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The Inter-American System for the Protection of Human Rights
*Institutional and procedural aspects*
Third edition

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# The Inter-American System for the Protection of Human Rights

*Institutional and procedural aspects*

Third edition

Héctor Faúndez Ledesma

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**This book is dedicated**

**To my Mother**, with special devotion and with the love that only she can inspire;

**To Lotti**, who has shared the same dreams and ideals, who sweetly and firmly with her extraordinary talent and generous patience encouraged me to write (and revise) this work and who has wisely commented on each passage. With the love of always, but with greater admiration;

To all of those who have dedicated their lives to the struggle for freedom and who have made the defense of human rights a noble profession.

Héctor Faúndez Ledesma, a lawyer, graduated with highest honors from the University of Chile and has an advanced degree in International and Comparative Law of Human Rights (Strasbourg), a L.L.M. from Harvard University and a Ph.D. from the University of London. Among his publications are *Introducción al Estudio de las Organizaciones Internacionales, Administración de Justicia y Derechos Humanos, Las Dimensiones de la Libertad de Expresión en Venezuela* and numerous articles in specialized publications.

Dr. Faúndez Ledesma is Professor of Public International Law at the Universidad Central of Venezuela and former Director of Studies of the Post-graduate program of that university.

# *The Inter-American System for the Protection of Human Rights*

## TABLE OF CONTENTS


***Introduction*** *1*

***First Part***
***The normative systems*** *23*

*Chapter I* *The sub-system stemming from the OAS charter 27*
*Chapter II* *The sub-system stemming from the American Convention on Human Rights 49*
*Chapter III* *The legal regime of states of emergency 89*
*Chapter IV* *The organs of the convention 133*

***Second Part***
***The competences of the Convention's organs*** *215*

*Chapter V* *Establishing the jurisdiction of the Commission 227*
*Chapter VI* *Conditions and requirements for the admissibility of petitions 261*
*Chapter VII* *The request for precautionary measures 351*
*Chapter VIII* *The proceedings before the Commission 375*
*Chapter IX* *The conciliation procedure 409*
*Chapter X* *The decision of the Commission 441*
*Chapter XI* *The adoption of provisional measures 483*
*Chapter XII* *The contentious jurisdiction of the Court 559*
*Chapter XIII* *Preliminary objections 595*
*Chapter XIV* *The procedural stages on the merits 637*
*Chapter XV* *Judgments and rulings on reparations 733*
*Chapter XVI* *The available remedies 867*
*Chapter XVII* *The advisory jurisdiction of the Court 883*

***Conclusion***
***Taking stock and perspectives*** *927*

*Bibliography 943*
*Appendix 963*

# TABLE OF CONTENTS

Foreword to the English Edition.....XXV
Foreword to the Third Edition .....XXIX
Foreword to the Second Edition .....XXXI
Foreword (to the First Edition) .....XXXIII

***Introduction***

A. The idea of *human rights* .....2
   1. Their relationship with fundamental rights .....3
   2. The elements that define them.....4
B. Human rights as rights vis-à-vis the State .....6
   1. The so-called *vertical effect* .....7
   2. Non-State agents.....10
C. The effects of this new branch of law .....16
D. Our objectives.....20

***First Part***
***The normative systems***

***Chapter I***
***The sub-system stemming from the OAS Charter***

A. The creation of the Inter-American Commission on Human Rights .....29
B. The statutory competences of the Commission.....32
C. The expansion of the powers of the Commission .....34

1. The proposed reforms .....34
2. Interpretation of the attributes of the Commission.....35
a) Individual petitions.....35
b) On-site visits .....36
3. Resolution XXII of the Conference of Rio de Janeiro .....40
4. The Rules of Procedure of the Commission.....43
5. The Protocol of Buenos Aires.....44

***Chapter II***
***The sub-system stemming from the***
***American Convention on Human Rights***

A. Its domestic application .....52
1. Its self-executing nature .....53
2. Its application to Federal States.....55
3. The margin of appreciation of the State .....57
B. The rights protected .....64
1. Civil and political rights .....65
2. Economic, social and cultural rights.....66
C. The commitment of the States .....68
1. The respect of human rights .....71
2. The guarantee of human rights .....71
3. The adoption of provisions of domestic law .....76
4. The prohibition of discrimination.....79
D. The relationship between rights and duties .....80
E. The interpretation of the Convention .....81

***Chapter III***
***The legal regime of states of emergency***

A. The operative circumstances.....92
1. War .....94
2. Public danger .....95
3. The threat to the independence of the State.....97
4. The threat to State security .....98

B. The general characteristics of the emergency .....102
1. Their timeliness or imminence .....103
2. Their exceptional nature .....103
3. The absence of alternative measures .....104
4. Its effect on the State .....105
5. Its effect on the population .....105
C. The conditions of the suspension .....106
1. The general conditions .....107
a) The rights that may not be suspended .....107
b) Their compatibility with international law .....113
c) Their non-discriminatory application.....114
2. The specific conditions.....115
a) The principle of necessity .....116
b) The principle of proportionality.....118
c) The principle of duration.....119
D. The formal requisites .....121
1. The proclamation of the emergency .....121
2. The duty to inform and the purpose of the information .....123
3. The recipients of the information .....125
a) The other States parties .....125
b) The Commission .....125
c) The Court .....125
d) The public of the State in question .....126
e) The judicial authorities of the State .....127
4. The characteristics of the information .....128
a) Its timeliness .....128
b) Its content.....129
5. The consequences of not complying .....130

***Chapter IV***
***The organs of the convention***

A. The Commission .....133
1. Its composition .....134
a) Requirements and mechanism for selection.....134
b) Regime of incompatibilities .....137
c) Impediments and disqualifications.....139

d) Extension of the terms of office .....140
2. Its competences .....140
3. Its functioning.....147
a) Its internal organization.....147
b) Its seat.....148
c) Its sessions.....148
d) The quorum .....149
e) The Executive Secretariat .....149
f) Financial resources.....155
4. Its working languages.....155
B. The Court .....156
1. Its composition .....157
a) Titular judges.....157
i. The required conditions .....157
ii. The selection mechanism .....159
iii. Prolongation of the mandate .....161
iv. The provision for vacancies .....167
b) *Ad hoc* judges .....169
i. Its justification .....170
ii. Its appropriateness .....175
iii. Aptness for the position .....181
c) Interim judges.....182
2. The regime of incompatibilities.....182
3. Impediments and disqualifications .....190
a) Impediments .....191
b) Disqualifications .....192
4. Its competences .....195
5. Its organization and functioning .....196
a) Its seat.....196
b) Its human and financial resources .....197
c) The internal organization .....198
d) The quorum .....199
e) The function of the Secretariat .....200
f) The sessions .....202
g) The internal practice.....203
6. The disciplinary regime.....203

indice.pdf 6/23/08 2:54:06 PM



7. The working languages .....205
C. Relations between the Commission and the Court.....208
1. Complementary and not rivals .....209
2. Cooperation and coordination .....210
3. Judicial control of the actions of the Commission .....211
4. The Court as a decisive body .....213

## *Second Part*
## *The competences of the Convention's organs*

A. The contentious jurisdiction .....218
1. The right of individual petition .....219
2. State communications.....222
3. The procedure .....223
B. The advisory jurisdiction.....225

### *Chapter V*
### *Establishing the jurisdiction of the Commission*

A. Jurisdiction *ratione personae* .....227
1. Jurisdiction with respect to the defendant .....228
2. Jurisdiction with respect to the complainant .....230
3. Jurisdiction with regard to the presumed victim .....239
B. Jurisdiction *ratione materiae* .....244
C. Jurisdiction *ratione loci* .....253
D. Jurisdiction *ratione temporis* .....255

### *Chapter VI*
### *Conditions and requirements for the admissibility of petitions*

A. Requirements of the petition.....263
1. Formal requirements .....265
2. Identification of the petitioner.....266
3. Identification of the alleged victim .....267
a) *De jure* violations of the Convention .....268

b) The protection of collective or diffuse interests.....274
B. Conditions of admissibility of a petition.....279
1. Exhaustion of domestic legal remedies .....279
a) The critical moment .....283
b) The nature of this institution .....284
c) The characteristics of the remedies that must be exhausted.....287
i. Adequate remedies .....289
ii. Effective remedies.....293
d) Exceptions to the rule.....300
i. The non-existence of due process of law .....302
ii. The lack of access to available remedies .....307
iii. The impossibility to exhaust the available remedies...310
iv. Unwarranted delay in the decision.....311
v. The development of jurisprudence.....315
e) The burden of proof .....317
f) The competent bodies .....320
g) The relationship with the merits of the petition .....323
h) The effect on the right of petition .....326
2. The timely presentation of the petition.....327
3. The absence of *litis pendencia* .....333
4. The absence of *res judicata* .....339
5. The appropriateness and basis of the petition.....342
C. The decision on admissibility .....346

***Chapter VII***
***The request for precautionary measures***

A. The procedural stage to request the measures .....351
B. Their legal grounds .....352
C. Their appropriateness.....353
1. The need to prevent irreparable harm to persons .....356
2. The gravity and urgency of the case.....359
3. The need to prevent irreparable harm .....360
D. Their legal nature.....361

E. The appropriate methods .....363
F. Their processing .....364
G. Its efficacy .....368

## *Chapter VIII*
## *The proceedings before the Commission*

A. Examination and initial processing of a petition .....376
B. The procedure before the Commission .....377
1. Separation of the cases .....378
2. Accumulation of cases .....379
C. The request for information and the adversary stage .....382
D. The oral stage: hearings before the Commission .....387
E. Verifying the facts .....391
1. Burden of proof .....392
2. Methods of gathering evidence .....393
a) Information provided by the parties .....394
b) Information obtained by the Commission.....394
c) On-site investigations.....395
3. Types of evidence .....399
a) Documentary evidence.....399
b) Testimonial evidence.....399
c) Presumptions .....399
d) Presumption of the truth of the allegations .....401
4. Weighing the evidence .....405
F. The special procedure.....406
G. Withdrawal of the petition .....407

## *Chapter IX*
## *The conciliation procedure*

A. The purpose of this procedure .....410
B. Its nature .....411
1. A politico-diplomatic procedure .....412
2. A non-compulsory procedure .....413
C. Its appropriateness .....416

D. When its application is appropriate .....422
E. Formal standing to promote it .....426
F. Its procedure .....428
G. The terms of the agreement .....431
H. The necessity of a subsequent approval .....433
I. The conclusion of the conciliatory procedure .....434
1. Compulsory nature of the agreement reached.....436
2. Supervision of compliance .....436

***Chapter X***
***The decision of the Commission***

A. The decision with regard to non-States parties .....441
B. The decision with regard to States parties .....442
1. The contents of Articles 50 and 51 .....443
2. The historical background of articles 50 and 51 .....444
3. The interpretation of the Court .....445
4. The characteristics of the Article 50 report .....448
a) Its content .....449
b) Its binding nature .....452
c) Its nomenclature .....452
d) Its confidentiality .....453
e) Its reconsideration .....455
f) The legal nature of the recommendations.....457
5. The purpose and nature of the three-month period .....459
6. The nature of the Article 51 report .....463
a) The contents of the Article 51 Report .....464
b) Publication of the report.....466
c) Revision of the report .....468
d) Notification of the report .....471
e) Reconsideration of the report .....472
7. Legal effect of the decision .....473
8. Follow-up of the recommendations of the Commission .....478
9. Length of the proceedings before the Commission .....480

## *Chapter XI*
## *The adoption of provisional measures*

A. The limits of the Court's jurisdiction to adopt provisional measures .....484
1. The Court's jurisdiction with respect to cases under its consideration .....485
2. The Court's jurisdiction with respect to matters pending before the Commission .....486
B. The difference with precautionary measures.....489
C. Justification of the jurisdiction to apply provisional measures ...492
D. Their purpose.....501
E. The necessary conditions in order to be appropriate .....503
1. The formal requisites.....504
2. The objective conditions .....508
a) The extreme gravity of the threat .....509
b) The urgency of the measure requested.....513
c) The need to avoid irreparable damage to persons .....515
i. The type of damage that is sought to be prevented.....515
ii. The persons they are designed to protect .....519
F. The applicable procedure.....519
1. Active standing to request provisional provisions.....521
2. The presentation and processing of the request.....523
a) The adoption of urgent measures .....523
b) The scope of the adversary proceedings .....526
c) The holding of a public hearing .....527
d) Modification or revocation of the measures .....528
e) The available appeals .....531
3. The proof of their appropriateness .....531
4. Supervision of their compliance.....536
G. The type of appropriate measures .....539
H. Their temporary nature .....545
1. The period set for the measures and its extension.....546
2. The justification for their extension .....548
3. The adoption of a final judgment .....550

4. Withdrawal of provisional measures .....551
I. The juridical nature of provisional measures .....553
J. Their efficacy.....556

***Chapter XII***
***The contentious jurisdiction of the Court***

A. The determination of the cases appropriate for examination .....562
B. Establishment of the Court's jurisdiction .....569
1. Jurisdiction *ratione personae* .....572
a) The defendant State .....572
b) The actors .....580
c) The position of the individual before the Court .....583
2. Jurisdiction *ratione materiae*.....585
3. Jurisdiction *ratione temporis* .....593

***Chapter XIII***
***Preliminary objections***

A. The nature and characteristics of the preliminary objections .....596
1. Their effect on the proceedings .....597
2. Their purpose.....599
3. Their classification .....601
a) According to their effect .....602
b) According to their scope with respect to the application 602
c) According to their purpose.....603
i. The lack of jurisdiction of the Court. .....604
ii. The inadmissibility of the application.....609
a) Defects of form .....610
b) The omission of prior procedural requisites.....610
c) The extemporaneous filing of the application.....612
d) The lack of competence of the Commission .....612
e) The lack of guarantees for the State's defense .....613
B. The admissibility of the preliminary objections .....615
1. The competent body .....617

2. When to interpose preliminary objections .....618
3. Their grounds and the necessary evidence .....624
C. The processing of preliminary objections .....626
1. Their notification.....627
2. The written observations .....628
3. The public hearing.....629
4. Their joining to the merits .....630
D. Withdrawal of the preliminary objections .....634
E. The decision of the Court .....635

## *Chapter XIV*
## *The procedural stages on the merits*

A. The conditions of admissibility of the application .....641
B. The filing of the application .....648
1. The preliminary examination of the application .....651
2. Notification of the application .....652
3. The representation of the parties .....654
4. The intervention of the individual .....655
5. The content of the application .....655
C. The reply to the application and the stages of the proceedings ...660
1. The joinder of cases and the proceedings .....660
2. The written stage .....661
a) The period to answer the application .....662
b) The formal requisites .....662
c) The content of the reply .....663
i) Rejection of the application .....663
ii) Acceptance by the State of all or part of the charges...664
d) The transmittal of the reply.....667
e) The other documents of the written stage .....667
3. The oral stage .....670
a) The date and hour of the hearings .....670
b) The site of the hearings .....671
c) The proceedings .....672
4. The final arguments.....674

5. The intervention of *amicus curiae*.....676
D. Establishing the facts .....678
1. An agreement between the parties .....679
2. The attributes of the Court to receive evidence.....680
a) The competence of the Court to receive evidence .....681
b) The determination of what is considered necessary.....683
c) The evidentiary actions on its own motion .....683
d) The obligation of the States to cooperate with the Court...686
e) The protection of witnesses and experts .....688
3. The burden of proof.....689
a) The offering of evidence .....691
b) When to present the evidence .....693
4. The elements of evidence .....697
a) The evidence of witnesses.....697
b) The evidence of experts .....702
c) Documentary evidence.....704
d) Judicial inspections .....707
e) Indicia or presumptions.....708
f) Proof rendered before the Commission.....712
5. Admissibility of the evidence.....712
6. Control and immediacy of the evidence.....714
7. Objections to the evidence .....715
a) Objections to witnesses and experts.....716
b) Objections to other evidence .....719
8. Weighing the evidence .....720
E. The effect of the non-appearance of a State .....724
F. Closing the case .....728

## *Chapter XV*
## *Judgments and rulings on reparations*

A. The internal discussions and practice of the Court.....733
B. The identification of the case .....737
C. The content of the judgment.....740
1. Establishment of the facts .....740

2. The legal qualification of the facts .....741
3. The determination of State responsibility .....747
4. The obligations arising from the responsibility of the State.....748
   a) The guarantee of the right infringed .....748
   b) The duty to make reparation and to pay fair compensation .....749
   c) The guarantee against recidivism.....750
   d) The obligation to investigate the facts and punish those responsible .....750
D. Reparations and indemnification .....753
1. The obligation to make reparation in International Law .....753
2. The distinction between "reparation" and "compensation" ...756
3. Reparation in the broad sense.....764
4. Compensation as a form of reparation .....773
   a) The scope of the indemnification .....774
   b) The elements of an adequate compensation.....777
      i. Material damages .....780
         (a) Consequential damages .....780
         (b) Lost earnings .....781
         (c) Damage to family estate .....782
      ii. Non-pecuniary damages .....783
      iii. Damage to the project of life (life plan).....789
      iv. The claim of punitive damages .....794
   c) The amount of compensation .....795
   d) The form of compensation .....798
5. The evidence on damages .....801
6. The injured party and the beneficiaries of the compensation.....810
7. The point in the proceedings at which reparations are ordered.....816
8. The proceedings to determine reparations .....820
   a) The decision on reparations joined to the judgment on the merits .....820
   b) The decision at the stage of reparations .....821

c) Their determination through an agreement between the parties .....823
d) The determination of compensation by national tribunals...826
9. The means of compliance.....829
E. The ruling on costs .....832
1. The costs of the Commission .....835
2. The costs of the petitioner .....837
a) The costs.....838
b) Lawyers' fees .....840
c) Future expenses .....844
d) Taxes .....845
3. The State's costs .....847
F. Publication of the judgment .....847
G. Notification, compliance and execution of the judgment.....848

***Chapter XVI***
***The available remedies***

A. Interpretation of the judgment .....867
1. Who may request the interpretation .....868
2. The appropriateness of the interpretation .....870
a) The purpose of the interpretation .....870
b) The judgments for which the remedy is appropriate.....875
3. When to present it.....876
4. The applicable procedure .....876
5. Amplification of the original request.....878
B. The request for revision .....878
C. The request for nullification.....880

***Chapter XVII***
***The advisory jurisdiction of the Court***

A. The scope of the advisory jurisdiction .....885
1. Jurisdiction *ratione materiae* .....885
a) The interpretation of the American Convention or other treaties .....885

i. The interpretation of the Convention .....886
ii. The interpretation of other treaties.....889
b) The compatibility of domestic legislation with the Convention .....892
2. Jurisdiction *ratione personae* .....895
a) The OAS member States .....897
b) The OAS organs .....897
c) Withdrawal of the request .....899
3. The relationship between the jurisdictions *ratione materiae* and *ratione personae* .....900
B. The formal requirements of the request .....901
C. The admissibility of the request .....903
1. The nature of the request .....904
2. Requests on pending contentious cases.....905
3. The admissibility of advisory opinions on other treaties .....912
4. Requests concerning draft legislation.....913
D. The proceedings .....914
1. Notification of the request.....915
2. Written observations.....915
a) Objections to the admissibility of the request .....916
b) The intervention of *amici curiae*.....917
3. The public hearing.....918
4. The advisory opinion of the Court .....919
E. The legal effect of the misnamed advisory opinions .....921

***Conclusion***
***Taking stock and perspectives***

A. The impact within the system.....927
B. Political promotion and judicial protection .....928
C. The comparison with the european system .....929
D. The guarantees of independence of the organs of protection of the system.....931
E. The procedural limitations.....932

F. The patience of the users of the system.....934
G. The insufficient political will of the states .....936
H. The evolution of the jurisprudence.....937
I. An encouraging picture .....938

A final word .....941

Bibliography .....943

## *Appendix*

Status of the Ratifications on the American Convention on Human Rights (As of March 31, 2004) .....965

Contentions cases submitted th the Inter-American Court of Human Rights (As of March 31, 2004) .....967

Request to the Inter-American Court of Human Rights under Article 64 (As of March 31, 2004) .....979

# Foreword to the English Edition

It is with deep satisfaction that I present the English version of "The Inter-American System for the Protection of Human Rights." The translation of this study by Professor Faúndez Ledesma has been done under the auspices of the Latin American and European Network on Human Rights (LAEHR), one of the objectives of which is to contribute to the study of human rights in the inter-American system. This book has been translated into English at a propitious moment given the increasing importance of the inter-American human rights system, the sparse information about it in English and the urgent need to have a work of such high quality to serve as an aid in understanding this regional system.

The ever-increasing tendency to carry out studies of comparative law and to refer at the international level to the invaluable work of the Inter-American Commission and Court in, among others, creating jurisprudence, protecting rights and establishing State responsibility make this version an important aid for those interested in human rights. This is undoubtedly one of the most profound and complete works on the functioning of the inter-American system.

Prof. Faúndez Ledesma's book presents a broad vision of the system from an institutional and procedural point of view and is a valuable addition for the academic community in general and, above all, for those outside the Americas. That is the great importance of the translation of this study, which will provide a broader public with a better knowledge of the material.

On behalf of the Latin American and European Network on Human Rights, I trust that the content of this work will be useful to the academic community, students and jurists who work in the area of human rights. We hope that the translation of this magnificent work contributes in some way to the study and dissemination of those rights.

I cannot conclude without thanking Prof. Faúndez Ledesma for his great intellectual effort and also to extend my thanks for the important support of the Inter-American Institute of Human Rights of San José, the universities and institutes of the LAEHR that promoted and made possible this version of Prof. Faúndez Ledesma's book.

Professor Leo Zwaak
Utrecht University

One of the great satisfactions of an Executive Director of an institution dedicated to education in human rights, as is the Inter-American Institute of Human Rights, is the opportunity of providing a key that enables interested persons to unlock the possibilities of the inter-American system for the protection of human rights.

The Institute has become increasingly recognized as the academic arm of the system. Although it is an autonomous body that is independent of the Organization of American States, this role has been recognized in various resolutions of the OAS General Assembly. The Institute's Statute also charges it with working closely with the Inter-American Court on Human Rights and the Inter-American Commission of Human Rights, the two pillars of our hemispheric system for the protection of human rights. Important steps have recently been taken to comply with this role, among which special mention should be made of the Agreement of Cooperation for the Promotion of Human Rights, signed in August 2004 by the three Secretariats.

In publishing this English version of Professor Faúndez' exhaustive examination of the inter-American system, which is in its third edition in Spanish, the Institute is fulfilling that part of its mission by making possible a greater and more professional use of those organs. That mission, as enunciated in its Statute, is to promote and strengthen respect for the human rights set forth in the American Convention through education and technical assistance. Since, unfortunately, few of the English-speaking member States of the Organization of American States have ratified the Convention and are, thus, not bound by it, to that mission I would add the promotion and strengthening of the rights enunciated in the American Declaration on the Rights and Duties of Man, which was adopted in March-April 1948 and applies to all OAS member States. As Professor Faúndez ably points out the Declaration achieved a binding force when the Protocol of Buenos Aires entered into force, converting the Commission into an organ of the OAS entrusted with "keeping vigilance" over the rights established in the OAS Charter. The Inter-American Court in its Advisory Opinion OC-10 has stated that "for the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter … with the result that … the American Declaration is for these States a source of international obligations related to the Charter of the Organization."

This book is a basic text for all who are interested in the work of the Court and the Commission. It will be especially useful for those who wish to denounce violations of human rights to the Commission, either as the alleged victim of the violation or as an individual or organization denouncing them on behalf of the alleged victim or victims. It covers every conceivable aspect of the activities of these two essential human rights organs and offers a complete description of their operations that will be of great use to the eventual beneficiaries of the system.

Professor Faúndez, a recognized authority on the system, has devoted long hours to dissecting the decisions of the Court and the Commission. He also casts a critical eye on what he sees as defects in the norms and jurisprudence of the system. Bringing these defects to the public attention is a first step in perfecting the still relatively new system.

The Institute has long been interested in extending its programs to the English-speaking members of the OAS, especially those located in the Caribbean. In May 1999 it sponsored a Regional Course on Human Rights in Barbados to which it invited two representatives of the English-speaking member States of the OAS of that region to a week-long course that covered the principal aspects of the system. The Institute has been fortunate to have the guidance, from its beginnings, of distinguished human rights leaders from the English-speaking countries of the OAS. In fact, the Institute arose out of an idea and through the active promotion of Thomas Buergenthal, a distinguished authority on human rights who now sits on the International Court of Justice. It has also had the active support of other members of its Board from the United States, Canada and the English-speaking Caribbean. Lloyd Barnett from Jamaica, Oliver Jackman from Barbados and Victor Cuffy from St. Vincent and the Grenadines have played a key role in focusing the attention of the Institute on problems in the Caribbean. Unfortunately, the latter two have recently passed away and I would, therefore, like to dedicate this English edition to their memory.

Finally, this English version of Professor Faúndez' book would not have been possible without the financial support of the Latin America and Europe Human Rights Network (LAEHR), which brings together universities and academic centers, including the IIHR, that specialize in human rights in Latin America and Europe and is headquartered at the University of Utrecht in The Netherlands. On behalf of the Board and staff of the Institute and those who will find this book extremely helpful in the never-ending struggle for human

rights, I wish to thank the Network for its continued support and for making possible the publication of this book.

Roberto Cuéllar
Executive Director
Inter-American Institute of Human Rights

# Foreword to the Third Edition

The first edition of this study of the inter-American system for the protection of human rights appeared in 1996. Although it has always been considered a technical legal work, it is more than that. Professor Héctor Faúndez Ledesma has had the skill to deal with a multitude of topics not only with the depth that each juridical or procedural issue requires, but also with absolute courage. He has written on topics that could be considered "thorny" with candor and has included new information in clear language and even, when necessary, with a knowledge that is almost anecdotal, which is a timely methodology that is not traditional in this type of book.

A second revised edition of this study was published at the beginning of my term as Executive Director. This third edition is not only overdue, but also necessary. The relatively recent changes in the Rules of Procedure of the Inter-American Commission and Court broke procedural paradigms, especially by allowing the autonomous participation of the victim vis-à-vis the Commission at all stages of the proceedings in contentious cases before the Court (*ius standi in judicio*) and by modifying and broadening the criteria for the presentation of cases to the Court by the Commission. These reforms represent a quantum leap by both regional human rights organs to open the system to the subject of protection that justifies their existence: the victim of human rights violations. This represents a partial payment of a debt. There remains the vital step of giving the victim the right to submit his complaint directly to the Inter-American Court, a challenge that the Central American countries met almost a century ago with the Central American Court of Justice.

We have thus needed an up-dated version of the "Faúndez book," as this impressive work is known within the inter-American system. It is now available to everyone, especially to those who every day deal with the details of the system at both the non-governmental and governmental levels. For all of us, it is a guide for daily use.

This publication is one more contribution of the Inter-American Institute of Human Rights to the strengthening of the inter-American system through a broad debate and increased emphasis on the new areas that the Commission and the Court are forging in their reports and in their decisions that go beyond the traditional themes of human rights violations in the region. The central challenge is to transform these studies, very close to the thinking of Héctor Faúndez, into new energies that will foster and give political weight to the

procedural transformations taking place in the inter-American system for the protection of human rights.

The impact of the Faúndez book has already been amply demonstrated and thanks to the efforts of our Department of Civil Society Entities, we were able to present this third edition on June 7, 2004 in Quito, Ecuador at the Thirty-fourth General Assembly of the Organization of American States. Since giving thanks is a form of nobility, in the name of those who will use it, practitioners and especially the victims of human rights violations, we salute Professor Faúndez Ledesma for this impressive intellectual effort that transcends personal and professional ambitions.

Roberto Cuéllar
Executive Director

*San José, May 2004*

# Foreword to the Second Edition

The Inter-American Institute of Human Rights (IIHR) is pleased to present a revised and up-dated edition of *The Inter-American System for the Protection of Human Rights: Institutional and Procedural Aspects* by Professor Héctor Faúndez Ledesma. This work, the first edition of which was published by the Institute in 1996, was warmly received by the American and European public, the Latin American university community and the users of the inter-American system for the protection of human rights -both the individuals or non-governmental organizations that present cases to the organs and the governmental agents charged with the legal representation of their States in Washington, D.C. or in San José. In addition, the success of the first edition allowed us to confirm, once more, that the IIHR is a useful instrument of dialogue between civil society and governmental bodies. These reasons prompted the decision to publish this second edition of the book of Professor Faúndez Ledesma.

The work of the Inter-American Court and Commission during the past three years has been unprecedented, reflected in a notable increase in the number of their decisions. This has created a need for a version of Professor Faúndez' book that includes the latest normative developments.

Professor Antonio Cançado Trindade, President of the Inter-American Court, in presenting the first edition of this book as Executive Director of the IIHR, offered us a picture of the inter-American system at a time when it was initiating an evaluation of its functioning. The IIHR contributed to that reflection, which has been recognized in various resolutions of the most important OAS bodies, including its General Assembly. Today, when we have just celebrated the 30th anniversary of the adoption of the American Convention on Human Rights, the 20th of the establishment of the Inter-American Court and the 40th of the Inter-American Commission, the idea of evaluating the functioning of the system has returned with great vigor to the agenda of the Americas and we believe that this new edition will permit a broader debate on the different options that are open to the inter-American system in the near future, especially as regards the practice of its two organs.

As I stated at the inter-American conference on "The Inter-American System for the Protection of Human Rights at the Dawn of the Twenty-first Century," organized by the Inter-American Court to celebrate those anniversaries, we believe that the Court, the Commission and, of course, the Institute, which

was created with the vision to educate in human rights, must work together to explore more profoundly the possibilities of reflection, participation, dialogue and understanding. We are honored that we are part of a system that definitively belongs to all of us and is, therefore, essentially democratic. The publication of this book falls within that intention.

We wish the same success for this edition as the previous one, assuring the IIHR and the author a prominent place among the reference books on the inter-American system for the protection of human rights.

I cannot conclude without thanking the Ford Foundation and the Commission of the European Union for their support, which made possible this edition of the book.

Roberto Cuéllar
Executive Director

*San José, December 1999*

# Foreword
# (to the First Edition)

It is with great satisfaction that I present, in the name of the Inter-American Institute of Human Rights, *The Inter-American System for the Protection of Human Rights: Institutional and Procedural Aspects*, a first-rate study that Dr. Héctor Faúndez Ledesma has opportunely given us. With this publication we continue the broad editorial project that we began two years ago in August 1994, when perfecting the inter-American system held an important place in the hemispheric agenda of human rights.

The perspectives of the regional systems of protection must necessarily be considered within the framework of the universality of human rights. In the construction of a universal culture of human rights observance, an important role is reserved to the regional systems of protection, each of which is undergoing a different historical process.

In the European system, Protocol No. 11 of May 1994 of the European Convention of Human Rights envisions the fusion of its Commission and Court into a single judicial organ of supervision, a new European Court of Human Rights, which will operate as a true European Constitutional Court. In the African system, the creation of an African Court of Human Rights to complete the work of the African Commission on Human and Peoples' Rights is on the agenda.

And in our inter-American system, we are working on achieving a closer coordination between the Inter-American Commission and the Inter-American Court and on gradually perfecting the mechanisms and procedures of the system. Each regional system has its own path, functions at its own rhythm and lives in its own historical moment.

Dr. Faúndez Ledesma's book fills a gap in our specialized bibliography, which for many years has awaited the publication of a study as up-to-date and carefully prepared as this one. The author dedicates attention both to normative and procedural aspects and in a special way to the competences and the procedures of the supervisory organs.

I am sure that this timely publication of the Inter-American Institute will greatly contribute to the dissemination of the topic in general and to the debate in specialized legal circles on the future of the inter-American system

for the protection of human rights. Dr. Faúndez' book already has assured itself a place in the hemispheric bibliography on the subject.

Antonio Augusto Cançado Trindade
Acting Executive Director and
member of the Executive Council of the
Inter-American Institute of Human Rights

*San José, August 1996*

# INTRODUCTION

An area in which international law has undergone great changes in recent decades –one that is still being formed and consolidated– is the law of human rights. This area, which is characterized by the progressive development of human rights and has the broader purpose of preserving and strengthening the rights of the individual, has seen a marked tendency towards the protection of what are considered vulnerable groups, towards the design of more effective international mechanisms of protection and even towards the formulation of new rights.[1]

Inasmuch as respect for human rights is an element that confers legitimacy to the social and political order, almost all States, to a greater or lesser degree, recognize in their internal legal order a list of individual rights and grant at least minimum guarantees for the enjoyment and exercise of those rights. Experience has shown, however, that such guarantees have not been sufficient since they may be subject to the prevailing values and interests of the dominant groups in each society and may be modified unilaterally by the State. Therefore, since the end of the Second World War, greater emphasis has been placed on the international recognition of certain basic rights of the individual, which have been given the term *human rights* and which have been buttressed by international procedural guarantees and protective mechanisms that make up a system of collective guarantee of the States, distinct from and complementary to that found in the national legal order. The rights guaranteed in the Constitutions and other provisions of internal law obviously play a very important role in recognizing and incorporating human rights domestically and in the design of mechanisms to ensure their exercise. As an expression of universally shared values, human rights are, however, a juridical category of international public law, which establishes the list of rights that comprise this category, defines the limits of their content and gives them a collective guarantee in addition to that found in domestic law.

1. *See* Pedro Nikken, La Protección Internacional de los Derechos Humanos: su desarrollo progresivo, Inter-American Institute of Human Rights / Editorial Civitas, S.A., Madrid, 1987, 321 pp.

The American States have participated in this development of the law of human rights and have adopted numerous human rights instruments in the framework of the system created by them with the aim that each State respond for the manner in which it treats every person subject to its jurisdiction. What remains to be examined is the efficacy of the system and the extent to which it is utilized by its eventual beneficiaries.

To pretend that human rights are simply an exotic innovation in the field of international law is not to understand their true dimension or their impact on national and international society. Beyond their normative aspects, human rights are the product of political struggles and depend on historical and social factors that reflect the values and aspirations of each society. At the same time, human rights require an environment in which those rights can be respected. Along these lines, the Inter-American Court has stated that the rule of law, representative democracy and the regime of personal freedom are consubstantial with the regime of protection of the human rights found in the American Convention on Human Rights.[2]

We cannot lose sight of the fact that, as a political and cultural phenomenon, human rights are too important to be left solely to the work of lawyers and that they cannot be fully understood unless they are examined from an interdisciplinary perspective. Neither can we ignore the historical and social context in which they are called upon to operate. As part of this broader effort, our purpose is to contribute to the study of human rights in the framework of a regional system: the inter-American system. It is in this context that we intend to analyze the legal dimension of human rights as an element that contributes to ensuring their full enjoyment.

## A. THE IDEA OF *HUMAN RIGHTS*

We are not going to refer here to the political and subjective content inherent in the idea of human rights or to the different ways in which this term is employed, whether as a moral obligation or an aspiration or an

2. I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985 (hereinafter cited as *Compulsory Membership*). Series A No. 5, para. 66.

ideal to achieve, a product of certain basic needs that must be fulfilled or a manifestation of unsatisfied political demands.[3]

While fully recognizing their political and cultural dimension, in the pages that follow we shall refer to human rights as a normative category, as a reflection of a power derived from the juridical order. We cannot forget, however, that this juridical order is a source of different categories of human rights, both for natural persons and for legal entities, and that by the term *human rights* we refer to *all* the rights that a human being may have,[4] whether from family ties, from contractual or non-contractual relations or from belonging to a social or political group. This expression has been reserved for certain basic, or minimum, rights that are inherent to each person and derive solely from one's condition as a human being. Without identifying exactly *which* are these basic or elementary rights, taking as a point of reference the inherent dignity of the human being we have offered a standard that allows a response to the question and that better identifies the material content of human rights, notwithstanding the old controversy between positivists and naturalists.

### *1. THEIR RELATIONSHIP WITH FUNDAMENTAL RIGHTS*

In this characterization of human rights as basic or minimum rights, we have deliberately avoided the expression *fundamental rights*, which is often used as a synonym of human rights. We believe that the term has a different connotation and that the expression *fundamental rights* refers to the human rights that are simply considered more important than others of a merely secondary nature[5] or to the rights that have an intangible character in that they cannot be suspended under any circumstances. Such an expression permits distinguishing, for example, between the right to life

3. Héctor Faúndez Ledesma, *El estudio de los derechos humanos: su concepto, carácter interdisciplinario, y autonomía juridical*, in REVISTA DE LA FACULTAD DE DERECHO, Universidad Católica Andrés Bello, No. 39-40, Caracas, 1988, p. 67 *et seq*.

4. *Ibid*., p. 71.

5. *See* Resolution XXII, entitled *Expansion of the Functions of the Inter-American Commission on Human Rights*, adopted at the Second Special Inter-American Conference of the Organization of American States, held November 17-30, 1965 in Rio de Janeiro, which requested the Commission to pay special attention to the observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV and XXVI of the American Declaration of the Rights and Duties of Man, relegating the other articles to a secondary status.

and the right to intimacy, the first of which would be *fundamental* as compared to the second or between the prohibition of torture and freedom of expression in that the former involves the absolute guarantee of the right to physical integrity (which in this sense may also be considered *fundamental*) in contrast, for example, to freedom of expression, the exercise of which may under certain conditions be restricted or even suspended. This has not prevented a very extended use in the doctrine of the expression *fundamental rights* as a synonym of human rights.[6] It is clear that this concept may be useful in domestic law, particularly in those States whose Constitutions employ the expression *fundamental rights* in referring to the rights and freedoms found therein,[7] but that circumstance does not necessarily identify them with human rights but rather underscores and emphasizes their difference with the latter. The reference in Article 25 of the American Convention to the "fundamental rights recognized by the constitution or laws of the state concerned or by this Convention" does not, therefore, authorize the use of this expression as a synonym of human rights since that would ignore the distinct categories of rights that the Convention establishes and would ignore the fact that some of them refer to rights that under the Convention may be characterized as fundamental rights.

## *2. THE ELEMENTS THAT DEFINE THEM*

This substantive idea also implies a no less important formal element that indicates the circumstances in which human rights acquire relevance.

6. *See, e.g.*, Gregorio Peces-Barba, ESCRITOS SOBRE DERECHOS FUNDAMENTALES, EUDEMA, Madrid, 1988; Antonio López Pina, LA GARANTÍA CONSTITUCIONAL DE LOS DERECHOS FUNDAMENTALES, Editorial Civitas S.A., Madrid, 1991; Gregorio Robles, LOS DERECHOS FUNDAMENTALES Y LA ÉTICA EN LA SOCIEDAD ACTUAL, Editorial Civitas S.A., Madrid, 1992; Jesús García Torres and Antonio Jiménez Blanco, DERECHOS FUNADAMENTALES Y RELACIONES ENTRE PARTICULARES, Editorial Civitas S.A., Madrid, 1986; Lorenzo Martín Retortillo and Ignacio de Otto y Pardo, DERECHOS FUNDAMENTALES Y CONSTITUCIÓN, Editorial Civitas S.A., Madrid, 1988; Angel Gil Hernández, INTERVENCIONES CORPORALES Y DERECHOS FUNDAMENTALES, Editorial COLEX, Madrid, 1995; Rafael de Asís Roig, LAS PARADOJAS DE LOS DERECHOS FUNDAMENTALES COMO LÍMITES AL PODER, Editorial Debate, Madrid, 1992; Mauricio Fioravanti, LOS DERECHOS FUNDAMENTALES, Editorial Trotta, Universidad Carlos III of Madrid, Madrid, 1996 and Antoni Rovira Viñas, EL ABUSO DE LOS DERECHOS FUNDAMENTALES, Ediciones Península, Barcelona, 1983.

7. *See* Section I of the Basic Law of Germany, which may be considered a precursor of this tendency and was followed by Section 1a. of Chapter I of the Spanish Constitution and by Chapter I of Title II of the Constitution of Colombia (although, in this case, excluding economic, social and cultural rights and environmental rights).

Human rights are, above all, the prerogatives that the individual has vis-à-vis State power and that limit the exercise of the latter. In the words of Judge García Ramírez, human rights are the "precise boundary between the legitimate action of the State and illegitimate behavior of its agents."[8] According to the Court, safeguarding "the individual in the face of the arbitrary exercise of the power of the State is the primary purpose of the international protection of human rights,"[9] for which "the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power."[10]

Taking into account these considerations, human rights may be defined as the prerogatives that each individual has under international law vis-à-vis the organs of power to preserve his dignity as a human being and the function of which is to exclude State interference in specific areas of individual life as well as to ensure the granting of certain services by the State to satisfy the individual's basic needs. They reflect the fundamental requirements that every human being may demand from the society of which he is a part.

The proposed definition refers to both the material and the formal elements inherent in the concept of human rights. It alludes to the universal nature of those rights, as a juridical category of positive law and not as a philosophical idea, and includes the obligations of the State with respect to civil and political rights as well as to economic, social and cultural rights. This definition also emphasizes the historical nature and importance of human rights and suggests that they are the unfinished product of social struggles and that they reflect the type of society in which we wish to live. It cannot escape our attention that human rights have a fluid and dynamic nature that corresponds to the relations of power and the prevailing ideas in the heart of the society where they are in force. In this context, once guaranteed as such, they become irreversible and are part of a process of progressive development that has slowly expanded the catalogue of human

8. *See* I/A Court H.R., *Case of Bulacio*. Judgment of September 18, 2003. Series C No. 100, para. 25 of his concurring opinion.

