan for members of the Nicaraguan National Police and the Nicaraguan Army related to international standards on the use of force and international standards

¹⁴³ Cf. *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of January 27, 2020. Series C No. 398, paragraph 226, and *Case of Noguera et al. v. Paraguay, supra*, para. 96.

for the protection of migrants' rights. This training plan must be incorporated into the regular training courses of these forces within one year.

F. Compensation

F.1 Pecuniary damage

123. In its case law, the Court has developed the concept of pecuniary damage and has established that this supposes the loss of or detriment to the victims' incomes, the expenses incurred owing to the facts and consequences of a pecuniary nature that have a causal nexus with the facts of the case.¹⁴⁴

124. In general terms, the **Commission** requested that the State provide comprehensive reparation, both pecuniary and non-pecuniary, for the human rights violations declared in its report, by adopting measures of financial compensation in favor of Mr. Patricio Roche Azaña and his parents.

125. The **representative** endorsed the Commission's request. In addition, he offered an expert opinion by the legal expert and architect Ximena del Carmen Paredes Pacheco with the aim of supporting his claims for pecuniary damages. The expert opinion focused on the calculation of consequential damages and lost earnings stemming from the facts of this case, together with non-pecuniary damage.

126. The **State** asked the Court to reject the Commission's proposal. It emphasized that on previous occasions the Court has refrained from ordering measures of compensation for pecuniary damage, when this has not been sufficiently proven. It pointed out that in this case, the Commission did not submit any pertinent documents to support its claim, and expressed its total opposition to paying financial compensation for pecuniary damage. In its final written arguments, the State also referred to the expert opinion provided by the representative and the calculations made for the loss of three properties as a result of their embargo and auction, and indicated that said auction was not attributable to the facts denounced, since the situation of insolvency arose prior to the events of April 14, 1996.

127. In its case law, the **Court** has developed the concept of pecuniary damage and the situations in which it must be compensated. The Court has established that pecuniary damage involves loss of or detriment to the income of the victims, the expenses incurred as a result of the facts, and the pecuniary consequences that have a causal nexus with the facts of the case.¹⁴⁵

128. With respect to the consequential damages requested, having examined the arguments and the report presented by the representative, the Court does not find sufficient elements to determine a causal nexus between the embargos of the properties belonging to the Roche Azaña family and the harm caused by the violations declared in this judgment, given that those embargos were made prior to the facts of this case and, therefore, are not valid for determining the compensation for pecuniary damage. However, the Court considers that the violations declared in this judgment resulted in financial expenses for the victims. Consequently, the Court considers that the State must pay, in equity, the sum of USD\$ 5,000 (five thousand United States dollars), respectively, to Patricio Fernando Roche Azaña, José Fernando Roche Zhizingo and María Angelita Azaña Tenesaca. Given that Mr. José Fernando Roche Zhizingo is deceased, the amount corresponding to him must be paid to Mrs. María Angelita Azaña Tenesaca.

¹⁴⁴ Cf. *Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Azul Rojas Marín et al. v. Peru, supra*, para. 256.

¹⁴⁵ Cf. *Case of Bámaca Velásquez v. Guatemala. Reparations and costs, supra*, para. 43, and *Case of Noguera et al. v. Paraguay, supra*, para. 114.

129. With respect to loss of earnings resulting from the death of Pedro Bacilio Roche Azaña, the Court considers that the State must pay, in equity, a total of USD\$ 50,000 (fifty thousand United States dollars) to José Fernando Roche Zhizhingo and María Angelita Azaña Tenesaca. Given that Mr. José Fernando Roche Zhizhingo is deceased, the amount corresponding to him must be paid to Mrs. María Angelita Azaña Tenesaca.

F.2 *Non-pecuniary damage*

130. In general terms, the **Commission** requested that the State provide comprehensive reparation for non-pecuniary damage related to the human rights violations declared in its report, in favor of Mr. Patricio Roche Azaña and his parents.

131. The **representative** endorsed the requests of the Commission.

132. The **State** asked the Court to reject the Commission's request. It argued that it does not owe any type of monetary reparation for moral damage to any of the alleged victims, inasmuch as it is not responsible for any situation in which, according to the Court, such damage has been established. In this regard, it emphasized that the evidence presented reveals that the authorities of the criminal justice system took all the steps necessary to investigate and prosecute the case to ensure that the facts did not go unpunished. Finally, it requested that if the Court should order reparations for non-pecuniary damage, that the amount be equitable.

133. The **Court** has established in its case law that non-pecuniary damage "may include both the suffering and distress caused to victims and the impairment of values that are highly significant to them, as well as suffering of a non-pecuniary nature that affects their living conditions." Furthermore, since it is not possible to assign a precise monetary value to non-pecuniary damage, for the purposes of making integral reparation to the victims, compensation may only be provided through the payment of a sum of money or through the delivery of goods and services that can be assessed monetarily, as prudently determined by the Court, applying judicial discretion and the principle of equity.¹⁴⁶

134. Therefore, considering the circumstances of this case, the violations committed, the suffering caused and experienced in different degrees, and the time elapsed, the Court sets in equity compensation for non-pecuniary damage in favor of the victims.

135. Accordingly, the Court orders, in equity, the payment of USD\$ 80,000 (eighty thousand United States dollars), for non-pecuniary damage in favor of Mr. Pedro Bacilio Roche Azaña and the sum of USD\$ 65,000 (sixty-five thousand United States dollars), for non-pecuniary damage in favor of Patricio Fernando Roche Azaña. The amount corresponding to Mr. Pedro Bacilio Roche Azaña must be delivered, in equal parts, to María Angelita Azaña Tenesaca and to Patricio Fernando Roche Azaña.