9. I/A Court H.R., *Case of Baena Ricardo et al., Competence*. Judgment of November 28, 2003. Series C No. 104, para. 78.

10. I/A Court H.R., *The Word "Laws" in Article 30 of the American Convention on Human Rights*. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 21.

rights, the outer limits of each of these rights and the international mechanisms for their protection.

## B. HUMAN RIGHTS AS RIGHTS VIS-À-VIS THE STATE

With their incorporation into international legal instruments, human rights have evolved from a simple group of more or less shared ethical values into a normative category of greater importance since they require a legitimate behavior on the part of State bodies. Human rights have historically developed as a guarantee for the individual and for society's most vulnerable groups against State oppression, placing the rights of the individual over the rights of the State, of society and of other groups. The function of the law of human rights is, therefore, not to protect the individual from other individuals, which is the responsibility of domestic laws, but to protect him from the exercise of State power.

The law of human rights recognizes a group of rights for the individual and assigns correlative obligations to the State. In the inter-American system, pursuant to Article 1.1 of the Convention States must respect the rights and freedoms enshrined in the Convention and must organize public power in such a way as to guarantee to all persons subject to their jurisdiction the free and full exercise of human rights. It is the conduct of the State through those who act in the exercise of public authority that may be characterized as a violation of human rights. The Inter-American Court has held that "respect for human rights constitutes a limit to a State's activity, and this is true for any organ or official in a situation of power, due to its official nature, with regard to other persons."[11] The function of the law of human rights is to regulate the exercise of public power vis-à-vis the individual. It is not concerned with the conduct of the individual vis-à-vis the organs of the State, even when such conduct is considered subversive. The Inter-American Commission has observed that, in the case of reciprocal incriminations, it cannot open an investigation in which the complainant is the government because its function is not to examine cases against groups accused of being subversive but against

11. I/A Court H.R., *Constitutional Court Case.* Judgment of January 31, 2001. Series C No. 71, para. 68.

contracting States.[12] It is the function of the State to adopt the measures necessary to preserve the stability of its institutions and to punish those who violate its legal order. The international bodies established under the law of human rights have the responsibility to oversee that the State, in the exercise of that power, does not go beyond the limits imposed by its duty to respect human rights.

The Court has held that the Convention places on the State the fundamental duties to respect and ensure human rights in such a way that

> any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention. …any exercise of public power that violates the rights recognized by the Convention is illegal. Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention.... This conclusion is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority; under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.[13]

### *1. THE SO-CALLED* VERTICAL EFFECT

In addition to their distinctive trait as universal rights inherent to all human beings, which distinguish them from other rights, human rights are also characterized by the fact that the correlative obligations fall on States and not on individuals or groups of individuals, an aspect that the doctrine refers to as the *vertical effect* of human rights.[14]

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12. *See* I/A Commission H. R., Report No. 6/91, Case 10.400, Guatemala, adopted February 22, 1991, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1990-1991, General Secretariat of the Organization of American States, Washington, D.C., 1991, p. 220, para. 90.

13. I/A Court H.R., *Velásquez Rodríguez Case*. Judgment of July 29, 1988. Series C No. 4, paras. 164, 169 and 170 and *Godínez Cruz Case.* Judgment of January 20, 1989. Series C No. 5, paras. 173, 178 and 179.

14. An earlier expression of the necessity of protecting the individual from abuses or excesses of State power is reflected in the idea of fundamental freedoms that, although more limited than the concept of human rights, emphasizes the obligation of the State to refrain from interfering in the exercise of certain individual rights.

These are not rights to decide controversies between individuals or disputes between corporations nor are they an area of law to resolve conflicts between public powers. As a corollary to the foregoing, Article 44 of the Convention grants to persons, groups of persons or non-governmental organizations the right to present complaints to the Commission against States for violations of the human rights guaranteed by the Convention. It does not provide for the possibility of an individual denouncing another individual or of a State organ denouncing another State organ with the purpose of resolving a controversy between public powers. It should be pointed out that a case decided by the Inter-American Court, known as the Constitutional Court Case,[15] was not the result of a complaint by a State organ against the State itself or other State powers but rather a complaint presented initially by a group of legislators who appeared before the Commission in their personal capacity to claim that the human rights of three members of that tribunal, not the rights of the Constitutional Court itself or another public power, had been violated by the State.

The Inter-American Court has held that the international protection of human rights should not be confused with criminal justice since the Court does not punish those persons who are guilty of violating human rights but has the function of protecting the victims and of determining the reparations for the damages caused by the State responsible for those actions.[16] For such effect, the Court is not required to determine, as in criminal law, the guilt of the perpetrators nor is it essential that it identify individually the agents to whom these acts are attributed. It is sufficient to demonstrate that the State has supported or tolerated the public power that infringed the rights set forth in the Convention or that the State has not taken the necessary steps under domestic law to identify and, where applicable, to punish the perpetrators of the violations.[17] In its *Report on Terrorism and Human Rights*, the Commission, while not speculating on the evolution of terrorism, limited itself to considering "the member states'

15. *Constitutional Court Case, surÓa* note11.

16. I/A Court H.R., *Bámaca Velásquez Case*. Judgment of November 25, 2000. Series C No. 70, para. 98.

17. I/A Court H.R., *The "White Van" Case (Paniagua Morales et al.).* Judgment of March 8, 1998. Series C No. 37, para. 91 and *The "Street Children" Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, para. 75.

(of the OAS) international legal obligations as presently constituted" and emphasized that, in accordance with Article 15 of the Inter-American Convention on Terrorism, those obligations include the requirements of the international law of human rights and that they "expressly contemplate the need to take exceptional measures in certain situations to protect human rights and democratic governance."[18] According to the Commission, "the very object and purpose of anti-terrorist initiatives in a democratic society is to protect democratic institutions, human rights and the rule of law, not to undermine them."[19] In cases in which States appear before the Court, they do not do so as defendants in a criminal trial since the Court does not impose punishments on those persons found guilty of violating human rights.[20]

This very clear characteristic of human rights does not in any way ignore the effect of relations among individuals in their enjoyment and exercise of those rights, which constitutes their so-called *horizontal effect*, and that also includes specific obligations for the States as guarantors of those rights. In this respect, the Court has held that the States parties to the Convention have the obligation to prevent, investigate, identify and punish the intellectual authors and accessories of human rights violations and that, on the basis of this obligation, the State has the duty to avoid and combat impunity, which has been defined as "the overall lack of investigation, tracking down, capture, prosecution and conviction of those responsible for violating the rights protected by the American Convention."[21]

The so-called *vertical effect* may also be explained from the perspective of international law where a radical difference may be observed between classical international law and the international law of human rights. In the former, relations among States, as the only subjects of that legal system, are posed basically in horizontal terms, that is, as relations

18. I/A Commission H.R., REPORT ON TERRORISM AND HUMAN RIGHTS, General Secretariat of the Organization of American States, Washington, D.C., 2002, para. 14.

19. *Ibid*., para. 2 of the Executive Summary.

20. *See, e.g.*, I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al.* Judgment of June 21, 2002. Series C No. 94, para. 66.

21. I/A Court H.R., *Ivcher Bronstein Case*. Judgment of February 6, 2001. Series C No. 74, para. 186 and *Constitutional Court Case*, *supra* note 11, para. 123.

among equals. On the other hand, the international law of human rights implies an unequal relationship between the State and the individuals subject to its jurisdiction, which may be characterized as a vertical relationship.[22] Thus understood, the international law of human rights is the last rational recourse available to the State before it falls into barbarity.

In this vertical relationship between the individual and the State, the international law of human rights provides the former with a collective guarantee of his rights. The Court has held that the American Convention and other human rights treaties "are inspired by a set of higher common values (centered around the protection of the human person), are endowed with specific supervisory mechanisms, are applied as a collective guarantee, embody essentially objective obligations, and have a special nature that sets them apart from other treaties, … (which) govern mutual interests between and among the States Parties and are applied by them, with all the juridical consequences that follow therefrom for the international and domestic legal systems."[23]

### *2. NON-STATE AGENTS*

As part of the political debate in a world marked by violence, there has been much debate on one of the elements of the concept of human rights: the question of who can violate them. It has been suggested that States, international organizations, multinational corporations and guerilla groups or terrorists, not to mention common delinquents, may also be responsible for violations of human rights.[24] The most orthodox doctrine, however, reserves the concept of human rights exclusively to relations between the individual and the organs of the State. According to the Court, "the objective of international human rights law is not to punish those

22. *See* concurring opinion of Judge Cançado Trindade in I/A Court H.R., *Castillo Petrazzi et al. Case, Preliminary Objections.* Judgment of September 4, 1998. Series C No. 41, para. 8, note 6.

23. I/A Court H.R., *Ivcher Bronstein Case. Competence*. Judgment of September 24, 1999. Series C No. 54, para. 42 and the *Constitutional Court Case. Competence.* Judgment of September 24, 1999. Series C No. 55, para. 41.

24. It has been suggested that the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), adopted in Belém do Pará, Brazil on June 9, 1994, may be read in the sense that human rights may also be violated by individuals. In this connection, Article 2 of that Convention, which defines violence against women to include that occurring within the family or domestic

individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible."[25] The Court has also stated that the jurisdiction of the organs established by the Convention for the protection of the rights found in the Convention "refers exclusively to the international responsibility of states and not to that of individuals."[26] The Court has also observed that it does not have jurisdiction to judge the nature and seriousness of crimes attributed to the alleged victims, but that its primary function is to safeguard human rights regardless of the circumstances,[27] to which could probably be added, with regard to all persons.

This, of course, does not pretend to suggest that the behavior of individuals may not violate the same juridical guarantees that the international law of human rights attempts to safeguard nor much less that this is incompatible with the suppression of crime. According to the Court,

> Without question, the State has the right and duty to guarantee its security. It is also indisputable that all societies suffer some deficiencies in their legal orders. However, regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action.[28]

Failure to prevent crimes and to punish delinquents constitutes a violation of the obligations that the State has undertaken in the area of

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unit or within any other interpersonal relationship, is cited. However, it is incorrectly assumed that "violence against women" is, technically, a synonym of human rights. On the other hand, Chapter III of the Convention, entitled "Duties of the States," which obligates the State, and only the State, to adopt all appropriate measures to prevent, punish and eradicate violence against women, is not cited. Similarly, Article 12 of the Convention, which permits any person or group of persons to present petitions to the Inter-American Commission on Human Rights that contain denunciations or complaints of the violation of Article 7 of the Convention by a State Party, is ignored. The fact that violence against women might take place within the family or domestic unit does not relieve the State of the responsibility of not having adopted the necessary measures to prevent or punish it.

25. *Velásquez Rodríguez Case*, *supra* note 13, para. 134. Also, *Godínez Cruz Case*, *supra* note 13, para. 140 and I/A Court H.R., *Fairén Garbi and Solís Corrales Case*. Judgment of March 15, 1989. Series C No. 6, para. 136.

26. I/A Court H.R., *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (Arts. 1 and 2 of the American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 56.

27. I/A Court H.R., *Castillo Petruzzi et al. Case*. Judgment of May 30, 1999. Series C No. 52, para. 89.

28. *Velásquez Rodríguez* and *Godínez Cruz Cases*, *supra* note 13, paras. 154 and 162, respectively.

human rights in guaranteeing the right of each person to live without fear of being exposed to criminal violence and in preventing, by all possible means, impunity for such acts. An illegal act that is initially not imputable to the State because it is the work of an individual may lead to the State's international responsibility, not for the act itself but for the lack of diligence by the State to prevent it and effectively guarantee human rights.[29] The determination of the responsibility of those individuals and the relevant sanctions at this stage of the development of international law is for the national tribunals, with a few exceptions such as the International Criminal Court, the Statute of which recently entered into force.[30]

The function of the international law of human rights is different than that of criminal law. Since State agents are not exempt from complying with the law, crime fought with crime or excesses committed in its suppression or power used in a manner contrary to the purpose of the State cannot be justified.[31] The enjoyment of human rights is what allows us to distinguish between a policeman and a delinquent. The Court has recognized that it is aware of the suffering of the victims and their families in cases of murder and has recalled that States have the duty to protect potential victims from this type of crime, to punish those responsible and generally to maintain public order, which may be affected by the proliferation of crime. At the same time, the Court has held that the States' struggle against crime must be conducted with full respect for the human rights of the persons subject to their jurisdiction and in compliance with the applicable human rights treaties.[32] As the Court has suggested in the Velásquez Rodríguez and Godínez Cruz Cases,[33] in a democratic society human rights imply a functional equilibrium between the exercise of power and the minimum margin of freedom to which its citizens may aspire.

29. *Ibid*., paras. 172 and 182, respectively.

30. *See* I/A Court H.R., *Caballero Delgado and Santana Case.* Judgment of December 8, 1995. Series C No. 22, para. 60 and *Castillo Petruzzi et al. Case, supra* note 27, para. 90.

31. This consideration has not escaped the attention of the Court, which has stated that "In the terms of Article 5.2 of the Convention, every person deprived of her or his liberty has the right to live in detention conditions compatible with her or his personal dignity, and the State must guarantee to that person the right to life and to humane treatment. Consequently, since the State is the institution responsible for detention establishments, it is the guarantor of these rights of the prisoners." I/A Court H.R., *Neira Alegría et al. Case*, Judgment of January 19, 1995. Series C No. 20, para. 60.

32. *Case of Hilaire, Constantine and Benjamin et al., supra* note 20, para. 101.

33. *See Velásquez Rodríguez* and *Godínez Cruz Cases, supra* note 13, paras. 154 and 162, respectively.

The function of human rights law is not to judge the conduct of individuals from the perspective of the criminal norms that might be applicable under domestic law but to decide on possible violations of the international law of human rights committed by States.[34] Therefore, the commission of an illegal act by individuals "would result in the intervention of the regular courts for a judgment as to the liability of those who committed it, but will not override the human rights of the accused nor deprive them of the possibility of access to organs of international jurisdiction."[35] If individuals commit a crime it may result in penal consequences, which depend on the crime, but it does not relieve the State from complying with the obligations that it assumed in ratifying the Convention.[36] The States clearly understand that distinction and have sometimes used it in their own defense. In the Blake Case, the State argued that the intention of the Commission was to convert a common crime into a human rights case and that the acts denounced (aggravated homicide or murder) were a criminal act that could not be imputed to the State and were not a human rights violation.[37]

In this connection, the saying, sometimes attributed to George Bernard Shaw, that while it is terrible for cannibals to eat missionaries, it would be worse for missionaries to eat cannibals, acquires meaning and emphasizes the civilizing role of the international law of human rights as a normative instrument designed to protect the individual, *all individuals*, and to prevent the State from falling into the temptation of wrongdoing. The State has the duty to enforce the law, but it must also strictly obey the law. The exercise of authority does not give license to break the law, even under the pretext of combating crime or violence.

The so-called *vertical effect* of human rights obviously implies an ideological option in which the individual comes before the State and the social group[38] and is distinct from other equally valid options that are inclined toward the interests of the collectivity when the latter conflict with the rights of the individual.[39] Paradoxically, those who most insist in

34. *Castillo Petruzzi et al. Case, Preliminary Objections, supra* note 22, para. 83.
35. *Ibid*., para. 84.
36. *Ibid*., para. 103.
37. I/A Court H.R., *Blake Case.* Judgment of January 24, 1998. Series C No. 36, paras. 17 and 84.
38. What might be characterized as the theory of classical liberalism or of liberalism as regards politics.
39. What might be characterized as the theory of socialism.

calling the international law of human rights a joke or the Magna Carta of delinquents and who favor the defense of society do not carry their theory to the ultimate consequences nor do they hold the same position in other areas. In fact, when it is a question of financial crimes such as bank fraud, those same sectors are quick to claim that the accused has the right to the benefit of the doubt and the right to be presumed innocent until proven guilty. We believe that human rights are the rights of *all persons* in their relations with organized society and not only the rights of a privileged minority.

There is no doubt that the actions of irregular armed groups have an adverse effect on the enjoyment of human rights.[40] It cannot be inferred, however, from this that such acts constitute, in the technical sense of the expression, a violation of human rights. Faced with guerillas, terrorists or the common criminal, the individual counts on the protection that the State provides by its criminal law[41] or, internationally, on humanitarian law, which imposes obligations on belligerents.[42] In the same way, the individual relies on the new international law of human rights when faced with the exercise of power by State organs.

Moreover, determining who has violated human rights in order to be in compliance with the international agreements in this area is the responsibility of the bodies that have assumed the obligation of respecting those rights –the States– and that are best placed to guarantee them through the organs of public power.

It is the supervisory organs created by the universal and regional systems that judge the *responsibility of the State* based on complaints of

40. *See* Resolution No. 1169 (XXII-O/92) of the General Assembly of the Organization of American States, of May 23, 1992, para. 6.

41. We do not refer to the no less important functions that the State exercises through other branches of law, among them civil, labor, procedural and administrative, that also have the effect of protecting the individual in the enjoyment and exercise of his rights.

42. Found principally in the four Geneva Conventions of August 12, 1949: the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea; the Convention relative to the Treatment of Prisoners of War and the Convention relative to the Protection of Civilian Persons in Time of War and the two additional protocols to those Conventions: the Protocol relating to the Protection of Victims of International Armed Conflicts and the Protocol relating to the Protection of Victims of Non-International Armed Conflicts, both of June 8, 1977.

human rights violations resulting from the direct action of State entities or from a failure of the duty to ensure. In the inter-American system, the States under Article 1 of the Convention undertake the obligation to *ensure* the rights recognized therein and to *guarantee* their free and full exercise.[43] In addition to the fact that Part I of the Convention is entitled "States Obligations and Rights Protected," it is noteworthy that Article 33 of the Convention refers to the competence of the Commission and the Court to decide on the fulfillment of the commitments made *by the States*, excluding acts that neither directly nor indirectly may be imputed to the States. It is also important to point out that the Preamble to the OAS Convention to Prevent and Punish Acts of Terrorism[44] declares that respect for the fundamental rights of the individual, recognized in the American Declaration of the Rights and Duties of Man and in the Universal Declaration of Human Rights, are primary duties of the States.

The existence of international organs to protect human rights arises, therefore, from the need to provide bodies to which individuals may have access when State entities or agents have violated their rights. International bodies established to oversee respect for the obligations undertaken by the States in the area of human rights cannot replace national entities in investigating the commission of unlawful acts, much less judge and punish those responsible for such acts.

Attempting to extend the concept of human rights, which has very precise legal and political connotations, by making State responsibility equal to that of insurgent groups, terrorists or common criminals is a very subtle form of trying to evade the obligations that correspond to the State. These attempts have the purpose of trivializing the idea of human rights and of justifying abuse and arbitrariness as the only possible responses to crime. In any event, this does not justify that States resort to intolerance and political repression in their diverse forms, such as imposing prior

43. According to the position of the Government of the United States, which is not in accord with the doctrine, Article 2 of the Convention, by which the States undertake to adopt the legislative or other measures that are necessary to give effect to the rights and freedoms guaranteed therein, would be the principal obligation assumed by the States and would eliminate the immediate and direct enforcement of the obligation to respect and to ensure found in Article 1. See, Louis B. Sohn and Thomas Buergenthal, INTERNATIONAL PROTECTION OF HUMAN RIGHTS, The Bobbs-Merrill Company Inc., New York, 1973, p. 1365.

44. Signed in Washington, D.C. on February 2, 1971.

censorship on information or ideas of all kinds, interfering in private lives, limiting the exercise of the rights of assembly or of association, restraining freedom of conscience and religion, restricting the exercise of political rights, or having controversies on any matter resolved by tribunals lacking due independence and impartiality.

To suggest that the international law of human rights is a collection of guarantees for delinquents so that they feel confident and act with impunity is more than a twisted abuse of language and institutions: it is a stupidity. The function of the international law of human rights is to serve as a legal standard for free men so that every person is treated with the respect inherent in his dignity. State agents are not exempted from complying with the rule of law and they cannot exercise unlimited power without concern for the citizens they are called upon to serve and for the principles and values that are the basis of community life. To insinuate that those who fight for the rule of law are defending delinquents is a Manichean and immoral argument that tries to distort the truth and misconstrue the role of the State in a democratic society, by pretending to present as legitimate, to paraphrase George Bernard Shaw, missionaries eating the cannibals. There is no doubt that the legal issues involved may be the same and that, from an ethical point of view, it *might* be argued that in any case human rights have been violated. Regardless of the criminal responsibility of the delinquent, the legal and political responsibility to respect human rights corresponds only to the State as their guarantor and we have the right to require a worthy and decent behavior on its part.

This is not the same as saying that State power and human rights are antagonistic and irreconcilable. Very much to the contrary, they are complementary and are in mutual need of each other. In a democratic society, while the State has the duty to respect and ensure human rights, society also needs the organs of power as the best guarantee so that each citizen may fully exercise and enjoy his rights.

## C. THE EFFECTS OF THIS NEW BRANCH OF LAW

Beyond the normative aspect, human rights have had an important political effect that is derived from the interdependence that exists among

human rights, democracy and economic development.[45] The existence of objective conditions that are, *per se*, a violation of human dignity and require efforts leading to the eradication of extreme poverty and the elimination of social injustice cannot be ignored.

This relationship to democracy is, of course, a two-way street in which, while democracy is a necessary element to ensure the enjoyment and exercise of human rights, it is no less true that the full enjoyment of those rights has become an essential part of democracy, which cannot be conceived without them.[46] Democracy and human rights are ideas that have to be developed jointly so that neither is sacrificed to the benefit of the other. It would be wrong to think that human rights are only a problem of the dictatorships of the past and that they are superfluous in a democratic society. The difference is that it is easier in the latter to guarantee them and less traumatic and dangerous to defend them. The Preamble to the Inter-American Democratic Charter affirms that the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights contain "the values and principles of liberty, equality, and social justice that are intrinsic to democracy" and that "the promotion and protection of human rights is a basic prerequisite for the existence of a democratic society." In addition, the Preamble recognizes "the importance of the continuous development and strengthening of the inter-American human rights system for the consolidation of democracy." According to Article 7 of the Charter, "democracy is indispensable for the effective exercise of fundamental freedoms and human rights."

The fact that human rights form part of the international juridical order –many grant it the rank of *ius cogens*– and that a society that does not respect those rights cannot be called a democracy imposes certain

45. *See* the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on June 25, 1993, point 8 of which states that "Democracy, development and respect for human rights are interdependent and mutually reinforcing." *See*, also, with reference only to its relationship with democracy, the Santiago Commitment to Democracy and the Renewal of the Inter-American System, adopted at the 3rd Plenary Session of the Twenty-first Regular Session of the General Assembly of the OAS held on June 4, 1991 in Santiago, Chile, OAS/Ser.P/AG/doc. 2734/91 of June 4, 1991.

46. It is obvious that the situation of human rights is more precarious under dictatorial regimes but, regrettably, their violation is not the exclusive privilege of dictatorships. The difference is that democracy makes it possible to assume commitments to ensure respect for human rights and, by its very nature, rejects assaults by the repressive apparatus that, under other circumstances, may form part of daily life.

obligations on the States with regard to their form of government, which obviously has to be compatible with respect for human rights. It is not surprising that the Court has held that "the just demands of democracy must consequently guide the interpretation of the Convention and especially the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions."[47]

The immediate effect of this development has been to eliminate once and for all the idea of human rights as something that fall within the exclusive domain of States by placing them among the legitimate concerns of the international community. It is not surprising that the OAS General Assembly, the UN Commission on Human Rights, the UN General Assembly and other international bodies now include in their agendas the examination of situations of human rights, not in purely abstract terms but with reference to specific countries and to very concrete situations.

From a formal point of view there is a substantial difference between classical international law and the international law of human rights since the latter does not govern relations among States nor does it imply a reciprocal exchange among them but rather it governs relations between the individual and the State, imposing certain obligations on the latter. Compliance with the international law of human rights does not require reciprocity on the part of individuals or the other States parties to the respective treaties. This aspect has been extensively treated by the Court, which has emphasized that "the object and purpose of the Convention is not the exchange of reciprocal rights between a limited number of States, but the protection of the human rights of all individual human beings within the Americas, irrespective of their nationality,"[48] in such a way that "in concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States but towards all individuals within their jurisdiction."[49] The international law of human rights, therefore, generates objective obligations for the States, distinct from the

47. *See Compulsory Membership*, *supra* note 2, para. 44.
48. I/A Court H.R., *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Arts. 74 and 75). Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 27.
49. *Ibid*., para. 29.

subjective and reciprocal rights of classical international law, and confers on the individual the condition of holder of the rights that derive directly from the international juridical order.

The fact that international human rights treaties are inspired by respect for human dignity and not by satisfying the particular interests of each State party has a special meaning, not only in that it reflects the formation of an ethical conscience of international society but in that it refers specifically to the principles that should guide the interpretation of those treaties. It is well to recall what the International Court of Justice stated regarding the Convention on the Prevention and Punishment of the Crime of Genocide.[50] According to that Court,

> The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention.[51]

It is obvious that both the recognition of the rights of the individual and the creation of international mechanisms of oversight are important innovations in classical international law, which until recently had held that the manner in which a State treated its own citizens was a matter of its exclusive competence. There is no doubt that this is now an area governed by international law and it is even argued that it is a matter that concerns the maintenance of peace and international security and that many of its norms are part of *ius cogens*, which makes them peremptory even against the will of the States.

With respect to the circumstances in which a human rights violation may be attributed to a State, the Inter-American Court has held that "in

50. Adopted by the UN General Assembly in its resolution 260A (III) of December 9, 1948 and in force since January 12, 1951.

51. International Court of Justice, *Reservations to the Convention on Genocide*, Advisory Opinion, ICJ Reports 1951, p. 23.

principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State,"[52] without prejudice to the State's international responsibility for the lack of due diligence to prevent the violation and, where applicable, to punish those responsible.[53]

The purpose of the inter-American human rights system is, therefore, to oversee the international responsibility of the State to respect and ensure human rights, which may be violated either by action or omission, and its duty to ensure that individuals also respect those rights. Moreover, the obligation undertaken by the States requires that they adopt all reasonable measures within their power so that these rights are not violated by individuals (such as common criminals) or by non-State agents of political violence (such as subversive groups or terrorists) and in the event that these measures are inadequate or insufficient that they adopt the measures necessary to prosecute and punish those responsible for the conduct that violated the protected rights. The State must respond not only for the acts of its agents but also, according to the Court, "under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, *even when those agents act outside the sphere of their authority or violate internal law*."[54]

## D. OUR OBJECTIVES

In line with this relatively recent universal tendency, as measured in the terms in which historians mark history, the Americas have seen the adoption of legal instruments and the creation of organs charged with overseeing compliance of human rights. This appears to be a good time to reflect on the characteristics of the inter-American human rights system because there is a greater awareness of the rights, there is already an abundant practice in this area, there exists a considerable number of decisions by the organs of protection and there is beginning to be a more intensive use of its institutions.

52. *See Velásquez Rodríguez* and *Godínez Cruz Cases*, *supra* note 13, paras. 172 and 181, respectively.
53. *Ibid*., paras. 172 and 182, respectively.
54. *Ibid*., paras. 170 and 179, respectively. (Emphasis added.)

Notwithstanding the abundant literature that has been produced in the area of human rights during the past twenty-five years, there remain many issues that have not been covered or that have not been analyzed sufficiently by taking into account the latest developments in jurisprudence and by considering the new dimensions of the problems that now confront the region. What is lacking, above all, is a global vision of the inter-American system that offers not merely a legal but also an historical and political explanation of the road traveled so far that points out its virtues and deficiencies and that suggests future perspectives and the areas that should be evolved.

An evaluation of the inter-American human rights system implies an analysis of its normative elements, the functioning of the organs created as part of its supervisory machinery, an analysis of the competences of those organs and, very especially, a study of the international procedures established to oversee compliance of the obligations assumed by the States and to ensure respect for the rights protected. To paraphrase Ronald Dworkin,[55] it is to determine whether the States have taken seriously the obligations that they have voluntarily undertaken under the American Convention and whether the organs established by it have also taken seriously their tasks of overseeing those obligations and protecting human rights.

It must be borne in mind that the bodies established by the inter-American system to examine individual petitions or State communications that contain complaints of human rights violations are jurisdictional or in the case of the Commission at least quasi-jurisdictional. However, the principles and norms that these organs apply in processing these complaints are not precisely the same as those found in the internal law of the States. If the response to that is that they are international and not domestic bodies, it must be agreed that notable innovations have been introduced in this area with regard to the principles and practices followed by other international tribunals. It, therefore, appears timely to study to what extent the international jurisdiction has contributed to the development of the law of human rights, but we should also explore the differences that exist

55. *See* TAKING RIGHTS SERIOUSLY, Harvard University Press, Cambridge, Massachusetts, 1977, 371 pp.

between that type of international jurisdiction and that created by this new branch of law.

In the end, it all boils down to establishing whether there are truly universal values identified with the concept of human rights that have given rise to a group of juridical norms that have a greater hierarchy than domestic law or whether this is simply an ingenuous illusion, the product of the relationship between States and politics.

These are some of the aspects that, ever mindful of our limitations, we have set out to tackle. We obviously do not have all of the answers and we would be satisfied if, at the very least, we contribute by posing some of the many questions suggested by this material in the hope that this will lead to a better utilization of the inter-American system for the protection of human rights.

# First Part

# THE NORMATIVE SYSTEMS

In referring to the inter-American system for the protection of human rights, we have in mind the diverse mechanisms and procedures established in the Charter of the Organization of American States and other OAS instruments and those found in the American Convention on Human Rights, which with its Additional Protocols is the result of the development and strengthening of this regional system.

From a methodological point of view, a global and coherent analysis of the inter-American system of human rights protection may be presented by means of an historical scheme or one that is merely normative or a combination of both. Following an historical focus, Antonio Cançado Trindade lists four fundamental stages in the evolution of the system: a) the phase of its early history, which includes the adoption of the American Declaration of the Rights and Duties of Man and the legal instruments that preceded and followed it, b) the period of its formation, with the creation of the Inter-American Commission on Human Rights and the gradual expansion of the Commission's functions, c) the phase of its consolidation, beginning with the entry into force of the American Convention on Human Rights and d) the step of perfecting the system, the product of the jurisprudence of the Inter-American Court of Human Rights and the adoption of Additional Protocols to the American Convention[1] and of new treaties that complement it. The complexity of having numerous international instruments makes it necessary in this last stage to distinguish between the central mechanism of the system –the law of the American Convention on Human Rights– and those additional elements supplied by the law of the Protocols and other conventions that, without ignoring their importance, are accessory to the Convention.

Without underestimating the obvious pedagogical value of the scheme proposed by Cançado Trindade and without ignoring the historical evolution of its institutions, the inter-American system may also be examined from an eminently normative perspective that does not exclude

1. *See La Protección Internacional de los Derechos Humanos en América Latina y el Caribe* (preliminary version), United Nations document A/Conf.157/PC/63/Add.3 of March 18, 1993, pp. 13-27.

consideration of its inherent historical and political aspects. This approach, which we will follow, presents two normative human rights sub-systems in the Americas, the result of the diversity of the juridical sources applicable in the area of human rights and the degree to which they are binding on the States. This diversity of sources splits the system into two different branches, which are not incompatible and which are mutually reinforced. In fact, the procedures in each sub-system may be applicable in the same case, which increases the pressure that the inter-American system can bring to bear on governments accused of violating human rights.[2]

The first sub-system includes the attributes of the OAS in the area of human rights with regard to all of its member States. The second is comprised of the institutions and procedures established by the American Convention and other similar instruments and that are only applicable to the States parties to those treaties. Although in both sub-systems there is a common organ, the Inter-American Commission, and although their procedures coincide in several aspects, these two situations have been clearly differentiated in the Rules of Procedure of the Commission.[3] The scope and nature of the Commission's jurisdiction vary considerably depending on whether a State has ratified the Convention, despite the fact that the procedures that the Commission must observe are similar and overlap.[4] While the Commission exercises only political and diplomatic functions with respect to OAS member States that have not ratified the Convention, it has important jurisdictional functions with respect to the States parties to the Convention.

2. Thomas Buergenthal, *El Sistema Interamericano para la Protección de los Derechos Humanos*, in ANUARIO JURÍDICO INTERAMERICANO 1981, General Secretariat of the Organization of American States, Washington, D.C., 1982, p.121.

3. Title II, Chapters II and III of the Rules of Procedure of the Commission.

4. The most appreciable differences are produced at the last step of the procedure and concern the Commission's mediation to achieve a friendly settlement and its actions before the Court, only for those States that have ratified the Convention and have accepted the jurisdiction of the Court.

## Chapter I

## THE SUB-SYSTEM STEMMING FROM THE OAS CHARTER

At the Inter-American Conference on the Problems of War and Peace, held February 21 to March 8, 1945 in Mexico City, the aspiration of having an instrument to govern a regime of human rights was felt with a special vigor for easily understood historical and political reasons. At the Conference, the American republics expressed their support for the idea of establishing an international system to protect human rights and charged the Inter-American Juridical Committee with drafting a Declaration of the International Rights and Duties of Man, with the aim of preparing the way for future commitments in the area.[5]

At the Ninth International American Conference, held March 30 to May 2, 1948 in Bogotá, the American States adopted two important juridical instruments in the area of human rights: a) the OAS Charter,[6] which proclaims the fundamental rights of the individual, without distinction as to race, nationality, creed or sex and which establishes respect for the rights of the human being as one of the fundamental duties of the States and b) the American Declaration of the Rights and Duties of Man, adopted on May 2, 1948, seven months before the adoption of the Universal Declaration of Human Rights.[7]

The American Declaration is an indispensable complement to the Charter since, unlike the latter, it develops the rights that it sets forth. While the Preamble to the Declaration states that the international protection

5. Act of Chapultepec, in INTERNATIONAL AMERICAN CONFERENCES, SECOND SUPPLEMENT, 1945-1954, Pan-American Union, Washington, D.C., 1956, p. 52 *et seq*.

6. The OAS Charter was signed on April 30, 1948 and is in force since December 13, 1951. It has been the object of four important reforms: the Protocol of Buenos Aires, signed on February 27, 1967 and in force since February 27, 1970; the Protocol of Cartagena de Indias, signed December 5, 1985 and in force since November 16, 1988; the Protocol of Washington, signed on December 14, 1992 and in force since September 25, 1997, and the Protocol of Managua, signed on October 6, 1993 and in force since January 29, 1996.

7. Resolution XXX, Final Act of the Ninth International Conference of American States, Bogotá, Colombia, March 30-May 2, 1948, p. 38. Other efforts in the area of human rights were also approved, such as a convention on the granting of civil and political rights to women, a resolution on the economic status of working women and the Inter-American Charter of Social Guarantees. INTERNATIONAL AMERICAN CONFERENCES, SECOND SUPPLEMENT, 1945-1954, *supra* note 5, p. 172 *et seq.* and pp. 195-203.

of human rights should be the "principal guide of an evolving American law," unlike the Charter it is not a treaty[8] and as a mere declaration it is not binding. The Preamble states that the Declaration was conceived as "the initial system of protection considered by the American States as being suited" for when it was adopted. However, the fact that the Declaration is not obligatory, *per se*, does not mean that its contents are not obligatory and that it lacks legal effect. It has been held that many of the rights that it recognizes have become international customary law[9] and that it enunciates fundamental principles recognized by the American States.[10] Moreover, the Government of Peru has argued that "although the Declaration could have been considered an instrument without legal effect before the American Convention entered into force … Article 29 (of the Convention), which prohibits any interpretation 'excluding or limiting the effect that the American Declaration of the Rights and Duties of Man … may have,' has given the Declaration a hierarchy similar to that of the Convention with regard to the States Parties."[11]

The Preamble to the OAS Charter states that "the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man."[12] At the same time, Article 3.l of the Charter establishes that "the American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex" and Article 17 provides that "the State shall respect the rights of the individual and the principles of universal morality."[13]

8. Resolution XL of the Inter-American Conference on the Problems of War and Peace held February 21 to March 8, 1945 in Mexico City (Conference of Chapultepec) states that, to achieve the international protection of human rights, these rights should be defined "in a Declaration to be adopted as a convention by the States." The Bogotá Conference, however, chose a different solution, approving a mere declaration and not a treaty.

9. *See* the position of the Governments of Costa Rica and Uruguay, in I/A Court H.R., *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*. Advisory Opinion OC-10/89 of July 14, 1989 (hereinafter *Interpretation of the American Declaration*). Series A No. 10, paras. 11, 14ii and 18.

10. *See* the position of the Government of Uruguay, *ibid*., para. 14ii.

11. *See* the position of the Government of Peru, *ibid*., para. 13.

12. This idea had already been expressed in paragraph 6 of the Preamble to the Inter-American Treaty of Reciprocal Assistance, signed September 2, 1947 in Rio de Janeiro, which affirms that the "juridical organization is a necessary prerequisite to security and peace, and that peace is founded … on the international recognition and protection of human rights and freedoms."

13. Along this same line, the reforms introduced into the OAS Charter with the adoption of the Protocol of Buenos Aires incorporated new provisions on economic, social and cultural rights in Chapters VII, VIII and IX of the Charter.

Notwithstanding the content and scope of those provisions, the OAS Charter in its original form did not provide for an organ or mechanism charged with the promotion and protection of human rights nor did it envision a body charged with overseeing the enjoyment of those rights. However, another resolution adopted at the Bogotá Conference requested the Inter-American Juridical Committee to prepare a draft statute for the creation of an international tribunal that would be charged with guaranteeing the protection of human rights and fundamental freedoms.[14] Although this initiative was repeated at the Tenth Inter-American Conference held in Caracas in 1954,[15] the obstacles and difficulties initially found by the Juridical Committee and by other OAS organs[16] forced numerous postponements of the matter, while awaiting a more suitable and favorable political environment to execute the mandate of the Conference. This, however, did not prevent the progressive adoption of other human rights treaties, such as the Convention on the Granting of Political Rights and Civil Rights of Women (1949), the Convention on Territorial Asylum (1954) and the Convention on Diplomatic Asylum (1954).

## A. THE CREATION OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

The political unrest in the hemisphere, especially in the Caribbean area and most particularly in the Dominican Republic, led to the convocation of the Fifth Meeting of Consultation of Ministers of Foreign Affairs[17] and to the consideration of two issues: the situation of international tension in the Caribbean and the effective exercise of representative democracy in relation to human rights. The environment was then politically more favorable for the adoption, within the framework of the inter-American system, of suitable measures to promote and protect human

14. Resolution XXXI, Final Act of the Ninth International Conference of American States, *supra* note 7.

15. Resolution XXIX of the Conference, entitled *Inter-American Court for the Protection of Human Rights*, expressed the importance of the further study of this matter and consideration of the possibility of establishing an inter-American tribunal charged with protecting human rights.

16. Notably, the Inter-American Council of Jurisconsultants at the Tenth Inter-American Conference, held in Caracas in 1954, and the OAS Council.

17. Held August 12-18, 1959 in Santiago, Chile.

rights. In addition to a resolution concerning the principles that should govern the democratic system and another that entrusted the Inter-American Council of Jurisconsultants with "the study of the possible juridical relationship between respect for human rights and the effective exercise of representative democracy," a resolution was adopted that instructed that body of experts to prepare a draft convention on human rights and it was resolved to create, in the interim, an Inter-American Commission on Human Rights, whose function would be to further respect for those rights.[18] In fact, this function of mere promotion was rapidly overtaken by events. In the opinion of Edmundo Vargas Carreño, "those who participated in the adoption of these instruments could not have imagined that the normative structure that they were creating would be challenged years later by massive and cruel violations of human rights, unheard of until that time in Latin America, which are a true expression of State terrorism and for which that structure was obviously not envisioned."[19]

Taking into account that background and the fact that the Commission was not created by a treaty but simply by a resolution of an OAS organ adopted by a simple majority of its members, the Commission clearly had, during its first years, a rather ambiguous legal position. It lacked a solid constitutional base to act against the will of the States. In fact, some governments objected that an organ such as the Inter-American Commission had been created by no more than a Meeting of Consultation, without amending the OAS Charter or adopting a treaty.

According to the terms of the second part of Resolution VIII of the Fifth Meeting of Consultation, the Inter-American Commission is composed of seven members, elected in their personal capacity, from slates of candidates presented to the then OAS Council by the governments of the member States. The Resolution provided that the Commission was to be organized by the Council and that it would have the attributes specifically granted by the Council. Complying with the mandate of the Resolution, on May 25, 1960 the OAS Council adopted the Statute of the Commission and on June 29 of that year elected its first members. This set the stage for

18. Resolution VIII, entitled *Human Rights*.

19. *See* his Foreword in Mónica Pinto, LA DENUNCIA ANTE LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, Editores del Puerto S.R.L., Buenos Aires, 1993, p. 16.

the formal installation of the Commission, which took place on October 3, 1960, and for the Commission to initiate its activities.

Under its original Statute, the Commission was conceived as an *autonomous entity* of the OAS that was not based on a treaty and the mandate of which was strictly limited to *promoting* among the member States respect for human rights, understood as those rights contained in the American Declaration, but without explicit powers to ensure their protection. In drafting the Statute, two options were considered that would have conferred broader powers on the Commission by allowing it to receive and process individual petitions or State communications, but neither of them received sufficient votes to be adopted by the Council. However, the rejection of these proposals did not prevent the Commission, despite its reduced powers, from undertaking at least in the case of some countries an intense activity in defense of human rights.