136. Furthermore, in view of the violations declared to the detriment of the victims' parents, the Court establishes, in equity, the sum of USD\$ 15,000 (fifteen thousand United States dollars), in favor of María Angelita Azaña Tenesaca and of José Fernando Roche Zhizhingo, respectively, for non-pecuniary damage. Given that Mr. José Fernando Roche Zhizhingo is deceased, the corresponding amount must be paid to María Angelita Azaña Tenesaca.

H. Costs and expenses

137. The Court observes that in this case the representative made no specific argument or request

¹⁴⁶ Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs.* Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Azul Rojas Marín et al. v. Peru, supra*, para. 261.

in this regard. Therefore, the Court considers that it is not necessary to rule on this point.

I. Reimbursement of expenses to the Victims' Legal Assistance Fund

138. In 2008, the General Assembly of the Organization of American States created the Victims' Legal Assistance Fund of the inter-American human rights system, in order to "facilitate access to the inter-American human rights system by persons who currently lack the resources needed to bring their cases before the system."¹⁴⁷

139. In a communication dated April 8, 2020, the Secretary of the Court forwarded a report to the State on the disbursements made in application of the Victims' Legal Assistance Fund in this case, which amounted to USD\$ 3,188.10 (three thousand, one hundred and eighty-eight United States dollars and ten cents) and, pursuant to Article 5 of the Court's Rules on the Operation of the Fund, granted the State of Nicaragua a period of time to present any observations deemed pertinent. The State presented its observations on April 22, 2020, indicating that it considered the total amount "reasonable," but adding that any further expenses of the Fund other than those stated would not be "acceptable."

140. In accordance with Article 5 of the Fund's Rules, and based on the violations declared in this judgment and also that the requirements to access the Fund were met, the Court orders the State to reimburse the said Fund in the amount of USD\$ 3,188.10 (three thousand, one hundred and eighty-eight United States dollars and ten cents) for the necessary expenses. This amount must be reimbursed within six months of notification of this judgment.

J. Method of compliance with the payments ordered

141. The State shall pay compensation for rehabilitation, as well as for pecuniary and non-pecuniary damages established in this judgment, directly to the persons indicated herein, within one year of notification of this judgment, without prejudice to making the full payment previously, in accordance with the following paragraphs.

142. If the beneficiaries are deceased or die before they receive the respective compensation, this shall be delivered directly to their heirs, in accordance with applicable domestic law.

143. The State shall comply with its monetary obligations through payment in United States dollars, using the exchange rate in force on the New York Stock Exchange (United States of America), on the day before payment in order to make the respective calculation.

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

145. The amounts allocated in this judgment for rehabilitation, and as compensation for pecuniary and non-pecuniary damage, shall be paid in full to the persons indicated, as established in this judgment, without any deductions arising from possible taxes or charges.

¹⁴⁷ AG/RES. 2426 (XXXVIII-O/08), Resolution adopted by the OAS General Assembly during its Thirty-eighth Regular Session, fourth plenary session, held on June 3, 2008, "Establishment of the Legal Assistance Fund of the Inter-American Human Rights System," Operative Paragraph 2(a), and CP/RES. 963 (1728/09), Resolution adopted on November 11, 2009, by the OAS Permanent Council, "Rules of Procedure for the Operation of the Legal Assistance Fund of the Inter-American Human Rights System", Article 1(1).

146. If the State should fall into arrears, including with the reimbursement of expenses to the Victims' Legal Assistance Fund, it shall pay interest on the amount owed corresponding to banking interest on arrears in the Republic of Nicaragua.

**VIII
OPERATIVE PARAGRAPHS**

THE COURT

DECLARES:

Unanimously, that:

1. The State is responsible for the violation of the right to life, enshrined in Article 4(1) of the American Convention on Human Rights, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Mr. Pedro Bacilio Roche Azaña, pursuant to paragraphs 50 to 72 of this judgment.
2. The State is responsible for the violation of the right to personal integrity, enshrined in Article 5 (1) of the American Convention on Human Rights, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Mr. Patricio Fernando Roche Azaña, pursuant to paragraphs 50 to 72 of this judgment.
3. The State is responsible for the violation of the rights to judicial guarantees and judicial protection, enshrined in Articles 8(1) and 25 of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Mr. Patricio Fernando Roche Azaña, Mrs. María Angelita Azaña Tenesaca and Mr. José Fernando Roche Zhizingo, pursuant to paragraphs 84 to 94 of this judgment.
4. The State is responsible for the violation of the right to personal integrity, enshrined in Article 5 (1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Mrs. María Angelita Azaña Tenesaca and Mr. José Fernando Roche Zhizingo, pursuant to paragraphs 100 to 102 of this judgment.

AND ORDERS:

Unanimously, that:

5. This judgment constitutes, *per se*, a form of reparation.
6. The State shall pay the amounts stipulated in paragraph 115 of this judgment for rehabilitation.
7. The State shall issue the publications indicated in paragraph 118 of this judgment.
8. The State shall create and implement a training program directed at members of the Nicaraguan National Police and the Nicaraguan Army on international standards related to the use of force, as well as on international standards for the protection of migrants' rights, pursuant to paragraph 122 of this judgment.
9. The State shall pay the amounts established in paragraphs 128, 129, 135 and 136 of this judgment as compensation for pecuniary and non-pecuniary damage.
10. The State shall reimburse the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights for the amount disbursed during the processing of this case, pursuant to paragraphs 140 and 146 of this judgment.
11. The State shall, within one year of notification of this judgment, provide the Court with a report on the measures adopted to comply with it, in accordance with the provisions of paragraph 118 of

this judgment.

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

Judges Eugenio Raúl Zaffaroni and L. Patricio Pazmiño Freire advised the Court of their individual concurring opinions, which accompany this judgment.

Done in Spanish at San José, Costa Rica, on June 3, 2020.

I/A Court HR. *Case of Roche Azaña et al. v. Nicaragua*. Merits and Reparations. Judgment of June 3, 2020.

Elizabeth Odio Benito
President

L. Patricio Pazmiño Freire

Eduardo Vio Grossi

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Eugenio Raúl Zaffaroni

Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri
Secretary

So ordered,

Elizabeth Odio Benito
President

Pablo Saavedra Alessandri
Secretary

**CONCURRING OPINION OF
JUDGE L. PATRICIO PAZMIÑO FREIRE**

CASE OF ROCHE AZAÑA ET AL. V. NICARAGUA

**JUDGMENT OF JUNE 3, 2020
(*Merits and Reparations*)**

I. Introduction

1. The judgment in the case *Roche Azaña et al. v. Nicaragua* consolidates and develops standards related to the obligation of States to guarantee the rights of migrants to have equitable and effective access to justice. The judgment addresses the right to judicial guarantees and judicial protection taking into consideration the special situation of vulnerability in which Mr. Patricio Fernando Roche Azaña found himself. It establishes, for the first time, the general obligation of States “to ensure that all those who have suffered human rights violations or abuses as a result of border governance measures have equal and effective access to justice, access to effective remedies, adequate, effective and prompt reparation for the harm suffered, and access to relevant information concerning violations and reparation mechanisms.¹”

2. The Court also considered that Mr. Patricio Fernando Roche Azaña’s status as a migrant had a fundamental impact on his right to participate in the criminal proceedings brought against those responsible for firing the shots on April 14, 1996, which resulted, *inter alia*, in the death of his brother and the injuries he received and from which he still suffers serious effects.² The Court noted that “Mr. Patricio Fernando Roche Azaña found himself in a situation of real inequality owing to his migratory status, which required the State to adopt certain special measures to help reduce or eliminate the obstacles and deficiencies that impaired or diminished his ability to effectively defend his interests because of the mere fact of being a migrant.”³ These considerations and assertions convinced me that I had to vote in favor of the matter under deliberation.

3. At present, there is no clear consensus - either at the regional or at the universal level - regarding the definition and application of the term “migrant.” For this reason, I offer this opinion as a contribution to a more precise definition of this concept based on a guarantees-oriented interpretation, and an expansive and inclusive perspective, guided by international human rights law and, in particular, by the *pro personae* principle, established in Article 29 of the American Convention on Human Rights.

¹ Paragraph 91.

² Paragraph 92.

³ Paragraph 93.

II. Configuring the category of a “migrant”: an inclusive proposal

4. There is currently no standard and agreed definition of the term “migrant” in public international law and in international human rights law. Unlike other concepts related to migration– such as the concept of “refugee,” which is clearly defined in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol,⁴ or the concepts of “migrant worker” or “cross-border worker” that are specified in the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,⁵ the term “migrant” does not derive from a single and agreed source.

5. According to the International Organization for Migration (IOM), the term migrant is understood as “a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons.”⁶ The IOM acknowledges that this is an “umbrella term, not defined under international law.”⁷

6. The United Nations Department of Economic and Social Affairs (DESA) also notes that, at present, “no formal definition exists” of the concept of an “international migrant.” However, most experts agree that the term includes any person who changes his or her country of usual residence, regardless of the reason for their migration or their legal status.⁸ The United Nations document, *Recommendations on Statistics of International Migration*, defines an international migrant as any person who has changed their country of usual residence, distinguishing between “short-term migrants” and “long-term migrants” (depending on whether the stay is shorter or longer than 12 months), but excluding those who move to that country “for the purposes of recreation, holiday, visits to friends and relatives, business, medical treatment or religious pilgrimage.”⁹

7. According to the UN Office of the High Commissioner for Human Rights (OHCHR), the term “international migrant” refers to any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence. The term includes migrants who intend to move permanently or temporarily, and those who move in a regular or documented manner as well as migrants in irregular situations.¹⁰

⁴ The above, without prejudice to the expanded definition developed by the Cartagena Declaration on Refugees, adopted by the “Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems,” held in Cartagena, Colombia, on November 19-22, 1984.

⁵ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted by the UN General Assembly in Resolution 45/158, of December 18, 1990.

⁶ IOM, Definition of the term “Migrant,” available at: <https://www.iom.int/es/quien-es-un-migrante> See also, IOM Glossary on Migration, which defines the concept of migrant as “[a]n umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students.” International Migration Law, No. 34, 2019, Glossary on Migration, page 132, available at:

https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf

⁷ *Idem*.

⁸ See: <https://refugeesmigrants.un.org/definitions> and DESA, Recommendations on Statistics of International Migration, Revision 1 (1998) para. 32.