The Commission's Statute named the former Pan-American Union (now the OAS General Secretariat), based in Washington, D.C., as its permanent seat. Nevertheless, since its first days the Commission has been empowered to meet in the territory of any American State, when it so decides by a majority vote and when it has the consent of the government of the State in whose territory it wishes to meet. In fact, it is this provision that permits the so-called on-site visits that the Commission frequently conducts in the member States.[20]

The Commission meets for a maximum period of eight weeks a year, distributed in two or three regular sessions, as the Commission decides. In addition, the Chairman of the Commission or a majority of its members may convoke special sessions. However, the exercise of this option has been strongly restricted by the scant financial resources that the OAS annually assigns to the Commission, which does not allow it to carry out a more intense activity.[21]

20. This was contemplated in Article 11c of the original Statute and in Article 16.2 of the current Statute.

21. The priority that has been given to human rights does not correspond to the reduced resources assigned to the Commission. In 1991, the Commission's budget was only $1,367,100, which scarcely represented 2.2% of the total OAS budget. In subsequent years, both the amount as well as the percentage of the global OAS budget has marginally increased as follows: $1,487,600 in 1992, $1,617,100 in 1993, $1,734,100 in 1994, $1,734,800 in 1995, $3,200,500 in 2001 and a budget adopted for 2004 in the amount of $3,429,900.

As has been indicated, the Commission is composed of seven members, now elected by the OAS General Assembly from slates presented by the governments of the member States in which they may include their nationals or those of other States. Those elected must be of *high moral character and recognized competence* in the field of human rights and nationals of an OAS member State.[22] To assure the participation of nationals from the greatest number of States, it has been provided that among the members there cannot be two nationals of the same State.

According to Commission's original Statute, which does not differ substantially from the current one, its members are elected in their personal capacity and, in accordance with the principle of collective representation, represent all of the OAS member States and act in their name.[23] While the conditions for the selection of its members should ensure an effective body for the defense of human rights in the hemisphere, they have not been sufficiently observed and, in fact, some of the members (fortunately not very many) have been political activists, strongly tied to the government of the country that proposed them or to the political party in power, and have acted without the necessary independence of judgment in exercising their functions, which has regrettably politicized the treatment of such a delicate matter.

The members are elected for a period of four years and may be re-elected only once. The Chairman and the two Vice Chairmen are elected for a period of one year by an absolute majority vote of the members.

## B. THE STATUTORY COMPETENCES OF THE COMMISSION

Among the functions and attributes that were initially granted to the Commission by Article 9 of its Statute, mention may be made of the following:

22. The manner in which the form and the procedure of selection has operated in practice and the attention that has been paid to the requisites to be a member of the Commission will be taken up in the following Chapter, in referring to the composition of the Commission after the American Convention entered into force.

23. The member States are represented by the Commission and not by the members of the Commission. *See*, in this sense, Article 35 of the Convention.

> a) To develop an awareness of human rights among the peoples of America,
> b) To make recommendations to the governments of the member states in general, if it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic legislation and, in accordance with their constitutional precepts, appropriate measures to further the faithful observance of those rights,
> c) To prepare such studies or reports as it considers advisable in the performance of its duties,
> d) To urge the governments of the member states to supply it with information on the measures adopted by them in matters of human rights,
> e) To serve the Organization of American States as an advisory body in respect of human rights.

In accordance with these initial powers, prior to the adoption of the American Convention the Commission considered human rights to be those set forth in the American Declaration.[24] With respect to the States that have ratified the Convention, the applicable legal instrument is the latter, with the Declaration having a merely subsidiary importance. The Declaration is invoked in cases concerning the OAS member States that have not ratified the Convention.

With respect to the special reports that the Commission may prepare, as of January 2004 it has adopted 50 reports on the general situation of human rights in the different countries of the region. The first appeared in 1962 and referred to the situation of human rights in Cuba. The Commission has also adopted reports on particular problems in a specific country. These include the reports on human rights violations in the District of Cayara, Peru (1993), the human rights situation in the so-called "Communities of Peoples in Resistance" in Guatemala (1994), the situation of human rights of asylum seekers within the Canadian refugee determination system (2000), the human rights situation at the Challapalca prison, Department of Tacna, Peru (2003) and the situation of human rights of a segment of the Nicaraguan population of Miskito origin (1983). The

24. Article 2 of the original Statute of the Commission, adopted on May 25, 1960.

Commission has also prepared the following special reports: The Status of Women in the Americas (1998), The Human Rights Situation of the Indigenous People in the Americas (2000), Authorities and Precedents in International and Domestic Law for the proposed American Declaration on the Rights of Indigenous Peoples (2001) and a Report on Terrorism and Human Rights (2002). Finally, there are the reports prepared by the Special Rapporteurs, particularly those presented by the Special Rapporteur for Freedom of Expression.

## C. THE EXPANSION OF THE POWERS OF THE COMMISSION

From its very first days, the Commission perceived that its limited powers contrasted with the magnitude of the responsibilities that it had been given. For that reason on October 28, 1960 during it first session, at the initiative of its Chairman, Rómulo Gallegos,[25] it informed the OAS Council that its attributes did not permit it to fulfill its mission in defense of human rights that the peoples of the Americas expected of it and that the Commission felt that its powers should not be restricted to promoting respect of such rights, but should also include ensuring that they not be violated. It thus proposed that Article 9 of the Statute be amended and that two articles be added.

### *1. THE PROPOSED REFORMS*

The proposed reforms were designed to empower the Commission to examine the petitions that it received from individuals or groups of individuals alleging serious violations of human rights, to draft reports on those communications and submit them to the governments with the recommendations that it deemed appropriate and to authorize it to publish those reports in the event that the government did not adopt the recommendations.[26]

25. A distinguished Venezuelan man of letters who, after having been elected President of Venezuela in December 1947, briefly governed that country from February 1948 until November 24, 1948, when he was deposed by a military coup d'état.

26. Louis B. Sohn and Thomas Buergenthal, INTERNATIONAL PROTECTION OF HUMAN RIGHTS, The Bobbs-Merrill Company, Inc., New York, 1973, pp. 1286-1288.

In support of these initiatives, the Eighth Meeting of Consultation of Ministers of Foreign Affairs held January 22 to 31, 1962 in Punta del Este, Uruguay adopted a resolution in which it recommended that the OAS Council amend the Statute to broaden and strengthen the Commission's attributes and powers to permit it to promote in an effective manner respect for those rights in the countries of the hemisphere.[27]

Understanding that the OAS Council could delay indefinitely the study of its proposals to amend its Statute, the Commission decided to submit the matter to the Second Special Inter-American Conference, held November 17 to 30, 1965 in Rio de Janeiro, which accepted some of the proposals.

## *2. INTERPRETATION OF THE ATTRIBUTES OF THE COMMISSION*

Parallel to this initiative to broaden its powers, the Commission interpreted its attributes very imaginatively and liberally with important consequences for the two procedures that have been decisive in the development of its activities: processing individual petitions and on-site visits.

### *a) Individual petitions*

Notwithstanding the clear terms of its competence, from the beginning the Commission interpreted Article 9.b of its Statute to authorize it to make *general recommendations* to all OAS member States as well as to each of them in particular.[28] On the basis of this interpretation, which probably went further than the original intention of the drafters of the Statute, the Commission initiated studies on the situation of human rights in Cuba, Haiti and the Dominican Republic, making recommendations to the respective governments.[29] This marked the beginning of the publication

27. Final Act of the Eighth Meeting of Consultation of Ministers of Foreign Affairs, Resolution IX, OASOR, OAS/Ser.F/II.8. Doc. 68 Rev.,1962.

28. I/A Commission H.R., REPORT ON THE WORK ACCOMPLISHED DURING ITS FIRST SESSION, October 3 to 28, 1960, OASOR, OAS/Ser.L/V/II.1, Doc. 32, General Secretariat of the Organization of American States, Washington, D.C., 1961, pp. 8-14.

29. I/A Commission H.R., THE ORGANIZATION OF AMERICAN STATES AND HUMAN RIGHTS 1960-1967, General Secretariat of the Organization of American States, Washington, D.C., 1972, pp. 39-53.

of reports documenting human rights violations in specific countries. As a complement to this, although the Commission admitted that it lacked competence to adopt decisions on individual petitions that it received denouncing human rights violations, it held that it was competent to receive and use them in the exercise of its attributes under Article 9.b and 9.c of the Statute –to make general recommendations or to draft studies– and established a procedure to examine these petitions.[30]

One of the most transcendental reforms that arose from the Rio Conference of 1965 concerned the procedure for complaints of human rights violations, which followed the interpretation that the Commission had made of its Statute.

At the beginning the OAS member States were opposed to granting the Commission competence to deal with complaints made directly by individuals, an opinion that was reflected in the terms of the Statute adopted by the Council. However, the Commission received numerous individual petitions denouncing human rights violations in the region at its very first meeting and although it recognized that it was not empowered to adopt decisions on them, it decided that it could receive these petitions for purposes of information and to better fulfill its duties. In the report that it presented to the Rio Conference, the Commission stated that:

> In a salutary and correct interpretation of clauses b), c) and d) of Article 9 of its Statute, the Commission adopted a Resolution that it later incorporated into its Rules by which it held itself competent to examine the communications or claims that it received regarding alleged violations of human rights in the American States, to transmit their pertinent parts to the interested States and request at the same time the corresponding information and to recommend that the States adopt, in accordance with their respective constitutional precepts, the appropriate and progressive measures to further the faithful observance of those rights.

### *b. On-site visits*

Another attribute that the Commission has developed from the time of its creation and that has played an important part in creating a more

30. *See* REPORT ON THE WORK ACCOMPLISHED DURING ITS FIRST SESSION, *supra* note 28, p. 9.

propitious environment of respect for human rights in the Americas is the on-site visit or *in loco* investigation.

Article 11.c of the Statute placed the Commission's seat at the Pan-American Union in Washington, D.C. and provided that the Commission could move to the territory of any American State when it so decided by majority vote and had the consent of the government in question.[31] In accordance with a holistic interpretation of its attributes under the Statute, the Commission understood that it was enabled to adopt measures that were inherent in the exercise of these powers, which included on-site visits or the sending of observer missions that were indispensable to prepare the studies or reports that it deemed advisable or to make the appropriate recommendations to the governments of the OAS member States.

The adoption of the current text of the Statute,[32] whose Article 18.g provides that the Commission may "conduct on-site observations in a State, with the consent or at the invitation of the government in question," removes any remaining doubts on the competence of the Commission to conduct on-site visits.

The on-site visit allows the Commission direct access to its sources and enables it to gather valuable information on the general human rights situation in the territory of an OAS member State, thus facilitating the drafting of the country report or establishing the facts for the examination of an individual complaint. Thanks to the broad publicity that these visits receive before they take place, it is not infrequent that they contribute to a lessening of repression and to promoting a dialogue among the different social forces. In its earliest days, between 1961 and 1974, the Commission made seven on-site visits, the first was to the Dominican Republic (October 22 to 29, 1961), followed by one to Miami, Florida (January 2, 1963) to visit Cuban refugees, to the Dominican Republic (May 5 to 9, 1963), a third visit to the Dominican Republic (June 11, 1965 to June 1, 1966), to El Salvador (July 4, 1969), to Honduras (July 8 to 10, 1969) and to Chile

31. A provision that enabled the Commission to meet in the Dominican Republic in 1961 and 1963 and allowed it to take advantage of this opportunity to receive complaints and consider the general situation of human rights in that country.

32. Adopted by the General Assembly of the OAS by means of Resolution No. 447, at its Ninth Session, held in La Paz, Bolivia, in October 1979.

(July 22 to August 2, 1974). After its visit to Chile, which marked a milestone as the appropriate means to examine a human rights situation in a specific country, the next visit took place at the end of November 1977 at the invitation of the Government of Panama. The Commission then began to make a systematic use of on-site visits, not as an occasional procedure but as an indispensable tool to conduct its work. Without including the visits of the rapporteurs on women and on migrant workers, the Commission had made 86 on-site visits as of August 2003. Since 1977 there have only been two years, 1981 and 1984, in which it has not made a visit to some country of the region. The most visited countries have been Haiti and Guatemala, with 13 and 11 visits, respectively.

As on-site visits require consent, States not only may clearly deny the visit, but may pretend to consent and then subtly make it impossible to conduct the visit. For example, in light of communications from diverse sources that denounced repeated human rights violations in Paraguay, the Commission in 1965 began to request the consent of the government to conduct an on-site visit. Finally in March 1977 through its OAS Representatives, the government informed that "for reasons of domestic politics, an official visit by the IACHR is not advisable, but that the possibility of a visit may be considered on some future occasion at the initiative of the Government of Paraguay."[33] It added that such a visit was not the only means to obtain valid information, since the government had manifested its willingness to provide the information necessary to demonstrate that the accusations directed against it were utterly false.[34] Under those circumstances, in May 1977 the Commission adopted its report on the human rights situation in Paraguay, which was transmitted to the government. In September of the same year (before the report was presented to the OAS General Assembly), the Foreign Minister of Paraguay sent a note to the Commission in which he stated that he was convinced that the Commission after studying the observations of the government to the report would no longer consider it necessary to make a visit to Paraguay but, if not, his government was willing to receive the visit of the

33. I/A Commission H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN PARAGUAY, General Secretariat of the Organization of American States, Washington, D.C., 1978, paras. 1-16.

34. *Ibid*., para. 16.

Commission "on a date to be determined by common agreement."[35] Despite repeated attempts with the official representatives of Paraguay, the Commission did not receive a concrete response as to a date that the government found suitable and the visit never took place.[36]

While a State may deny its consent to hold an on-site visit in its territory, it does not have absolute discretion to permit or refuse such an investigation because of its duty to comply in good faith with the obligations placed upon it by the OAS Charter, as well as its duty to cooperate with the work that it has entrusted to the organs of the system. An unjustified refusal by a State authorizes the Commission to seek other sources of information and to extract the legal consequences that derive from the lack of cooperation by a State.[37] In fact, numerous country reports have been published despite the refusal of a State for an on-site visit.

Once a State has consented to an on-site visit by the Commission, it must furnish all the necessary facilities so that the Commission might fulfill its mission, including the freedom of the members to travel within the country, visit places of detention and speak, confidentially and without fear of reprisals, with any person who has information on the situation of human rights in that country.

Although it would seem normal that the initiative to conduct an on-site visit come from the Commission through a request that the government of the State concerned issue an invitation or, in any case, its consent for the visit, it is also possible that the initiative come from the State itself. For example, the Commission visited Panama from November 29 to December 7, 1977 at the invitation of the Head of Government of that country. This was also the case of the visit made April 21 to 28, 1980 to Colombia at the invitation of the Foreign Minister of that country, after the M-19 seized the Embassy of the Dominican Republic in that country and held hostages.

35. *Ibid*., para. 18.
36. *Ibid*., para. 20.
37. In contrast, Edmundo Vargas believes that the on-site visits authorized by the Convention to establish the facts in the case of individual petitions or State communications do not require the consent of the State in question, which, under Article 48.1.d of the Convention, must provide the Commission with all of the facilities necessary for such effect. *Las observaciones in loco practicadas por la Comisión Interamericana de Derechos Humanos*, in DERECHOS HUMANOS EN LAS AMÉRICAS: HOMENAJE A LA MEMORIA DE CARLOS A. DUNSHEE DE ABRANCHES, Inter-American Commission on Human Rights, Washington, D.C., 1984, p. 292 *et seq*.

As Vargas Carreño has written, it has been a deliberate policy of the Commission that an on-site visit not include all of its members in order to reserve consideration of the report on the visit to the full Commission.[38] Under the terms of Article 55 of the current Rules of Procedure, a Special Commission is appointed to conduct a visit. Moreover, Article 56 prohibits a member of the Commission who is a national or resides in the territory of the State in which the visit is to take place from participating in it, which does not seem to be in keeping with the fact that the members are elected in their personal capacity and not as representatives of a government.

The organization and preparation of the visit is the task of the Executive Secretariat of the Commission, whose officials travel to the country before the visit to resolve logistical details, gather information and prepare a draft agenda for the Special Commission.

Although these on-site visits have a very broad purpose and generally do not pursue the investigation of individual cases but rather examine the general human rights situation of the country where the visit is taking place, there is nothing to prevent the Commission during the course of the visit from receiving individual complaints or investigating those pending before it.

To date (March 2004), the exercise of this attribute has permitted the Commission to conduct almost a hundred on-site visits in the countries of the region, many of which have received the visit of the Commission on more than one occasion.

### *3. RESOLUTION XXII OF THE CONFERENCE OF RIO DE JANEIRO*

The American States did not object to the Commission's very liberal interpretation of its Statute. In fact, as a result of the successful mediation by the Commission during the crisis in the Dominican Republic in 1965, Resolution XXII adopted at the Second Special Inter-American Conference of Rio de Janeiro[39] expanded the mandate of the Commission by

38. *Ibid*., p. 295.
39. Held November 17-30, 1965 in Rio de Janeiro.

incorporating into its functions those that the Commission had considered as inherent, giving it a more active role in the protection of human rights.

Just as a political event –the situation in the Caribbean– marked the birth of the Inter-American Commission, another equally political event –a new crisis in the Dominican Republic and the invasion of that country by forces of the United States– served as the pretext to a broadening of its powers and attributes. In effect, the Rio Conference adopted a resolution entitled Expansion of the Functions of the Inter-American Commission on Human Rights,[40] which authorized amending the Statute adopted by the Council in 1960 in terms compatible with the provisions of that resolution, which the Council did at its next meeting in 1966.

This resolution urged the Commission to "conduct a continuing survey of the observance of fundamental human rights" in each of the OAS member States and requested that it pay special attention to the observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV and XXVI of the American Declaration. Most of the work of the Commission was thus understood to have been concentrated, fundamentally but not exclusively, on the rights guaranteed in those provisions, which refer to the right to life, liberty and personal security, to equality before the law, to religious freedom, to freedom of expression, to the right to a fair trial, to the right of protection from arbitrary arrest and to the right to due process of law.

This same resolution authorized the Commission, formally and expressly, to examine the communications submitted to it and any other available information. In principle, this attribute was applied only to complaints regarding the violation of the fundamental rights mentioned in the previous paragraph and it was soon incorporated into the Commission's Statute, as Article 9 (bis).a. Even with this limitation, the Commission became the first international organ authorized to deal with individual petitions in the absence of a treaty that conferred such a competence.[41]

40. Resolution XXII, adopted at the Second Special Inter-American Conference of the OAS, held November 17-30, 1965 in Rio de Janeiro.

41. See LA DENUNCIA ANTE LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, *supra* note 19, p. 28.

Finally, the resolution authorized the Commission to request of the government of any American State the information that it deemed pertinent and to make recommendations, when it considered it appropriate, in order to achieve a more effective respect for human rights. It also requested the Commission to submit an annual report to the Inter-American Conference (now the General Assembly) or to the Meeting of Consultation of Ministers of Foreign Affairs with the aim of making possible an annual review at the ministerial level of the progress achieved and the degree of protection of human rights in the Americas.[42] Nonetheless, until 1975, the General Assembly only took note of the Annual Report of the Commission and thanked it for its work, avoiding a debate on the Report and the adoption of measures regarding the countries that in the Commission's opinion appeared to be responsible for grave violations of human rights.

Some months after the adoption of that Resolution, at its Thirteenth Session held in Mexico in April 1966 the Commission incorporated into its Statute, as Article 9 (bis), the new powers that had been conferred by the Second Special Inter-American Conference.[43] At this same session, the Commission also amended its Rules to include the new attributes, especially concerning the examination and processing of the communications that it received denouncing human rights violations in the OAS member States, distinguishing between the so-called "general situations," which concern allegations of generalized human rights violations, and complaints on individual cases. In addition, since Article 9 (bis) granted it competence to make recommendations to the States, the

42. At its meeting in May 1975, after receiving the Commission's report on the human rights situation in Chile, the General Assembly broke with its previous practice and adopted a resolution in which it requested the Commission to use all pertinent means to obtain and consider more information and to present at the next session of the General Assembly a new report on the situation of human rights in that country. *See* Resolution 190 of May 19, 1975. The following year, the General Assembly not only adopted a stronger resolution on violations of human rights committed in Chile (AG/OAS, Resolution 243, of June 17, 1976) but also adopted another resolution (AG/OAS, Resolution 242, of June 17, 1976) on some of the aspects treated in the Commission's Annual Report for 1975. Since that time, the General Assembly has examined, with greater or lesser interest, the reports of the Commission and has adopted measures with respect to the situations detailed in the reports.

43. In addition to Article 9 (bis), Articles 7 (bis) and 14 (bis) were added to the Statute. The former authorized the Chairman to go to the seat of the Commission and remain there for the time necessary for the performance of his duties. The latter stated that the secretariat services of the Commission would be provided by a specialized functional unit that would be part of the OAS General Secretariat and that it would have the resources to perform the tasks that had been assigned to it by the Commission.

Commission interpreted it to allow these recommendations to be directed to all the OAS member States or to a particular State and to refer to specific situations of human rights violations.

### *4. THE RULES OF PROCEDURE OF THE COMMISSION*

As a complement to the foregoing, the amended Rules established a special procedure for communications that denounced a violation of one of the fundamental, or preferential, human rights referred to in the second paragraph of Resolution XXII.

In addition to the operational steps found in the original Rules of 1960, this new procedure included: a) the duty of the Commission to verify the exhaustion of internal legal remedies, b) a period of six months to present a complaint to the Commission, counted from the moment of the adoption of the final domestic decision or from the time that the petitioner has concluded that his internal remedies have been arbitrarily hindered or that the final decision has been unjustifiably delayed, c) the establishment of a period of 180 days, from the moment in which the complaint has been communicated to the government in question, for the government to furnish the pertinent information, allowing the presumption of the truth of the acts denounced if the government does not supply the information in the period stipulated, d) the preparation by the Commission of a report on the case with the appropriate recommendations for the government of the State in question, e) authorization for the Commission to make the observations that it deems appropriate in the annual report that it is to submit to the General Assembly or to the Meeting of Consultation of Ministers of Foreign Affairs, if the government has not adopted the measures recommended by the Commission within a reasonable period and f) the publication of its report, if the General Assembly or the Meeting of Consultation does not make any observations to the Commission's recommendations and if the government does not adopt the recommended measures. The Commission also decided to apply this same procedure to the communications that denounce reprisals against the complainant or any person mentioned as a victim in those communications.

## *5. THE PROTOCOL OF BUENOS AIRES*

As the system was not treaty-based, it was characterized in its first stage as lacking a solid juridical base and was plagued with ambiguities that, in the best of cases, only permitted the Commission to act as an instrument of human rights promotion and not as an effective organ for their protection. The Commission was simply an international body created by a resolution of a Meeting of Consultation of Ministers of Foreign Affairs and, since it was not included in the institutional structure of the OAS, it had a very precarious legal standing that forced it to resort to persuasion and to the political and diplomatic skills of its members in order to carry out its functions.

This situation was corrected with the entry into force of the Protocol of Buenos Aires,[44] which amended the OAS Charter. The Charter strengthened the Commission's juridical bases by incorporating it into the text of the Charter and by designating it "a principal organ of the Organization,"[45] the essential function of which is "to promote the observance and protection of human rights and serve as a consultative organ of the Organization in these matters."[46]

The Protocol of Buenos Aires not only freed the Commission from the legal limbo that it had found itself in by granting it the status of treaty organ and principal organ of the OAS, but also strengthened its political and diplomatic attributes with respect to those that had already been conferred on it. The Commission was thus converted into the only OAS body with specific competence in the area of human rights, whose functions ranged from the promotion and the protection of human rights to serving as an advisory body of the OAS in these matters.

To the extent that Article 150 of the amended OAS Charter refers to the Commission existing at the time of the Protocol, with the juridical bases that governed its functioning under its original Statute (Article 2 of which considered as human rights those found in the American Declaration), this reform indirectly gave obligatory juridical effect to the

44. Signed on February 27, 1967 and in force since February 27, 1970.
45. Article 51 of the OAS Charter (now Article 53).
46. Article 112 of the OAS Charter (now Article 106).

Declaration. The Court, citing Articles 112 and 150 of the OAS Charter, has stated that these norms give the Commission competence to oversee human rights and that these rights are none other than those set forth and defined in the American Declaration.[47] Therefore, with respect to the OAS member States that have not ratified the Convention, the Declaration serves as a point of reference to what should be understood by human rights as found in the OAS Charter and the Commission's Statute and Rules.[48]

That system was essentially transitory. In accordance with the amended Charter the structure and competence of the Commission as well as its procedures would be ultimately determined by an inter-American convention on human rights that, on these questions,[49] would be binding even on the non-ratifying member States.[50] With the impetus that it received from the Buenos Aires meeting, a convention was signed on November 21, 1969 in San José, Costa Rica, which was a little more than a year before the Protocol of Buenos Aires entered into force. The American Convention entered into force on July 18, 1978 after having been ratified by the required number of eleven States.

Until the convention mentioned in the Protocol of Buenos Aires was adopted and ratified, the Commission maintained its original form, established by the 1960 Statute as amended, with the function of overseeing the observance of human rights in the Americas under the OAS Charter.[51] This transitory provision also had the indirect effect of giving a constitutional basis to the Statute of the Commission and of strengthening the legal nature of the American Declaration, which has not prevented the nature of the Commission's attributes and the binding effect of the Declaration from being questioned today. In a matter under consideration by the Commission, the Government of the United States argued that Article 112 of the OAS Charter and Article 1 of the Commission's Statute defined it as a "consultative organ" of the OAS and not as an entity with inherent powers to decide issues and make recommendations that exceeded its powers. In the opinion of the US Government, the Commission "may

47. *See Interpretation of the American Declaration, supra* note 9, para. 41.
48. Article 1.2.b of the Statute and Article 51 of the Rules of Procedure of the Commission.
49. We refer specifically to the structure and competence of the Commission.
50. *See supra* note 46.
51. Article 150 of the OAS Charter, amended by the Protocol of Buenos Aires.

only review the instant human rights allegations and in reference to the American Declaration, which is an agreed statement of non-binding general human rights principles."[52]

The functions of the Commission are set forth in Article 41 of the Convention and are substantially the same as the powers that it had been granted under Article 9 and 9 (bis) of its former Statute, maintaining the interpretation that the Commission itself had given to these provisions. In addition, the new Statute[53] confirmed the attributes that the Commission had prior to the entry into force of the Convention.

After the Convention entered into force, the Commission acquired a duality of functions, perfectly defined by the Convention and by its Statute, the exercise of which depends on whether the State in question has ratified the Convention. The Commission's attributes are essentially political or diplomatic in the case of non-ratifying States, while it also has important judicial or quasi-judicial powers with respect to the States parties to the Convention.[54]

This duality of functions is also reflected in the diversity of the rights protected by one or the other normative systems. While the applicable text with respect to the ratifying States is the American Convention, the other OAS member States are judged with respect to the rights set forth in the American Declaration. This diversity does not exclude the possibility that in interpreting the Declaration the Commission look by analogy to the more detailed norms of the Convention.[55] The fact that a State has ratified the Convention does not mean that with respect to that State the American Declaration has no legal effect. In its final report on the Cantos Case, the Commission found that, in addition to some provisions of the

52. Note of the Government of the United States, of January 4, 1991, cited in I/A Commission H.R., Report No. 31/93, Case 10.573, the United States, adopted October 14, 1993, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, General Secretariat of the Organization of American States, Washington, D.C., 1994, p. 317.

53. *See* Resolution 447, *supra* note 32.

54. This duality of functions has led to the distinction in the text of the Convention, especially in Article 41, between the Commission's functions with respect to the OAS member States and those with respect to the States parties to the Convention. The differences between them are minimal and refer basically to the procedure of conciliation, found in Article 48.1.f, and the possibility of referring a case to the Court, both applicable only to the States parties to the Convention.

55. *See El Sistema Interamericano para la Protección de los Derechos Humanos*, *supra* note 2, p. 155 *et seq.*

Convention, the State had violated Mr. Cantos' right to justice and right of petition found in Articles XVIII and XXIV of the Declaration.

It is important to note that with respect to non-States parties, the Commission maintains its previous powers, which have not been diminished by the entry into force of the Convention. Those functions are found in Article 41 of the Convention, which contains those attributes that had been conferred on the Commission by Article 9 and 9 (bis), incorporating the Commission's very liberal interpretation on its scope and adding a new provision (Article 41.f) on friendly settlements for the States parties to the Convention.

## Chapter II

## THE SUB-SYSTEM STEMMING FROM THE AMERICAN CONVENTION ON HUMAN RIGHTS

The other main component of the inter-American human rights system is based on the American Convention on Human Rights. In fact, this sub-system is the heart of the system.

The history of the American Convention dates from the Inter-American Conference on the Problems of War and Peace held February 21 to March 8, 1945 in Mexico City, which requested the Inter-American Juridical Committee to prepare a draft Declaration of the International Rights and Duties of Man.[1] However, several factors including the beginning of the cold war prevented its completion. It was not until the Fifth Meeting of Consultation of Ministers of Foreign Affairs held in Santiago, Chile in August 1959 that, in addition to creating the Inter-American Commission on Human Rights, called for the drafting of two human rights conventions: one on the substantive part and the other on the creation of a court or tribunal to apply that law.

The draft of the Inter-American Council of Jurisconsultants was presented to the Second Special Inter-American Conference held in Rio de Janeiro in November 1965, which also had before it the proposals of the Governments of Chile and Uruguay. The Conference did not adopt a decision on the matter, but forwarded the documents to the OAS Council for its study along with the opinions of other governments and the Inter-American Commission. In response to the invitation of the Council, in April 1967 the Commission submitted its observations as a draft treaty, which differed in several aspects from that presented by the Inter-American Council of Jurisconsultants. This draft was also sent to the governments of the OAS member States for their observations.

1. Resolution XL of the Conference.

The conscientious preparation of the drafts and the seriousness of the meetings that examined them led the OAS Council to convoke a Specialized Inter-American Conference on Human Rights, which met November 7 to 22, 1969 in San José, Costa Rica. On the basis of the drafts of the Inter-American Council of Jurisconsultants and of the Inter-American Commission and taking into account the proposals and observations made by the governments, on November 21, 1969 the Conference adopted the text of the American Convention on Human Rights, which, in recognition of the hospitality of the host country, was also given the name of the Pact of San José, Costa Rica.

To ensure respect for the rights enshrined in the Convention to which all the OAS member States could adhere and to oversee compliance with the obligations assumed by the States parties to the Convention, an Inter-American Commission on Human Rights and an Inter-American Court of Human Rights were established. The Preamble to the Convention makes it clear that the protection offered by the Convention reinforces or complements that provided by domestic law and does not replace it. This means that the Convention organs do not have primacy over the instances of domestic jurisdiction but complement them. In order for the Convention's mechanisms to function, the domestic law must have been unable to provide an appropriate and timely remedy to those who allege that their human rights have been violated.

In drafting the Convention, special importance was given to the European experience and in many aspects the European Convention for the Protection of Human Rights and Fundamental Freedoms[2] was used as a template, especially regarding the organs and mechanisms that put into motion its institutional machinery. Edmundo Vargas has criticized the fact that institutions were transplanted *mechanically* into the American Convention without the necessary adaptations.[3] There are, however, very notable differences between the two systems that do not always result in a more adequate protection under the inter-American system, such as the catalogue of rights protected, the definition or delimitation of those rights,

2. Signed in Rome on November 4, 1950 and in force since September 3, 1953.

3. *See* his Foreword, in Mónica Pinto, LA DENUNCIA ANTE LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, Editores del Puerto, S.R.L., Buenos Aires, 1993, p. 16.

the operative circumstances that permit their restriction or suspension in exceptional situations, the characteristics of the systems of individual or State complaints, the conditions for the presentation of individual complaints and the nature and composition of the organs charged with overseeing the enjoyment of human rights. Another factor, of course, is the political will demonstrated by the States within the framework of each regional system and the suitability of those who, whether as commissioners or judges, comprise its organs of supervision.

Although in the inter-American system both the OAS General Assembly and the Permanent Council have some attributes in the area of human rights[4] and even though the European system was used as a model in the drafting of the American Convention, the inter-American system does not provide for the intervention of a political organ that would perform a function similar to that initially performed by the Committee of Ministers of the Council of Europe. This has deprived the system under the American Convention of the efficacy necessary to order compliance of the measures required to ensure respect for the human rights enshrined in the Convention, such as monitoring compliance of the Court's judgments or adopting a decision when the case has not been submitted to the Court, requiring compliance with the Commission's recommendations and applying sanctions in the cases in which a State has not complied. In fact, when the Court informed the OAS General Assembly that Honduras had refused to comply fully with its judgments in the Velásquez Rodríguez and Godínez Cruz Cases,[5] the General Assembly did not adopt a decision requiring compliance of those judgments.

In its normative aspect, the system created by the American Convention has been complemented by two additional protocols and by several special conventions. The OAS General Assembly adopted the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)[6] and at its Twentieth

4. For example, the General Assembly receives the special reports that the Commission prepares on any OAS member State and the Annual Reports of the Commission and of the Court, even though the latter is not an OAS organ.

5. *See* Annual Report of the Inter-American Court of Human Rights 1991, General Secretariat of the Organization of American States, Washington, D.C., 1991, p. 9.

6. Signed in San Salvador on November 17, 1988 and in force since November 16, 1999.

Regular Session adopted the Additional Protocol to Abolish the Death Penalty.[7] There are also the Inter-American Convention to Prevent and Punish Torture,[8] the Inter-American Convention on Forced Disappearance of Persons,[9] the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará)[10] and the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities.[11] This constant expansion of the international law of human rights, both with regard to its substantive content and to its mechanisms of protection, which has been described as the progressive development of human rights,[12] has considerably extended the boundaries of the inter-American system and serves as a complement to the institutions and norms established by the American Convention, which is the heart or central axis of the system.

Within this very broad normative framework, and without ignoring the indisputable importance of these recent complementary instruments, our analysis will center on the institutional and procedural aspects of the American Convention.

## A. ITS DOMESTIC APPLICATION

The Convention does not indicate its place in internal law, a question that concerns the broader problem of the relationship between international law and domestic law referred to in Articles 26 and 27 of the Vienna Convention on the Law of Treaties, which stipulate that all treaties in force obligate the parties and must be complied with in good faith and that no State may invoke the provisions of domestic law as a justification for the non-compliance of a treaty. In this connection, several recent Constitutions

7. Signed in Asunción, Paraguay on June 8, 1990 and in force since August 28, 1991.
8. Signed in Cartagena de Indias, Colombia on December 9, 1985 and in force since February 28. 1987.
9. Adopted at the Twenty-fourth Regular Session of the OAS General Assembly in June 1994 and in force since March 28, 1996.
10. Adopted at the Twenty-fourth Regular Session of the OAS General Assembly on June 9, 1994 and in force since March 5, 1995.
11. Adopted in Guatemala City on June 7, 1999.
12. *See* Pedro Nikken, LA PROTECCIÓN INTERNACIONAL DE LOS DERECHOS HUMANOS: SU DESARROLLO PROGRESIVO, Inter-American Institute of Human Rights / Editorial Civitas, S.A., Madrid, 1987.

give human rights treaties a priority in the hierarchy of the norms of internal law.[13]

On the national level, the Convention is distinguished by the self-executing and autonomous nature of its provisions, which the State has a margin of appreciation in applying. Federal States, however, have a special regime that is distinct from that of States with a unitary structure. In this aspect, the Convention differs from other international human rights instruments, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which impose the same obligations on all States regardless of their federal or unitary structure.

### *1. ITS SELF-EXECUTING NATURE*

In principle, the Convention has an immediate effect on domestic law, directly creating rights for individuals and directly applicable by the national tribunals without the necessity of recourse to other steps. This principle, of course, does not mean that are not some practical difficulties that may be presented internally by the application of the Convention. In our opinion, if domestic law does not ensure a right enshrined in the Convention or if it is ensured to a lesser degree than under the Convention, regardless of the way in which the Convention has been incorporated into the domestic law, the State organs must apply the Convention. It is possible that in States that require international law to be legislated into provisions of domestic law individuals may not be able to invoke directly the Convention, but State bodies must apply it.

13. In the Americas, for example, Article 5.2 of the Constitution of Chile of August 11, 1980 as amended on this point on August 17, 1989; Article 93 of the Constitution of Colombia of July 6, 1991 and Articles 23 and 31 of the Constitution of Venezuela in force since December 30, 1999.

The States parties have undertaken to *respect* and to *ensure* the exercise of the rights set forth in the Convention, which implies that they have an immediate effect,[14] unlike merely programmatic provisions that only require an obligation of behavior by the State and do not ensure a result. Together with the self-executing nature of most of the rights contained in the Convention,[15] this means that the Convention is self-executing and does not require domestic legislation. The Convention's language reflects the intention of the parties that its provisions have an effect on domestic law immediately following ratification.

In our opinion, this interpretation may be drawn from its Article 2, which provides that where the exercise of the rights and freedoms recognized in the Convention "is not already ensured by legislative or other provisions, the States parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms." This provision was included at the initiative of the Chilean Delegation with the aim of expressly pointing out the States' obligation to adopt the laws or other measures that are essential to make effective *some* of the rights recognized in the Convention and not to deny the self-executing nature of its other provisions. As an example, the Chilean Delegate cited Article 18 of the Convention regarding the right to a name, which provides that "the law shall regulate the manner in which this right shall be ensured."[16]

Moreover, the very nature of the rights protected imposes on the States, except for rare exceptions, the obligation *not to act*, which emphasizes the self-sufficiency of the provisions of the Convention. When

14. This obligation may be compared to that assumed by the States pursuant to Article 2 of the International Covenant on Economic, Social and Cultural Rights, which provides that each of the States parties "undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

15. It is clear that this does not include those rights regarding which the Convention grants the regulation of their exercise to the domestic laws of the States. *See, e.g.,* Articles 10, 18 and 25 of the Convention.

16. *See*, in this sense, Thomas Buergenthal, *El Sistema Interamericano para la Protección de los Derechos Humanos*, in ANUARIO JURÍDICO INTERAMERICANO 1981, General Secretariat of the Organization of American States, Washington, D.C., 1982, p. 124 *et seq*.

a State has not adopted the legislative or other measures referred to in Article 2, it at least has the duty to refrain from applying provisions of its domestic law that are incompatible with the Convention and has the duty to respect and to ensure the rights contained in the Convention that the State assumes immediately and unconditionally.

In this connection, the Court has held "the States parties to the Convention must guarantee compliance with its provisions and its effects (*effet utile*) within their own domestic laws. This principle applies not only to the substantive provisions of human rights treaties (in other words, the clauses on the protected rights), but also to the procedural provisions, such as the one concerning recognition of the Court's contentious jurisdiction. That clause, essential to the efficacy of the mechanism of international protection, must be interpreted and applied in such a way that the guarantee that it establishes is truly practical and effective, given the special nature of human rights treaties."[17]

On the other hand, the self-executing nature of the Convention is closely related to the autonomous nature of its provisions. That is to say, the concepts utilized by the Convention, such as *national security*, *law* and *public order*, have their meaning within the context of the Convention and are independent of the meaning and scope that domestic laws may attribute to these same expressions.

### *2. ITS APPLICATION TO FEDERAL STATES*

Article 28 of the Convention, entitled "Federal Clause," which was included at the initiative of the United States, to a great degree restricts the obligations assumed by federal States under the Convention. This Article establishes that where a State party is constituted as a federal State its national government must implement all of the provisions of the Convention "over whose subject matter it exercises legislative and judicial jurisdiction" and that, with respect to the provisions regarding matters that fall under the jurisdiction of the entities that compose the federation,

17. I/A Court H.R., *Ivcher Bronstein Case, Competence*. Judgment of September 24, 1999. Series C No. 54, para. 37 and *Constitutional Court Case, Competence.* Judgment of September 24,1999. Series C No. 55, para. 36.

the national government must "take suitable measures in accordance with its constitution and its laws to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention."

This provision contrasts notably with the text of Article 50 of the International Covenant on Civil and Political Rights and Article 28 of the International Covenant on Economic, Social and Cultural Rights, which state that the provisions of those instruments "shall extend to all parts of the federal States without any limitations or exceptions."

In the opinion of Thomas Buergenthal, Article 28 of the American Convention is an anachronism that dates from the League of Nations and has been copied by very few modern international human rights instruments.[18] Buergenthal points out the European Convention on Human Rights, the Convention for the Prevention and Punishment of the Crime of Genocide and the International Convention on the Elimination of All Forms of Racial Discrimination as treaties whose provisions are equally applicable to unitary as well as federal States and to which the United States has been able to adhere without the need to make any reservation on this point.[19]

The Commission requested in the Garrido and Baigorria Case that the Court render an opinion on the federal clause and the scope of Argentina's obligations at the stage of reparations under that clause.[20] The Court had previously held in this case that the agreement and other documents that the parties had presented did not constitute the agreement between the parties stipulated in the judgment on the merits. The Court observed that the agreement should have been signed by the parties to the controversy, one of which was the Republic of Argentina, but it noted as a significant fact that the agreement was signed by officials of the Province of Mendoza.[21] When the merits of the case were debated, Argentina initially argued that by virtue of the federal clause the Province of Mendoza had

18. *El Sistema Interamericano para la Protección de los Derechos Humanos*, *supra* note 16, p. 127.
19. *Ibid*.
20. I/A Court H.R., *Garrido and Baigorria Case. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of August 27, 1998. Series C No. 39, para. 33.
21. *Ibid*., para. 24.

the responsibility and not the federal government. However, it promptly withdrew this argument and expressly acknowledged its international responsibility.[22] In the hearing on reparations, Argentina again argued that the adoption of certain measures would be difficult due to its federal structure.[23] According to the Court,

> when a federal State's constituent units have jurisdiction over human rights matters, Article 28 of the Convention makes provision for said federal State becoming a party to the Convention. However, from the time of its approval and ratification of the Convention, Argentina has conducted itself as if the federal State had jurisdiction over human rights matters. Hence, it can hardly argue the contrary now, as this would imply a breach of the principle of estoppel. As for the "difficulties" invoked by the State at the January 20, 1998 hearing, the Court should note that the case law, which has stood unchanged for more than a century, holds that a State cannot plead its federal structure to avoid complying with an international obligation.[24]

### *3. THE MARGIN OF APPRECIATION OF THE STATE*

The doctrine of the margin of appreciation has been widely developed by the jurisprudence of the European Court of Human Rights and the former European Commission. As long ago as 1958 in the Cyprus Case, prior to Cyprus' independence from Great Britain, where the State denounced had invoked Article 15 of the European Convention, which permitted the suspension of certain rights under that Convention to the extent strictly required by the demands of the situation, the European Commission held that it always has the competence and the duty to examine and rule on the determination of a government that there was a public emergency threatening the life of the nation for the purposes of that Article, but the government must have some discretion and a margin of appreciation to determine whether there is a public emergency that threatens the life of the nation that must be met with the exceptional measure of the suspension

22. *Ibid*., para. 45.
23. *Ibid*.
24. *Ibid*., para. 46. The citations have been omitted.

of its normal obligations under the Convention.[25] In later cases, the European Court has even held that a State has a "broad margin of appreciation."[26] The idea that a State may exercise a margin of appreciation in applying the Convention is not expressly found in the American Convention and must be treated, if not warily, at least with much caution. It is, however, obvious that this doctrine has an application in the inter-American system and that it is inherent in the expressions used in some of its provisions.

Although the concepts in the American Convention are autonomous and independent of their content and scope under domestic law, many of them are somewhat subjective in implicitly conferring on the State a certain *margin of appreciation* in specific circumstances found in the Convention. Examples include the determination of the legislative or other measures necessary to give effect to the rights set forth in Article 2, of the elements of an emergency situation of the kind found in Article 27.1, of what constitutes a threat to national security (or public morals) under Article 13.2 and of what is considered necessary under Article 22.3 in a democratic society to prevent crime and restrict the right of circulation or the restrictions that, for the purposes precisely stated in the Convention, laws may impose on the right of assembly (Article 15) or association (Article 16). This margin of appreciation may also allow a State a certain discretion in the determination of how to compensate those who have been found guilty as a result of a miscarriage of justice (Article 10), to set the conditions on how the right to rectification or reply may be exercised (Article 14.1), to regulate the manner to ensure the right of each person to his own name and the surnames of his parents (Article 18), to determine the conditions for acquiring nationality for those who have not been born in the territory of the State (Article 20), to regulate the exercise of political rights (Article 23), to choose between a direct democracy and a representative democracy

25. Report of the European Commission of Human Rights, Application No. 176/56, Greece v. United Kingdom, in YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, vol. 2, 1958-1959, p. 182. In the Lawless v. Ireland Case the European Court of Human Rights held that both the Commission and the Court must consider whether the national authorities had "sufficient reason" to believe that there existed a public emergency of the kind referred to in Article 15 of the Convention. European Court of Human Rights, *Lawless v. Ireland*, Judgment of July 1, 1961, paras. 23-30.

26. *See* the judgment of the Court in *Brannigan and McBride v. United Kingdom*, Judgment of May 23, 1993, para. 43.

(Article 23.1.a), to decide how often to hold elections (Article 23.1.b) or to determine the proper judicial remedies to protect an individual from acts that violate his basic rights, including the determination of a competent tribunal to hear his case (Article 25).

On this issue, the Court has cautiously stated that "although it has been traditionally accepted that the determination and regulation of nationality are the competence of each State, the evolution in this matter shows that international law imposes certain limits on a State's discretionality and that, in the regulation of nationality, it is not only the competence of States, but also the requirements of the integral protection of human rights that intervene."[27]

The doctrine of the margin of appreciation gives the State room to maneuver and allows it to define the measures that are necessary to give effect to the rights and freedoms guaranteed by the Convention or to make a first evaluation of the *facts and circumstances* that justify a restriction of some of those rights or even their suspension. This margin of appreciation does not, however, authorize State organs to interpret freely the Convention's provisions or to interpret the Convention in a way that has different effects in the distinct States. Neither may this discretion to regulate certain rights serve as an excuse to deny a person the exercise of the rights guaranteed in the Convention or to ignore the self-sufficiency of the Convention. The fact that some of its provisions permit the State to restrict or regulate the exercise of a right enshrined in the Convention does not mean that the right is in a suspended state should the State not exercise that power.

On the other hand, the application of this doctrine cannot be used to derogate the *pro homine* principle found in Article 29 of the Convention, which requires that the provisions of the Convention be interpreted in the manner most favorable to the individual. The deference that the doctrine of the margin of appreciation gives to States does not imply a blank check that permits them to act without any control or that in case of doubt favors the State, turning the principle enshrined in the Convention on its head and denying any efficacy to the rights recognized in it.

27. I/A Court H.R., *Ivcher Bronstein Case.* Judgment of February 6, 2001. Series C No. 74, para. 88.

It is obvious that this margin of appreciation may only be exercised within certain reasonable limits and may not be confused with arbitrary powers. The subsidiary nature of the system of protection of human rights also contains a margin of appreciation for the national authorities by making them responsible for the compliance of the human rights obligations assumed by the State and the decision on how to reach those objectives.

Recognizing that the State authorities are initially in the best position to appreciate the circumstances of a case does not exempt this activity from subsequent international control. In any event, international supervisory bodies may not use the doctrine of the margin of appreciation as an excuse to avoid a coherent and profound analysis of the legal issues posed in each case. Article 33 of the Convention assigns this analysis to the Commission and the Court, the organs charged with dealing with matters related to the fulfillment of the commitments contracted by the States under the Convention. This analysis must include taking into account the purposes set forth in the Preamble to the Convention and the norms of interpretation in its Article 29.

It is clear that the provisions of international human rights instruments that authorize restrictions, for example, to protect the rights or reputation of others or to protect national security, public order, public health or public morals contain subjective elements that make it difficult to interpret them rigidly and inflexibly. Moreover, it is the national authorities who are in the best position to make an immediate and direct evaluation of the evidence invoked to restrict human rights and to judge the necessity of the restrictions. This has led, in weighing the exercise of human rights with the aforementioned legal issues, to granting the national authorities who must consider the interests of society as a whole, a certain margin of appreciation to determine which rights should prevail.[28]

The essence of this doctrine is that, in the event that the national authorities have various options in a specific situation, international tribunals may only intervene if the decision taken cannot be reasonably justified. Otherwise, this doctrine would allow the State authorities who

28. European Court of Human Rights, *Case of Otto-Preminger-Institute v. Austria,* Judgment of September 20, 1994, para. 55.

judge the circumstances to determine whether it is justified and the extent to which they may interfere with the exercise of human rights.[29] The European Court has held that States enjoy a certain margin of appreciation in evaluating to what extent an interference with the enjoyment of the freedom of expression is necessary, taking into account the reasonable and appropriate choice of the means used to guarantee that lawful activities,[30] including public demonstrations,[31] take place peacefully. Moreover, the measures that a State deems necessary to safeguard those other interests do not respond to pre-established criteria but to what, at that moment, the government of that State considers appropriate. According to the European Court, national authorities must have a certain margin of appreciation to determine the existence of circumstances that would justify restricting a human right and the extent of the restriction.[32] In the opinion of the European Court, the perception of what would be an appropriate response to speech that is not protected by the European Convention or that may not be invoked for its protection may differ notably from one State to another. This doctrine admits that national authorities are in a better position to evaluate the situation and, therefore, must have a broad margin of appreciation.[33] With respect to the reasons that led the Swiss authorities to deny a license to transmit a television program on automobiles, the European Court admitted that opinions might differ on their appropriateness but the Court held that it could not substitute its own evaluation for that of the national authorities who, reasonably, had considered that this interference with freedom of expression was necessary.[34]

The doctrine of the margin of appreciation, thus understood, occupies an important place in the international law of human rights and reconciles

29. European Court of Human Rights, *Case of Jacubowski v. Germany*, Judgment of May 26, 1994, para. 26.

30. European Court of Human Rights, *Case of Steel and others v. The United Kingdom*, Judgment of September 23, 1998, para. 101.

31. European Court of Human Rights, *Case of Chorherr v. Austria*, Judgment of August 25, 1993, para. 31.

32. *Case of Otto-Preminger-Institute v. Austria, supra* note 28, para. 50

33. European Court of Human Rights, *Case of Tolstoy Miloslavsky v. The United Kingdom*, Judgment of June 23, 1995, para. 48.

34. European Court of Human Rights, Second Section, *Case of Demunth v. Switzerland*, Judgment of November 5, 2002, para. 48.

human rights protection with the national authorities' obligations and responsibilities to preserve the rights and interests of society as a whole. In the Wingrove v. The United Kingdom Case, in which the State authorities refused to grant a certificate of distribution to a video considered blasphemous that in their opinion presented an object of religious veneration in a clearly provocative and indecent manner and whose dissemination was sufficiently broad to offend and attack the religious beliefs of Christians, the European Court pointed out some important elements of the doctrine. According to the Court, while there is little room to restrict freedom of expression when it concerns political content or matters of public interest, States generally have a broader margin of appreciation when dealing with the regulation of that freedom in matters susceptible of offending the personal convictions of others in the area of morals and religion. In the opinion of the Court, just as in the moral sphere and probably to an even greater extent, there is no uniform European conception of the requirements for the protection of the rights of others regarding attacks on religious convictions. What might profoundly offend persons of a certain religious persuasion will vary significantly from one era to another and from one place to another, especially in an era characterized by an ever-increasing number of religious creeds. The European Court stated that it was conscious of the amplitude of the idea of blasphemy and of the risk that it be invoked to restrict arbitrarily and excessively freedom of expression. Nonetheless, it held that, because of their direct and permanent contact with the actual situation in their countries, State authorities are in principle in a better position than international tribunals to give an opinion on the exact content of the requisites regarding the rights of others, as well as the necessity of a restriction to protect this material from those whose sentiments and convictions may be offended.[35] The Court held that, in view of the difficulties of protecting the public, national authorities were in a better position to evaluate the probable impact of a video considered blasphemous.[36]

35. European Court of Human Rights, *Case of Wingrove v. The United Kingdom*, Judgment of October 22, 1996, paras. 56 and 58.

36. *bid*., para. 63.

The European Court and the former European Commission have developed a doctrine of the margin of appreciation that does not confer on a State an unlimited margin to decide on its own the interpretation or application of the Convention. Although admitting that it is the State authorities who are better positioned to appreciate the circumstances that have led them to restrict freedom of expression, without relinquishing their control functions the international supervisory bodies have decided to look at the initial determination of the State with a certain deference,[37] ensuring that it is not excessive. In any event, a State always has the burden of proof as to the necessity and relevance of any restriction to human rights.[38] In particular, the European Court has reserved the right to issue a final decision on the compatibility of any measure adopted by a State with the right to freedom of expression enshrined in Article 10 of the Convention[39] and has held that the international supervision exercised by the organs of the European Convention refers both to national legislation and to the decisions that apply it, even if they have been adopted by an independent tribunal.[40] The European Court has also held that special attention must be paid to those cases that involve prior censorship.[41] In any event, in exercising this supervisory function the Court's task is not to take the place of the national authorities but to review the decisions that they have taken under their powers of appreciation and to determine in the light of Article 10 and considering the case as a whole whether the reasons given to justify the interference that gave rise to the complaint are relevant and sufficient.[42]

In recent decisions, the European Court has slowly extended its degree of control to make it more effective and has reached the point of holding that its supervision is not limited to establishing whether a State exercised its discretion reasonably, carefully and in good faith. The Court was of the opinion that it must examine the restriction giving rise to the

37. European Court of Human Rights, *Case of Muller and others*, Judgment of May 24, 1988, para. 32.
38. E/CN.4/1985/4, para. 12.
39. European Court of Human Rights, *Case of Castells v.Spain*, Judgment of April 23, 1996, para. 46.
40. European Court of Human Rights, *Case of Markt Intern Verlag GmbH and Klaus Beermann*, Judgment of November 20, 1996, para. 33. *See*, also, European Court of Human Rights, *Case of Surek and Ozdemir v. Turkey*, Judgment of July 8, 1999, para. 57(ii).
41. *See Case of Wingrove v. The United Kingdom, supra* note 35, para. 58.
42. European Court of Human Rights, *Case of Goodwin v. The United Kingdom*, Judgment of March 27, 1996, para. 40.

case before it in the light of the case as a whole, determining whether it is proportional and pursues a legitimate end and whether the reasons given by the national authorities are relevant and sufficient. The Court must also arrive at the conviction that the national authorities applied criteria compatible with the principles found in the European Convention and that they based their decision on an acceptable appreciation of the facts.[43] This decision of the European Court reduces substantially the national authorities' margin of appreciation and subjects their decision to the international principles found in the Convention and to the subjective criteria of reasonableness, thoroughness, good faith and an acceptable appreciation of the facts.

Finally, this doctrine must be linked to the interpretation and application of domestic law particularly regarding restrictions that might affect the exercise of human rights, which must be *provided by law.* This has been the opinion of the European Court, although its interpretation may refer to the very existence of the condition already discussed in the sense that this restriction is effectively provided by law.[44]

## B. THE RIGHTS PROTECTED

The list of rights protected by the American Convention is more extensive than that of any other international human rights instrument. The Convention refers both to traditional civil and political rights and to economic, social and cultural rights, although they are not treated the same.

While an analysis of the content of each right protected by the Convention is not an objective of this study,[45] which is limited to the examination of institutional and procedural aspects of the inter-American human rights system, notwithstanding the interdependence that exists among them we believe it advisable to make some general comments on each of the categories of rights guaranteed by the Convention.

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43. European Court of Human Rights, *Case of Maronek v. Slovakia*, Judgment of April 19, 2001, para. 53 and *Case of Vogt v. Germany*, Judgment of September 26, 1995, para. 52.

44. *See Case of Muller and others, supra* note 37, paras. 44-45.

45. Some of those rights have been examined by the author in ADMINISTRACIÓN DE JUSTICIA Y DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS, Universidad Central de Venezuela, Caracas, 1992. Also, Daniel O'Donnell, PROTECCIÓN INTERNACIONAL DE LOS DERECHOS HUMANOS, Andean Commission of Jurists, Lima, 1988.

### *1. CIVIL AND POLITICAL RIGHTS*

The Convention enunciates and develops the civil and political rights already recognized in the American Declaration of the Rights and Duties of Man, which include the following: to life, humane treatment, personal liberty, a fair trial (referred to in the Convention as judicial guarantees), freedom from *ex post facto* laws (referred to in the Convention as the principle of legality), protection of honor, privacy, of conscience and religion, of expression, of rectification or of reply, of assembly, of association, a nationality, of movement and residence, political rights, the equal protection of the law and a simple and prompt remedy that protects against acts that violate a person's fundamental rights. To this list, the Convention adds the right to compensation in the case of a miscarriage of justice, the right to a name, and the prohibition of slavery, involuntary servitude and forced labor. In addition, the Convention mentions two rights that, although they do not exactly fall in this category, are included in the chapter on civil and political rights: the right to the protection of the family[46] and the right to the protection of the child.

In the chapter on civil and political rights, Article 21 guarantees the right to private property, the status of which as a human right is debatable but which had already been included in slightly different terms in Article XXII of the American Declaration. It is important to observe that, although Article 17 of the Universal Declaration of Human Rights also mentions this right, it did not survive the drafting of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, neither of which includes it among the rights protected. This right, in spite of its marked economic tilt, has traits that allow it to be characterized as a civil right. It is interesting to note that, more than a right to *access* to property, what is emphasized is the right not to be arbitrarily deprived of property. The Universal Declaration includes the right to property among other civil and political rights, far from the economic, social and cultural rights that it enshrines.

46. Although the right to found a family may be qualified as a civil right, the right to the protection of a family has an obvious social content.

The rights guaranteed in the Convention are only minimum rights and do not exclude "the exercise of any other right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party."[47] The Convention itself states that its interpretation may not "preclude other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government."[48] Moreover, Article 31 of the Convention does not discount the possibility that other rights and freedoms may be included in the Convention, whether by amending it or by adopting additional protocols.

### *2. ECONOMIC, SOCIAL AND CULTURAL RIGHTS*

The Convention's treatment of economic, social and cultural rights is notably different than that of civil and political rights. While the American Declaration explicitly recognizes several rights in this category, among which are the rights to the protection of the family (Article VI), to the protection of mothers and children (Article VII), to health and well-being (Article XI), to education (Article XII), to the benefits of culture (Article XIII), to leisure (Article XV) and to social security (Article XVI), the Convention does not specifically mention any right in this category. On the contrary, despite what is expressed in the last paragraph of its Preamble, recalling that the Third Inter-American Special Conference held in 1967 in Buenos Aires approved the incorporation into the OAS Charter of "broader standards on economic, social and cultural rights," the American Convention only refers to them in very general terms.[49] The Convention contains no precise statement on such rights, but remands to the provisions on economic, social, educational, scientific and cultural standards found in the OAS Charter. It does, however, include under civil and political rights those relating to the protection of the family (Article 17) and children (Article 19), which are certainly of a social nature, and to private property (Article 21) that, regardless of whether it may be

47. Article 29.b of the Convention.
48. Article 29.c of the Convention.
49. Chaper III, Article 26 of the Convention.

characterized as an *inherent* right of the human being, appears to belong in the category of economic rights.

The right to private property, despite being found in Article 17.1 of the Universal Declaration, is recognized neither in the International Covenant on Civil and Political Rights nor in the International Covenant on Economic, Social and Cultural Rights. While it would be absurd to debate the validity of its inclusion in the positive law, particularly in Article 21 of the American Convention,[50] we cannot avoid making a few comments on the nature of the right to property and on the appropriateness of including it as a human right. Without denying its importance or its function in the structure of society, property is a right that, as in the case of many other rights, does not correspond to the essence of human rights, which are rights inherent to the person as such and do not depend on a title of property nor can they be renounced or transferred as is the case with property. This is a right that has nothing to do with the intrinsic dignity of the human person with which we are all born and a right that is unknown to millions of persons. It is a right that is not derived from the condition of the human being, but stems from having or possessing certain goods. The incorporation of this right into the catalogue of human rights tends to trivialize the importance and hierarchy of the latter. Jeanne Hersch has written that it is useless to put in the same sack, under the title of human rights, all that might appear to us as useful, beneficial or pleasing.[51] What does constitute a human right and is enunciated in Article 8 of the American Convention is the right of every person to judicial guarantees for the determination of his rights and obligations of a civil, labor, fiscal or any other nature, *without excluding the determination of rights connected with owning certain assets*.

Despite the clearly inadequate manner in which Article 26 of the Convention refers to economic, social and cultural rights, that provision

50. Article 1 of Protocol 1 to the European Convention of Human Rights extends the protection of the Convention to the right of private property. This right is also included in Article 14 of the African Charter of Human and Peoples' Rights, adopted June 27, 1981 in Nairobi, Kenya by the Eighteenth Conference of Heads of State and Government of the Organization of African Unity.

51. *Los fundamentos filosóficos de los derechos humanos en el contexto europeo*, in A. Diemer, J. Hersch and others, LOS FUNDAMENTOS FILOSÓFICOS DE LOS DERECHOS HUMANOS, Serbal /UNESCO, Paris, 1985, p. 153.

does recognize rights derived from the human rights norms in the OAS Charter and does impose specific obligations on the States parties to the Convention. Moreover, Article 29.d states that none of its provisions may be interpreted in the sense of "excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have." Nonetheless, in an early decision the Commission held that it may only consider petitions regarding alleged violations of the human rights defined in the Convention and that the right to work had not yet been incorporated into the Convention, which did not include economic, social and cultural rights.[52]

The Protocol of San Salvador attempts to fill this vacuum in the Convention, although unfortunately in an insufficient and inadequate manner, particularly with reference to the justiciability of social rights, an area in which there has been a marked regression with respect to what had already been achieved in the text of the Convention.[53]

## C. THE COMMITMENT OF THE STATES

It seems unnecessary to observe that rights, as a product of a relationship between two parties, always have correlative obligations that each party assumes. In the case of human rights, this relationship is between the individual and the State and it is the State that has the duty to ensure the full enjoyment of those rights. Thus, those obligations fall exclusively on the State. The individual is the subject of rights and the State is the agent that assumes the inherent obligations regarding those rights. Under the Convention, the States parties acquire different commitments that in essence refer to the recognition of the rights protected, the adoption of domestic laws necessary to give effect to the rights and the prohibition of discrimination in the exercise of such rights.

With respect to the rights that the Convention enunciates, the States assume a double obligation. In the first place, under Article 1.1 the States

52. I/A Commission H.R., Report No. 25/88, Cases No. 9.777 and 9.718, Argentina, adopted March 30, 1988, para. 6 of the operative part, in Annual Report of the Inter-American Commission on Human Rights 1987-1988, General Secretariat of the Organization of American States, Washington, D.C., p. 76.

53. As of March 2004, this Protocol had been ratified by 13 States: Argentina, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Panama, Paraguay, Peru, Suriname and Uruguay.

undertake to *respect* the rights guaranteed in the Convention and, in the second place, they assume the commitment to *ensure* their "free and full exercise to all persons subject to their jurisdiction, without any discrimination for reasons of race, color, sex, language, political or other opinion, national or social origin, economic status, birth, or any other social condition." In the opinion of the Court, this provision specifies the obligation contracted by the States parties with respect to each right protected so that a claim that one of these rights has been violated necessarily involves a violation of Article 1.1.[54] Therefore, the violation of any of the rights and freedoms ensured by the Convention necessarily signifies the violation of the general obligation contained in its Article 1.1.

Except for Article 2 of the Convention, which obligates the States to undertake to adopt the provisions of domestic law necessary to give effect to the rights enunciated in the Convention, the Convention does not indicate the specific means or procedures that the States must employ to comply with their human rights commitments. Therefore, the nature of their obligations is basically characterized by the *results* that the Convention pretends to ensure and not the States' manner in executing such obligations.

Articles 1 and 2 refer to the general obligations that the States assume in the area of human rights. These obligations are developed by a description of the substantive rights that the States have promised to respect and ensure. Therefore, to violate one of the Convention's rights is also to violate the general obligations found in Articles 1.1 or 2.

The Court has held that Article 1 is fundamental to determine whether a violation of a human right guaranteed by the Convention may be attributed to a State party. According to the Court, Article 1 charges the States parties with the fundamental duties to respect and to ensure, so that any infringement of the human rights recognized by the Convention that can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which

54. I/A Court H.R., *Velásquez Rodríguez Case*. Judgment of July 29, 1988. Series C No. 4, para.162 and *Godínez Cruz Case*. Judgment of July 29, 1988. Series C No. 5, para. 171.

assumes responsibility in the terms provided by the Convention. Under Article 1.1 any exercise of public power that violates rights recognized by the Convention is unlawful. Thus, whenever a State organ, official or public institution unduly infringes a right, the result is the failure to observe the duty to respect found in that provision. This conclusion does not depend on whether the organ or official has contravened the provisions of domestic law or overstepped the limits of its or his authority, since it is a principle of international law that a State is responsible for the acts of its agents performed in their official capacity and for their omissions, even when they act outside the limits of their authority or in violation of domestic law.[55]

With respect to Article 2, the Court has stated that, in international law, customary law "prescribes that a State that has concluded an international treaty must introduce into its domestic laws whatever changes are necessary to ensure execution of the obligations it has undertaken" and that this principle has been characterized by the jurisprudence as an evident principle. It is along this line that the American Convention establishes the obligations of each State party to adapt its domestic law to the provisions of the Convention in order to ensure the rights guaranteed by the Convention.[56] In the opinion of the Court, "the general duty under Article 2 of the Convention implies the adoption of measures of two kinds: on the one hand, elimination of any norms and practices that in any way violate the guarantees provided under the Convention; on the other hand, the promulgation of norms and the development of practices conducive to effective observance of those guarantees."[57] The States parties to the Convention cannot adopt legislative or any other measures that infringe the rights and freedoms recognized in the Convention because that would violate not only the Convention's norms that enshrine the respective rights, but also Article 2.[58] Moreover, the Court has held that a domestic law may, *per se*, violate Article 2, regardless of whether it has been applied in a specific case.[59]

55. *Ibid*., paras. 164, 169 and 170 and 173, 178 and 179, respectively.
56. *See Garrido and Baigorria Case. Reparations, supra* note 20, para. 68.
57. I/A Court H.R., *Castillo Petruzzi et al. Case*. Judgment of May 30, 1999. Series C No. 52, para. 207.
58. I/A Court H.R., *Baena Ricardo et al. Case*. Judgment of February 2, 2001. Series C No. 72, para. 182
59. I/A Court H.R., *Suárez Rosero Case.* Judgment of November 12, 1997. Series C No. 35, para. 98

### *1. THE RESPECT OF HUMAN RIGHTS*

The obligation to respect the rights protected by the Convention is a general obligation that is eminently negative, since it mainly involves the duty to refrain from interfering with the exercise of those rights. For example, this obligation may be seen as the duty not to kill arbitrarily in the case of the right to life or not to torture with respect to the right to personal integrity or not to censor with regard to freedom of expression. This obligation, therefore, prohibits interference with the exercise of the rights protected and is directed specifically to the agents of the State party.[60]

This obligation primarily concerns the traditional rights, civil and political, which in this context may in principle be characterized as fundamental freedoms: an individual's rights vis-à-vis the State.

According to the Court's jurisprudence, the duty to respect not only implies a negative obligation but also imposes positive obligations that establish a bridge between the latter and those that ensure human rights together with the duty to adopt the necessary measures to give effect to such rights and freedoms.[61] Pursuant to Article 1.1, the Court has held that the State is obligated to respect the rights and freedoms recognized in the Convention and "to organize the public power so as to guarantee to the persons subject to its jurisdiction the free and full exercise of human rights."

### *2. THE GUARANTEE OF HUMAN RIGHTS*

The duty to ensure the full enjoyment of human rights is the result of the *horizontal effect* and has a positive character, unlike the obligation to respect. It implies a State's duty to adopt all necessary measures that under the circumstances are reasonable to ensure the enjoyment of those rights and to prevent their interference by third parties. Parallel to its duty

60. It is obvious that this obligation is closely linked to the very concept of human rights, which arises within the framework of relations between the individual and the State and implies placing limits on the power exercised by the organs of the State.

61. I/A Court H.R., *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003, Series C No. 99, para.142.

to respect, this obligation imposes on the State the duty to protect individuals from the actions of those persons who would infringe their rights by preventing or punishing, for example, attempts of armed groups against the life or physical integrity of individuals or interference with the private life of third persons or the instigation of racial discrimination of any kind. The Court has held that "this obligation implies the duty of States parties to organize the governmental apparatus and, in general, all of the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and moreover, if possible, attempt to restore the right violated and provide compensation as warranted for the damages resulting from the violation."[62]

The Court added that "the obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation –it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights."[63] More recently, the Court has observed that, by virtue of the principle of *effet utile*, the provisions of domestic law must be effective, which means that the State must adopt all the measures necessary so that the rights enshrined in the Convention are truly complied with.[64] According to the Court, the existence of a pattern of summary executions tolerated and promoted by a State results in a climate incompatible with the effective protection of the right to life. States, therefore, have the obligation to create the necessary conditions to prevent the violation of this inalienable right and, especially, the duty to prevent its agents from attempts against the right to life, because, from the point of view of the Court, compliance with Article 4 (which enshrines the right to life) in conjunction with Article 1.1 not only requires that no person be arbitrarily deprived of his life (a negative obligation), but also that the States take all appropriate measures to protect and preserve the right to life (a positive obligation) under their duty to ensure the full and free

62. *See Velásquez Rodríguez* and *Godínez Cruz Cases*, *supra* note 54, paras. 166 and 175, respectively.
63. *Ibid*., paras. 167 and 176, respectively.
64. I/A Court H.R., *Case of Bulacio*. Judgment of September 18, 2003. Series C No. 100, para. 142.

exercise of the rights of all persons subject to their jurisdiction. The Court has underscored that the active protection of the right to life by the State not only involves legislators but every State institution including its security forces, be they the police or the armed forces.[65] In the opinion of Judges Cançado Trindade and Pacheco Gómez, the violation of a substantive right must be linked expressly with the States parties' general obligation to ensure the rights protected under Article 1.1. Otherwise, it would be depriving the Convention of its effect under domestic law.[66]

Pursuant to this obligation, the Court has held that "an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention."[67] According to the Court, "the State has the legal duty to take reasonable steps to prevent violations of human rights and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[68] When the norms of domestic law that ensure the rights embodied in the Convention are not observed, a State must then apply the provisions provided for the failure to comply with those norms and impose the relevant punishment. These are the measures provided by the Convention to ensure that the rights and freedoms that it guarantees are effective.[69] This obligation openly refutes the detractors of human rights who incorrectly assume that this area of the law is designed to protect delinquents. In fact, strict respect for human rights encompasses the obligation to investigate and punish crimes with the only limitation that in complying with this obligation the State cannot use the methods of the delinquent nor may it renounce the values of a democratic and civilized society.

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65. *See Case of Juan Humberto Sánchez, supra* note 61, para. 110.
66. *See* their joint opinion, in I/A Court H.R., *Las Palmeras Case*. Judgment of December 6, 2001. Series C No. 90, para. 8.
67. *See Velásquez Rodríguez* and *Godínez Cruz Cases, supra* note 54, paras. 172 and 184, respectively.
68. *Ibid*., paras. 174 and 184, respectively.
69. *See Garrido and Baigorria Case. Reparations, supra* note 20, para. 71.

In the opinion of the Court, this duty to ensure implies the obligation of the State to inform on the fate of detainees. In that respect, the Court has held that "if a person was detained in good conditions of health and subsequently dies, the State has the obligation to provide a satisfactory and convincing explanation of what happened and to disprove accusations regarding its responsibility through valid evidence, because in its role as guarantor the State has the responsibility both of ensuring the rights of an individual under its custody and of providing information and evidence pertaining to what happened to the detainee."[70] This obligation to ensure implies, according to the Court, that in questions of extra-legal executions the authorities must act on their own initiative and further their investigation and not place this burden on the families.[71]

The State's duty to ensure is closely linked to its obligation to adopt the appropriate measures to achieve it. According to the Court's jurisprudence, the general duty under Article 2 of the Convention implies the adoption of measures of two kinds: the repeal or elimination of any norms or practices that violate the guarantees under the Convention and the promulgation of norms and the development of practices conducive to the effective observance of such guarantees.[72] The obligation to ensure is also closely related to the obligation to respect human rights. The Court has held that "by carrying out or tolerating actions directed toward effecting extra-legal executions, by not investigating them adequately and by not punishing those responsible, if applicable, the State violates the duty to respect the rights recognized in the Convention and to ensure their free and full exercise, both by the alleged victim and by his next of kin."[73] According to the Court, the obligation to ensure requires that the State take all necessary measures to remove any obstacles that may exist that would prevent individuals from enjoying the rights enshrined in the Convention and that, therefore, a State that tolerates circumstances or conditions that impede recourse to domestic remedies designed to protect an individual's rights violates Article 1.1 of the Convention.[74]

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70. *See Case of Juan Humberto Sánchez, supra* note 61, para. 111.
71. *Ibid*., para. 132.
72. *Castillo Petruzzi et al. Case, supra* note 57, para. 207 and *Case of Bulacio, supra* note 64, para. 143.
73. *See Case of Juan Humberto Sánchez, supra* note 61, para. 134.
74. I/A Court H.R., *Exceptions to the Exhaustion of Domestic Remedies* (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights). Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11, para. 34.

The obligation to ensure also means that a State may not adopt provisions that would allow it to undermine compliance of its international commitments in order to protect its agents who have violated human rights. An example would be an amnesty law designed to benefit the perpetrators of human rights violations, even though that law has been promulgated by a government or regime that was not directly responsible for such violations, because it constitutes a mechanism that is incompatible with the States' obligation to ensure the exercise of human rights. Unlike the historic purpose of an amnesty, which was to pardon enemies of the government, the use of this institution to favor the impunity of excesses of power and to benefit State agents is not compatible with the values of a democratic society to which the Convention repeatedly refers, even when each State power is independent. That is what the Court has held, for example, in the Barrios Altos and Bulacio Cases.[75]

Closely connected to the foregoing, the Court has compared the obligation to ensure found in Article 1 with a State's obligation under Article 63 to compensate for a violation of the Convention. According to the Court, the obligation to ensure is autonomous and distinct from that of reparations, because while the latter might erase the consequences brought about by the unlawful act with regard to the victim or to his next of kin, the State's obligation to investigate the acts and punish the guilty does not eliminate the consequences of the unlawful act for the victim but has as its purpose that each State party ensure in its legal order the rights and freedoms provided by the Convention. Although the victim of a human rights violation may renounce the compensation that he is due and may even pardon those responsible, the State is still obligated to punish those responsible.[76] If a violation remains unpunished in such a way that the victim's rights have not been fully restored to the extent possible, the State has violated its duty to ensure their free and full exercise to all persons subject to its jurisdiction.[77]

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75. I/A Court H.R., *Barrios Altos Case*. Judgment of March 14, 2001. Series C No. 75, paras. 41-44 and *Case of Bulacio, supra* note 64, paras. 111 and 116.
76. *Case of Bulacio, supra* note 64, para. 72.
77. *Ibid*., para. 73.

It must be borne in mind that the obligation to ensure has the very broad purpose of achieving certain goals or objectives, among the most important of which is that every person effectively exercise and enjoy his human rights, leaving to the States the determination of the means to achieve those objectives.

### *3. THE ADOPTION OF PROVISIONS OF DOMESTIC LAW*

As a complement to the obligation to respect and ensure human rights found in Article 1, Article 2 provides that "where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States parties undertake to adopt, in accordance with constitutional processes and the provisions of (the) Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms." As may be concluded from its text, this provision is especially relevant with regard to the duty to ensure human rights undertaken by the States parties to the Convention. It does not have in principle an impact on the duty to respect human rights, which has an immediate and direct effect on individuals.

The Court has held that "the State has the duty to organize the apparatus of government and structures through which public authority is exercised, in such a manner that they are able to juridically ensure the free and full exercise of human rights."[78] The Court has also held that the duty to act domestically is the result of having contracted an international commitment. In the opinion of the Court, a norm of international law, derived from customary law, "prescribes that a State that has concluded an international agreement must introduce into its domestic laws whatever changes are needed to ensure execution of the obligations it has undertaken. This principle is universally valid and has been characterized by the case law as an evident principle." This obligation of the State implies that the domestic laws must be effective and that the State must adopt the necessary measures in order that the provisions of the Convention are truly complied

78. *See Case of Juan Humberto Sánchez, supra* note 61, paras. 137 and 142.

with and put into practice in its internal legal order.[79] It is important to underscore that the Court's holding reinforces and does not diminish the self-executing nature of the Convention.

According to the Court, Article 2, like Article 1.1, "sets forth a general obligation –that is added to the specific obligations as to each of the protected rights– and the Court, as the judicial organ of supervision of the Convention, has the official duty to determine its fulfillment by the States parties."[80] In the context of a specific case, therefore, the Court may examine the substance and legal effects of a domestic law to determine its compatibility with the norms of the Convention and the international law of human rights.[81] The Court has accepted the terms of an agreement between the parties that created an advisory mechanism with the participation of experts and organizations of civil society with the purpose of adapting and modernizing internal legal norms regarding the detention of children and of proposing to the pertinent organs changes to update and modernize the domestic law in that area.[82]

In the Barrios Altos Case, in line with the arguments of the Commission that were not challenged by the State, the Court considered that the amnesty laws adopted by Peru prevented the families of the victims and the surviving victims in the case from being heard by a judge as guaranteed by Article 8.1, violated the right to judicial protection of Article 25, prevented the investigation, pursuit, capture, prosecution and punishment of those responsible for the acts that occurred in Barrios Altos and thus did not comply with Article 1.1 but rather obstructed clarification of the facts of the case. The Court also held that the adoption of self-amnesty laws that are incompatible with the Convention signified a failure to comply with the obligation to adapt its domestic law pursuant to Article 2. According to the Court, in light of the general obligations set forth in Articles 1.1 and 2, the States parties must take all measures so that no one

79. *Garrido and Baigorria Case. Reparations, supra* note 20, paras. 68 and 69 and I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al.* Judgment of June 21, 2002, Series C No. 94, para. 112.

80. I/A Court H.R., *Cantoral Benavides Case. Preliminary Objections*. Judgment of September 3, 1998. Series C No. 94, para. 46.

81. *Ibid*., para. 45.

82. *See Case of Bulacio, supra* note 64, para. 144.

is deprived of judicial protection and the exercise of the right to a simple and effective remedy in the terms of Articles 8 and 25. States parties that adopt laws such as self-amnesty laws violate Articles 8 and 25 in conjunction with Articles 1.1 and 2. The Court has held that self-amnesty laws lead to a defenselessness of the victims and the perpetuation of impunity and are thus manifestly incompatible with the letter and spirit of the Convention. In its opinion, this type of law precludes the identification of those responsible for human rights violations because it blocks the investigation and access to justice and prevents the victims and their families from learning the truth and receiving the appropriate compensation. As a consequence of the manifest incompatibility between self-amnesty laws and the Convention, the Court has determined that those laws lack legal effect and must not remain an obstacle to the investigation of the facts of a case or to the identification and punishment of those responsible. Neither can they have an equal or similar impact with respect to other cases in Peru of violations of the rights set forth in the Convention.[83]

While the Court considered that the general obligations set forth in the Articles 1.1 and 2 require the States parties to adopt all necessary measures so that no one is deprived of his right to judicial protection established in Article 25,[84] it did not feel inhibited from indicating the measures that the State must adopt in this area. In the Juan Humberto Sánchez Case the Court held that under the general obligation of Article 2 the State must implement a registry of detainees, if it did not exist at the time of its judgment, that would permit control of the legality of detentions and that would include the identification of the detainees, the reason for detention, the competent authority, the day and hour of entry and of departure, and information on the order of detention.[85]

This obligation, made in positive terms, also implies that the State has the obligation to refrain from adopting any measure incompatible with the Convention. In this respect, the Court held that pursuant to Article 2 the positive obligation of States to adopt the legislative measures necessary to ensure the exercise of the rights recognized by the Convention also

83. *Barrios Altos Case, supra* note 75, paras. 42-44.
84. *See Case of Bulacio, supra* note 64, para. 116.
85. *See Case of Juan Humberto Sánchez, supra* note 61, para. 189.

implies the obligation not to promulgate laws that ignore those rights or prevent their exercise and to repeal or amend those that have that purpose; if not, they violate Article 2.[86]

### *4. THE PROHIBITION OF DISCRIMINATION*

In the framework of the obligations that the States undertake, Article 1 inserts an element inherent to human dignity and to the universality of human rights: the principle that no one may be discriminated against in the enjoyment of his human rights. Pursuant to that provision, the commitment of the States implies the duty to ensure the full and free exercise of the rights embodied in the Convention without discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition.

This idea, which is one of the fundamental principles of human rights law and is the counterpart of the equality of all human beings that is the other essential guiding principle of this new branch of law, is reinforced by Article 24, which claims it as a human right by stating that all persons are equal before the law and that, therefore, they are entitled to equal protection of the law without discrimination.

While the Court has stated that any treatment that can be considered to be discriminatory with regard to the exercise of any of the rights guaranteed under the Convention is, *per se,* incompatible with the Convention,[87] what is prohibited, obviously, are odious or irrelevant distinctions. The Court has observed that "not all differences in legal treatment are discriminatory as such, for not all differences in treatment are in themselves offensive to human dignity."[88] According to the Court, there exist certain factual inequalities that might legitimately give rise to inequalities of legal treatment that do not violate the principals of justice and that to the contrary may be "instrumental in achieving justice or in

86. *Case of Hilaire, Constantine and Benjamin et al., supra* note 79, para. 113.
87. I/A Court H.R., *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 53.
88. *Ibid*., para. 56.

protecting those who find themselves in a weak legal position."[89] Not every difference in treatment on the part of the State vis-à-vis the individual is discriminatory since the distinction may be a result of factual differences that express a true relationship between those differences and the aims of the rule of law, which may not be unjust or unreasonable and may not be arbitrary, capricious, despotic or "in conflict with the essential oneness of humankind."[90]

## D. THE RELATIONSHIP BETWEEN RIGHTS AND DUTIES

Part I of the Convention includes a chapter (Article 32) on personal responsibilities, entitled "Relationship between Duties and Rights." Article 32.1 does not specifically establish that relationship but only indicates in a general way that every person has responsibilities to the family, the community and mankind without specifying those duties.[91] In the same sense, the Preambles to the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights state that "the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized" in those international treaties.