⁹ Department of Economic and Social Affairs, Statistics Division, Recommendations on Statistics of International Migrations, ST/ESA_/STAT/SER.M/58/Rev.1, paras. 33 to 37, available at:

https://unstats.un.org/unsd/demographic-social/Standards-and-Methods/files/Principles_and_Recommendations/International-Migration/SeriesM_58rev1-S.pdf

¹⁰ OHCHR, Recommended Principles and Guidelines on Human Rights at International Borders, para. 10, footnote No. 2, available at:

8. Probably, the greatest development in standards for the protection of migrants has occurred in the context of the international protection of labor rights.¹¹ Thus, we have the definition of the term “economic migrant” or “migrant worker,” which the International Labor Organization (ILO) defines as any person who emigrates from one country to another to take up remunerated employment, a definition that does not include migrants who work for themselves (self-employed). This view differs from that expressed by the IOM, which defines a migrant worker or labor migrant as a person who migrates from one country to another with a view to being employed otherwise than on his or her own account, while the term “economic migrant” includes those working for an employer as well as self-employed migrant workers, such as entrepreneurs, investors or business travelers.¹²

9. In current practice, it is clear that there are two different approaches to the concept of a migrant, which are essentially based on the reason why a person abandons his or her country of usual residence. Thus –in my view – there is an *exclusive* conception of migrants as persons who have abandoned their place of usual residence for reasons other than those established in the Convention Relating to the Status of Refugees.¹³ However, there is nothing to prevent this term from being made as inclusive as possible, with the aim of not excluding anyone from the appropriate governmental or international protection.

10. In my reasoning of this opinion, I wish to emphasize the following: I consider it unnecessary and even counterproductive to draw a strict line between voluntary displacement and forced displacement of persons, since it is clear that the reasons for migration tend to be multi-causal and complex, and therefore it is very problematic to “pigeonhole” migrants in a single category. Consequently, we should try to advance toward the configuration of a concept that includes everyone who leaves a State (voluntarily or otherwise), to move to another State, whether or not they intend to settle there. Thus, an *inclusive* interpretation of the term would refer to anyone who has left his or her place of usual residence, regardless of legal status or the reasons for doing so, to settle in a country, whether temporarily or permanently. That said, this interpretation of a migrant does not preclude taking into account, as a significant factor, the reasons that prompted that person to leave his country when determining the degree of protection (and, therefore, the obligations of the States) that migrants should be granted. Moreover, this conceptualization does not mean that we cannot (or should not) make an intersectional analysis of different situations of vulnerability that may arise.

11. Bearing in mind the importance of the use of language in creating a collective worldview, and in giving form and meaning to specific situations, it is also important to discard concepts that in some way dehumanize, label and stigmatize a person, such as the notion of “illegal immigrants.” This is not a question of mere compliance

https://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines_SP.pdf

¹¹ By way of example, see the Migration for Employment Convention (No. 97), Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No. 143), Migration for Employment Recommendation (No. 86), Migrant Workers Recommendation (No.151), Convention Concerning Forced or Compulsory Labour, (No. 29) and the Abolition of Forced Labour Convention (No. 105).

¹² IOM, Glossary on Migration, International Law on Migration, No. 7, available at: https://publications.iom.int/system/files/pdf/iml_7_sp.pdf

¹³ That is, a person who “owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”. Cf. Refugee Convention, Article 1.

with the canons of political correctness; rather, it contributes to shape an inclusive view of the migrant population in society.

12. The consequences of the foregoing ideas are not purely theoretical: for it is on the basis of such resolve and amplitude that States' obligations emanate in this regard, an approach that has been exhaustively developed by the Inter-American Court in a multiplicity of cases and advisory opinions, including those that I will refer to below.

III. Evolution of inter-American standards for the protection of migrants

13. The State's obligation to protect migrants emanates from the principle of equality and non-discrimination. As the Court has indicated, this principle "belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws."¹⁴

14. With regard to standards for the specific protection of migrants, the Court's jurisprudence has contributed decisively to their development, having evolved toward a form of protection that is increasingly comprehensive and intersectional.

15. Some examples include the Court's Advisory Opinions OC-16/99,¹⁵ OC-18/03¹⁶ and OC-21/14.¹⁷ In Advisory Opinion OC-16/99, concerning the right to information on consular assistance, the Court established, *inter alia*, a series of standards regarding the right of a detained foreign national to information on consular assistance, which must be provided "at least before he makes his first statement before the authorities." It also stated that failure to provide such information in cases in which the death penalty is imposed and implemented would constitute arbitrary deprivation of life.¹⁸ The Court also determined that States have certain obligations with respect to their own nationals when they are abroad, and indicated the following:

"Taking the above-cited texts as a whole, it is evident that the Vienna Convention on Consular Relations recognizes assistance to a national of the sending State for the defense of his rights before the authorities of the host State to be one of the paramount functions of a consular officer. Hence, the provision recognizing consular communication serves a dual purpose: that of recognizing **a State's right to assist its nationals** through the consular officer's actions and, correspondingly, that of recognizing **the correlative right of the national of the sending State to contact the consular officer** to obtain that assistance."¹⁹

16. As is evident, on this occasion the Court used the terms "foreigner" and "national of the sending State" to refer to migrants.

17. In Advisory Opinion OC-18/03, on the "Juridical Condition and Rights of Undocumented Migrants," the Court set important standards regarding the obligation of States to strictly respect the principle of equality before the law and equal protection of the law in favor of all persons, given that these are "constitutive

¹⁴ *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 101.

¹⁵ *The Right to Information on Consular Assistance in the Framework of the Guarantees of the due process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16.

¹⁶ *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, *supra*.

¹⁷ *Rights and guarantees of Children in the Context of Migration and/or in Need of International Protection*. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21.

¹⁸ *The Right to Information on Consular Assistance in the Framework of the Guarantees of the due process of Law*. Advisory Opinion OC-16/99, *supra*, Operative Paragraphs 1, 3 and 7.

¹⁹ *Ibid.* para. 80. Emphasis added.

elements of a basic and general principle related to the protection of human rights.”²⁰ Furthermore, the Court indicated that States have an obligation to adopt “positive measures” to remedy discriminatory situations in their societies, particularly those that affect persons in situations of vulnerability.²¹ The Court emphasized the fact that migrants are in a particular situation of vulnerability and inequality with respect to the nationals of a country, which in practice has led to both groups not enjoying equal access to public resources.²² On this occasion the Court made reference to the concept of migrants to refer “generically” to emigrants (that is, persons who leave a State in order to transfer to another and establish themselves” and immigrants (persons who enter another State in order to reside there).²³ The Court then proceeded to establish standards with respect to “migrants,” also making reference to the terms “foreigner” or “foreign person,” as well as “undocumented migrants” and “undocumented migrant workers” or those in an irregular situation, although most of the standards are related to “migrants” and “undocumented migrant workers”.

18. The development of the Court’s case law regarding migrant children has been of major importance. In Advisory Opinion OC-21/14, the Court established standards and special measures of protection for migrant children, including guarantees of due process applicable to immigration proceedings and to measures that entail restriction or deprivation of their liberty, as well as guarantees of their right to seek and receive asylum and their right to family life. The Court again made reference to the concept of migrants to refer “generically” to emigrants and immigrants.²⁴ It also indicated the following:

“International migration is a complex phenomenon that may involve two or more States, including countries of origin, transit and destination, for both migrants and those seeking asylum or refugee status. In this context and, in particular, that of **mixed migration flows that entail population movements of a diverse nature, the characteristics of and the reasons for the journey that children undertake** by land, sea or air, **to countries other than those of which they are nationals or where they habitually reside, may bespeak both persons who require international protection and others who are moving in search of better opportunities for diverse reasons, which may change during the course of the migratory process.** This means that the needs and requirements for protection may vary widely.”²⁵

19. It is also worth highlighting other important rulings, such as in the *Case of the Yean and Bosico Children v. Dominican Republic*²⁶ where the Court decided that “a person’s migratory status cannot be a condition for the State to grant nationality, because migratory status can never constitute a justification for depriving a person of the right to nationality or the enjoyment and exercise of his rights,”²⁷ citing, in this case, the discrimination suffered by children of Haitian origin born in the territory of the Dominican Republic. The Court fundamentally made reference to the terms “migrant” and “foreign person” or “foreigner.”

²⁰ *Juridical Condition and Rights of Undocumented Migrants. Advisory Opinion OC-18/03, supra*, para. 83.

²¹ *Ibid.* para. 104.

²² *Ibid.* para. 112.

²³ *Ibid.* para. 69.

²⁴ *Rights and guarantees of Children in the Context of Migration and/or in Need of International Protection. Advisory Opinion OC-21/14, supra*, para.49.

²⁵ *Ibid.* para. 36. Emphasis added.

²⁶ *Case of the Yean and Bosico Children v. Dominican Republic. Judgment of September 8, 2005. Series C No. 130.*

²⁷ *Ibid.* para. 156.

20. Another significant judgment was issued by the Court in the case of *Vélez Looor v. Panama*,²⁸ where it addressed, *inter alia*, the detention of migrants who are undocumented or in an irregular situation, identifying them as a vulnerable group affected by “cultural prejudices about migrants that perpetuate their situation of vulnerability, making it difficult for [them] to integrate into society.”²⁹ Importantly, the Court emphasized³⁰ and reiterated that States have a duty to adopt special measures to ensure the protection of migrants’ human rights³¹ and, in particular, to guarantee them “the opportunity to exercise their rights and defend their interests effectively and in full procedural equality with other individuals subject to prosecution.”³²

21. Also noteworthy is the Court’s judgment in the case of the *Pacheco Tineo Family v. Bolivia*,³³ in which it continued to develop the right to judicial guarantees and judicial protection in cases of deportation of “migrants” and those seeking “refugee status,” also making reference to “foreign nationals.”

22. Finally, I emphasize the Court’s recent rulings on the protection of migrants, in relation to the Covid-19 pandemic, which are inevitably related to economic, social, cultural and environmental rights (ESCER), particularly the right to health. In this regard the Court, in its recent Statement 1/20 of April 9, 2020,³⁴ has underscored the necessary emphasis that should be placed on the protection of migrants in matters related to ESCER and, in particular, on the rights to life and to health:

“Given the nature of the pandemic, the **economic, social, cultural and environmental rights** must be guaranteed, **without discrimination**, to every person subject to the State’s jurisdiction and, especially, to those groups that are disproportionately affected because they are in a **more vulnerable situation**, such as older persons, children, persons with disabilities, **migrants**, refugees, and stateless persons.”³⁵

At times such as this, it is **especially important** to ensure, promptly and appropriately, the **rights to life and health** of everyone subject to the State’s jurisdiction without any discrimination, including older persons, **migrants, refugees and stateless persons**, and members of indigenous communities.”³⁶

23. The basic principles expressed in this statement have been incorporated into the recent adoption of precautionary measures ordered by the President of the Court in the aforementioned case of *Vélez Looor v. Panama*.³⁷ In the context of monitoring compliance with judgment, and before the onset of the Covid-19 pandemic and the infection of at least 58 migrants and several officials, the President of the Court had considered that the overcrowding and health care conditions did not comply with inter-American standards, and that this created a situation of extreme gravity and

²⁸ *Case of Vélez Looor v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2010. Series C No. 218.

²⁹ *Ibid.* para. 98.

³⁰ *Idem.*

³¹ *Ibid.* para. 99.

³² *Ibid.* para. 143.