This focus is not new in the inter-American system as it had previously been adopted by the American Declaration, whose Preamble refers to the relationship between one and the other by stating that "the fulfillment of duty by each individual is a prerequisite to the rights of all," that "rights and duties are interrelated in every social and political activity of man" and that "while rights exalt individual liberty, duties express the dignity of that liberty."

While from an ethical point of view it cannot be denied that rights and duties are closely related, politically we cannot fail to underscore the

89. *Ibid*.
90. *Ibid*., para. 57.
91. Similarly, the Preambles to the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights state that "the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized" in those treaties.

danger of emphasizing that relationship in this type of instrument, the function of which is to express the limits of State authority vis-à-vis the individual and not the duties, formulated generically and abstractly, of the latter vis-à-vis society.

It must be remembered that, despite the fact that Article 29 prohibits States from interpreting any of the Convention's provisions to permit the suppression of the enjoyment and exercise of the rights and freedoms recognized in the Convention or to restrict them to a greater extent than is provided by it, there is a risk that Article 32.1 may suggest –to some small-minded spirit– that the exercise of the rights set forth in the Convention depends on the fulfillment of the duties of each person. Such an interpretation is absolutely unacceptable in the field of human rights and is incompatible with the spirit and letter of the Convention. The fact that a person does not comply with his legal, moral or other duties does not deprive him, for example, of the right that his physical integrity be respected or that he be subjected to slavery or his right not to be judged by unfair courts or those that lack the necessary independence and impartiality.

As the product of the development of the conscience of humanity, human rights are the reflection of the society that we desire, respectful of the dignity inherent in the person and not a prize or a reward that is only granted to its good citizens.

## E. THE INTERPRETATION OF THE CONVENTION

According to the generally accepted rules of the interpretation of treaties, the text of the Convention is presumed to be the authentic expression of the will of the parties. The need to interpret a treaty only arises when the literal sense of the words is not sufficiently clear or leads to an unreasonable result.

Under Article 33 of the Convention, it is the Commission and the Court that hear matters related to the fulfillment of the commitments made by the States parties and, therefore, are the organs charged with interpreting the Convention. The Convention, however, gives the Court the last word to issue the authorized interpretation. On the other hand, Article 51

authorizes the Commission or the State concerned to submit a matter to the consideration of the Court. Moreover, Article 62.1 enables the States to recognize as binding, *ipso facto*, the jurisdiction of the Court on all matters relating to the interpretation or application of the Convention. Pursuant to Article 63.1, in the contentious cases that are referred to it, it is the Court that decides whether there has been a violation of a right or freedom protected by the Convention. Finally, Article 64.1 permits the States as well as the principle organs of the OAS, within their spheres of competence, to consult the Court on the interpretation of the Convention. Therefore, it is the Court that is authorized to give a true interpretation of the Convention, which is binding on all of the States parties. According to Judge Cançado Trindade, "it is the duty of an international tribunal of human rights to look after the due application of the human rights treaty at issue in the framework of the domestic law of each State Party, so as to secure the effective protection in the ambit of this latter of the human rights set forth in such treaty. Any understanding to the contrary would deprive the international tribunal of human rights of the exercise of the function and of the duty of protection inherent to its jurisdiction, failing to ensure that the human rights treaty has the appropriate effects (*effect utile*) in the domestic law of each State Party."[92]

The first element that is striking about the interpretation of the Convention refers to the objective nature of the human rights obligations assumed by the States. This means that its provisions have precedence over domestic law since they are autonomous and that the Convention does not impose correlative obligations among the States but rather creates a superior legal system to which the States must adapt their conduct. In this sense, the Court has stated that

> modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is

92. *See* his separate opinion in I/A Court H.R., *Hilaire Case. Preliminary Objections*, Judgment of September 1, 2001. Series C No. 80; *Constantine et al. Case. Preliminary Objections*. Judgment of September 1, 2001. Series C No. 82 and *Benjamin et al. Case. Preliminary Objections*. Judgment of September 1, 2001. Series C No. 81, para. 20.

> the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.[93]

This principle has been underscored by the Court in its advisory opinion on The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law and in its judgment in the Mayagna Community Case by holding that the terms of an international human rights treaty have an autonomous meaning, that they cannot be compared to the meaning that they might be given under domestic law and that such treaties are living instruments, whose interpretation must conform to the evolving times and, especially, to present-day conditions.[94] According to the Court, the Convention and other human rights treaties are inspired by a set of higher common values that have as their center the protection of the human being. In the Court's opinion, these treaties have "specific supervisory mechanisms, are applied as a collective guarantee, embody essentially objective obligations, and have a special character that sets them apart from other treaties."[95] This characteristic of human rights treaties had already been referred to by the International Court of Justice in its advisory opinion on the Reservations to the Convention on Genocide. According to the ICJ, the object of the Convention on Genocide must be taken into account, which is its purely humanitarian and civilizing purpose. The States parties do not have their own interests in adopting the Genocide Convention but a common interest in accomplishing the high purposes that are its *raison d'être*. Therefore, the high ideals that inspired that

93. I/A Court H.R., *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Arts. 74 and 75). Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 29.

94. I/A Court H.R., *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, para. 114 and *The Mayagna (Sumo) Awas Tingni Community Case*. Judgment of August 31, 2001. Series C No. 79, para. 146.

95. *See Ivcher Bronstein Case, Competence, supra* note 17 and *Constitutional Court Case, Competence supra* note 17, paras. 42 and 41, respectively.

Convention are, thanks to the common will of the parties, the foundation and measure of all of its provisions.[96] In classical international law, treaties are based on the principle of reciprocity and the attempt to maintain a certain equilibrium in the obligations assumed by the parties. In contrast, human rights treaties are inspired by the recognition of higher objectives than the interests of the parties arising from the existence of an international public order to which the parties have undertaken to give their collective guarantee. Human rights treaties, the aim of which is the recognition of certain fundamental values that make civilized living together possible, have contributed to create *ius cogens* norms, valid *erga omnes*, that have a legal effect even without any treaty obligation. These principles, which served as an inspiration to the former European Commission on Human Rights,[97] have been part of the reiterated jurisprudence of the European Court of Human Rights,[98] which has been cited with approval by the Inter-American Court.[99]

In the interpretation of the Convention, the principle of *effet utile*, so relevant in international law, acquires a transcendental importance and has been acknowledged by the Court. Citing its European counterpart,[100] the Inter-American Court has emphasized that the Convention must be interpreted taking into account its special nature as a treaty of the collective enforcement of human rights and fundamental freedoms and that the object and purpose of this instrument of protection of human beings require interpreting and applying its provisions so as to make its safeguards effective and practical.[101]

We must bear in mind in interpreting the Convention that the text is the primary element to take into consideration and that the rules of

96. International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. Advisory Opinion. I.C.J. Reports 1951, p. 23.

97. European Commission of Human Rights, Decision as to the admissibility of application No. 788/60, *Austria v. Italy*, YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, M. Nijhoff, The Hague, 1961, p. 140.

98. European Court of Human Rights, *Ireland vs. The United Kingdom*, Judgment of January 18, 1978, para. 239.

99. *See Ivcher Bronstein Case, Competence*, *supra* note 17 and *Constitutional Court Case, Competence*, *supra* note 17, paras 45 and 44, respectively.

100. European Court of Human Rights, *Soering case*, Judgment of January 26, 1989, para. 87.

101. *Ivcher Bronstein Case. Competence*, *supra* note 17, para. 45 and *Constitutional Court Case. Competence*, *supra* note 17, para. 44.

interpretation respecting the particularities of human rights treaties are found in international law. In this respect, the Court has rejected the arguments of a State regarding the effect of its declaration accepting the Court's jurisdiction and has held that acceptance of such declaration in the terms proposed by the State would lead to a situation in which the Court would have the Constitution of the State as its first point of reference and the American Convention only as a subsidiary parameter. That situation would lead to a fragmentation of the international legal order of human rights protection and would make illusory the object and purpose of the Convention.[102] Moreover, in the cases against Trinidad and Tobago, Judge Cançado Trindade stated that in the field of the international protection of human rights there are no implicit limitations to the rights found in the pertinent treaties and that the limitations established in those treaties must be interpreted restrictively.[103]

Article 29 establishes additional norms of interpretation, which acquire special relevance in clarifying the meaning and scope of a human rights treaty such as the American Convention. According to this Article, "no provision of the Convention shall be interpreted as a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in (the) Convention or to restrict them to a greater extent than is provided for herein; b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of said States is a party; c) precluding other rights and guarantees that are inherent in the human personality or derived from representative democracy as a form of government, or d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."

In the Mayagna Community Case, taking into account the applicable norms of interpretation and pursuant to Article 29.b of the Convention,

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102. *Hilaire Case. Preliminary Objections*, *supra* note 92, para. 93; *Constantine et al. Case. Preliminary Objections*, *supra* note 92, para. 84 and *Benjamin et al. Case. Preliminary Objections*, *supra* note 92, para. 84.

103. *See ibid*., para. 17 of his opinion.

which prohibits a restrictive interpretation of the rights included in the Convention, and by means of an evolutionary interpretation of the international human rights instruments, the Court held that Article 21 "protects the right to property in a sense which includes, among others, the rights of members of indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua." Given the characteristics of the case, the Court found that it was necessary to expound on the concept of property in indigenous communities. In that respect, the Court considered "the communal form of the collective property of land, in the sense that ownership is not centered on an individual but on the group and its community." The Court concluded that "indigenous groups, by the fact of their very existence, have the right to travel freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival." The Court held that the relationship of indigenous communities with the land is not merely a question of possession and production but a material and spiritual element that they must be able to enjoy fully, even to preserve their cultural legacy and transmit it to future generations.[104]

In the Constitutional Court Case, in establishing whether the State conduct conformed to the Convention, the Court considered it opportune to recall that the Preamble to the Convention reaffirms the purpose of the American States to "consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man." According to the Court, this conforms to the norm of interpretation found in Article 29.c, which states that none of the Convention's provisions may be interpreted as "excluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government." The Court, however, noted that the facts submitted to its consideration contrasted with the requirements of the Convention, since the Constitutional Court was "dismantled and disqualified from exercising its jurisdiction appropriately, particularly with regard to controlling constitutionality since Article 4 of that Court's statute requires the vote in

104. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 94, paras. 148-149.

favor of six of the seven member justices to declare that a law is unconstitutional." According to the Court, since the Constitutional Court is one of the democratic institutions that guarantees the rule of law, dismissal of the judges and the failure on the part of the Congress to name their replacements violated *erga omnes* the possibility of exercising control of constitutionality and of examining the State's conformity to the Constitution.[105] In view of the rights derived from representative democracy, the Court has held that, "under the rule of law, the principles of legality and non-retroactivity govern the actions of all bodies of the State in their respective fields of competence, particularly when the exercise of that punitive power where the State manifests with maximum strength one of its most serious and intense functions vis-à-vis human beings: repression, applies." The Convention is, therefore, not limited to requiring the existence of a law to legitimate the enjoyment or exercise of the rights or freedoms but also requires that the laws are enacted for reasons of general interest and with the purpose for which such restrictions have been established.[106] Therefore, "in a democratic system it is necessary to intensify precautions in order for such measures to be adopted with absolute respect for the basic rights of individuals." Moreover, in order to achieve legal certainty it is necessary for the punitive law, be it penal or administrative, to exist and to be known, or may be known, before the action or omission that violated it and for which punishment is intended occurs. The definition of an act as unlawful and the determination of its legal effects must precede the conduct of the subject who is considered the violator. Otherwise, individuals would not be able to guide their behavior according to "a valid and true legal order, within which social reproach and its consequences were expressed."[107]

105. I/A Court H.R., *Constitutional Court Case*. Judgment of January 31, 2001. Series C No. 71, paras. 111-112 and *Baena Ricardo et al. Case*, supra *note* 58, para. 105.

106. *See Baena Ricardo et al. Case, supra* note 58, paras. 107 and 170.

107. *Ibid*., para. 106.

## Chapter III

## THE LEGAL REGIME OF STATES OF EMERGENCY

In times of crisis or emergency, domestic laws, whether they are called *state of siege*, *martial law*, *state of emergency*, *state of war*, *state of internal disturbance*, *state of catastrophe*, *state of exception* or something similar, provide for the suspension of constitutional guarantees in order to give the government increased powers to face the emergency.[1] While, under such circumstances, those measures may be the only suitable means to preserve the existence of the group and the superior interests of society, they may only be applied to the extent necessary to confront the danger to the enjoyment of the rule of law and fundamental freedoms and they may not be left to the arbitrariness of State authorities without strict jurisdictional control.

In extraordinary situations, the American Convention, like other international human rights instruments,[2] authorizes the States parties to suspend the fulfillment of the obligations that they have contracted under the Convention. The Convention does not indicate which State body has this authority because that is a matter to be decided by the constitutional law of each country and is in principle for the Executive or the Legislative Branch or is a joint undertaking.

From the point of view of terminology, the Court has held that it is not a question of a *suspension of guarantees* in an absolute sense nor of a *suspension of rights*, as they are inherent to the person and all that may be suspended or limited is their full and effective exercise.[3] Notwithstanding

1. For the purposes of the international law of human rights, the term that is given to this institution in domestic law is absolutely irrelevant. What is important is its effect on the exercise of human rights and whether the specific situation that gave rise to it is provided for in the Convention. In the pages that follow, we shall refer to the regime of suspension provided for in the Convention as state of emergency.

2. Article 4 of the International Covenant on Civil and Political Rights and Article 15 of the European Convention on Human Rights and Fundamental Freedoms.

3. I/A Court H.R.. *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987 (hereinafter *Habeas Corpus).* Series A No. 8, para. 18.

this holding, we believe that in practical terms these measures involve both the suspension of the rights embodied in the Convention and of the appropriate means to ensure their exercise, i.e., the guarantees that the Convention provides in each case.[4] In this respect, while Chapter IV of the Convention is entitled "Suspension of Guarantees, Interpretation and Application" and Article 27 indicates in its heading that it refers to the "Suspension of Guarantees," Article 27.1 authorizes a State to suspend compliance of its *obligations* under the Convention. Pursuant to Article 1, a State undertakes both to *respect* and to *ensure* the rights enshrined in the Convention. Moreover, Article 27.2 lists the *rights* that may not be suspended and Article 27.3 requires a State to inform of any suspension of the application of the *provisions* that affect the enjoyment, and not merely the guarantee, of the rights set forth in the Convention.

The appropriateness of this type of measure is undoubtedly justified by the State's obligation to maintain a healthy equilibrium between the rights of the individual and the rights of society as a whole. Living in a community requires having institutions with sufficient powers to achieve its objectives. In order to protect society and preserve the values and interests of special social relevance, the State has been authorized to resort to extraordinary powers that restrict the exercise of human rights. In a hemisphere in which states of siege have been declared for long periods and in a region that has been distinguished by "the variety and harshness of the statutes and laws of exception that suppress human rights to an appreciable degree,"[5] the indiscriminate use of these extreme measures could completely eliminate the importance of the international law of human rights and the international obligations undertaken by States in this area. This is an attribute, therefore, that under the Convention a State may only exercise in exceptional situations and it is subject to very precise conditions and requisites. The Commission has expressed the view that in exceptional situations it cannot ignore the reasons in favor of recognizing extraordinary powers for the Executive Branch. At the same time, it has

4. *Ibid*., para. 25. According to the Court, "guarantees are designed to protect, to ensure or to assert the entitlement to a right or the exercise thereof."

5. Alfredo Vázquez Carrizosa, *La democracia y los derechos humanos en América Latina*, mimeographed document for the organizing meeting of the Asociación Latinoamericana para la Defensa de los Derechos Humanos, Quito, August 1980, p. 3.

indicated that those attributes are subject to very clear limitations to protect human rights and has observed that the necessity to defend the regularly established institutional order must be harmonized with the protection of the individual's fundamental attributes.[6]

The importance of this matter brings to mind what was expressed as long ago as 1866 by the United States Supreme Court when it held in a decision opposing special powers that the Constitution is the same in times of peace and in times of war and that "no doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." That Court held that such a doctrine would lead directly to anarchy or despotism.[7] Rather than incorporate this reasoning into the American Convention, it was decided to include the generally accepted practice in the region. It is precisely for this reason that extraordinary powers, including the suspension of the human rights commitments undertaken by the States, have been reserved for truly exceptional circumstances and subjected to very precise requirements so that they cannot be used as a pretext to resort to tyranny or the arbitrary exercise of power. Given the purpose of the Convention, these provisions must be interpreted restrictively in order that they interfere as little as possible with the exercise of human rights and that they not be used to justify their systematic violation. The Court has stated that it cannot ignore the abuses that may result from the suspension of guarantees and that have in fact occurred in the region.[8] Referring to combating guerrilla movements, the Court has recognized the existence of the right and even the obligation of a State to guarantee its security and maintain public order. Nonetheless, its powers are not unlimited and its actions must at all times respect the fundamental rights of all individuals subject to its jurisdiction.[9]

6. I/A Commission H.R., ANNUAL REPORT PRESENTED BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS TO THE GENERAL ASSEMBLY FOR THE YEAR 1974, General Secretariat of the Organization of American States, Washington, D.C., 1975, pp. 24-25.

7. *Ex Parte* Milligan, 4 Wall 475 (1867).

8. *See Habeas Corpus, supra* note 3, para. 20.

9. I/A Court H.R., *Bámaca Velásquez Case.* Judgment of November 25, 2000. Series C No. 70, para. 174.

## A. THE OPERATIVE CIRCUMSTANCES

A State obviously does not have absolute discretion to declare the existence of an emergency and thus interrupt the exercise of human rights. Article 27.1 indicates the conditions under which a State is permitted to suspend the rights embodied in the Convention, such as "in time of war, public danger or other emergency that threatens the independence or security of a State Party." Other than those situations, a State must comply fully with the obligations that it has contracted under the Convention. The existence of any of the above situations must be established not only when a State expressly invokes the right of suspension but also when it applies provisions or adopts measures under any name that would interfere with the free and full exercise of human rights.

In an earlier publication,[10] we criticized the method employed by the Convention to indicate the circumstances under which a State may invoke the right of suspension, which are not the same as those found in the International Covenant on Civil and Political Rights and in the European Convention. The Covenant employs a standard by which the suspension of human rights is only permitted "in time of public emergency which threatens the life of the nation,"[11] which contains two very precise elements that the alleged emergency must meet to justify the suspension: that it is a public emergency and that it threatens the life of the nation. The European Convention also authorizes the suspension of human rights "in time of war or other public emergency threatening the life of the nation."[12] Both instruments thus substantially restrict the right of suspension, limiting it to exceptional situations, which is generally the case with war, that threaten the life of the nation. In contrast, the American Convention has preferred a casuistic focus, by enumerating the situations in which the suspension may occur without those situations being entirely comparable or all of them being exceptional situations that threaten the life of the nation. In fact, the threat to a State's independence or security may be interpreted in

10. *La protección de los derechos humanos en situaciones de emergencia*, in CONTEMPORARY ISSUES IN INTERNATIONAL LAW: ESSAYS IN HONOR OF LOUIS B. SOHN, edited by Thomas Buergenthal, N.P.Engel, Publisher, Kehl/Strasbourg/Arlington, 1984, p. 110 *et seq*.

11. Article 4.1 of the Covenant.

12. Article 15.1 of the European Convention.

a way that requires less strict conditions than the above. The Commission has repeatedly emphasized the exceptional nature of this measure, which is reserved for situations of special gravity that, moreover, must be a threat to the organized life of the State as such.[13]

The scope of the situations indicated in Article 27 –war, public danger or other emergencies that threaten the independence or security of the State– depends especially on the interpretation that is given to each of them, taking into account their autonomous nature and irrespective of their meaning under the domestic law of the States parties.

Notwithstanding the wording of Article 27, the conditions that create an emergency conducive to exercising the right of suspension may vary and do not necessarily have to be the result of political tensions, within or outside the State, but may be the product of natural catastrophes or disasters or structural faults in the economy that, on the whole and for their possible repercussions on the life of the State, must be dealt with by means of extraordinary powers.[14] The operative circumstances indicated in Article 27.1, therefore, must be interpreted basically in function of their effect on the State regardless of their roots.

The operative circumstances, found in the American Convention and in other human rights treaties, that permit the suspension of human rights have the effect of eliminating the distinction found in classical international law between the Law of War and the Law of Peace by introducing elements that make up a different legal system.[15] In this aspect, the Convention reflects the different levels of violence that may occur in

13. *See*, for example, I/A Commission H.R., REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS ON NICARAGUA, p. 122 and REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS ON COLOMBIA, p. 221, General Secretariat of the Organization of American States, Washington, D.C., 1983 and 1981, respectively.

14. A theory, which we do not share because of the danger that it represents for individual freedom, that suggests that underdevelopment may also constitute an emergency that justifies the suspension of human rights. Stephen P. Marks, *Les principes et norms des droits de l'homme applicables en période d'exception*, in LES DIMENSIONS INTERNATIONALES DES DROITS DE L'HOMME, Karel Vasak, general editor, UNESCO, Paris, 1978, p. 199 *et seq*.

15. In the absence of absolute peace, F. van Hoof has distinguished between situations of a) international armed conflicts, b) non-international armed conflicts and c) internal disturbances. *The Protection of Human Rights and the Impact of Emergency Situations under International Law with Special Reference to the Present Situation in Chile*, in HUMAN RIGHTS JOURNAL, vol. X, No. 2, 1977, p. 214.

the life of a State, which range from absolute institutional normality with full enjoyment of human rights, to sporadic alterations of the public order that would permit restricting the exercise of those rights, to the most extreme crises, such as war, that may lead to their suspension.

### *1. WAR*

The first situation that the Convention refers to is "time of war," on which there is already a group of standards that govern both the right of a State to resort to the use of armed force (*ius ad bellum*) and the use of legitimate means to harm the enemy (*ius in bellum)*. The advent of international humanitarian law in the second half of the 19th century added a new dimension to govern this area. In order to reduce the damage caused by military operations, norms for the protection of non-combatant military personnel and civilians were adopted, which have been reinforced by the law of human rights, that have a general application and involve not only enemy soldiers but, more importantly, the population of the State itself both in times of peace and in times of war. It is important to emphasize that international humanitarian law protects the individual even in conflicts in which the very existence of the State is threatened and that the law of human rights grants the individual a minimum level of protection in circumstances not contemplated by the other.

The Convention does not provide sufficient elements to be able to state precisely whether the concept of war has been employed in a common and broad sense, referring to any armed combat, or whether it has been used in a precise technical sense, referring to an international armed conflict between States, governed by international law.[16] Since Article 27 attempts to regulate exceptional situations, it should be interpreted as referring to military operations between States, which normally correspond to the concept of war.

In any event, holding that the concept of war as employed in Article 27 does not include civil wars or other armed conflicts that, by their nature,

16. It is unnecessary, of course, to underscore that this concept has not been used in the figurative sense, as it has been used in "war against crime," war against hunger" or "war against unemployment."

are not international in scope does not mean in any way that these forms of military confrontations may not be included in some of the other operative circumstances that justify the suspension of human rights and that will be examined in another place.[17] It is also possible that certain violent situations, such as isolated alterations of public order or a civil war, may evolve and be transformed into conflicts of greater intensity, such as a world war.

On the other hand, no matter how grave and dramatic the images brought to mind by an international war, obviously not all wars are a threat to the organized life of the nation as a whole or require the adoption of extraordinary measures that include the suspension of human rights. A war no matter how harsh between two distant States that does not affect us or a paper war, merely declared between two or more States that does not involve military operations, is not necessarily going to require extreme measures that affect the exercise of human rights.

### *2. PUBLIC DANGER*

The second category to which Article 27 refers is that which, in ambiguous and imprecise language that cannot be read without fear and a lack of confidence, is termed public danger.

The *travaux préparatoires* of the Convention leave it clear that this idea includes public calamities, such as floods or earthquakes. As to other aspects that it may cover, the expression *public danger* must be interpreted in connection with the concept of *public order* to which several provisions of the Convention refer and which does not constitute a sufficiently severe threat to justify the suspension of human rights. The idea of a public danger requires much more serious conditions than those posed by a mere threat to the public order that, in a regime of absolute institutional normality,

17. This circumstance has led Daniel O'Donnell to downplay the importance of the distinction between the classical concept of war, civil war or other forms of armed conflict, since, although the word *war* was stricken from the Convention, any armed conflict that threatens the independence or security of the State constitutes a public danger or other emergency that would permit the suspension of human rights. *Legitimidad de los Estados de Excepción a la Luz de los Instrumentos de Derechos Humanos*, in DERECHO, Facultad de Derecho / Pontificia Universidad Católica del Perú, No. 38, December 1984, p. 170.

allows the exercise of some of the rights embodied in the Convention to be restricted, but not fully suspended.[18] A simple threat to public order is obviously not, under the Convention, a situation of such gravity that would justify the exercise of extraordinary powers and permit the State to exempt itself from complying with its human rights obligations. Moreover, this provision must be interpreted in the context of the Convention, particularly its Article 27, in such a way that the operative circumstances that are not war be as exceptional as war and present characteristics comparable to war.

In attempting to clarify the concept of *public danger* and to examine it in the context of the Convention, it must be understood that it is necessarily linked to the idea of a threat to the independence or security of the State.[19] In an effort to define the scope of the expression *public danger*, it is well to emphasize that Article 1.2 of Protocol Additional to the Geneva Conventions of 1949, Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), expressly excludes from its application situations of "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." While these situations are not entirely normal, they cannot be classified as extraordinary or exceptional in the life of a State and may in principle by dealt with by the State's ordinary powers while allowing the full exercise of human rights. In this respect, the Inter-American Commission in its Report on the Human Rights Situation in Bolivia did not find a direct causal relationship between the actions opposing the decision to declare the entire territory of the State a military zone and the measures adopted by the government to suspend the right of assembly, freedom of association, freedom of conscience and religion, right to personal freedom and freedom of movement and residence that in the opinion of the Commission, considering the gravity of the situation,

18. Articles 13.2, 15, 16.2 and 22.3. *See* also the concepts of public *security*, employed in Articles 12.3, 15, 16.2 and 22.3 of the Convention, and of public *order*, referred to in Article 12.3 of the Convention.

19. *See*, in this respect, Roberto Garretón Merino, *Los Estados de Excepción al servicio de la Doctrina de la Seguridad Nacional: La experiencia chilena*, in ESTADOS DE EMERGENCIA EN LA REGION ANDINA, compiled by Diego García-Sayán, Andean Commission of Jurists, Lima, 1987, p. 131.

exceeded the limits imposed by the Convention, particularly by its Article 27.[20]

The use of systematic violence by clandestine groups –terrorists or others– does appear to correspond to the idea of public danger. The European Court of Human Rights in the Lawless Case pointed out that the presence of a public emergency may be reasonably concluded from a combination of several factors: "the existence … of a secret army engaged in unconstitutional activities and using violence to attain its purposes; … the fact that this army was also operating outside the territory of the State, thus seriously jeopardizing the relations of the Republic … with its neighbors; (and) the steady and alarming increase in terrorist activities" during this period.[21]

### *3. THE THREAT TO THE INDEPENDENCE OF THE STATE*

The lack of allegations of a threat to the independence of the State – which in any case is associated with other considerations equally worthy of attention– is one of the reasons that this area has been less developed by the doctrine and the jurisprudence.

In attempting to be precise about the limits of the concept of the independence of the State, we must remember that it has an essentially political connotation and refers to the capability of State organs to adopt their own decisions and to act as a sovereign power. According to Charles Rousseau, a theory of independence in international law may only be formulated with respect to the prerogatives of the State, that is, its powers.[22] The first consequence deriving from the independence of the State would be the exclusive nature of its competence, meaning the State's monopoly of the powers of enforcement, of the exercise of the judicial function and of the organization of public services.[23] A second consequence arises from

20. I/A Commission H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE REPUBLIC OF BOLIVIA, General Secretariat of the Organization of American States, Washington, D.C., 1981, p. 23.

21. European Court of Human Rights, *Lawless case (Merits)*, judgment of July 1, 1961, series A, 1961, para. 28 of the considerations of law.

22. *See* DROIT INTERNATIONAL PUBLIC, TOME II, LES SUJETS DE DROIT, Editions SIREY, Paris, 1974, p. 72.

23. *Ibid*., pp. 73-84.

the independence of the State and, especially relevant for our purposes, refers to the autonomy of the State, which implies a discretion or freedom of appreciation on the part of State authorities as to what decisions to adopt and when to adopt them.[24]

In the context of the American Convention, this operative circumstance must be understood as an external threat to the autonomous functioning of the State. The purpose of the Convention must, however, be taken into account because in the area of human rights the independence of the State may not be construed to confer on the State absolute discretion with respect to what it may do to its own citizens or to those persons subject to its jurisdiction. The States themselves have consented to the regime of human rights being governed by international law. This area is, therefore, no longer under their exclusive competence. An act of a third State or an international organization to protect human rights may not be presumed to be an act of intervention against the principles of international law. It would be absurd to pretend that such an act constitutes a threat to the independence of the State.

It is evident that, when dealing with an external threat, the threat to the independence of the State is closely linked to the desire to control the political decisions of the State, which may be achieved by resorting to the threat of war or to other ways of achieving the same result through non-military means, but which may open the door to an armed conflict. Thus understood, it seems inevitable to conclude that this concept is implicit in the broader idea of State security, which we will now analyze.

## *4. THE THREAT TO STATE SECURITY*

A final category is that of *state security*, a term that is characterized by its amplitude and conceptual lack of precision and that for a long time has meant what governments have decided it meant.[25] Having been linked

24. *Ibid*., pp. 84-91.

25. *See* Stephen J. DelRosso Jr., *The Insecure State: Reflections on "the State" and "Security" in a Changing World,* in DAEDALUS, JOURNAL OF THE AMERICAN ACADEMY OF ARTS AND SCIENCES, Vol. 124, No. 2, Spring 1995, p. 183.

to the consolidation of national States, it has had a clear and unequivocal military connotation, directed toward the protection of the State when faced with outside threats of violence. During the past few decades, however, non-military elements have been added to the components of this traditional notion of state security, such as access to specific resources or economics,[26] the protection of the environment[27] and doctrines that suggest the need to preserve the State not only from external threats but also from the risk of internal subversion.

The concept of state security has in the context of the Convention, like many other expressions found in it, an autonomous nature, unlike the meaning and scope that domestic legislation might give this term. State security is defined in many countries rather more broadly than its dimension under the Convention, where it is limited by its purposes and by the requirements of a democratic society. As an example, Article 2 of the Venezuelan Organic Law of the Security of the Nation states that "the security of the Nation is based on integral development and is the condition, state or situation that ensures the enjoyment and exercise of the rights and guarantees in the economic, social, political, cultural, geographic, environmental and military spheres, of the constitutional principles and popular values, the institutions and every person who make up the State and society, with a projection to the future, within a democratic, participative and protagonistic system, free of threats to its survival, its sovereignty and the integrity of its territory and other geographical spaces." Each of these elements that, in the opinion of the lawmakers, forms a part of the security of the nation may be invoked to affect the exercise of individual rights. In the context of the nation's security, Article 47 of this law also defines zones of security as "the areas of the national territory that, for their strategic importance, characteristics and elements that comprise them, are subject to special regulations as to the persons, goods and activities that are found there, with the aim of guaranteeing the protection of these zones from external and internal dangers and threats."

26. *See* Robert McNamara, THE ESSENCE OF SECURITY: REFLECTIONS IN OFFICE, Harper and Row, New York, 1968.

27. *See* Lester Brown, REDEFINING NATIONAL SECURITY, World Watch Institute Paper No. 14, Washington, D.C., 1977.

Article 48 states that the National Executive may declare any area a "security zone that is considered necessary for the security and defense of the Nation." In exercise of this attribute, the President of Venezuela has declared as security zones a series of spaces, including a broad area adjacent to the Presidential Palace, which considerably restricts the right to pacific protest, the right to assembly and other forms of collective expression.

Notwithstanding the imprecision and ambiguity that may result from the term, *state security* is associated with the idea of *national security* that the Convention lists as an element that justifies restricting, but not suspending, certain human rights. On the other hand, we must remember that in the 1970s and at the beginning of the 1980s the doctrine of *national security* served as a pretext for large-scale human rights violations by identifying the population of the State as a domestic enemy that had to be combated.

The situations indicated in the Convention as a threat to *national security*, which permit the restriction of certain rights without affecting their essence and full enjoyment,[28] must be distinguished from the threats to the *independence or security of the State* to which Article 27 refers. The latter must exhibit a greater seriousness and intensity, which would authorize resort to such a drastic measure as the suspension of human rights.

It is well to emphasize that, according to the Convention's Preamble[29] and its Article 29,[30] these ideas must be interpreted within the framework of the requirements of a democratic society, whose bonds are stretched each time a State suspends the exercise of human rights, because when a State assumes extraordinary powers over its people to defend society that power may not be exercised without any form of control. In this respect, the Court has emphasized that, within the principles that orient the inter-American system, "the suspension of guarantees cannot be disassociated

28. Articles 13.2, 15, 16.2 and 22.3 of the Convention.

29. The Preamble to the Convention reaffirms the "intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man."

30. Article 29.c states that no provision of the Convention may be interpreted as "precluding other rights or guarantees derived from representative democracy as a form of government."

from the effective exercise of representative democracy" referred to in Article 3 of the OAS Charter and that such a measure is unlawful whenever it is resorted to for the purpose of undermining democracy, which has limits that cannot be breached, thus ensuring the permanent enjoyment of certain essential human rights.[31] The ultimate purpose of this institution is to preserve democracy as a condition for the exercise of human rights, without losing sight of the fact that a society that does not respect human rights cannot call itself a democracy. In the opinion of the Court, "in a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law are a triad," each one of whose components defines itself, complements and derives its meaning in function of the others.[32]

Attempting to clarify this concept, Hernán Montealegre has observed that the problem of state security is that of the totality of its elements. In his opinion, the security of a State is found in its capacity to affirm its fundamental identity in time and in space. In this sense, "a State is secure when each of its integral elements is secure. With respect to the territory, its security consists in its integrity; with respect to the government in its stability and with respect to the inhabitants in the intangibility of their fundamental human rights."[33] So that there is no doubt as to the scope of this concept and the origin of its eventual challenges, Montealegre has also pointed out that it is necessary to distinguish between external and internal threats to state security. The latter may be generated by insurrections of the people or from the threats that come from the higher reaches of State power and find their expression in the human rights violations of its inhabitants.[34]

An example of a threat to the security of a State party, which would also illustrate the connection that exists among the different operative

31. *See Habeas Corpus, supra* note 3, para. 20.
32. *Ibid*., para. 26.
33. LA SEGURIDAD DEL ESTADO Y LOS DERECHOS HUMANOS, Edición Academia de Humanismo Cristiano, Santiago (Chile), 1979, p. 7. *See*, also, the opinion of Daniel Hugo Martins that this expression implies a grave threat to the integrity or existence of any of the three constitutive elements of the State: its people, its territory and its legal order. *The Protection of Human Rights in connection with the Suspension of Guarantees or "State of Siege*," in THE ORGANIZATION OF AMERICAN STATES AND HUMAN RIGHTS: 1960-1967, Organization of American States, Washington, D.C., 1972, p. 153.
34. *Ibid*., p. 6.

circumstances indicated in the Convention, would be a war between two neighboring countries. A non-belligerent State obviously could not use such a war to justify the suspension of human rights, but could allege a threat to its security created by such a war,[35] whether due to the risk that the belligerents use its territory as a base of operations (with the accompanying danger that the conflict might extend) or to the effect that the war might have in the displacement of persons to its territory[36] or for the way in which the conflict might affect the flow of its vital imports or exports.

## B. THE GENERAL CHARACTERISTICS OF THE EMERGENCY

In determining the scope of the operative circumstances, the purpose of the Convention and the context of its provisions must be taken into account. Here the commitments undertaken by the States under Article 1 to respect and ensure the rights that Convention embodies must not be lost sight of. In addition, the Convention's Preamble recalls that in accordance with the Universal Declaration of Human Rights the ideal of free human beings enjoying "freedom from fear" can only be achieved if conditions are created that allow each person to enjoy all of his human rights. The reference to the Universal Declaration also serves to recall that the third paragraph of its Preamble states that it is essential that human rights be protected by the rule of law "if man is not compelled to have recourse, as a last resort, to rebellion against tyranny and oppression." It can be argued that, even in the event of internal political tension, created by a repressive policy of the government itself, the government may not use such emergency as a pretext to institutionalize human rights violations.[37]

35. *See* REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE REPUBLIC OF BOLIVIA, *supra* note 20.

36. An example might be the impact of migration on India due to the civil war in East Pakistan, just before the independence of Bangladesh.

37. In its October 1978 Report on the Situation of Human Rights in Nicaragua the Commission, in examining the state of emergency in force in that country, pointed out that the domestic law had created a socio-political reality in the country that had been turned into a legal abnormality since it lent itself to a systematic and generalized violation of human rights. I/A Commission H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN NICARAGUA, General Secretariat of the Organization of American States, Washington, D.C., 1978, p. 30.

On the other hand, the circumstances that authorize the use of the right of the suspension do not operate automatically. They have several common traits –implicit in the context of aforementioned provisions– that permit underscoring both the gravity of the emergency and the exceptional circumstances under which the State may adopt such an extreme and drastic measure as the suspension of human rights.

### *1. THEIR TIMELINESS OR IMMINENCE*

The operative circumstance that the State invokes to implement the right of suspension must be real. The emergency must be the result of an actual situation or, at least, of a situation that poses an imminent danger to the organized life of the State. The State may not suspend human rights on the pretext of a mere theoretical possibility or an unfounded fear that a danger to its independence or security may occur. According to the Commission, exceptional measures "may only be justified in the face of real threats to the public order or the security of the State."[38]

### *2. THEIR EXCEPTIONAL NATURE*

This institution is provided only for emergency situations. Therefore, no right guaranteed by the Convention may be suspended unless the conditions set forth in its Article 27 are strictly complied with. The Court has underscored that "the suspension of guarantees constitutes an emergency situation in which it is lawful for a government to subject rights and freedoms to certain restrictive measures that, under normal circumstances, would be prohibited or more strictly controlled."[39] It added that "rather than adopting a philosophy that favors the suspension of rights, the Convention establishes the contrary principle, namely, that all rights are to be guaranteed and enforced unless very special circumstances justify the suspension of some of them, and that some rights may never be suspended, however serious the emergency."[40]

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38. I/A Commission H.R., ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1980-1981, General Secretariat of the Organization of American States, Washington, D.C., 1981, p. 115.
39. *See Habeas Corpus*, *supra* note 3, para. 24.
40. *Ibid*., para. 21.

In order that an emergency to the life of a State justify the suspension of human rights, it is necessary that it be of an exceptional nature that cannot be confronted with the ordinary powers available to the organs of the State. Moreover, the provisions of the Convention, in a regime of the full exercise of human rights, permit a State to restrict, but not suspend, the exercise of some of the rights that the Convention guarantees when necessary, *inter alia*, to maintain public order or to protect national security.[41] The right of suspension is, therefore, reserved only for situations of extraordinary gravity and urgency that may be characterized as exceptional and that require a timely reaction on the part of the State.

This conclusion is not altered by the fact that Article 27 provides operative circumstances of distinct kinds, such as war, public danger or other emergency that threaten the independence or security of the State. In our opinion, in order to invoke the right of suspension, these circumstances must be comparable in nature to war, both in its abnormality and in its effects.

The exceptional nature of the emergency, together with its gravity, requires that it be a real situation, objectively verifiable, that demands a timely reaction on the part of the State and not a merely potential or probable danger. In this respect, a war between distant States or a war that is merely declared but does not involve military operations does not necessarily constitute a threat to the organized life of the State and would not justify, *per se*, the suspension of human rights.

### *3. THE ABSENCE OF ALTERNATIVE MEASURES*

There is no doubt that in the presence of an emergency the easiest recourse is the use of extraordinary powers. Given the nature of human rights as limits to State power and taking into account the power of the State to restrict the exercise of some of the rights guaranteed in the Convention, a State may only invoke the right of suspension when it is not possible to confront the emergency with the ordinary powers that it has at

41. Articles 12.3, 13.2, 16.2 and 22.3 of the Convention.

its disposal. This measure is, therefore, a last resort for the State, available only in the absence of other measures.

### *4. ITS EFFECT ON THE STATE*

It must be a true emergency of such a scope as to threaten the organized life of the State as a whole. It is not important that the emergency is limited to only a part of the territory, because its effects may be general.

Article 15 of the European Convention requires that it be an emergency "threatening the life of the nation," which suggests not only the gravity but the exceptionally severe effect that it must produce with respect to the State as such.

### *5. ITS EFFECT ON THE POPULATION*

Although the emergency may be localized to a specific place in the territory of a State, directly involving only a part of the population, the magnitude of the emergency must affect the whole population or, at least, an important portion of it. Both the International Covenant on Civil and Political Rights[42] and the European Convention[43] expressly require that the emergency threaten the life of the nation as a way of indicating that it cannot be the result of mere disturbances or alterations to the public order that have a limited effect and that can be controlled by ordinary measures.

By analogy, the European Court of Human Rights, in the Lawless Case, held that under the terms of Article 15 of the European Convention the suspension of human rights is provided for in "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed."[44]

42. Article 4.1 of the Covenant.
43. Article 15.1 of the European Convention.
44. *See Lawless case (Merits), supra* note 21.

## C. THE CONDITIONS OF THE SUSPENSION

One of the greatest difficulties that constitutional theory has to resolve in an emergency is designing a mechanism capable of maintaining an appropriate balance between the exercise of human rights and sufficient authority to confront the situation. In this context, the frequent warning that "the apparent needs evoked by the danger enter into serious conflict with the pillars of constitutional democracy"[45] acquires a pronounced importance.

The impact that an emergency may have on the full exercise of human rights depends on the nature and characteristics of the particular emergency. In the international law of human rights, the power to suspend some rights does not imply the suspension of the rule of law or the uncontrolled suspension of certain provisions of the Convention. According to the Court, the suspension of guarantees does not mean "the temporary suspension of the rule of law, nor does it authorize those in power to act in disregard of the principle of legality by which they are bound at all times. When guarantees are suspended, some legal restraints applicable to the acts of public authorities may differ from those in effect under normal circumstances. These restraints may not be considered to be non-existent, however, nor can the government be deemed thereby to have acquired absolute powers that go beyond the circumstances justifying the grant of such exceptional legal measures."[46]

Taking into account these considerations and assuming the occurrence of some of the operating circumstances that permit the suspension of the rights embodied in the Convention, a State may only invoke this exceptional right subject to various conditions. Some of these conditions are general and imply limitations to the right of suspension under any circumstances, irrespective of the nature of the emergency. Other conditions that the Convention imposes on a State that invokes the right of suspension, however, specifically refer to the measures that it may adopt within the framework of the particular characteristics of the alleged

45. Harry E. Groves, *Emergency Powers*, in JOURNAL OF THE INTERNATIONAL COMMISSION OF JURISTS, Vol. VIII, No. 2, Geneva, 1961, p. 1.

46. *See Habeas Corpus*, *supra* note 3, para. 24.

emergency, limiting the effect of the suspension to the precise requirements implied by the emergency.

### *1. THE GENERAL CONDITIONS*

These conditions impose limits to the right of suspension under all circumstances, regardless of the nature of the emergency or its gravity. This implies that there are certain rights that may never be suspended, that the measures adopted by a State must be compatible with its other international human rights obligations and that they may not be applied discriminatorily. It is important to note that in the light of the Convention's purpose the Court has from its beginning emphasized that while a State has the right and the duty to guarantee its security and that all societies suffer deficiencies in their legal order, the power of a State is not unlimited nor may it resort to any means to achieve its objectives since it is subject to law and morality. The Court added that a State may not take any action that is based on disrespect for human dignity[47] and that, therefore, a State has the duty to apply at all times procedures in accordance with the law and that respect the fundamental rights of each individual subject to its jurisdiction.[48]

#### *a) The rights that may not be suspended*

Regardless of the special circumstances created by the emergency, the Convention does not authorize under any circumstances the suspension of an extensive list of rights that in this sense are basic or intangible.[49] These are rights that, because of their importance, may not be suspended and whose legal regime may not be altered under any pretext.

Among the non-derogable rights, Article 27 specifically lists the right to juridical personality (Article 3), the right to life (Article 4), the

47. I/A Court H.R., *Velásquez Rodríguez Case*. Judgment of July 29, 1988. Series C No. 4, para. 154 and *Godínez Cruz Case*. Judgment of July 29, 1988. Series C No. 5, para. 162.

48. I/A Court H.R., *Bámaca Velásquez Case*, *supra* note 9, para. 174 and I/A Court H.R., *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003. Series C No. 99, para. 86.

49. It is not correct to characterize these rights as *absolute*, since some of them that may not be suspended (such as the right to life, freedom of conscience and religion) may be subjected, under normal circumstances, to important restrictions set forth in the Articles that govern them. For example, the guarantee of the right not to be deprived arbitrarily of life does not prevent, *per se*, the application of the death penalty nor is it incompatible with deaths caused legitimately during a war.

right to humane treatment (Article 5), freedom from slavery and involuntary servitude (Article 6), the principle of legality and the prohibition of *ex post facto* laws (Article 9), freedom of conscience and religion (Article 12), rights of the family (Article 17), right to a name (Article 18), rights of the child (Article 19), right to nationality (Article 20) and political rights (Article 23). In addition, the Convention provides that the essential judicial guarantees for the protection of any of these rights may not be suspended.

This broad catalogue of rights that may never be suspended is more extensive than the list of intangible rights contained in the European Convention[50] and the International Covenant on Civil and Political Rights.[51] The American Convention, however, differs from the latter in that it does not include the prohibition of imprisonment for the failure to fulfill a contractual obligation.[52] In addition, there is the possible difference in that both the Covenant and the European Convention prohibit suspension regarding slavery and involuntary servitude but not forced labor, a question that is not obvious in the American Convention.[53]

The fact that, unlike the Covenant and the European Convention, the American Convention has included among its intangible rights the judicial guarantees essential for the protection of the non-derogable rights has a transcendental importance in the legal system of human rights.

In determining the meaning and scope of the judicial guarantees essential for the protection of the non-derogable rights, the Inter-American Court has stated that, as not every right enshrined in the Convention may be even temporarily suspended, it is imperative that there are judicial

50. Article 15.2 of the European Convention does not authorize the suspension of Article 2 regarding the right to life (except with respect to deaths resulting from lawful acts of war), Article 3 regarding personal integrity, Article 4 on slavery and forced labor and Article 7 prohibiting the retroactive application of criminal laws.

51. Pursuant to Article 4.2 of the Covenant, the following provisions may not be suspended: those regarding the right to life, to personal integrity, the prohibition against slavery and forced labor, the prohibition against imprisonment for the non-payment of debts, the prohibition of the retroactive application of criminal laws, the right to recognition of juridical personality and the right to freedom of thought, conscience and religion.

52. Articles 11 and 14 of the International Covenant on Civil and Political Rights.

53. Héctor Faúndez Ledesma, *La Prohibición de la Esclavitud, Servidumbre y Trabajos Forzados: Su Relevancia Actual*, in REVISTA DE LA FUNDACIÓN PROCURADURÍA GENERAL DE LA REPÚBLICA, año 8, No. 7, Caracas, 1993, pp. 47-65.

guarantees essential for the protection of such rights and that Article 27.2 does not link these judicial guarantees to any specific provision of the Convention, which indicates that what is important is that these judicial procedures are indispensable to ensure those rights.[54] The determination as to what judicial guarantees are essential for the protection of non-derogable rights differs depending on the rights affected. For example, the indispensable judicial guarantees to ensure the right to physical integrity necessarily differ from those that protect the right to a name, although neither may be suspended.[55] Therefore, for the effects of Article 27 what must be considered as essential are those judicial procedures that ordinarily are ideal to ensure the full exercise of the rights and freedoms referred to in that Article and whose denial or restriction would endanger this enjoyment.[56]

The Court has also emphasized the judicial nature of the non-derogable guarantees, indicating that they imply the involvement of an independent and impartial judicial body capable of determining the lawfulness of acts adopted under a state of emergency.[57]

Specifically, the Court indicated that any interpretation of Article 27.2 must take into account the object and purpose of the treaty and that in the context of Article 29.a would avoid any conclusion that would imply suppressing "the enjoyment or exercise of the rights and freedoms recognized in (the) Convention or to restrict them to a greater extent than is provided for therein."[58] The Court also concluded that the judicial procedures set forth in Articles 25.1 and 7.6 of the Convention may not be suspended, which means that "the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights … even though such violation may have been committed by persons acting in the course of their official duties" and the right of each person deprived of his freedom to have recourse to a competent judge or court to rule on the lawfulness of

54. *See Habeas Corpus*, *supra* note 3, para. 27.
55. *Ibid*., para. 28.
56. *Ibid*., para. 29.
57. *Ibid*., para. 30.
58. *Ibid*., para. 16.

his arrest or detention and to order his release, if his detention or arrest was unlawful, also may not be suspended.[59]

In view of events in the hemisphere, characterized by disappearances, torture and assassinations committed or tolerated by some governments, and that experience has shown that the rights to life and humane treatment are threatened when habeas corpus is partially or totally suspended, the Court has held that, as an instrument for the judicial determination of the lawfulness of a detention, habeas corpus requires the appearance of the detainee before a competent judge or tribunal under whose authority the person is being held. Habeas corpus, thus, plays a fundamental role in respecting the life and personal integrity of a detainee and in preventing his disappearance or the place of his detention from being known, as well as protecting him against torture or other cruel, inhuman or degrading treatment.[60]

Since the right to personal liberty is not among those that may not be suspended in situations of emergency, the Court has been consulted on whether the writ of habeas corpus remains a means to ensure that right. According to the Court, since the suspension of guarantees may not exceed the limits strictly necessary to deal with the emergency, any act of the public authorities that goes beyond those limits, which must be precisely stated in the decree of the state of emergency, would be unlawful even during a state of exception.[61] The Court has held that since the suspension of guarantees may not be adopted without respecting the conditions established in Article 27, the specific measures that affect the suspended rights may not exceed those general principles, as would be the case if such measures violated the legal regime of the state of emergency, if they are prolonged beyond their temporary limits, if they are manifestly irrational, unnecessary or disproportionate or if, in adopting them, there was an abuse or misuse of power.[62] The writ of habeas corpus, therefore, is absolutely intangible and maintains its efficacy even with respect to those rights whose exercise has been suspended by the government.

59. *Ibid*., paras. 33, 35 and 44.
60. *Ibid*., paras. 35-36.
61. *Ibid*., paras. 37-38.
62. *Ibid*., para. 39.

Two supreme decrees that declared a state of emergency in the Provinces of Lima and El Callao and in the restricted military zone around three Peruvian prisons (among them, San Juan Bautista) afforded the Court the opportunity to rule on the application of this provision. In the Neira Alegría *et al.* Case, the Court held that these decrees, which gave the armed forces control and jurisdiction over the San Juan Bautista prison, violated Article 27.2 because, although the decrees did not expressly suspend the writ of habeas corpus, the manner of its application made it ineffective thereby prejudicing the alleged victims who were inside the San Juan Bautista jail by preventing an investigation and learning their whereabouts after the actions carried out by the Peruvian Navy to control a riot by some of the prisoners.[63]

On the other hand, in response to a request for an advisory opinion by the Government of Uruguay and clarifying that it would not be appropriate to provide an exhaustive list of all the necessary judicial guarantees that may not be suspended under Article 27.2, the Court stated that it would include "habeas corpus (Art. 7.6), *amparo*, and any other effective remedy before judges or competent tribunals (Art. 25.1), which is designed to guarantee the respect of the rights and freedoms whose suspension is not authorized by the Convention."[64] In addition, the concept of due process of law recognized in Article 8 should be understood to be applicable, to all extents and purposes, to all the judicial guarantees referred to in the Convention even under the regime of suspension regulated by Article 27. According to the Court, the principles of due process of law contained in Article 8 constitute the necessary conditions for the procedural instruments governed by Articles 7.6, 25 and 27.2 to be considered as judicial guarantees and, therefore, may not be suspended in situations of exception.[65]

In the opinion of the Court, "the 'essential' judicial guarantees which are not subject to suspension, include those judicial procedures, inherent

63. I/A Court H.R., *Neira Alegría et al. Case*. Judgment of January 19, 1995. Series C No. 20, paras. 77 and 84.

64. I/A Court H.R., *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987 (hereinafter *Judicial Guarantees*). Series A No. 9, operative para. 1.

65. *Ibid*., paras. 29-30.

to representative democracy as a form of government (Art. 29.c), provided for in the laws of the States Parties as suitable for guaranteeing the full exercise of the rights referred to in Article 27.2 of the Convention and whose suppression or restriction entails the lack of protection of such rights."[66]

The Court's reference to Article 29.c is to a norm that does not permit any of the Convention's provisions to be interpreted in a way that would exclude other rights and guarantees that are inherent to the human being or that derive from a democratic representative form of government and are not expressly guaranteed by the Convention. The Court probably had in mind some of the judicial guarantees found in Article 8, such as the right to be judged by an independent and impartial tribunal, the principle of full equality in judicial proceedings and the presumption of innocence in criminal matters, the public nature of the administration of justice and the like.

The Commission has insinuated that the right to be judged within a reasonable period, for which there is no express prohibition of suspension, as a specific judicial guarantee, is not susceptible to temporary suspension.[67] It appears to us, however, that if due to the nature of the emergency the number of accused persons would overload the tribunals (as occurred in the case of Nicaragua in 1980) the length of the proceedings must be examined in the light of these circumstances (and the need to avoid hasty judicial decisions, which are the product of resentment and pressure of public opinion) because of their effect on what could be considered a reasonable time.

On the other hand, regarding the suspension of the right to personal freedom during periods of emergency, the Commission has stated that detention for prolonged periods without due process is a human rights violation because it imposes a punishment without the benefit of a trial.[68] In agreeing with this position, we would underscore that what is rejected

66. *Ibid*., operative para. 2.
67. I/A Commission H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE REPUBLIC OF NICARAGUA, 1981, General Secretariat of the Organization of American States, Washington, D.C., 1981, p. 89.
68. *Ibid*.

is not simply a deprivation of personal freedom but also detention for prolonged periods without due process.

***b) Their compatibility with international law***

As the rights guaranteed by the Convention are minimum rights, their exercise may not be limited to a greater extent than that allowed by other international instruments. Therefore, any obligation undertaken by a State under other international human rights instruments is of the greatest relevance and its coexistence with the obligations under the Convention should be taken into account to ensure results that are most favorable to the individual.

Thus, with respect to States that have also ratified the International Covenant on Civil and Political Rights, the right not to be deprived of freedom for failure to meet a contractual obligation may not be suspended, which is a right the suspension of which is prohibited by the Covenant but not by the Convention.

In the area of humanitarian law, the Geneva Conventions of 1949[69] also contain many provisions that, in the exceptional circumstances of war, impose on States stricter obligations than those contained in the American Convention and that, therefore, appreciably reduce the ability of a State to suspend some of the rights guaranteed by the Convention or affect the scope of those measures. Common Article 3 of those four Conventions, which is applicable in the case of armed conflicts that are not international, lists a group of rights that may not be suspended under any circumstances, among which are the right to life and physical integrity, prohibition of torture, cruel, inhuman and degrading treatment, prohibition of outrages on personal dignity, prohibition of taking hostages and prohibition of passing of sentences or executions without a previous judgment, issued by a regularly constituted tribunal, with the judicial guarantees recognized as indispensable by civilized peoples. These provisions also include the right, in all circumstances, to be treated

69. The Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the Convention to Ameliorate the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, the Convention relative to the Treatment of Prisoners of War and the Convention relative to the Protection of Civilian Persons in Time of War, all signed in Geneva on August 12, 1949.

humanely, without any adverse distinction based on race, color, religion or faith, sex, birth or wealth or any other similar criteria.

This restriction, of course, not only refers to the international obligations undertaken by States in other human rights treaties, but also extends to any other treaty provision that more favorably protects the individual regardless of whether it is contained in a bilateral or multilateral treaty and irrespective of its principal object.[70]

Although the Convention does not expressly refer to the compatibility of measures adopted by a State that invokes the right of suspension of a norm of customary law (such as the prohibition of genocide, the right of asylum or the prohibition of taking hostages), it is evident that, at least in the case of *ius cogens* norms, this requirement is equally applicable. In addition to not having merited an explicit reference in the Convention, its principal difference with the obligations under a treaty is the necessity of proving the existence of the obligation under customary law.

***c) Their non-discriminatory application***

To the extent that the principle of non-discrimination is inherent to the concept of personal dignity and to the law of human rights, it was perhaps unnecessary to repeat this principle. The drafters of the Convention, however, thought it advisable to state expressly that when a State decides to suspend rights enshrined in the Convention, such a measure may not involve any discrimination based on race, color, sex, language, religion or social origin.[71]

The prohibition of discrimination also is reinforced by Article 30, which provides that the restrictions permitted by the Convention to the enjoyment or exercise of the rights recognized therein may not be applied unless they conform to laws that are enacted "for reasons of general interest" and with the purpose for which such restrictions have been established.

70. In this area, we are following the same criterion as expressed by the Court in I/A Court H.R., "*Other Treaties" Subject to the Advisory Jurisdiction of the Court* (Art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 43.

71. Not included is national origin, which is the root of international conflicts and many local conflicts. In such circumstances, it would appear natural that those holding power adopt measures designed to favor the interests of their own national group.

This prohibition does not, of course, only refer to measures that suspend human rights, which may be conceived in absolutely neutral terms, but above all to their application on certain sectors of the population but not on others. In fact, what is prohibited is any odious discrimination even when based on motives other than those of race, color, sex, language, religion or social origin. In this respect, a provision such as that found in Article 51 of the Statute of Rights and Guarantees of Nicaraguans of August 21, 1979 that suspended for sixty days the exercise of the rights and guarantees of those persons under investigation for crimes under the penal code or under international agreements committed during the regime of Somoza, irrespective of the reasons that justified such a measure, appears to be incompatible with the spirit, if not the letter, of the Convention in general and Article 27.1 in particular.

Strict application of such provisions is not easy because, in the case of political conflicts, it would be highly improbable that, deep down, elements such as race, color, language, religion or national origin are not involved. In any case, a State's power to deal with the origin of a conflict may not be used in any way to combat, much less exterminate, a group as such.

### *2. THE SPECIFIC CONDITIONS*

First of all, in order for a State to invoke extraordinary powers and suspend the exercise of human rights, it must justify the necessity of the measure by showing the existence of an emergency of the type and gravity required by the operative circumstances found in Article 27, which permit a State to invoke the right of suspension and which must be interpreted restrictively.

Moreover, the precise type and characteristics of the alleged emergency must have a decisive effect on the scope of the suspension, determining the rights that may be suspended, the degree to which they may be affected by such a measure and their duration. The Court has observed that "since Article 27.1 envisages different situations and since, moreover, the measures that may be taken in any of these emergencies must be tailored to 'the requirements of the situation' it is clear that what might be permissible in one type of emergency would not be lawful in

another. The lawfulness of the measures taken to deal with each one of the special situations referred to in Article 27.1 will depend, moreover, on the character, intensity, pervasiveness and particular context of the emergency and upon the corresponding proportionality and reasonableness of the measures."[72] Each measure that a State might adopt must thus be strictly justified with respect to the specific nature of the emergency that is invoked. Therefore, the suspension of human rights, in addition to having to be extraordinary, must be guided by three principles: necessity, proportionality and duration, all strictly limited to the requirements of the situation. In fact, these three requisites are intimately associated and their precise content depends on the characteristics of each emergency.

### *a) The principle of necessity*

This principle implies that no emergency justifies the suspension of *all* human rights[73] and that the decision to suspend rights must not be capricious, but must be based on the exigencies of the particular situation and no other practical means must be available to deal with it. The Court has held that the suspension of guarantees must not exceed the limits that are strictly necessary and that any action of the public authorities that goes beyond those limits must be precisely set forth in the provisions that decree the state of exception. In the opinion of the Court, the limitations imposed on the actions of the State respond to the general necessity that in every state of emergency there are appropriate means to control the measures taken that are proportionate to the needs of the situation and that do not exceed the strict limits imposed by or derived from the Convention.[74]

In the Baena Ricardo *et al*. Case in which the State had alleged the existence of a national emergency and had invoked Article 27, the Commission argued that the decision to suspend rights may not be arbitrary and may only be taken when a less restrictive alternative does not exist. According to the Commission, the measures adopted by the State in this case were unlawful since they exceeded the alleged threats against the

72. *See Habeas Corpus*, *supra* note 3, para. 22.

73. In this context, "all" means those rights that are not intangible and that, in general terms, may be suspended.

74. I/A Court H.R.,*Castillo Petruzzi et al. Case*. Judgment of May 30, 1999. Series C No. 52, para. 109: *Habeas Corpus*, *supra* note 3, para. 38 and *Judicial Guarantees*, *supra* note 64, paras. 21 and 36.

nation and, thus, the massive firing of public workers was unnecessary and did not correspond to the exigencies of the situation. In its opinion, the pardon of Col. Eduardo Herrera Hassán showed that the object of Law 25 was not to deal with the situation of emergency but rather to punish the public workers since ordinary procedures were applied to the leader of the coup who was pardoned, while punitive measures under the law of emergency were applied to the public servants who were not pardoned.[75]

The suspension of human rights is, of course, necessary when a State does not have an alternative that would permit it to cope with the emergency. A State must, however, justify each measure that restricts the exercise of human rights and the suspension of each specific right. The decision to suspend may not under any circumstances be used as a tool to control public debate to favor the government in power or to repress those who are opposed to the regime.

In application of this principle, damage caused by an earthquake may justify the decision to suspend freedom of movement in the affected zone in order to facilitate the tasks of rescue, prevent looting or avoid the outbreak of an epidemic. These circumstances would not, however, provide a motive for a State to suspend the rights of association or assembly or freedom of expression. Similarly, in the event of widespread terrorist activities, a State could take measures to suspend the right of personal freedom in order to be able to detain suspicious persons but could not invoke this emergency to suspend the right to a fair trial and deprive those accused of terrorist activities of the right to be judged by an independent and impartial tribunal.[76] While an emergency of this type would permit a State to detain a person suspected of participating in subversive activities and deprive him of his freedom during the emergency, in the event that he is accused of a crime and brought to trial the State has the duty to ensure the necessary judicial guarantees so that he is given a fair trial.

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75. I/A Court H.R., *Baena Ricardo et al. Case*. Judgment of February 2, 2001. Series C No. 72, para. 90.

76. The reference that Article 27 of the Convention makes to the intangibility of judicial guarantees is only to assure the protection of the other rights that may not be suspended, which does not include the right of personal freedom, thus posing the question whether, in cases such as that proposed, its suspension is necessary.

According to the Commission, during the application of emergency measures individual rights must be legally protected in the face of the omnipotence of the authorities. The Commission believes that under a properly structured state of siege that does not appreciably alter the independence of the different branches of government the enjoyment of human rights may be preserved, at least with respect to those rights considered as fundamental. While recognizing the legality of this institution, the Commission considered that any measure that might involve abuse or neglect, which may justly thought to be excessive, continues to be inadmissible.[77]

To a certain extent, this principle was posed tangentially in the Neira Alegría *et al*. Case, in which the Commission argued in its final submissions to the Court that the State had violated "the deadlines established for cases of suspension of guarantees as provided for in Article 27 of the Convention."[78] In addition, the Commission presented evidence during proceedings before the Court that indicated that the demolition by plastic explosives of the San Juan Bautista jail after the surrender of the rioting inmates had no logical explanation and, therefore, was not justified. The Court held that neither the fact that the prisoners were highly dangerous nor that they were armed was a sufficient reason to justify the amount of force that was used in the jail and that caused its demolition with "all of its consequences; among them the death of inmates who would have eventually surrendered."[79] In spite of the foregoing, it is remarkable that the Court did not deal with this matter and did not examine whether the measures adopted by the State to suspend some of the provisions of the Convention were justified as necessary.[80]

### *b) The principle of proportionality*

A second limitation deals with the scope of the measures that a State may lawfully adopt in reaction to an emergency.

77. I/A Commission H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN PARAGUAY, General Secretariat of the Organization of American States, Washington, D.C., 1978, p. 18, para. 20.

78. *See Neira Alegría et al. Case, supra* note 63, para. 58.

79. *Ibid*., para. 74.

80. The Court declared that Peru had violated the prohibition of Article 27.2 of the Convention with regard to the rights that may not be suspended under any circumstances, but it did not refer to the question of compliance with this requirement, whose absence was implicit both in the submissions of the Commission and in the evidence that it presented.

Assuming that the nature of an emergency requires the suspension of certain human rights, such a measure must be applied in a way that is not excessive or disproportionate to the circumstances that caused it. In the case of a civil war, for example, the arrest of children, old people and the disabled who do not represent a threat to the State and in no way prevent the government from dealing with the rebels would be a disproportionate measure that goes beyond the powers that the Convention grants the State. Similarly, while the existence of an international war may justify the suspension of freedom of expression in order not to interfere with the State's war plans and prevent the dissemination of information that might affect the security of its troops, such a measure may not be applied without restrictions, subjecting to censorship the dissemination of information that has nothing to do with the conflict that gave rise to the suspension of human rights.

In the Neira Alegría *et al.* Case, the Commission presented evidence that showed that the military force used to control the riot in a jail was disproportionate to the true danger[81] and argued in its final submissions to the Court that the State had violated Article 27.[82] Curiously, although the Court held that there had been a disproportionate use of force,[83] it did not hold that the State had violated this basic requirement of Article 27.1.

### *c) The principle of duration*

It is obvious that no emergency may be converted into a pretext to derogate human rights or to suspend them indefinitely. A suspension may not be prolonged unnecessarily and in no case may be extended beyond the time that the emergency that gave rise to it endures. In this respect, the Commission has shown its legitimate concern for "the enactment of these states of emergency for indefinite or prolonged periods of time, above all when they grant the Chief of State a broad concentration of power, including the inhibition of the judiciary concerning the measures enacted by the executive, which may lead, in certain cases to the denial itself of the existence of the rule of law."[84]

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81. *See Neira Alegría et al. Case*, *supra* note 63, para. 43.
82. *Ibid*., para. 58.
83. *Ibid*., paras. 69 and 74.
84. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1980-1981, *supra* note 38, p, 115.

This principle is associated with the meaning and purpose of the powers that are granted to the State, including the suspension of human rights, the function of which is to give the State extraordinary powers temporarily to allow it to re-establish order and the full enjoyment of human rights. These attributes, however, may not become permanent or prolonged indefinitely. In accordance with this principle, the State must make a serious effort to return to normality and re-establish the full exercise of the suspended rights, especially when the State authorities themselves admit that the motives that gave rise to the suspension no longer exist.

This principle also implies that the effect of the measures adopted during the emergency may not be prolonged beyond the time that the emergency lasts. In this respect, although only as an analogy, it is worth citing the decision of the former European Commission on Human Rights in the DeBecker Case, which rejected the position of the Government of Belgium that the measures of war did not automatically lose their effect once the war ended. The European Commission held that the measures of suspension pursuant to Article 15 of the European Convention may only be justified under the circumstances indicated in the provision itself "representing a violation of the Convention if they remain in force after these circumstances disappear."[85] In line with the opinion of the European Commission are the terms of Article 30 of the American Convention regarding the restrictions permitted to the enjoyment or exercise of the Convention's rights or freedoms that may not be applied except in conformity with the laws that are enacted for reasons of general interest and with the purpose for which such restrictions were established.

As it is not possible, of course, to foresee exactly how long an emergency will last, the duration of measures that suspend the obligations of the State under the Convention cannot be established *a priori*. In this respect, a decree that suspends human rights for thirty days[86] or a decree that suspends those same rights for periods of six months[87] may be applied in a manner compatible with the Convention only to the extent that the motives that gave rise to the suspension continue to exist. If not, the State

85. European Commission on Human Rights, *DeBecker case*, series B, 1962, p. 133.
86. *See* the notification of El Salvador to the OAS Secretary General of May 9, 1980.
87. *See* the notification of Nicaragua to the OAS Secretary General of January 27, 1980.

must re-establish the full exercise of the rights under the Convention as soon as the causes that brought about the measure have disappeared.

## D. THE FORMAL REQUISITES

Under Article 27, a State that invokes the right to suspend the obligations contracted under the Convention must immediately inform the other States parties, through the OAS Secretary General, of the provisions of the Convention whose application has been suspended. Once a State has terminated such suspension, it must also so inform the other States parties, once again through the Secretary General.

Article 27.3 requires the presentation of two reports on the part of a State that invokes the right of suspension: one immediately after its decision and a second report once the full exercise of the rights guaranteed by the Convention has been reestablished.

The content and scope of the information in these reports must be interpreted taking into account the object and purpose of the treaty and the requirements of Article 27.1 since this provision provides that the suspension of the obligations contracted by the State under the Convention must be compatible with its other obligations under international law, among which is Article 4.1 of the International Covenant on Civil and Political Rights, which requires that the existence of a public emergency be officially proclaimed. This official proclamation must at least indicate the nature of the emergency, the measures adopted to deal with it and a list of the rights that the State considered necessary to suspend.

### *1. THE PROCLAMATION OF THE EMERGENCY*

A measure as drastic as the suspension of human rights under Article 27, which directly affects the exercise of individual rights, must be accompanied by notification to the public. If the object and purpose of the treaty is to protect human rights and to avoid the arbitrary exercise of power, such an extreme measure may only be applied in conformity with that purpose after a formal proclamation that there exists an emergency of the nature provided for in Article 27.1.

The Convention permits restricting the exercise of the human rights that it guarantees when the following condition is fulfilled: the existence of legitimate causes, previously established by law and necessary in a democratic society.[88] In addition, Article 30 provides that such restrictions to the enjoyment or exercise of the rights or freedoms recognized in the Convention may not be applied except in accordance with laws that are enacted for reasons of general interest and with the purpose for which such restrictions have been established. The public must be advised, through a previously enacted law, of the conditions in which they may exercise certain rights and freedoms under the Convention and must know the restrictions to which those rights and freedoms are subject. Otherwise, these restrictions would be imposed arbitrarily, needlessly and without the public knowing what to do. Such an extreme measure as the suspension of the rights guaranteed by the Convention should never require less than an official proclamation, as a way of advising that an emergency exists and that the State organs have assumed extraordinary powers that affect, or may affect, the exercise of individual rights.

On the other hand, Article 29.b states that the Convention may not be interpreted to limit the enjoyment or exercise of any right or freedom that may be recognized by virtue of another treaty to which the State is a party. Article 4.1 of the International Covenant on Civil and Political Rights, which confers on States a power equivalent to that granted under Article 27.1, for example, subjects the exercise of that power to an official proclamation of the emergency justifying the suspension of human rights. A State may not invoke an emergency to justify restrictions of human rights, applied discretionally, without the public being officially informed of the nature of the emergency and the manner in which it affects the exercise of public freedoms.

In the Baena Ricardo *et al.* Case, the State alleged that at the moment of the acts denounced there existed a grave situation of national emergency that threatened the security of the State and that Law 25 had been enacted in accordance with the law, incorporating the restrictions authorized by the Convention with express mention, *inter alia*, of its Article 27. In its

88. Articles 7.2, 11.2, 15 and 16.2 of the Convention.

submission, the Commission argued that "the state of emergency was not formally declared by Panama; that it violated the principles of proportionality, proclamation and notification that govern the states of emergency, according to which the exercise of the right to suspend guarantees is limited to the existence of certain given material conditions and to compliance with precise formal requirements, which, in this case, were omitted by the State."[89] Because a state of emergency had not been declared in Panama in which some guarantees under the Convention would have been suspended, the Court rejected the position of the State concerning the presumed existence of a state of emergency.[90]

### *2. THE DUTY TO INFORM AND THE PURPOSE OF THE INFORMATION*

A State does not have absolute discretion to invoke extraordinary powers, which are subject to rigorous control and very precise formal requirements. The suspension of human rights, regardless of the reasons, carries with it the danger of a temptation towards totalitarianism and of grave abuses by the authorities. In fact, *states of exception* have traditionally been associated with grave and massive violations of human rights.[91] The purpose of notification to the other States parties is to allow international supervision in two aspects: this information permits verifying that the characteristics of the emergency alleged by the State correspond to those allowed under the Convention and notification allows control on the manner in which the State employs this right and that its application is compatible with the purposes of the Convention. It is in this second sense that in the Castillo Petruzzi *et al.* Case the Court through its Secretariat requested the OAS Secretary General to inform whether, in accordance with this provision, the State had notified him of any suspension of guarantees during

89. *See Baena Ricardo et al. Case, supra* note 75, paras. 89-90.
90. *Ibid*., para. 94.
91. *See*, for example, Diego García-Sayan, *Hábeas Corpus y Estados de Emergencia*, Andean Commission of Jurists, Lima, 1989, p. 35 *et seq*. Also, Héctor Gros Espiell, Rodolfo Piza R. and Daniel Zovatto, *Los etados de excepción en América Latina y su incidencia en la cuestión de los derechos humanos en caso de disturbios internos*, in ESTADOS DE EMERGENCIA EN LA REGION ANDINA, Diego García-Sayán (editor), Andean Commission of Jurists, Lima, 1987, p. 19 *et seq*. and Harry E. Groves, *Emergency Powers*, *supra* note 45, p.1 *et seq*.

the period of January 1, 1993 to June 1, 1994 and whether such information included an indication of the provisions suspended, the reasons for the suspension, its territorial scope and the date of its termination.[92]

Regrettably, the Commission's function of oversight in this area has not been exercised systematically or rigorously, but sometimes selectively. For example, the popular protests in Caracas and other cities of Venezuela between February 27 and the first week of March of 1989 that led to the suspension of constitutional guarantees and the death of hundreds of persons did not merit any comments in the Commission's Annual Report or any statement regarding the operative circumstances that would justify a suspension or an examination as to whether the suspension had been applied to the extent strictly required by the circumstances. Neither was there a mention in the Annual Report of the suspension of guarantees in February and November of 1992, provoked by two military uprisings, the second of which was prolonged, according to statements by the Venezuelan Minister of the Interior, beyond the time necessary to deal with the emergency and when the reasons that gave rise to it had already disappeared.

While a State is in the best position to appreciate the nature of an emergency and the need to suspend rights, an area in which it has a margin of appreciation in the initial judging of the facts, it is not exempt from rigorous international control by the Convention organs and the other States parties. The Commission has an important role in overseeing compliance of the obligation to inform and above all in verifying the operative circumstances that justify the suspension and the degree to which the measure affects the exercise of certain rights and the conditions of its application.[93] Of course, the opinion of the Commission in each of these aspects may differ from the initial appreciation of the State authorities[94] and must prevail over the opinion of the latter. The Commission must exercise this control not only when a State has expressly invoked the right

92. *Castillo Petruzzi et al. Case*, *supra* note 74, para. 50.

93. *See* in this respect, one of the reports of the Commission on Nicaragua that points out that, despite the margin of discretion that the State has, the Commission must examine the justification of the measures. REPORT ON THE SITUATION OF HUMAN RIGHTS IN NICARAGUA, *supra* note 13, p. 126.

94. *See* REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE REPUBLIC OF BOLIVIA, *supra* note 20.

of suspension, but also in any circumstances in which the effect of the measures adopted by a State is the suspension of rights guaranteed by the Convention.

### *3. THE RECIPIENTS OF THE INFORMATION*

Although the Convention only mentions the other States parties, this information has in principle three other recipients: implicitly, the Commission as an organ of control of the system; less obviously, the people and the judicial authorities of the State concerned and, at times, the Inter-American Court may have an interest in having this information.

#### *a) The other States parties*

Under Article 27, a State that invokes the right of suspension has the duty to notify this measure to the other States parties through the OAS Secretary General. Although not properly organs of control, the other States parties have a legitimate interest in maintaining the lawfulness of, respect for and fulfillment of the obligations assumed by each State under the terms of the Convention.

#### *b) The Commission*

Although Article 27 does not expressly refer to the duty to notify the Commission, Article 41.d authorizes the Commission to request that the governments of the OAS member States (whether or not they are parties to the Convention) report on the measures adopted in the area of human rights. Similarly, by virtue of Article 43, the States parties are obligated to provide the Commission with the information that it requests on the manner in which their domestic laws ensure the effective application of any provision of the Convention. Moreover, until a case is referred to the Court, the Commission is the competent organ to hear matters related to the fulfillment of the commitments contracted by the States parties to the Convention.

#### *c) The Court*

The Court has a special interest in this information, particularly with regard to cases pending before it that raise the issue of the application of

Article 27. In the Durand and Ugarte Case, the Court's Secretariat requested the OAS Secretary General to inform whether Peru had notified of any state of emergency or suspension of guarantees between June 1, 1986 and July 20,1987, pursuant to Article 27.3.[95] Forty-two days after the date of this request, the Department of International Law of the General Secretariat informed the Court that it had not received or registered any such notification.[96]

### *d) The public of the State in question*

There is an important difference in this area with the International Covenant on Civil and Political Rights. The Covenant requires that the existence of the emergency be proclaimed, which implies defining and informing the public of its nature. While the American Convention does not expressly mention this requirement it would appear to be implicit in its Article 30, which provides that the restrictions allowed to the enjoyment or exercise of the rights or freedoms recognized in the Convention may not be applied except in accordance with laws that have been enacted in the general interest and with the purpose for which such restrictions were established. The general interest, of course, requires that a measure of such impact be duly notified to the public by means of its publication and dissemination with an indication of its causes and scope.

Although Article 27 does not expressly provide guidelines to govern a suspension, Article 30 does regulate the measures of suspension in order to guide the authorities charged with its application and the public, which must obey the restrictions but which may not be subject to arbitrary measures. In this respect, it is not sufficient to indicate, for example, that the right of assembly or freedom of movement is suspended in general terms. In order for such a measure to be compatible with the Convention, it must point out, for example, that the right to hold political meetings is suspended or that the holding of any political meeting must be notified previously to the administrative authority or that permission is necessary to hold a meeting or that meetings of a social nature of more than x number of persons must be notified to the administrative authority before the

95. I/A Court H.R., *Durand and Ugarte Case. Preliminary Objections*. Judgment of May 28, 1999. Series C No. 50, para. 26.

96. *Ibid*.

meeting or that the circulation of unauthorized persons in sector z, whether in absolute terms or between certain hours, is prohibited. From this point of view, a measure that suspends in general terms freedom of movement, personal freedom or freedom of expression, without any basis and without adequate regulation of the rights that are suspended, would be absolutely incompatible with the purposes of the Convention.

On the other hand, a State by invoking Article 27.1 affects the nature of its obligations and, therefore, the Court must consider this fact in the cases before it. In the Baena Ricardo *et al*. Case, the Court's Secretariat upon instructions of the President requested the OAS Secretary General to inform it of any information that might have been received of a notification from Panama between November 20 and December 31, 1990 regarding the suspension of guarantees of the Convention, the provisions suspended and the date of its termination. This request was later sent to the Assistant Secretary for Legal Affairs, in response to which the Director of the Department of International Law informed the Secretariat that no notification had been received or registered by that Department with respect to the suspension of guarantees of the Convention on the part of the State.[97]

***e) The judicial authorities of the State***

The information contained in the proclamation of the emergency allows the State authorities to exercise judicial control over the measures decreed by the government. It must be remembered that an emergency situation does not authorize suspension of the rule of law. This control of lawfulness is necessary to verify, for example, whether a detention based on the suspension of personal freedom complies with the legislation authorized by the state of emergency.[98]

The importance of this matter may be seen in a decision of the Federal Court of Appeals in Criminal and Correctional Matters of Buenos Aires in which it held that it was "unacceptable to sustain the theory that the President (of Argentina) is the only person empowered to evaluate the situation of persons held on his instructions." According to that tribunal, "although eminently political and non-judicial matters fall outside its sphere

97. *See Baena Ricardo et al. Case, supra* note 75, paras 27, 29 and 30.
98. *See Habeas Corpus, supra* note 3, para. 40.

of jurisdiction, it is no less true that the judicial branch is responsible for analyzing, in exceptional cases such as this, the reasonableness of the measures adopted by the Executive Branch." It added that "the national interest and individual freedom must be made compatible in such a way that it is not even possible to presume that those who are deprived of their freedom on instructions from the Executive Branch will be left to their fate and beyond any control by the judges of the Nation."[99]

### *4. THE CHARACTERISTICS OF THE INFORMATION*

As has been indicated, the suspension of human rights for whatever reason involves the danger of the temptation of totalitarianism and of grave abuses by the authorities. It is not coincidental that states of exception have traditionally been associated with dictatorial governments and with grave and massive human rights violations. In this respect, the purpose of the notification to the other States parties is simply to permit international oversight of the use that States make of this right.

#### *a) Its timeliness*

Pursuant to the clear language of the Convention, when a State invokes the right of suspension it must immediately inform the other States parties. Nevertheless, given the urgency of the measures required to deal with an emergency, it is obvious that the need to inform *immediately* should not be interpreted as a requirement to inform at the moment of an emergency and the declaration of the suspension of rights, but rather at the first possible opportunity.

The lack of timely notification prevents the exercise of an opportune control on the measures adopted by a State in the case of an emergency and, therefore, does not meet the essential object of this requirement. For example, the notification of the Government of Nicaragua five months after the decree of emergency and the suspension of some provisions of

99. *See* the decision of April 1977 in Case 1980, in I/A Commission H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN ARGENTINA, General Secretariat of the Organization of American States, Washington, D.C., 1980, p. 252.

the Convention,[100] with no justification for the delay, does not meet the requirement of timeliness found in Article 27.3 and might affect the position of the State in the case of a petition submitted to the Commission after the decree of emergency but before the Secretary General receives the notification.[101]

In the case of measures of suspension that are decreed for a precise time and then renewed periodically, the State is obligated to report each renewal of the suspension of the obligations that it has contracted under the Convention and to comply with the other requisites found therein.

***b) Its content***

The information that the State is required to provide must be sufficiently detailed and indicate the nature of the alleged emergency, the reasons that justify the suspension and especially the provisions of the Convention whose application has been suspended. The State must then inform when it lifts the suspension.