³³ *Case of the Pacheco Tineo Family v. Bolivia. Preliminary objections, merits, reparations and costs.* Judgment of November 25, 2013. Series C No.

³⁴ Statement of the Inter-American Court of Human Rights 1/20, “Covid-19 and Human Rights: The problems and challenges must be addressed from a human rights perspective and with respect for international obligations,” of April 9, 2020, available here:

http://www.Corteidh.or.cr/docs/comunicados/cp_27_2020.pdf

³⁵ *Ibid.*

³⁶ Emphasis added.

³⁷ *Case of Vélez Looor v. Panama. Provisional measures. Adoption of Precautionary Measures.* Order of the President of the Inter-American Court of Human Rights of May 26, 2020.

urgency that could cause irreparable harm to the rights to health, personal integrity and life of migrants held at La Peñita and Laja Blanca Migration Reception centers. Based on these considerations, the Court ordered the State of Panama to adopt “all adequate measures to effectively protect the rights to health, personal integrity and life of persons” detained at those migrant detention centers.

IV. Conclusion

24. Human migration is a phenomenon that has existed since the dawn of human history. It is estimated that in 2015 there were around 244 million international migrants around the world, equivalent to 3.3 per cent of the global population, representing an increase from an estimated 155 million migrants in 2000 (2.8% of the world’s population).³⁸ According to figures from the UN Department of Economic and Social Affairs (DESA),³⁹ the current flow of international migrants totals 271.6 million people, equivalent to 3.5% of the global population.⁴⁰ This type of migration is clearly increasing and is a trend that deserves our full attention.

25. Undoubtedly, one of the greatest challenges facing the world is the constant mass movement of people between countries, a process that has been exacerbated by globalization and growing inequality that have exponentially increased the alarming levels of poverty⁴¹ and extreme poverty,⁴² as well as the catastrophic effects of climate change.⁴³ These factors, along with their current limits and percentages, will surely be intensified by the global economic crisis triggered by the Covid-19 pandemic that is ravaging our planet.⁴⁴ This will widen the discrepancy between an uncertain and changing social reality, and the necessary normative adaptation and regulation, as well as the possibilities, opportunities and challenges for legislation. For this reason it is essential and urgent that, from the inter-American jurisdiction, we reflect on this issue from a legal and human rights perspective, in order to strengthen our understanding of the constantly changing reality of migration, its nature and sphere of protection, in an inclusive manner that focuses on guarantees.

26. Every nation in the world is affected by the phenomenon of migration, either as a country of origin, transit and/or destination of migrants; it is a global issue that requires global solutions. Addressing migration from the perspective of international human rights law is insufficient. Political and legal debates on the regulation of

³⁸ IOM, World Migration Report 2018 https://publications.iom.int/system/files/pdf/wmr_2018_sp.pdf

³⁹ Cf. Migration Data Portal at: https://migrationdataportal.org/es/data?i=stock_abs &t=2019

⁴⁰ *Ibid.*

⁴¹ According to ECLAC: “Since 2015 there has been an increase in levels of poverty in the region, and especially extreme poverty, although this trend waned between 2017 and 2018. However, total poverty in 2018 was 2.3 percentage points higher than in 2014, an increase of about 21 million people. Extreme poverty grew by 2.9 percentage points and by around 20 million people between 2014 and 2018.” Economic Commission for Latin America and the Caribbean (ECLAC), “Social Panorama of Latin America.” Ed. 2019, page. 96, available at: https://repositorio.cepal.org/bitstream/handle/11362/44969/5/S1901133_es.pdf

⁴² According to ECLAC figures, “In 2018, about 30.1% of the regional population was below the poverty line, while 10.7% was below the extreme poverty line. This meant that about 185 million people were living in poverty, 66 million of them in extreme poverty. Economic Commission for Latin America and the Caribbean (ECLAC), “Social Panorama of Latin America,” Ed. 2019, page 17, available at: https://repositorio.cepal.org/bitstream/handle/11362/44969/5/S1901133_es.pdf

⁴³ There is international academic consensus around the idea that environmental conditions, including climate change, influence migration flows. For further information, see: International Organization for Migration, *Climate change, migration and critical international security considerations*, No. 42, 2011, available here: <https://publications.iom.int/es/system/files/pdf/mrs42.pdf>

⁴⁴ According to World Bank forecasts, in 2020 the global economy is expected to shrink by 5.2% as a result of the Covid-19 global pandemic, which would represent “the deepest recession since the Second World War, with the largest fraction of economies experiencing declines in per capita output since 1870.” World Bank, *Global Economic Prospects*, June 2020, available at: <https://www.bancomundial.org/es/publication/global-economic-prospects>

international migration have traditionally focused on issues of border control, using a narrative and terminology that normalizes an antagonistic “logic” in society and views migrants as an “enemy” or “hostile.” Consequently, governmental action at borders, in addition to being socially accepted, is perceived as protecting a State’s nationals, often being closely linked to ideas of “combating” drug-trafficking, organized crime, people trafficking and “undocumented people” etc. And, of course, in that context of “war,” there will always be direct or “collateral” victims, with little consideration given to the rights of key actors in the drama, *ergo*: women, girls, men, boys and elderly persons. Therefore, in their approach to regulating migration, countries must undertake an ontological reformulation in order to overcome the perception of “the other” as an “enemy” or an “irregular” or “illegal” person, and to move toward an understanding of migration as a process involving human beings who, for multiple reasons, are forced to move elsewhere and, of course, have certain obligations, but equally, are holders of rights inherent to their human condition.