Pursuant to the foregoing, since the notification must indicate both the reasons that justify the measures and the provisions whose application has been suspended, a communication that is limited to indicating that, due to the serious crisis of public order that affects the people of El Salvador in general, the guarantees established in Articles 154, 158.1 and 160 of the Constitution have been suspended for a period of 30 days,[102] is insufficient and inadequate. In the first place, it is insufficient to justify the suspension because, by not specifying the nature of the alleged "crisis of public order" that affects the State, by not mentioning how this is manifested and its effect on the public and on the State in general, it is not possible to know if it meets the operative circumstances found in Article 27. In the second place, this notification is incomplete because it does not specify the provisions of the Convention whose exercise is suspended, which does

100. *See* the note of the Minister of Foreign Affairs of Nicaragua of January 23, 1980, addressed to the OAS Secretary General, in compliance of Article 27 of the American Convention, in which he informed that the Government of Nicaragua had decided to extend for six months the suspension of citizen's rights and guarantees decreed on August 21, 1979.

101. *See*, in this sense, Thomas Buergenthal, Robert Norris and Dinah Shelton, PROTECTING HUMAN RIGHTS IN THE AMERICAS: SELECTED PROBLEMS, N.P. Engel, Publisher, Kehl/Strasbourg/Arlington, 1982, p. 197.

102. *See* the note of the Permanent Representative of El Salvador of May 9, 1980, addressed to the OAS Secretary General, in compliance with Article 27 of the American Convention.

not allow an appropriate control on the measures adopted by the State and which would require a study of constitutional law to determine if the suspended constitutional guarantees correspond to the human rights that the Convention allows to be suspended and whether, under the circumstances, their suspension is justified. Obviously, Article 27 refers to the provisions of the Convention whose application is suspended and not to provisions of domestic law, whether they are constitutional or of any other hierarchy, that do not create international obligations.

A more precise description of the characteristics of an emergency is contained in the January 1980 notification of Nicaragua, which stated the well-known reasons for the suspension of certain rights and guarantees. It will be recalled that only six months previously Nicaragua had lived through a bloody civil war that put an end to the Somoza dictatorship, which lasted 45 years and was backed by a fierce foreign-trained military apparatus of almost 15,000 men, especially trained to repress and assassinate opponents of the dictatorship, half of whom were in prison at the disposition of special tribunals. It was argued that in a situation of this kind, for historical reasons it was impossible to maintain a state of legal normality.[103] On the other hand, notwithstanding the detail describing the emergency, this notification did not indicate the specific effects on the life of the State that would permit a control on the purpose of the suspension and on the degree and type of rights that legitimately may be suspended. In addition, and although this aspect is not an absolute requisite, the notification did not indicate whether the emergency could be characterized as a case of war, public danger, or another kind of threat to the independence or security of the State.

### *5. The consequences of not complying*

In the event that a State does not comply with its duty to notify its exercise of the right of suspension under Article 27 or that it does so incompletely or tardily, the Convention does not indicate the consequences for the State and for the enjoyment of human rights. This is not a violation of "a provision essential to the accomplishment of the object or purpose of the treaty" (Article 60.3 of the Vienna Convention on the Law of Treaties)

103. *See* the note of the Minister of Foreign Affairs of Nicaragua, *supra* note 100.

that would justify the suspension or termination of the American Convention with respect to that State. In any event, Article 60.5 of the Vienna Treaty does not apply to treaties concerning the protection of human rights because it would then have the negative effect of freeing that State from its other human rights obligations.

Notification to the other States parties is not established as a requirement to suspend but as a necessary instrument to control and monitor the circumstances in which a State invokes the right of suspension. Therefore, total or partial non-compliance does not, *ipso facto*, nullify the suspension.

Not informing pursuant to Article 27.3 or doing so insufficiently is a failure to comply with one of the commitments undertaken by a State and obliges recourse to other means to determine whether such a measure is being applied in a manner compatible with the Convention. In any event, the Commission may in exercise of its attributes under Article 41.d of the Convention require the State to provide sufficient information on the legal or other provisions that it has adopted and that might affect its obligations under the Convention.[104]

In the Baena Ricardo *et al*. Case in which the State had alleged the existence of a grave situation of national emergency that threatened the security of the State in order to decree a law whose compatibility with the Convention was not challenged, the Commission argued that the state of emergency had not been notified, which violated the principles governing states of emergency that limit the exercise of the right of the suspension of guarantees to the existence of certain material conditions and to the compliance of formal requirements, in this case omitted by the State.[105] Panama argued that it had not violated Article 27 because failure to comply with the notification of a state of emergency, *per se*, had not been recognized by the Inter-American Court as a violation of the obligations of the States.[106]

104. *See*, in this sense, the communication of the Executive Secretary of the Commission of August 8, 1980, addressed to the Government of Bolivia, after the coup d'état of July 17 of that year, when the new government decreed the suspension of constitutional guarantees. REPORT OF THE SITUATION OF HUMAN RIGHTS IN THE REPUBLIC OF BOLIVIA, *supra* note 20, pp. 2-4.

105. *See Baena Ricardo et al. Case, supra* note 75.

106. *Ibid*., para. 91.

However, after verifying that, according to the certification of the Director of the Department of International Law, indicating that the State had not notified the OAS General Secretariat that it had suspended some of the guarantees established in the Convention, the Court rejected the argument of Panama referring to the supposed existence of a state of emergency and proceeded to examine the application without taking into consideration the normative elements in Article 27 applicable to states of exception.[107]

107. *Ibid*., paras. 93-94.

# Chapter IV

## THE ORGANS OF THE CONVENTION

As part of its machinery of human rights supervision and protection, the Convention establishes two organs: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Competence to hear matters on compliance of the commitments undertaken by the States parties to the Convention is distributed between these two bodies. Their function is to oversee the correct application of the Convention in the internal workings of the States and not to serve as a higher body to ensure the correct application of domestic law.

### A. THE COMMISSION

Pursuant to the Protocol of Buenos Aires, which amended the OAS Charter, the structure and competence of the Commission was to be determined by a convention. This material is covered in Chapter VII of the Convention and is similar to what had been established by the Commission's Statute, adopted in 1960 by the OAS Council, as amended.

In accordance with the terms of Article 35 of the Convention, the Commission represents all OAS member States,[1] which confirms the dual nature of the inter-American human rights system that, with differences of degree regarding its competences, charges the Commission with promoting the observance and defense of human rights in the territory of all OAS member States, regardless of whether they are parties to the Convention.[2] Articles 18 and 19 of its current Statute defines the functions of the Commission both with respect to the States parties to the Convention and with respect to the OAS member States that have not ratified it.

1. In this aspect the Convention introduces an innovation to the Commission's original Statute, which provided that the members of the Commission represented all the OAS member States and acted in their name.

2. *See*, in this sense, Article 41 of the Convention. The English version, instead of referring to the function of "promoting the observance and defense of human rights" as does the Spanish text, states that its function is "to promote respect for and defense of human rights," which could suggest a less active role for the Commission in promoting the observance or full effect of human rights.

## *1. ITS COMPOSITION*

The Convention confirms a Commission comprised of seven members, who should be persons of high moral character and recognized competence in the field of human rights. No two nationals of the same State may be members at the same time.

### *a) Requirements and mechanism for selection*

The members are elected by the OAS General Assembly in their personal capacity and as experts from a list of candidates proposed by the governments of the member States, regardless of whether they are parties to the Convention. Notwithstanding the nature of the functions of the Commission, it is not necessary to be a lawyer in order to be a member.

The participation of all OAS member States in selecting the members is tied to the dual character of the Commission's functions since it has competence in human rights matters both with respect to the States parties to the Convention and to all member States. Each government may propose up to three candidates, nationals of the States that proposes them or of any member State.[3] When more than one candidate is proposed, one of them must be a national of a different State. Each State generally proposes only one candidate or none. When a State presents a candidate, it enters into diplomatic negotiations in an attempt to have its candidate elected.

In practice, the selection procedure set forth in the Convention has not ensured the due independence and impartiality of the Commission's members. The manner in which the States propose candidates and the diplomatic negotiations to obtain sufficient votes for election, including agreements of reciprocal support for the distribution of posts within the OAS and even outside it, diminish the credibility of the presumed independence of those elected.

This lack of transparency in the selection process means that the necessary attention is not always paid to the two essential requirements that the members must possess: being persons of high moral character and

3. In contrast, the members of the European Commission were elected by the Committee of Ministers of the Council of Europe from a list of names drawn up by the officers of the Consultative Assembly, to which each group of representatives presented three candidates, at least two of whom were from its country.

recognized competence in the field of human rights. There should be a careful consideration as to whether these conditions have been met and it should not lightly be assumed that a candidate proposed by a State truly possesses the requisites to be elected in his personal capacity that would guarantee his independence and impartiality. The Bar Association of the City of New York has observed that the election process in the OAS "has not always produced Commissioners with a solid commitment to human rights"[4] and has asserted that "the (Commission's) failure to exercise its powers effectively to protect human rights in individual cases is a reflection of its place in the politics of the OAS,"[5] suggesting the absence of a serious commitment by the States.

High moral character and recognized competence in the field of human rights are conditions not easily satisfied. High moral character, of course, implies exceptional morals in both the public and the private arena that would guarantee the political independence of the person elected and his commitment to the values implicit in the recognition of the human rights that the system is designed to protect. The candidate's curriculum vitae should reflect not only a high level of competence in human rights matters but also, more importantly and in accordance with the Convention, public recognition of that degree of competence. While some members or former members possess or possessed these conditions and have acted with absolute independence and impartiality in carrying out their functions, the selection process does not ensure the designation of the best candidates nor does it guarantee their independence from the States that propose and elect them.

The lack of independence that, more than once, has characterized the work of the Commission has not escaped the attention of those who have been its members. In order that this does not appear to be an unfounded accusation, Professor Tom Farer, who was a member of the Commission from 1976 to 1983 and its Chairman from 1980 to 1982 has expressed the view that "for many years, there seemed to be a gentleman's

4. *The Inter-American Commission on Human Rights: a promise unfulfilled,* a report by the Committee on International Human Rights of the Association of the Bar of the City of New York, mimeographed, February 1993, p. 28.
5. *Ibid*., p. 5.

agreement among member states of the OAS to overlook each other's atrocities. As long as the members of the Commission are true to their obligations and as long as the Commission's existing degree of autonomy is preserved, it will obstruct any slide, blatant or subtle, back to the days when a conspiracy of silence prevailed."[6]

As was established in the original Statute, the members of the Commission are not representatives of the States that have proposed them or of which they are nationals. They are elected among nationals of any OAS member State, but in order to achieve a broader participation there cannot be more than one national of the same State. In September 2003 this circumstance led Juan Méndez, who had been elected four years previously when he was a national of Argentina, to present his resignation because he had become a United States citizen and there was already a member from that country, an incompatibility under Article 37.2 of the Convention.[7]

Some years ago, Nicaragua proposed that the Commission be enlarged to eleven members[8] with the purported aim of achieving a broader representation of the member States but with the hidden agenda of permitting States to exercise a stricter control over its activities. This proposal ignored the fact that, under the Convention, the members are elected in their individual capacity and do not represent States. If it had been adopted, the proposal would have negatively affected the legal regime of the Commission as an organ independent of the States, would have greatly affected any degree of credibility that it might have, would have politicized it and would have compromised even more its effectiveness.

The members are elected for a term of four years and, in order to permit a broader participation, may be reelected only once. To ensure a partial renovation of the members every two years, the Convention establishes that the mandate of three of the members chosen in the first

6. THE GRAND STRATEGY OF THE UNITED STATES IN LATIN AMERICA, Transaction Books, New Brunswick (USA) and Oxford (UK), 1988, p. 77.

7. *See* the letter of Juan Méndez of September 23, 2003, addressed to the Chairman and Executive Secretary of the Commission.

8. *See* the note of the Permanent Representative of Nicaragua to the OAS of April 1993, addressed to the President of the Preparatory Committee of the General Assembly, OAS/Ser.P/AG/CP/doc.539/93, of April 20, 1993.

election would terminate after two years. Immediately after that election, the General Assembly determined those members by lot.

Vacancies that occur on the Commission that are not due to the normal expiration of a mandate (such as death or resignation) are filled by the OAS Permanent Council in accordance with the Commission's Statute, which was drafted by the Commission and adopted by the General Assembly.[9]

### *b) Regime of incompatibilities*

The Commission's members are neither agents nor representatives of the State of which they are nationals or of any other State. They cannot hold within the structure of the State positions that might compromise the international responsibility of the State or be subject to orders of their superiors with respect to their functions as Commissioners. To preserve the independence and impartiality of the members, Article 71 of the Convention establishes that the position of member is incompatible with any other activity that might affect the exercise of his functions, as determined by the Commission's Statute. For its part, Article 8 of the Statute establishes simply that the position of member is incompatible with the exercise of activities that might affect his independence and impartiality or the dignity or prestige of the position, but does not specifically mention any post or activity that, by its nature, is incompatible with being a member. Although less precise than the wording of the Court's Statute, it has the advantage of not omitting a position or activity that, whether objectively or subjectively, might interfere with the exercise of the functions of a member.[10] Cabinet ministers, public officials and judges (federal or state) obviously may not be members without resigning from those positions. This incompatibility obliges the member to choose between one or the other, but he cannot maintain both. In this respect, the resignation presented by Chairwoman Marta Altolaguirre on September 1, 2003, upon announcing her candidacy to the Congress of her country, "to guarantee that not a shadow of a doubt might affect the credibility of the Commission" is a precedent of transcendental ethical and political importance.

9. The original and current text of the Statute of the Commission was adopted by the OAS General Assembly (Resolution No. 447) at its Ninth Regular Session, held in La Paz, Bolivia, in October 1979.

10. Article 18 of the Statute of the Court.

Article 4.1 of the Commission's Rules repeats the terms of Article 8 of the Statute and adds that, upon taking office, members undertake not to represent the victims or their families or States in provisional measures, petitions and individual cases for a period of two years after they have left the Commission.

The Rules, however, implicitly admit that a member may be a diplomatic agent of the State of which he is a national. Article 17.2 provides that members may not participate in the discussion, investigation, deliberation or decision of a matter submitted to the consideration of the Commission, *inter alia*, "if they were accredited or carrying out a special mission as diplomatic agents of the State under examination by the Commission."

The procedure established in the Statute makes it highly improbable that membership on the Commission will be found to be incompatible with a member's other positions or activities. Under its Statute, the Commission is entrusted with deciding, by a vote of at least five of its members,[11] whether there is an incompatibility and submitting the issue to the OAS General Assembly so that the latter, by a majority of two-thirds of the member States, might declare the existence of an incompatibility. As this is the same body that elected the person as a member and in view of the necessity of a two-thirds majority, it is highly unlikely that the General Assembly would adopt such a decision.

In the improbable event that an incompatibility is declared, the affected member should be allowed to relinquish the incompatible position or activity. The Statute, however, provides that such a declaration shall result in immediate removal from the Commission, although it does not invalidate the acts in which the member had participated. The Statute, unfortunately, does not distinguish whether such participation counted for the quorum necessary to meet, if it has provided the decisive vote for the adoption of that decision or if it has benefited the State in which the member

11. In addition to the collegial feeling that might exist among its members, considering that the Commission is comprised of only seven members, that the quorum to meet is four and that the member affected is disqualified from participating in the vote on a decision that concerns him, this majority virtually becomes a requirement of unanimity to declare an incompatibility.

has an incompatible position or activity, which is not necessarily the State of his nationality.

***c) Impediments and disqualifications***

Except as provided by Article 52 of the Rules, nothing prevents a member from hearing a matter because of his nationality. That provision states that the member who is a national or resides in the territory of the State where an on-site investigation is to take place is disqualified from participating in it. The logic of this clause is not easily understood since the members are elected in their personal capacity and each member enjoys in the territory of the States parties to the Convention, from the moment of election and during his mandate, the immunities recognized by international law for diplomatic agents and, while in the exercise of his position, all the diplomatic privileges necessary to carry out his functions.

Article 17.2 of the Rules provides that the members may not participate in the discussion, investigation, deliberation or decision of a matter submitted to the consideration of the Commission in the following cases: "a) if they are nationals of the State which is the subject of the Commission's general or specific consideration, or if they were accredited or carrying out a special mission as diplomatic agents before that State, or, b) if they have previously participated, in any capacity, in a decision concerning the same facts on which the matter is based or have acted as an advisor to or representative of any of the parties interested in the decision." Article 17.2 of the Rules should probably include the situations in which the Commissioner or a member of his family has a direct interest because the purpose of that provision is to avoid a conflict of interest in cases that the Commissioner is called upon to decide.

In line with this Rule, Article 52 of the Rules provides that a member who is a national or resides in the territory of the State where an on-site visit is to be conducted may not participate in it.

Those provisions, which preclude a member from participating in matters concerning his own country, do not correspond to the spirit or letter of the Convention, which provides that a member is elected in his personal capacity and not in representation of any State. In addition to being hypocritical, the provisions are totally useless since they do not

prevent the member from talking to his colleagues and exchanging impressions on the case. It would be healthier to abandon these Rules and follow Article 35 of the Convention, which does not prevent a judge of the Court who is national of one of the States parties to a case from hearing the matter. This, of course, implies a selection mechanism that fully ensures the independence of the Commission's members.

In the event that a member believes that he should not participate in the examination or decision of a matter submitted to the consideration of the Commission, he so informs the Commission, which decides if he should be disqualified. Any member may raise the disqualification of another member, based on the causes listed in Article 17.2 of the Rules.

### *d) Extension of the terms of office*

Under Article 2.2 of the Rules, if new members have not been elected to replace those whose terms have expired, the latter continue in office until the election of new members. It should be noted, however, that there is a question of the constitutionality of this provision since it is not supported by any provision of the Convention or the Statute of the Commission.

## *2. ITS COMPETENCES*

The functions that have been assigned to the Commission are diverse and cover both the promotion and the protection of human rights and include advisory functions. Pursuant to Article 41 of the Convention, the Commission has the principal function of promoting the observance and defense of human rights and in the exercise of its mandate has the following functions and attributes:[12]

a. to develop an awareness of human rights among the peoples of America,
b. to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive

12. Distinguishing the functions from the attributes and placing more emphasis on the latter, Félix Laviña believes that these *attributes* of the Commission are not exhaustive and that it may exercise others necessary to carry out its functions. SISTEMAS INTERNACIONALES DE PROTECCIÓN DE LOS DERECHOS HUMANOS, Depalma, Buenos Aires, 1987, p. 106.

> progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights,
> c. to prepare such studies or reports as it considers advisable in the performance of its duties,
> d. to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights,
> e. to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request,
> f. to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention, and
> g. to submit an annual report to the General Assembly of the Organization of American States.

Article 42 of the Convention indirectly adds the function of overseeing promotion of the rights implicit in the economic, social and educational, scientific and cultural norms contained in the OAS Charter. That provision obligates the States parties to furnish the Commission with a copy of the reports and studies that, in their respective fields, they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture. In addition to granting the Commission another function, this article facilitates compliance of the Commission's work under Article 41.c-e of the Convention.

Albeit with some differences in language, the first five functions correspond substantially[13] to those granted under Article 9 of the original Statute. Only the last two are an innovation with respect to the original competences of the Commission and of them only the obligation to present a report to the OAS General Assembly was not previously provided for.

13. In spite of what appears later regarding the Commission's competence to deal with requests by States for advisory services on questions relating to human rights, which should not be confused with the Court's advisory jurisdiction regarding the interpretation of the Convention or other human rights treaties.

It should be pointed out that, except for the function in Article 41(f), the Commission exercises these attributes with respect to all OAS member States, regardless of whether they are parties to the Convention.

The exercise of most of these attributes involves the use of the political and diplomatic talents of the Commission's members. In acting on the petitions and communications of alleged violations of the human rights recognized in the Convention that are submitted to it, the Commission has a different function that, with respect the preliminary investigation that it conducts, the Court has compared to a kind of *Ministerio Público* of the inter-American system.[14] It appears to us, however, that this function is of a jurisdictional, or quasi-jurisdictional, nature since it is subjected to pre-established procedures that imply an examination of a complaint, offering the same procedural opportunities to the petitioner as to the State in question, and that require a decision of the Commission on the basis of law with the aim of resolving the case.[15] The Court has held that, in examining petitions that accuse a State party of violating the obligations that it has undertaken under the Convention, "the Commission exercises quasi-judicial functions, similar to that of the European Commission of Human Rights."[16] In this scheme, the Commission would be a quasi-judicial organ called upon to participate in the proceedings before the Court and to which the Convention gives it for certain purposes a role hierarchically inferior to that of the Court.[17]

On the other hand, Félix Laviña has expressed the view that the Commission is simply an international administrative body that fulfills the function of the administrative policing of the protection of human rights.

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14. I/A Court H.R., *In the Matter of Viviana Gallardo and Others*. Judgment of November 13, 1981. Series A No. G 101/81, para. 22.

15. The repeated jurisprudence of the European Court of Human Rights concerning the judicial function has held that, regardless of its nomenclature, a *tribunal* is characterized in the substantive sense of the term by its judicial function, that is, by the power to resolve or determine matters within its competence on the basis of the law and following the procedures conducted in a pre-established manner. *See*, for example, the judgments in the *Belilos Case*, of April 29, 1988, para. 64 and the *H. v. Belgium Case*, of November 30, 1987, para. 50.

16. Thomas Buergenthal, *El Sistema Interamericano para la Protección de los Derechos Humanos,* in ANUARIO JURÍDICO INTERAMERICANO 1981, General Secretariat of the Organization of American States, Washington, D.C., 1982, p. 133.

17. *Ibid*., p. 142.

In his opinion, it is not a tribunal nor does it have jurisdictional functions and its resolutions are not binding.[18] While its procedures are more or less similar to those in the judicial sphere, Laviña believes that that is not sufficient to confer on the Commission a judicial function.[19] For reasons that we will develop, we do not share this opinion.

Expressing an opinion on the nature of the Commission's activities is not free of subtleties. It must be admitted that many of its functions have a pronounced political facet. This has led Diego Uribe Vargas to contrast the eminently political and diplomatic nature of its functions with the strictly jurisdictional role assigned to the Court.[20] In our opinion, this primacy of the political role does not mean that there are no jurisdictional, or quasi-jurisdictional, functions, assigned to the Commission. The Commission's competences before the Convention entered into force must be distinguished from those granted after its entry into force. To its early attributes that were exclusively political and diplomatic, the Convention has added important jurisdictional functions. Within the framework of human rights, the coexistence of these two types of functions is not incompatible and in fact they are mutually complementary.

Under the procedure established by the Convention for hearing petitions or communications that claim a violation of the Convention by a State party, it appears to us that, despite its *sui generis* nature, the Commission exercises jurisdictional, or quasi-jurisdictional, functions that are a necessary procedural element in order that the Court hear a case. This interrelationship has not gone unnoticed by the Court, which has observed that although it, as a judicial body, does not lack the power to carry out investigations, gather evidence and take the relevant actions to better inform the judges, it is clear that the system of the Convention is designed to reserve to the Commission the initial phase of the investigation of the allegations. Moreover, the Commission is the organ to which a

18. *See* SISTEMAS INTERNACIONALES DE PROTECCIÓN DE LOS DERECHOS HUMANOS, *supra* note 12, p. 107. The opinion of Félix Laviña appears to have been confirmed by the earlier holding of the Court, without much explanation, in the sense that the Commission "is not a judicial body." *In the Matter of Viviana Gallardo and Others, supra* note 14, para. 24.

19. *Ibid*., p. 129.

20. *See* LOS DERECHOS HUMANOS EN EL SISTEMA INTERAMERICANO, Instituto de Cultura Hispánica, Madrid, 1972, p. 312.

State provides the relevant information and arguments. Above all, and this is a fundamental aspect of its role in the system, the Commission is the competent organ to receive individual complaints and is the channel through which the Convention grants the individual the right to set in motion the international system for the protection of human rights.[21] Notwithstanding its obligations to the parties, the Commission is not a mere spectator in the procedure and has attributes derived from its jurisdictional functions that are essential in driving the procedure to its conclusion. In this context, the Commission is called upon to rule on the petitions submitted to it on the basis of law.

As to the nature of the procedure, notwithstanding the Commission's efforts to achieve a friendly settlement in each case[22] or the proposals and recommendations that it might make to the State concerned,[23] the procedure before the Commission with respect to petitions or communications that claim a violation of the Convention are strictly governed by the Convention, the Statute and the Rules of Procedure, which do not leave a margin of discretion or diplomatic appreciation. The weighing of the evidence by the Commission to arrive at its conclusions is also subjected to the norms of the Convention. This is an inquisitive and adversary procedure in which the Commission must hear the parties and investigate the facts and is by nature closer to a judicial than a diplomatic or political proceeding. Its procedural decisions, such as those relating to the admissibility of a petition, are certainly binding. Moreover, the conclusions and recommendations that it adopts within the context of its Article 50 Report are not without legal effects for the parties.

The jurisdictional nature of some of the functions of the Commission has not gone unnoticed in the doctrine. Elihu Lauterpacht has emphatically stated that the Commission exercises *judicial* functions even with respect to the OAS member States that have not ratified the Convention, in contrast to its *quasi-judicial* functions that he likens to those of the UN Security

21. *In the Matter of Viviana Gallardo and Others*, *supra* note 14, paras. 22 and 23.

22. A task in which it should obviously use all of its political abilities, but in which it cannot ignore respect for the rights guaranteed in the Convention.

23. Proposals and recommendations that undoubtedly may be more political than legal, but nonetheless remain binding on the States parties.

Council.[24] In this same sense, although more subtle and emphasizing the concentration of distinct functions in one body, José Miguel Vivanco has stated that the Commission is "a quasi-judicial organ, with legal, diplomatic and political attributes."[25]

In global terms, it is important to reiterate that, although the Commission is one body, its attributes differ depending on whether it acts as an OAS organ with respect to the member States or as a Convention organ with competence only regarding the ratifying States. While the procedure before the Commission with respect to claims of human rights violations is basically the same, the content of the rights protected is governed either by the American Declaration or by the American Convention. The latter permits the Commission to act as a conciliatory organ with the aim of reaching a friendly settlement of the claim or eventually to request the Court to render a judgment, which is not the case for the countries that have not ratified the Convention or have not accepted the Court's jurisdiction.

In addition to its primordial function as the organ to receive and process the petitions and communications submitted to it alleging the violation of a right protected by the Convention, the Commission also has the function of preparing studies and reports that permits it to draft *special reports* on the general situation of human rights in a particular country. In special cases, these reports may also refer to specific problems in a country, such as political prisoners or indigenous minorities.

A no less relevant aspect is the Commission's advisory function, found in Article 41(e) of the Convention and repeated in Article 18 of its Statute, for all OAS member States. Among the attributes initially granted to the Commission was that of consultative body to the OAS in the field of human rights.[26] With the entry into force of the Convention, this advisory function acquired a different dimension both with reference to who may

24. *See* ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE, Grotius Publications Limited, Cambridge, England, 1991, p. 30 *et seq*. *See* also ASIL Proceedings, 1991, p. 38 *et seq*.

25. *International Human Rights Litigation in Latin America: The OAS Human Rights System*, in COLLECTIVE RESPONSES TO REGIONAL PROBLEMS: THE CASE OF LATIN AMERICA AND THE CARIBBEAN, compiled by Carl Kaysen, Robert A. Pastor and Laura W. Reed, American Academy of Arts and Sciences, Cambridge, Massachusetts, 1994, p. 74.

26. Article 9.e of the original Statute.

request advice and to the subject matter. It must also be interpreted in conjunction with Article 64.1 of the Convention, which confers jurisdiction on the Court to issue advisory opinions requested by the member States or principal organs of the OAS regarding the interpretation of the Convention, and in connection with Article 64.2, which authorizes the Court to receive requests for advisory opinions from the member States on the compatibility of any of their internal laws with human rights treaties. What is striking in the text of the Convention is the advisory function given to the Commission, which makes it necessary to distinguish between those matters on which the Commission may be consulted and those that are within the province of the Court. This distinction leads to another important difference, which is the legal effect that is given to each of these cases. In our opinion and to differentiate it from that of the Court under Article 64, the role of the Commission in this area has been mainly in the development of the law of human rights, especially with respect to the drafting of treaties where it has played a very important part.[27] On the other hand, the advisory function of the Court refers to the authorized interpretation of the Convention itself or of other human rights treaties and to the determination of the compatibility of domestic legislation with the provisions of the Convention.

An attempt to systematize and classify the distinct competences of the Commission results in three principal categories: a) consideration of individual petitions that denounce the violation of a right protected, which includes investigating them, b) preparation and publication of reports on the situation of human rights in a specific country and c) other activities directed toward the promotion of human rights, such as the advisory tasks that it may offer to the States or the preparation of draft treaties that would lead to a greater protection of human rights.

27. For example, the Commission has participated in the preparation of the Protocol of San Salvador regarding economic, social and cultural rights, in the drafting of the Inter-American Convention to Prevent and Punish Torture, in the preparation of the Protocol on the Abolition of the Death Penalty and the two draft conventions, recently adopted in the OAS General Assembly held in Belém do Pará, on forced disappearance of persons and on violence against women.

## 3. ITS FUNCTIONING

Notwithstanding some aspects on its functioning found in the Convention, this area is largely governed by the Commission's Statute and Rules.

### *a) Its internal organization*

Pursuant to Article 6 of the Rules, the officers of the Commission are its Chairman, First Vice Chairman and Second Vice Chairman, whose functions are described in the Rules. The election of these authorities is by secret ballot, although the members may agree by unanimous vote to a distinct procedure.

Article 8 of the Rules limits the terms of the officers to one year, which extend from their election to the holding of the election of officers the following year. The officers may be re-elected to their respective positions only once during each four-year period. In the event that the term of the Chairman or either of the Vice Chairmen expires as a member of the Commission, until a new Chairman or either of the Vice Chairmen is elected they will be replaced by the officer next in line or, if necessary, by the member with the greatest seniority. According to Article 9 of the Rules, in the event that an officer resigns his position or is no longer a member of the Commission, the position is filled during the following session for the remainder of the term.

Under Article 15 of its Rules, the Commission may name rapporteurs to better fulfill its functions. The rapporteurs are chosen by a majority vote of the members and need not be Commission members. The Commission establishes the mandate for each rapporteur, who periodically submits his work plans to the full Commission. In exercise of this attribute, at its 97th Session held in October 1997 the Commission established the position of Special Rapporteur for Freedom of Expression.

The Commission may also create working groups or committees to prepare its meetings or to carry out special programs or projects. The Commission forms the working groups it considers advisable. Article 36 of the Rules provides for a working group that meets before each regular session to study the admissibility of petitions and to make recommendations to the full Commission. In accordance with Article 65 of the Rules, the

Chairman may create working groups to participate in the hearings during a specific session.

Article 51 of the Rules provides that a Special Commission, appointed for that purpose, conducts on-site investigations. The Commission determines the number of members of the Special Commission and names its President. In cases of extreme urgency, the Chairman may make these decisions, subject to the approval of the Commission. Pursuant to Article 53 of the Rules, the Special Commission organizes its own work and may assign any mission activity to its members and, in consultation with the Executive Secretary, to Secretariat staff or any other person necessary.

***b) Its seat***

Pursuant to Article 16 of its Statute, the city of Washington is the seat of the Commission. It may, however, meet in any OAS member State with the consent of the respective government or at its invitation.

***c) Its sessions***

The Commission determines the number of annual regular sessions and may convoke the special sessions that it deems advisable. Article 15 of the previous Rules provided that the total duration of the regular sessions could not exceed eight weeks per year. While this limitation does not exist in the current Rules, the number of sessions, regular and special, depends ultimately on the availability of financial resources and the budget that is assigned to the Commission. Under Article 14 of the Rules, the Commission holds at least two regular sessions per year for the duration previously determined by it and the special sessions that it deems necessary. Each session has the number of meetings required to carry out its activities. Before concluding a session, the Commission sets the date and place of the following session.

The sessions of the Commission are held at its seat. However, by a vote of the majority of its members, the Commission may agree to meet in another place with the consent or at the invitation of the respective State.

The sessions of the Commission are confidential unless the Commission determines otherwise.

A member who, for reasons of illness or any other serious cause, cannot attend all or a part of any session or who cannot carry out his other functions notifies, as soon as possible, the Executive Secretary of the Commission, who informs the Chairman and places the reasons in the minutes.

Under Article 20.1 of the Rules, minutes are taken at each session and contain the day and hour of the meeting, the names of the members present, the matters dealt with, the decisions adopted and any statement made by a member with the specific purpose that it be included in the minutes. These minutes are confidential internal working documents.

***d) The quorum***

In accordance with Article 17 of the Statute, an absolute majority of members, that is, four, constitutes a quorum. In September 2003, this quorum was dangerously threatened because of the resignation of two members due to incompatibilities. With respect to matters involving the States parties to the Convention, decisions are taken by an absolute majority vote in the cases in which it is expressly established by the Convention or the Statute. In the other cases, a majority of the members present is sufficient. With respect to the States that are not parties to the Convention, decisions are taken by an absolute majority vote, except for procedural matters where a simple majority is sufficient.

Article 18 of the Rules lists the matters in which there must be an absolute majority to adopt a decision: a) the election of the officers of the Commission, b) the interpretation of the application of the Rules, c) the adoption of a report on the situation of human rights in a specific State and d) when such a majority is required by the Convention, its Statute or Rules. With respect to other matters a majority vote of the members present is sufficient.

***e) The Executive Secretariat***

Pursuant to Article 21 of the Statute, the Commission's secretariat services are provided by a specialized unit, which is part of the OAS General Secretariat and should have the resources necessary to accomplish the tasks assigned to it by the Commission. Under Article 11 of the Rules, the

Secretariat is composed of an Executive Secretary and at least one Assistant Executive Secretary in addition to the professional, technical and administrative personnel necessary for carrying out its activities. Taking into account the dimension of its tasks, the personnel assigned to the Commission, which in January 2004 was 19 lawyers and 14 administrative staff, appears to be insufficient.

Under the Commission's Statute, the Executive Secretary must be a person of high moral character and recognized competence in the field of human rights. The Executive Secretary is appointed by the OAS Secretary General in consultation with the Commission (Art. 21.3 of the Statute). In order to remove the Executive Secretary, the Secretary General must consult the Commission and inform it of the reasons for his decision. The spirit of these provisions reflects the fact that the Executive Secretary is a person of confidence within the OAS[28] and his appointment lasts as long as he enjoys the confidence of the OAS Secretary General and the Commission. Since the Executive Secretary is not appointed for a fixed term and must enjoy the confidence of the body he serves, the Commission may ask for his resignation when he loses its confidence or may ask the Secretary General to remove him and name a substitute. In any event, it should be emphasized that the Executive Secretary is not a person of confidence of the OAS member States and that he does not act in his own name but that his function is primarily to execute the decisions of the Commission or its Chairman. In this respect, in March 2004 the Commission rejected the request of the Agent of Venezuela to the Secretary General that the Executive Secretary be removed. In its report, the Commission found unacceptable the accusations of manifest partiality with which Venezuela pretended to question the acts of the Executive Secretary with respect to that country and held that the request lacked any factual or legal basis, especially since such an action was not contemplated in any of the instruments of the inter-American system.[29]

28. Article 20.a of the General Standards for the Functioning of the General Secretariat of the Organization of American States, adopted by the General Assembly by means of Order AG/RES.123 (III-0/73) and amended by Orders AG/RES.248 (VI-0/76), AG/RES.256 (VI-0/76), AG/RES.257 (VI-0/76), AG/RES.301 (VII-0/77), AG/RES.359 (VIII-0/78), AG/RES.404 (IX-0/79), AG/RES.438 (IX-0/79), AG/RES.479 (X-0/80), AG/RES.671 (XIII-0/83), AG/RES.672 (XIII-0/83), AG/RES.731 (XIV-0/84), AG/RES.791 (XV-0/85), AG/RES.842 (XVI-0/86), AG/RES.981 (XIX-0/89) and AG/RES.1036 (XX-0/90).

29. I/A Commission H.R., REPORT OF THE 119TH REGULAR SESSION, adopted on March 12, 2004, General Secretariat of the Organization of American States, Washington, D.C., para. 16.

Among the functions of the Executive Secretary, Article 12 of the Rules mentions: a) direct, plan and coordinate the work of the Executive Secretariat, b) prepare in consultation with the Chairman the draft program-budget of the Commission, which is governed by the budgetary norms of the OAS, c) prepare in consultation with the Chairman the draft agenda for each session, d) advise the Chairman and the members of the Commission in the performance of their duties, e) present a written report to the Commission at the beginning of each session on the work accomplished by the Executive Secretariat since the previous session, as well as those matters of a general nature that might be of interest to the Commission and f) implement the decisions that have been entrusted to him by the Commission or its Chairman.

According to the Rules, the Assistant Executive Secretary substitutes for the Executive Secretary in the event of his absence or disability. In the absence or disability of both, the Executive Secretary or the Assistant Executive Secretary, as the case may be, temporarily designates one of the specialists of the Secretariat as a temporary replacement.

Article 12.3 of the Rules provides that the Executive Secretary, Assistant Executive Secretary and Secretariat personnel must keep confidential all matters so defined by the Commission. Similarly, upon assuming his functions, the Executive Secretary undertakes not to represent victims or their families or States in provisional measures, petitions or individual cases submitted to the Commission for a period of two years from the time that he ceases his functions as Executive Secretary.

Under Article 13 of the Rules, the Secretariat prepares the draft reports, resolutions, studies and other materials requested by the Commission or its Chairman. It also receives and processes the correspondence and the petitions and communications addressed to the Commission. The Secretariat may also request that the interested parties supply the information that it deems pertinent in accordance with the Rules. In this respect, Article 26 of the Rules states that the Secretariat has the responsibility to study and initially process the petitions presented to the Commission that meet the requirements of the Statute and Article 28 of the Rules. If a petition does not meet those requirements, the Secretariat may request the petitioner or his representative to complete it. If the

Secretariat has any doubt as to whether the requirements have been met, it consults the Commission.

Under Article 29 of the Rules, the Commission, acting initially through the Secretariat, receives and initially processes petitions in the following manner: a) receive and register the petition, record the date of reception and acknowledge receipt to the petitioner, b) if the petition does not meet the requirements of the Rules, the Secretariat may request the petitioner or his representative to complete it in accordance with Article 26.2 of the Rules, c) if the petition describes acts, or refers to more than one person or to other alleged violations without any connection in time and space, it may deal with them as separate petitions, as long as they meet the requirements of Article 28 of the Rules, d) if two or more petitions deal with the same acts, involve the same persons or reveal the same pattern of conduct, it may join them and process them together and e) in the latter two cases, give written notification to the petitioners. In serious or urgent cases, the Secretariat immediately notifies the Commission.

The previous Rules provided that the Secretariat personnel, in addition to assisting the members during the sessions, had the responsibility of day-to-day tasks, such as processing the petitions or communications that it received,[30] requesting information from the governments of the States named in those petitions,[31] preparing draft reports, resolutions and studies,[32] aiding in the preparation of country reports and the other tasks assigned by the Commission or its Chairman.[33] The Secretariat was also responsible for distributing among the members the minutes of its meetings, so that they might make their observations before they were adopted,[34] and distribute the other documents for the use of the Commission.[35] The functions of the Secretariat are now covered by Article 13 of the Rules, which provides that the Secretariat prepares the draft reports, resolutions, studies and other documents requested by the Commission or its Chairman and receives and processes the correspondence and the petitions and

30. Article 30 of the previous Rules of Procedure.
31. Article 14.2 of the previous Rules of Procedure.
32. Article 14.1 of the previous Rules of Procedure.
33. *Ibid*.
34. Articles 14.1 and 22.2 of the previous Rules of Procedure.
35. Article 14.1 of the previous Rules of Procedure.

communications addressed to the Commission. The Secretariat may also request that the interested parties provide the information that it deems pertinent in accordance with the Rules.

Although the Secretariat cannot reject a petition, a function that belongs solely to the Commission, in practice it is the Secretariat that decides to *open* for processing the cases that have been presented, which is an attribute that is not found anywhere in the Convention and which places it between the individual and the Commission. While it is desirable to have a sufficiently competent secretariat, it should never be so powerful that it substitutes for the ultimate decision-making body.

The legal regime of the Secretariat personnel is found in Article 118 *et seq.* of the OAS Charter, the first of which provides that "in the performance of their duties, the Secretary General and the personnel of the Secretariat shall not seek or receive instructions from any Government or from any authority outside the Organization, and shall refrain from any action that may be incompatible with their position as international officers responsible only to the Organization." Similarly, Article 21 of the General Standards for the Functioning of the General Secretariat of the OAS indicates that the personnel of the General Secretariat are international staff and in the fulfillment of their duties are responsible only to the General Secretariat. Moreover, in accepting a position in the General Secretariat staff members promise to carry out their functions and to govern their conduct in conformity with the nature, purposes and interests of the Organization.[36]

On the other hand, under Article 119 of the Charter "the Member States pledge themselves to respect the exclusively international character of the responsibilities of the Secretary General and the personnel of the General Secretariat, and not to seek to influence them in the discharge of their duties."