27. In this regard, it is laudable and no less important to ratify in this opinion, and be consistent in asserting - as I have done publically in the Court’s rulings and decisions related to economic, social, cultural and environmental rights -the imperative for States parties to the inter-American system to fulfil their international obligations, assumed when they voluntarily signed and ratified international commitments and, unreservedly, to recognize, abide by, apply and progressively implement, actively and effectively, the 2030 Sustainable Development Agenda.⁴⁵ And, in the instant case, the States should focus especially on 11 of the 17 Sustainable Development Goals with targets and indicators related to migration or displacement, in which they undertake to fulfil Target 10.7 by 2030: “To facilitate migration and the orderly, safe, regular and responsible movement of people, including through the implementation of well-planned and well managed migration policies.”

28. In conclusion, it is imperative to approach this issue from a perspective of guarantee-oriented, progressive hermeneutics of a unified nature to expand and define the notion of “migrant.” From my perspective, this must be understood as an open, non-restrictive category that includes every human being who, regardless of reason, cause, motive or circumstances, abandons his country of origin or nationality, where he usually resides, either temporarily or permanently, irrespective of his legal status. This characterization does not mean that the States’ duties and obligations toward migrants should be standardized. As this Court has indicated, it is acceptable and reasonable that States grant migrants a differentiated treatment, adapted to their varying situations of vulnerability, provided that this differentiated treatment is reasonable, objective, proportionate, and does not breach human rights.⁴⁶ To complement this broad definition of the notion of “migrant,” States also have an ineludible obligation to protect and guarantee the human rights of their own nationals, beyond their territorial boundaries, regardless of their situation or legal status, effectively exercising the universal principles of international cooperation and reciprocity in light of multilateralism and an intersectional approach, in accordance with the standards derived from international human rights law.

L. Patricio Pazmiño Freire
Judge

Pablo Saavedra Alessandri
Secretary

⁴⁵ Available at: <https://www.un.org/sustainabledevelopment/es/development-agenda/>

⁴⁶ Cf. *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03, *supra*, para. 119 and 121, and *Case of Vélez Loo v. Panama*, *supra*, para. 248.

**CONCURRING OPINION OF
JUDGE EUGENIO RAÚL ZAFFARONI**

CASE OF ROCHE AZAÑA ET AL. V. NICARAGUA

JUDGMENT OF JUNE 3, 2020

I consider it important to emphasize that, in this case, the State's international responsibility in relation to the violation of the human right to life, does not arise merely from the outcome of the actions of its agents, in their supposed use of force with weapons of war supplied by the State itself, but rather from their subsequent and arbitrary impunity.

Indeed, a result of impunity could have occurred in a regular proceeding, based on some extenuating circumstance, such as a psychotic episode or any other serious mental disturbance in an armed State agent - unforeseeable or very difficult to foresee - which, by means of the corresponding civil reparations, would not be likely to produce an injustice from the perspective of international human rights law, a situation that obviously does not apply to this case. That assumption differs completely from any other related to arbitrary impunity or lack of a reasonable explanation.

It is clear that the primary international obligation of every Member State of the ACHR is to guarantee the life of all its inhabitants, whether permanent or transient, nationals or foreigners, documented or undocumented - that is, anyone within its territory. Therefore, according to the territoriality principle, the State is required to apply its criminal laws to every active subject that commits the crime of killing another person. In other words, it must investigate and, if appropriate, punish every crime of intentional or culpable homicide, without being permitted to make an arbitrary selection of cases, especially when there is a high probability that its own officials bear responsibility.

As this Court has ruled on repeated occasions, it is the State's duty to make every effort to investigate and punish crimes committed within its territory that affect juridical rights which, from the perspective of international human rights law, are also rights that must be protected under the ACHR.

Each State, in its criminal law - its domestic law - regards a crime as an act that injures or endangers a juridical right - in accordance with the harm or offense principle. However, from the international perspective, only an offense against some of these juridical rights requires the State to exercise its punitive power.

Thus, it would be very difficult to consider that impunity in the case of a public order offense, or issuing a check without funds, could entail the State's international responsibility. However, it is obvious that some juridical rights under domestic law are also human rights that the State has an international obligation to protect and which, in the event of being impaired, imposes upon it the international duty to investigate and, if appropriate, punish.

On repeated occasions - and not just with respect to the right to life, but also when there is impairment of other juridical rights under domestic

criminal law that are also subject to international protection as a human right - this Court has ruled accordingly to establish the State's international responsibility, particularly in cases where impunity involves active subjects that are the State's own agents.

Thus, the Court issued such a ruling in the case of the *Women Victims of Sexual Torture in Atenco v. Mexico*. (Preliminary Objection, Merits, Reparations and Costs. Judgment of November 28, 2018. Series C No. 371), acknowledging that the impunity was related to negligent or reckless conduct.

In the aforementioned case, and with respect to the possible criminal responsibility of the State's agents in the chain of command, the Court stated: "This Court is not a criminal court, but it cannot overlook the fact that the State's omission in relation to the chain of command should have been investigated based on the reports that would have reached the superior authorities, not only in the eventuality that they had ignored the reports and had accepted the possibility of the result (*dolus eventualis* or legal intention), but also in the eventuality that they had underestimated the reports, rejecting the possibility of that result (willful intent). Furthermore, the State should not have rejected the latter elements of criminal responsibility because, in light of the characteristics of the sexual abuse, which was not committed by a single individual but by a group, it is evident that the law enforcement agents who took part in the operation lacked the most elemental and appropriate training, and that any duly organized and disciplined police force would never have permitted the perpetration of such heinous crimes by a group of its agents."

The State's international responsibility does not arise merely from the results produced, however serious these may be, or necessarily from the commission of crimes, but rather from their impunity; or, when it acts in an arbitrarily selective manner that affects juridical rights that are also human rights, which the State has an international obligation to uphold.

The crimes may well have been committed by persons not linked to the State, but from the international perspective, the breach of the human right to life arises precisely from the impunity of such crimes when the State has had the material possibility of investigating and punishing these.

Therefore, it should be emphasized that it is only logical that, for this Court to hold a State accountable for impunity - that is, for failing to investigate and, where appropriate, punish a human rights violation - it must establish in its judgment the very high probability that a punishable act was committed under the domestic law of that State.

Only the results of human behavior may be subject to punishment, bearing in mind that mere acts of nature or of chance are not punishable.

Therefore, the Court must establish the very high probability that a "punishable act" has been committed which, as is well known, is the most formal and simple definition of a crime.

Regarding the impunity that makes the State internationally responsible, in the instant case the situation is much clearer than in the case mentioned above and on which this Court ruled with great clarity.

In the case under examination, shots were fired using weapons of war against a moving vehicle and at the height of the people who were traveling inside. The argument that the agents did not know whether or not there were people inside the van is irrelevant to any rational judge, according to the principles of sound judgment. In any case, armed agents of the State fired weapons of war against a vehicle which, at the very least, they knew was not an automaton, but was being driven by a person, even though the latter did not suffer any consequences from the gunshots. Thus, the resulting death and injuries did not occur by chance, but are causally linked to the act of shooting. Even assuming that the vehicle's tinted glass meant that the other human beings inside it were not visible, this was no reason for the State agents to rule out the possibility of their presence.

In legal terms -not doctrinal or jurisprudential terms, which are not discussed in any of our countries - willful homicide is not considered to be limited to the direct intention to kill; it also includes *dolus eventualis* an act carried out in which the perpetrator foresees and accepts the possibility of his act causing death, as may occur in cases of torture, where the death of the victim is not desired, only his pain, but the act is carried out in spite of the possible outcome.

Although in this case it is highly probable that the act which has gone unpunished is a crime of culpable homicide and willful injury, even accepting *ad argumentationem* the hypothesis that there was no willful intent, there is not the slightest doubt that the act of firing a weapon at a vehicle, at the height of the passengers, without knowing whether or not more people were traveling inside, constitutes gross negligence, which constitutes, at least, homicide and grievous bodily harm under the criminal laws of any of our countries, based on the hypothesis of fault-based or culpable liability which was specifically taken into account in the aforementioned judgment of this Court.

I understand, therefore, that in this case the State's international responsibility arises from its failure to investigate and, if appropriate, punish the perpetrators of the very probable crime of homicide and injury, willful or culpable, committed by its agents on active duty, crimes that breach the juridical right to life and physical integrity of which, according to the ACHR, no person may be arbitrarily deprived.

It is clear that this Court does not condemn nor does it demand the criminal conviction of the active subjects; but in light of the *notitia criminis* recorded in the proceedings before the Court, the latter requires that it be investigated and, if appropriate, punished. Therefore, *prima facie* there is the appearance of a probable crime.

It is certainly possible, among other assumptions, that the active subjects were not convicted because, as in the aforementioned example, the trial found grounds for non-imputability, which are recognized in all our current legal systems. The Court would be seriously inconsistent if it were to impose on the States the duty to convict in any case, given that convicting an unfit person would, in turn, be a violation of human rights.

Consequently, the Court merely confirms the high probability of being in the presence of an unpunished crime which, in the case *sub judice* requires that it be considered as an act that all legislations typically define as homicide committed with intent or with negligence.

As stated in the judgment, this Court could hardly consider that the State committed a breach of the right to life through impunity, if the latter did not entail the high probability of a crime that should have been punished in response to the intent or negligence of its agents, since by not specifying this possibility, the Court would be accepting eventual punishment based on so-called "strict liability," which is a form of imputation that is repugnant to human dignity and a person's status as a being with a moral conscience.

In synthesis: to accuse the State of impunity, this must necessarily entail the "impunity of a crime," which is the only "punishable act." And there is no crime that is not either intentional or negligent. It is not sufficient to merely establish a causal relationship with the fatal outcome since, according to the ACHR itself, the *versari in re illicita* rule is inadmissible.

In conclusion: without considering the existence of willful intent or negligence, it is not possible from the international perspective to speak of "impunity" as an omission by the State that violates human rights.

The reasons for impunity, due either to the deficiencies of the State's procedural system at the time, or its irregular application or for any reason other than the material impossibility of enforcing punishment, is of no consequence to the case, given that, ultimately, the active subjects of what in all likelihood was a willful homicide - and, in the best of cases, a negligent homicide - went unpunished without any reasonable explanation being given for this. In other words, the impunity was arbitrary.

To prove the State's international responsibility in this case, it is sufficient to confirm that there was a high probability that its agents committed a crime of homicide and grievous bodily harm, very possibly with willful intent or, in the best of cases, with reckless negligence, and that the

State had an opportunity to punish that crime but did not do so, and did not provide sufficient reasons for that impunity.

In my view, this is the impunity indicated in this judgment as a violation of the human right to life and physical integrity, and represents the State's failure to comply with its obligation under international law to ensure the life of every person, an obligation that is binding for a State party to the AHCR.

Based on these arguments I agree with the Court's decision regarding the violation of the human right to life, as indicated in the corresponding operative paragraph of this judgment.

That is my opinion.

Eugenio Raúl Zaffaroni
Judge

Pablo Saavedra Alessandri
Secretary