In spite of the clear wording of Articles 118 and 119 of the Charter, since they are international staff and even more so because they carry out delicate functions and assist the Commission in the protection of human

36. Articles 24, 25 and 27 of the General Standards for the Functioning of the General Secretariat of the Organization of American States.

rights,[37] the independence of Commission's staff vis-à-vis the States is an imperious requirement of the utmost relevance. As a corollary to those provisions, the position of Secretariat staff member at any level is absolutely incompatible with any work, financial or other type of association that he may have with a member State.[38] Moeover, Article 115 of the General Standards for the Functioning of the General Secretariat of the OAS indicates that the Secretary General will issue rules that ensure that staff members do not have direct or indirect interests that conflict with the correct performance of their obligations in the OAS and with the responsibilities assigned to them under the OAS Charter and other relevant provisions.[39] More than a simple legal requirement, this is an implicit ethical requisite in the spirit of the Convention that, if not duly observed, would seriously harm the effectiveness and credibility of the system. The lack of a procedure that would effectively ensure the functional and political independence of the Secretariat personnel and that would prevent some of them from continuing to have a tie to the foreign service of their respective States through temporary permissions, special leaves, subsidiary payments or any other manner, reflects negatively on the performance of their functions and diminishes their credibility with regard to the objectivity and impartiality that must characterize their work.[40]

37. *See*, in this respect, the functions that the Commission's Rules give to the staff members of the Secretariat, especially in Articles 14, 22, 30, 50.2, 57 and 68.

38. *See*, in this respect, Article 28 (now 32) of the General Standards for the Functioning of the General Secretariat of the Organization of American States that states that "No staff member shall render services to any government or entity under conditions other than those specifically approved by the Secretary General. No staff member may accept a decoration from any government. Neither may he/she accept honors, awards, remuneration, favors, or gifts when, in the opinion of the Secretary General, this is incompatible with his status as an international civil servant or with the interests of the Organization."

39. Although specifically referring to the Secretary General and Assistant Secretary General of the OAS, Article 112 of the General Standards contains a provision that, by analogy and interpreting Article 115 of the same General Standards, may be applied to the Executive Secretary of the Commission. According to this provision, the Secretary General and Assistant Secretary General "shall avoid any action, whether or not specifically prohibited by these Standards, which might result in, or create the appearance of: a) giving preferential treatment to any organization or person; b) losing complete independence or impartiality of action; c) making an administrative decision without observing established procedures; d) adversely affecting the good name and integrity of the General Secretariat."

40. Of course, this situation contrasts with the legal regime found in Article 59 of the Convention regarding the staff of the Secretariat of the Court.

### *f) Financial resources*

Notwithstanding the provisions of Article 40 of the Convention that state that the Secretariat of the Commission "shall be provided with the resources required to accomplish the tasks assigned to it by the Commission," its budget does not match the level of its responsibilities. For 1995, the budget was $1,734,800, which had to cover, *inter alia*, the cost of maintaining the offices in Washington, the travel and per diem of the members, staff salaries, on-site investigations, preparation of country reports, consideration of petitions and presentation of cases before the Inter-American Court. The budget adopted for 2000 was $2,987,500, which is less than the amount assigned to the recently created Unit for the Promotion of Democracy, which was $3,493,200 and which carries out essentially the same work that is done with less resources by non-governmental organizations such as the Inter-American Institute of Human Rights through its Center for Electoral Promotion and Assistance (CAPEL). For 2003 the Commission had a budget of $3,200,500 and that adopted for 2004 was $3,429,900.

In comparative terms and taking into account the functions of the Commission, this budget has not evolved significantly in recent years. The budget of the Commission in 1988 was $1,083,700 and rose to $1,487,600 in 1992.[41] Taking into account both the increase in the volume of work and inflation, there does not appear to have been a substantial increase in the budget.

## *4. ITS WORKING LANGUAGES*

Article 22 of the Rules provides that its official languages are English, French, Portuguese and Spanish. The working languages, however, are those agreed to by the Commission and depend on the languages spoken by its members. This same provision allows a member to request interpretation of the debates and the preparation of documents in his language.

41. Budget of the Commission for 1988, $1.083,700; for 1989, $1,168,900; for 1990, $1,305,500; for 1991, $1,367,100; for 1992, $1,487,600; for 1993, $1,617,100; for 1994, $1,734,100; for 1995, $1,734,800 and for 2000, $2,987,500.

In practice, the working languages have been English and Spanish, which excludes the other official languages of the OAS, such as French and Portuguese and also excludes the language of other member States and parties to the Convention, such as Dutch, which is the official language of Suriname.

It is obvious that more working languages, in addition to increasing the financial burden, might hinder the work of the Commission. On the other hand, by not expressly providing that a petitioner may use his own language, as is the case in proceedings under the European Convention, the possibilities of using the system are reduced. Nonetheless, with the above limitation, a petitioner may elect among any of the official languages in his communications with the Commission.

## B. THE COURT

Notwithstanding the importance of the tasks of the Commission, the Court is undoubtedly the organ of greater relevance under the Convention. The exercise of its contentious jurisdiction, however, is subject to the express acceptance that a State must make through a special declaration.

An organ of the Convention but, unlike the Commission, not an OAS organ, the Court is conceived as "a judicial institution of the inter-American system."[42] According to the Court, "it is precisely its advisory jurisdiction which gives the Court a special place not only within the framework of the Convention but also within the system as a whole. This conclusion finds support, *ratione materiae*, in the fact that the Convention confers on the Court jurisdiction to render advisory opinions interpreting international treaties other than the Convention itself and, *ratione personae*, in the further fact that the right to seek an opinion extends not only to all organs mentioned in Chapter X of the OAS Charter, but also to all OAS Member States, whether or not they are Parties to the Convention."[43]

42. I/A Court H.R., *"Other Treaties" Subject to the Advisory Jurisdiction of the Court* (Art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982. Series A. No. 2, para. 19.
43. *Ibid*.

To the extent that the prestige and reputation of a tribunal depends on the confidence that it inspires in its beneficiaries and that this confidence depends on the quality and independence of its judges, it is vitally important to examine the personal traits of those who have been given the function of declaring what is the law and of overseeing that the States respect and ensure the exercise of the rights embodied in the Convention. It is also relevant to explore to what extent this is a question that must be determined by law more than by politics because, as occurs in the composition of national courts, it is an aspect that does not escape the inherent political tensions and legal solutions that ultimately frequently follow political interests.

### *1. ITS COMPOSITION*

The Court is comprised of seven judges, nationals of the OAS member States, regardless of whether they have ratified the Convention. To distinguish these judges from other categories of judges who may eventually join the seven-member Court, we refer to the latter as titular judges because this is the term that is employed by the Court's Rules, whose Article 2.e (now 2.18) denotes as Titular Judge any judge elected pursuant to Articles 53 and 54 of the Convention.

#### *a) Titular judges*

This nomenclature, which is not found in the Convention but which refers to the only category of judges that it mentions, resulted from the possibility of having interim judges who, in spite of their dubious constitutionality, are provided for by Article 6.3 of the Statute of the Court.[44]

***i. The required conditions.*** Pursuant to Article 52 of the Convention, the ordinary or titular judges are elected in "an individual capacity, from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as

44. Which was adopted by the OAS General Assembly, which means that, in any event, it has the approval of the States parties to the Convention.

candidates." There is no age limit either to become a judge or to be forced to retire from the Court.

Like the Convention, other international tribunals, such as the International Court of Justice and the Court of Justice of the European Communities, require that candidates to those courts meet the conditions necessary to hold the highest judicial functions in their respective countries or be jurists of recognized competence because, as may be appreciated, these qualities do not necessarily go hand-in-hand since intellectual or academic attributes are not always sufficient to become a judge on the domestic plane. In this case it is essential to have competence in human rights matters and, moreover, meet the required conditions to aspire to the highest judicial functions of the State of which he is a national or of the State that proposes him.

Unlike the European Court of Human Rights and the Court of Justice of the European Communities that do not require their judges to be nationals of one of the States parties, to be a judge of the Inter-American Court it is necessary to be a national of one of the OAS member States. In addition to the personal qualifications that each candidate must meet, there is also the restriction that there cannot be two judges of the same nationality simultaneously on the Court. This limitation should not be interpreted in the sense that it might affect the independence of the judges of the State of which they are nationals since, in principle,[45] it is not directed to ensure the representation of different States but to permit a broader participation of jurists of different nationalities, taking into account the States and the distinct regions of the hemisphere as a whole.[46]

By insisting that the judges are elected in their individual capacity, the drafters wanted to emphasize the independence of the judges vis-à-vis the States parties and that, although it is not stated expressly in the Convention, they cannot request or receive instructions from any government or State authority or other type. In fact, the most important

45. Although the institution of *ad hoc* judge may suggest something different.

46. Compare with Article 9 of the Statute of the International Court of Justice, which provides that "at every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured."

requirement to become a judge of the Inter-American Court is to be capable of offering guarantees of independence above all suspicion.

The Convention does not include any provision that specifically refers to the possibility that a judge might cease to satisfy the requisites to sit on the Court. For example, it might happen that, as a consequence of a supervening act, a judge risks his moral authority or that, through some reproachable conduct, he has been disbarred or he is no longer a national of a member State. Article 20.2 of the Statute provides that the OAS General Assembly has disciplinary authority over the judges, but only at the request of the Court composed of the remaining judges. In contrast, this attribute belongs to the International Court of Justice itself under Article 18 of its Statute. Article 6 of the Rules of that Court states that the member concerned is informed by the President or, if applicable, the Vice President by means of a written communication that includes the grounds and the relevant evidence. Later, at a private meeting of the Court specifically convoked for this purpose, the judge has the opportunity to make any statement, to provide the information and explanations that he wishes and to respond to the questions put to him. In a subsequent meeting of the Court, at which the judge concerned is not present, the matter is discussed and, if necessary, submitted to a vote.

***ii. The selection mechanism.*** In keeping with the purposes of the Convention and in order to ensure that the most suitable persons are elected and that they are independent, the selection mechanism of the judges is a very important aspect of the system.

The judges of the Court are elected by secret ballot by an absolute majority vote of the States parties to the Convention[47] in the OAS General Assembly from a list of candidates proposed by those same States. The first election of judges took place in May 1979, at which time Thomas Buergenthal (national of the United States, proposed by Costa Rica), Máximo Cisneros (Peru), Huntley Eugene Munroe (Jamaica), César

47. Unlike the members of the Commission who are elected by all the OAS member States. The reason for this difference is that the Commission is an OAS organ, to which the Convention gives specific functions, while the Court is merely an organ of the Convention, notwithstanding its functions with respect to the non-States parties to the Convention.

Ordóñez (Colombia), Rodolfo Piza Escalante (Costa Rica), Carlos Roberto Reina (Honduras) and Rafael Urquía (El Salvador) were elected.

Each State party may propose up to three candidates, nationals of the State that proposes them or of any other member State. In fact, for the first election Costa Rica nominated Thomas Buergenthal, a national of the United States. When a slate is proposed, at least one of the candidates must be a national of a State other than the State proposing it. Like the election of the members of the Commission, each State generally proposes only one candidate or none, which restricts the wide range of possibilities that the spirit of the Convention encourages. Unlike the selection procedure in the Statute of the International Court of Justice where the candidates are not proposed directly by the States but by "the national groups in the Permanent Court of Arbitration,"[48] the American Convention does not provide for the participation of non-State bodies[49] in the presentation of candidates.

In order to prepare a list of candidates six months before the regular session of the OAS General Assembly occurring before the expiration of the judges' terms, the OAS Secretary General makes a written request to each State party to the Convention to present its candidates within a period of ninety days. The Secretary General then prepares a list of the candidates in alphabetical order and forwards it to the States parties at least thirty days before the session of the General Assembly. When filling a vacancy that is not the result of the normal expiration of the term of a judge, these periods may be reduced in the judgment of the Secretary General.

Like the members of the Commission, there is a staggered renewal of the judges so that the terms of three of the judges chosen by lot at the first election expired at the end of three years. This allows for the partial renewal of the Court every three years and, in ensuring that at least some of its members (three or four judges, depending on the case) are not replaced, guarantees some degree of continuity in the composition of the tribunal and its work.

48. Article 4 of the Statute of the International Court of Justice.
49. Such as academic institutions or non-governmental human rights organizations.

***iii. Prolongation of the mandate.*** Although in principle the judges remain in their functions only until the end of their respective terms, pursuant to Article 54.3 of the Convention they continue to hear the cases that they have begun to hear and that are still pending, for which effects they are not replaced by the newly-elected judges. There is an important discrepancy between the different versions of the Article, which has already been debated in the Court. While the texts in Spanish and Portuguese state that the judges whose terms have expired continue to hear the cases that are in a state of sentencing, the English and French versions provide that the judges continue to hear the cases that are pending. Under the first version, the judges whose terms have expired may only continue to hear those cases in which there is no procedural act pending, lacking only the deliberations, decision and issuance of the judgment. In contrast, the second version implies a matter that has been submitted to the Court, with a specific composition, which is at any procedural stage. By way of comparison, Article 33 of the Rules of the International Court of Justice provides that its judges continue "to sit until the completion of any phase of a case in respect of which the Court convenes for the oral proceedings prior to the date of such replacement."

In the Neira Alegría *et al*. Case, the Court had the occasion to rule on this difference in the texts. To interpret the meaning and scope of Article 54.3 of the Convention, the Court observed that the tr*avaux préparatoires* stated that the judges should continue with the matters that they have already been hearing while the respective process is in a state of sentencing and that the current Spanish version of the provision appeared for the first time in the Style Committee, apparently without a debate, so the Court assumed that the expression "in a state of sentencing" had the same meaning as "while the respective process was substantiated."[50] The Court considered that the object and purpose of this provision was to avoid disruptions in the proceedings each time a judge who was actively participating was replaced.[51] In support of its position, the Court also invoked, by analogy, Article 19.3 of the Rules that states that "when, for

50. I/A Court H.R., *Neira Alegría et al. Case.* Order of June 29, 1992 (Art. 54.3 American Convention on Human Rights), para. 24.
51. *Ibid*., para. 26.

any reason whatsoever, a judge is not present at one of the hearings or at other stages of the proceedings, the Court may to decide to disqualify him from continuing to hear the case." In the opinion of the Court, the rule reflects the principle that fairness to the litigants and judicial efficacy require that, whenever possible, only those judges who had participated at all stages of the proceedings should participate in deciding a case.[52] The Court also cited Article 27.3 of its Rules in force at the time (Article 36.3 of the current Rules), which provided that preliminary objections do not suspend the proceedings on the merits, the purpose of which is to ensure that the proceedings are not delayed as would be the case if the new judges replaced those already familiar with the matter but whose mandates had expired.[53]

In determining its composition, the Court has also applied Article 54.3 of the Convention when ruling on an interpretation of a judgment (Article 67 of the Convention) because, in accordance with the general rules of procedural law, a contentious case is not concluded until the judgment has been fully complied with. By way of analogy, the Court concluded that the judges should continue to participate in a case that was in the enforcement stage because the Court had resolved that it would supervise compliance of the award of damages and that the case would not be closed until the damages had been paid.[54] In this respect, Article 59 of its Rules indicates that, in considering a request for interpretation, the Court shall meet, if possible, with the composition that it had when it delivered the respective judgment, unless a judge had to be replaced because of death, resignation, impediment, excuse or disqualification.

It is interesting to observe that the Court's interpretation of this provision coincides with the provisions of Article 13.3 of the Statute of the International Court of Justice, which indicates that, even after being replaced, the judges finish the cases that they have begun. This interpretation is also in agreement with Article 23.7 of the European Convention, which provides that after their replacement the judges continue to deal with the cases that they have been considering.

52. *Ibid*., para. 18..
53. *Ibid*., para. 19.
54. I/A Court H.R., *Velásquez Rodríguez Case. Interpretation of the Compensatory Damages Judgment* (Art. 67 American Convention on Human Rights). Judgment of August 17, 1990. Series C No. 10, para. 12.

The fact that the terms of judges are prolonged until a decision is reached in the cases that they had been examining and that are in the state of sentencing requires an explanation of exactly what *case* means in this context. In determining the true scope of this provision, we must not forget that the general rule is that the judges remain in their functions until the end of their terms and only in exceptional circumstances should their terms be prolonged to decide cases that meet very precise characteristics. In our opinion, especially since this is a matter that should be resolved before the decision on the merits of a case and should require a special decision, this term refers only to the issue that is pending and not necessarily to the case in its totality. This is the standard that the Court applied in the Neira Alegría *et al.* Case, in which it decided that the appeal of the judgment of December 11, 1991 that rejected the preliminary objections would be heard by the Court with the composition that it had at the moment of handing down that judgment and that the merits of the case would be heard by the Court in its new composition, composed of judges who had assumed their positions on January 1, 1992.[55] In addition, the Court stated that there would be two distinct procedural steps, one on the preliminary objections and one on the merits,[56] and that the failure to suspend the proceedings on the merits does not affect the distinct and separate nature of the preliminary objections stage.[57]

Notwithstanding the aforementioned decisions, this question was again posed in the Genie Lacayo Case, which was submitted to the Court on January 6, 1994 when the terms of three judges had expired. On March 21, 1994 the Government of Nicaragua presented its preliminary objections for which the Court convened a public hearing on November 18, 1994. In application of Article 54.3 of the Convention, those preliminary objections were decided on January 27, 1995 with the composition of the Court as it existed on December 31, 1994, rejecting all objections except that related to the failure to exhaust domestic legal remedies, which was left to be

55. *Neira Alegría et al. Case, supra* note 50.
56. I/A Court H.R., *Paniagua Morales et al. Case*. Order of May 17, 1995; *Castillo Páez Case*. Order of May 17, 1995 and *Loayza Tamayo Case*. Order of May 17, 1995, para. 1 of the considerations of the respective Orders.
57. *Ibid*., para. 2 of the considerations of the respective Orders.

resolved with the merits of the case,[58] unlike the situation posed in the Neira Alegría *et al.* Case. After delivering its decision on the preliminary objections, a new member of the Court, Judge Cançado Trindade, sent a communication to the President requesting that the Court "with the current composition" adopt a resolution on the question of its composition to hear the merits of the case.[59]

The request of Judge Cançado Trindade again required distinguishing between the composition of the Court for hearing preliminary objections, a question that was certainly for the Court as composed at the time of the public hearing, and its composition to decide the merits of the case, a question that, although it received the reply to the application on May 23, 1994, still had not been examined by the Court. Unlike the holding in the Neira Alegría *et al.* Case, the Court, in view of the fact that the decision on the preliminary objections had left one of the objections to be resolved together with the merits, held that the judges who resolved the preliminary objections were those who composed the Court for the decision both on the merits and on the pending objection.[60] In our opinion, if the Court had not yet entered into hearing the merits of the case –although the reply had already been presented– in order to strictly apply the provision that indicates that the judges remain in functions until the expiration of their terms and that the new judges replace them as of January 1 of the year following their election, it would be reasonable that the Court, composed of the recently incorporated judges, should enter into the examination of the case and decide, as a preliminary question, the pending objection since it had been joined to the merits of the case.

Since the preliminary objections must be resolved as a preliminary question, the situation presented in the Genie Lacayo Case underscores the advisability that only in clearly justified exceptional cases should they be joined to the examination of the merits. Since in that case the Commission had carefully examined the application of the rule of the

58. I/A Court H.R., *Genie Lacayo Case. Preliminary Objections.* Judgment of January 27, 1995. Series C No. 21, operative para. 2.

59. I/A Court H.R., *Genie Lacayo Case*. Order of May 18, 1995 (Art. 54.3 American Convention on Human Rights), para. 1.

60. *Ibid*., paras. 6 and 7 of the considerations and operative para. 2.

exhaustion of internal legal remedies and had stated that it met at least two of the three exceptions listed in the Convention,[61] the Court should have better explained its decision to join the objection to the consideration of the merits and not limited itself to affirming that the subject matter of the claim had to do with the administration of justice and that, therefore, it was intimately linked to the internal remedies.[62] Moreover, the need for transparency in a tribunal of this type necessitates that this requirement be met since, as was stated in its resolution of May 18, 1995, before the adoption of the decision on preliminary objections and in anticipation of it the Court had decided on November 18, 1994 that, with the composition that it had at that date, it would continue hearing both the preliminary objections and the merits with the idea that a preliminary objection would be joined to the merits.[63] In fact, that decision prejudged the pending preliminary objection and the judgment that it handed down two months later when the Court had incorporated the recently elected judges.[64] In the opinion of Judge Cançado Trindade, which we certainly share, the parties have the right to know the criteria that the Court used to determine its composition.[65] In this case, these criteria were not sufficiently clear, placing in doubt the motives for the decision.

In order to resolve the problems concerning the Court's composition during the different stages of a case before it, the Court adopted a resolution that should have been incorporated into its Rules. This resolution ratified the criterion of the Neira Alegría *et al*. Case in the sense that the preliminary objections and the merits were two separate stages of a case and that the same standard is applicable in determining reparations and indemnities as well as in monitoring compliance of the judgments as they are new and distinct stages of the process, subsequent to the decision on the merits. That resolution provides that everything relevant to the determination of reparations, indemnities and supervision of compliance of its judgments are for the judges who were members of the Court at the time of the

61. I/A Commission H.R., Report No. 2/93, 1992, para. 5.5, 5.17, 5.29, 5.31 and 5.32, cited in para. 12 of the separate opinion of Judge Cançado Trindade in the *Genie Lacayo Case*, *supra* note 59.
62. *See Genie Lacayo Case. Preliminary Objections, supra* note 58, para. 29 of the considerations.
63. *See Genie Lacayo Case*. Order of May 18, 1995, *supra* note 59, para. 7 of the considerations..
64. *See* the separate opinion of Judge Cançado Trindade, *supra* note 61, para. 3.
65. *Ibid*., para. 5.

respective decisions.[66] According to Judge Fix-Zamudio, in an opinion that we share, although this resolution contributes to making the procedure more prompt from a conceptual point of view, "it cannot be said that the procedure on setting reparations and indemnities can be separated from the merits of the matter in which the respective condemnation was determined."[67]

Resolving this difference in the texts of the Convention, Article 16 of the Court's Rules provides that the judges whose terms have expired continue to hear the cases that they have begun to hear and are in the stage of sentencing (or "still pending" in the English version). However, in the event of death, resignation or disqualification, it provides for the replacement of that judge by the judge who has been elected to replace him, if applicable, or by the judge who has seniority among the new judges elected upon the expiration of the term of the judge to be replaced. This same provision further states that all matters relevant to reparations and indemnities, as well as supervision of the implementation of the Court's judgments are for the judges who comprised the Court at that stage of the proceedings, unless there has already been a public hearing, in which case it is for the judges who were present at that hearing. All matters regarding provisional measures are to be heard by the Court comprised of the titular judges.

This provision, which prolongs the terms of the judges so that they continue to hear cases that they are already involved in and are "still pending" or in a "state of sentencing," should not be interpreted as being only applicable to contentious cases. It should also be applied cautiously and not as a mechanism designed to prolong artificially the terms of the judges. In a request for an advisory opinion by Venezuela on November 12, 2003, after having consulted the other judges and since a request for an advisory opinion does not have the same degree of urgency as a contentious case or a request for provisional measures and, taking into account that as of January 1, 2004 the tribunal would have new judges, the

66. Order of the Court of September 19, 1995, paras. 2-5 of the considerations and the operative part.
67. *Ibid*. Separate opinion of Judge Fix-Zamudio.

President decided to place this matter on the agenda of the first session of the Court for the year 2004.[68]

***iv. The provision for vacancies.*** The Court's composition may obviously be affected by death, resignation, an event that would prevent the discharge of duties or an incompatibility that would result in a removal from office.[69] In any of these cases, the vacancy is filled in accordance with the norms established by the Convention and its Statute.

The resignation of a judge must be submitted in writing to the President and is effective when it has been accepted by the Court, in which case the President informs the OAS Secretary General for the appropriate action.[70]

When the Court determines that a judge is incapable of performing his functions, the President so notifies the OAS Secretary General so that he might adopt the measures deemed pertinent.[71]

In accordance with Articles 54.2 of the Convention and 5.1 of the Statute, a judge elected to replace another whose term has not expired completes the term of the latter.[72]

At its beginnings, the Court had to fill several vacancies, either because of incompatibilities or the death of a judge. Immediately after the first election of judges in May 1979, a curious situation was presented when Rafael Urquía, a national of El Salvador, resigned before taking the oath of office and was replaced in October 1979 by the election of Pedro Nikken, a national of Venezuela.

During its Nineteenth Regular Session, held July 18-29, 1988, Judge Jorge Hernández Alcerro informed the Court that he was resigning as he had been appointed Ambassador of Honduras to the United States, a post that was incompatible with his functions of judge. The resignation was

68. Order of the President of the I/A Court H.R. of December 19, 2003. Request for an advisory opinion by Venezuela, paras. 2 and 3 of the considerations and operative para. 1.

69. Article 18.3 of the Statute of the Court.

70. Article 21.1 and 21.3 of the Statute of the Court.

71. Article 21.2 and 21.3 of the Statute of the Court.

72. It is also interesting to observe that the practice has been that, in filling a vacancy that occurs before the expiry of the mandate of a judge, the candidate proposed by the State of which the judge who caused the vacancy is a national is chosen.

accepted and at the OAS General Assembly the States parties elected Policarpo Callejas Bonilla, a national of Honduras, to complete the term. Subsequently, on January 9, 1990 the Court held a special session to accept the resignation, as of March 1, 1990, of its President, Héctor Gros Espiell, who had been named Foreign Minister of Uruguay. To complete his term, the States parties at the June 1980 OAS General Assembly elected Julio Barberis, a national of Argentina. More recently, with the naming of Judge Sonia Picado as the Costa Rican Ambassador to the United States, at its Fifteenth Special Session held June 19-22, 1994 the Court accepted the resignation dated June 16 of Judge Picado, given the incompatibility of the new position with that of judge, and notified the OAS Secretary General for the appropriate action. As Judge Picado had less than a year left in her term, the position was not filled at that time.

On two occasions there have been vacancies on account of the death of a judge. The first of these occurred in 1982 when Judge Ordóñez Quintero, a national of Colombia, died. To fill this vacancy the States parties at the Twelfth Regular Session of the OAS General Assembly, held in Washington, DC from November 15 to 21, 1982, elected Rafael Nieto Navia, a national of Colombia. This procedure was again applied due to the death on November 21, 1991 of Judge Orlando Tovar Tamayo, a national of Venezuela. To succeed him and complete his term, the States parties at the OAS General Assembly at its meeting in Nassau, Bahamas in May 1992 elected Asdrúbal Aguiar, also of Venezuela.

With respect to vacancies caused by incompatibilities, in February 1994 and with less than a year to conclude his term, Judge Asdrúbal Aguiar assumed executive functions as Governor of the Federal District of Caracas but the Court did not declare vacant the position due to the incompatibility of functions. Although the Secretary of the Court requested the Judge's resignation, in the absence of an express resignation by Judge Aguiar and since there was no declaration of removal for reasons of incompatibility, which would have been correct, Judge Aguiar was convoked to the Fifteenth Special Session of the Court that was held June 19-22, 1994. Judge Aguiar informed by telephone that he would not be able to attend because he understood that there was an incompatibility.[73] Judge Aguiar was not

73. This information was kindly given to the author, orally, by Asdrúbal Aguiar.

convoked to the following regular session, held November 16-December 11, 1994 and in a footnote in the Annual Report for that year, the Court indicated he had been removed from the Court on February 2, 1994 for having accepted a position that was incompatible with that of being a judge.[74]

***b) Ad hoc judges***

Article 55.2 of the Convention provides that if one of the judges called upon to hear a case is a national of one of the States parties to the controversy, any other State party to the case may designate an *ad hoc* judge. Pursuant to Article 55.3, in the event that none of the judges is a national of the States parties to the case, each of the latter may appoint an *ad hoc* judge. In that event, Article 18 of the Rules provides that the President through the Secretariat advises the States concerned of the possibility of appointing an *ad hoc* judge within thirty days following notification of the application. A State that does not exercise its right within that period is deemed to have waived that right.

Since the judges are elected in their individual capacity, a judge who is a national of one of the States parties to the controversy maintains his right to hear the case, although Article 4.3 of the Court's Rules prohibits him from presiding in such a case. This provision was applied for the first time in the Caballero Delgado and Santana Case, in which Judge Nieto Navia relinquished the presidency.[75] Nationality is not, *per se*, a sufficient reason to disqualify a judge for lack of impartiality and, in fact, Judge Nieto Navia continued to hear the case.

The Court's composition may be altered in a case in which one of its members is a national of a State party to the controversy and there is no judge who is a national of the other State to the controversy, in which case the latter may appoint an *ad hoc* judge, who need not be a national of that State. If among the judges called upon to hear a case none is a national of the States parties to the controversy, each may appoint an *ad hoc* judge, who must meet the requisites to be elected a titular judge. If several States

74. I/A Court H.R., ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1994, General Secretariat of the Organization of American States, Washington, D.C., p. 6.

75. I/A Court H.R., *Caballero Delgado and Santana Case. Preliminary Objections.* Judgment of January 21, 1994. Series C No. 17, para. 8.

parties have a common interest in the controversy, they may be considered as one party with the right to appoint one *ad hoc* judge, the Court deciding in cases of doubt. In all the aforementioned situations, the person named must meet the conditions set forth in the Convention for the titular judges. The Court has stated that *ad hoc* judges are similar to the other judges in the sense that they do not represent a specific government nor are they its agents and that they join the Court in an individual capacity.[76]

This institution was copied from the Statute of the International Court of Justice but is not common in other international tribunals. In the Court of Justice of the European Communities, now the European Union, there is no provision for an *ad hoc* judge. While it is true that the number of judges in principle reflect the number of member States of the European Communities and that each State party is represented when the Court meets,[77] this does not fully guarantee respect of the States parties to a controversy, especially since the Court does most of its work through its chambers. Moreover, the Communities' treaties provide that a party cannot invoke the nationality of a judge or the absence on the Court or on one of its chambers of a judge of its nationality to request a change in the composition of the Court or one of its chambers.[78]

While the figure of *ad hoc* judge has been recognized by Article 43 of the European Convention, it is well to recall that its tribunal, unlike the Inter-American Court, is made up of a number of judges equal to the number of member States of the Council of Europe. The European Convention, however, provides for the possibility that among its judges there is not a national of all the States parties to the Convention because it is not necessary to be a national of a State party to be a judge of the European Court.

***i. Its justification.*** In any event, *ad hoc* judges are an undesirable vestige of arbitration that has been encrusted on some international

76. I/A Court H.R., *Paniagua Morales et al. Case*. Order of September 11, 1995, para. 1 of the considerations.

77. Although this is the composition of the Court in practice, it must be observed that it is a theoretical possibility since, strictly speaking, it is not necessary to be a national of a State Party to be a judge of the Court of the European Communities.

78. Article 16.4 of the Treaty of the European Economic Community, Article 19 of the Treaty of the European Community of Coal and Steel and Article 16 of the Treaty of the European Community of Atomic Energy.

tribunals, confusing the diplomatic and conciliatory function of arbitration with the strictly jurisdictional function that corresponds to a judge.[79] Such an institution could be justified in the International Court of Justice, which is called upon to resolve disputes in which the litigants are sovereign States, equal in rights. It is in this context, and referring precisely to the International Court of Justice, that Thomas Franck has suggested that a judge who is a national of one of the parties to a controversy should not participate in hearing the case, but that, should he participate, his presence should be balanced by the appointment of an *ad hoc* judge to avoid an unacceptable advantage.[80]

This fact became evident in the Trujillo Oroza Case in which the *ad hoc* judge Charles Brower, acting more as the lawyer for the State that had appointed him than as a judge, stated that he shared the opinion of an *ad hoc* judge of the International Court of Justice in the sense that an *ad hoc* judge had "the special obligation to endeavor to ensure that, so far as reasonable, every relevant argument in favor of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected in any separate or dissenting opinion that he may write."[81] *Ad hoc* judge Brower did not show the same concern in considering the relevant arguments that favored the victim.

In the case of the International Court of Justice, this figure has been established to maintain a procedural balance between the parties that, as has been mentioned, are only sovereign States, equal in rights. In that

79. According to Elihu Root, "It has been a very general practice for arbitrators to act, not as judges deciding questions of fact and law upon the record before them under a sense of judicial responsibility, but as negotiators effecting settlements of the questions brought before them in accordance with the traditions and usages and subject to all the considerations and influences which affect diplomatic agents. The two methods are radically different, proceed upon different standards of honorable obligation, and frequently lead to widely differing results. It very frequently happens that a nation that would be very willing to submit its differences to an impartial judicial determination is unwilling to subject them to this kind of diplomatic process." Instructions to the American Delegates to the Hague Conference, May 31, 1907, Foreign Relations of the United States, at 1128, 1135, cited by W. Michael Reisman, *Has the International Court Exceeded its Jurisdiction?*, in AMERICAN JOURNAL OF INTERNATIONAL LAW, 80, No. 1, January 1986, p. 134.

80. *See* JUDGING THE WORLD COURT, Priority Press Publications, New York, 1986, p. 69. However, even with regard to the International Court of Justice, the institution of *ad hoc* judge has been severely criticized. *See*, in this respect, José María Ruda, PRESENTE Y FUTURO DEL TRIBUNAL INTERNACIONAL DE JUSTICIA, Universidad de Granada, 1990, p. 35.

81. *See* his separate opinion in I/A Court H.R., *Case of Trujillo Oroza. Reparations* (Art. 63.1 American Convention on Human Rights). Judgment of February 27, 2002. Series C No. 92, para. 1.

respect, Article 31 of that Court's Statute provides that the judges of the nationality of each of the litigating parties retain their right to participate in the matter before the Court and that if, in hearing a matter, the Court includes a judge of the nationality of one of the parties, any other party may appoint a person to be a judge. This article also states that if the Court does not include among its judges someone of the nationality of the parties, each of those parties may appoint a judge. As may be appreciated, Article 55 of the American Convention simply transcribes almost literally the first three paragraphs of the aforementioned Article 31, which has a markedly different role designed to ensure the interests of States (including respect for their sovereign equality) and not the fundamental rights of individuals.[82] It is in the framework of disputes between States, and with reference to the Statute of the Permanent Court of International Justice, that it has been stated that countries would not have complete confidence in the decisions of the International Court of Justice in a case affecting them if it did not include a judge of the nationality of the other party.[83]

The Inter-American Court has unanimously held that it is sufficiently clear that the international settlement of human rights cases (entrusted to tribunals like the Inter-American Court) cannot be compared to the peaceful settlement of international disputes involving purely inter-State litigation (entrusted to tribunals such as the International Court of Justice) for being two fundamentally distinct contexts.[84] Paradoxically, the Court has not followed these considerations regarding the institution of *ad hoc* judge and, to the contrary, in those same cases has notified the States concerned that they have the *right* to designate an *ad hoc* judge.[85] In accordance with the practice of the International Court of Justice, under Article 35 of its Rules, if one party elects to exercise the right to appoint an *ad hoc*

82. Moreover, it is interesting to observe that, in the framework of the interlocutory procedures before the International Court of Justice, the States Parties to the process have not always exercised this right. For example, in the *Temple of Preah Vihear Case* neither Cambodia nor Thailand named an *ad hoc* judge.

83. Informal Inter-Allied Committee, REPORT OF THE DRAFT STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, para. 39, cited by Judge Montiel Argüello in his dissenting opinion in the *Paniagua Morales et al. Case, supra* note 76, para. 3.

84. I/A Court H.R., *Ivcher Bronstein Case. Competence*. Judgment of September 24, 1999. Series C No. 54, para. 48 and *Constitutional Court Case. Competence.* Judgment of September 24, 1999. Series C No. 55, para. 47.

85. *Ibid*., paras. 19 and 22, respectively.

judge, it must notify this intention to the tribunal at least two months before the expiration of the period established for presenting the counter-memorial. Upon receiving this notification, the tribunal must decide whether the State has the right to appoint an *ad hoc* judge. The Court's Rules also provide for the possibility that a State refrain from appointing an *ad hoc* judge on the condition that the other State party does the same, which emphasizes the fact that this is an institution designed to maintain a procedural balance between the parties and not to give one of them an unacceptable advantage. In adopting its latest Rules, the Inter-American Court missed an opportunity to make as complete an analysis as the International Court of Justice, by developing in its Rules the conditions under which, in accordance with Article 55 of the Convention, it was appropriate to appoint an *ad hoc* judge.

While its Rules do not differ from the provisions of the Convention, it is interesting that no judge has perceived that this institution is being applied in situations for which it is not appropriate and no judge has objected to the appointment of *ad hoc* judges for cases arising from an application filed by the Commission. Perhaps we must resign ourselves to accept that what is behind all of this is not exactly the strict application of law but the possibility of political calculations. After all, mysteriously, the Commission has not objected to this practice of the Court. On the other hand, Judge Cançado Trindade, while President of the Court and although referring to another matter, has observed that "not every practice consubstantiates into custom so as to conform general international law, as a given practice may not be in conformity with Law (*ex injuria, jus non oritur).* Thus, it is not the function of the jurist simply to take note of the practice of States but rather to say what the Law is."[86] Nonetheless, the Court has left us with the legacy of the institution of *ad hoc* judge that is not sanctioned by the Convention but to an erroneous practice of the Court itself and that unfortunately persists in the new Rules. We may only hope that new judges will finally correct this error.

86. *See* the separate opinion of Judge Cançado Trindade in the judgments in the cases against Trinidad and Tobago, I/A Court H.R., *Hilaire Case. Preliminary Objections*. Judgment of September 1, 2001. Series C No. 80, *Constantine et al. Case. Preliminary Objections*. Judgment of September 1, 2001. Series C No. 82 and *Benjamin et al. Case. Preliminary Objections*. Judgment of September 1, 2001. Series C No. 81, para. 26 in the respective judgments.

The figure of *ad hoc* judge does not have any justification in the field of human rights since the tribunals established to hear these matters must decide on complaints that, at least initially, have been presented by an individual against a State. Moreover, it is important to note that, in the new version of the Court's Rules, it is the victim or the alleged victim who has been made a *party* to the proceedings before the tribunal.[87] In not conferring on the Commission or on the individual a right similar to that of the State, the presence of an *ad hoc* judge contravenes the very purpose of the Court, which is to achieve an equality between the parties and not give an advantage to the State in question.

As part of the system of human rights protection, the institution of *ad hoc* judge is, at first glance, reproachable and inadvisable because, as the Court is a judicial body and its members are elected in their individual capacity, it must act with absolute independence and impartiality. It is, therefore, unacceptable that a State party has the right to appoint an *ad hoc* judge to hear a controversy and participate in the adoption of a judgment that supposedly is the result of an impartial evaluation of the arguments of fact and law. Although it is true that the presence of a judge who is a national of a State party to the controversy may provide knowledge of the law and legal system of the State that proposes him, such an advantage is not very important when the applicable law is international and not domestic law. This same objective could be achieved, more transparently, with the participation of a lawyer in the course of the proceedings. In the system of international human rights protection, which has been designed to ensure respect for individual dignity, the Court should not be able to modify its composition to give greater attention to the interests and perceptions of a State since this compromises its independence and impartiality.[88]

Although the person appointed may be morally irreproachable and although an *ad hoc* judge may eventually decide against the interests of the State that named him, the origin of *ad hoc* judge appointed directly by the State involved may place in doubt the Court's equanimity and independence with respect to one of the parties to the controversy. There

87. Article 2.23 of the Rules of the Court.

88. *See*, in this sense, the separate opinion of Judge Cançado Trindade in the *Paniagua Morales et al. Case*, *supra* note 76, para. 4.

also exists the possibility that this judge transmit information or give guidance to the State that has appointed him, which will affect the transparency and rectitude of the judicial proceedings, in addition to the moral integrity and suitability of those who have been called to serve as judges.

***ii. Its appropriateness.*** The fact that this institution has been copied from the Statute of the International Court of Justice is also relevant with respect to the conditions in which it is appropriate under the Convention. A strict interpretation of Article 55.2 and 55.3 of the Convention implies the participation of at least two States and permits a State party to the controversy to appoint an *ad hoc* judge only when one of the judges hearing the case is a national of the other State party to the case. Therefore, this possibility should not exist when the only State involved is the State that has been denounced. However, in spite of the clear wording of the Convention and the Court's Statute, in every case submitted to the tribunal to date (January 2004) that has arisen not as a result of inter-State complaints but from individual petitions that the Commission has referred to the Court, whenever there has not been a national of the State concerned on the Court, the State has been invited to appoint an *ad hoc* judge.[89] This error, which should not be repeated without damaging the credibility of the system, could have been corrected when the Court's Rules were recently amended. However, the practice of the Court has been to continue to generously invite the States to appoint *ad hoc* judges in situations that are not authorized by the provisions of Article 55.2.

By way of comparison, under Article 35 of the Rules of the International Court of Justice, if a State party proposes to avail itself of the

89. *See* I/A Court H.R., *Cayara Case. Preliminary Objections.* Judgment of February 3, 1993. Series C No. 14, para. 5, in which the Government of Peru named as *ad hoc* judge Manuel Aguirre Roca; *Neira Alegría et al. Case. Preliminary Objections.* Judgment of December 11, 1991. Series C No. 13, para. 6, in which the Government of Peru named as *ad hoc* judge Jorge E. Orihuela Ibérico; *Aloeboetoe et al. Case*. Judgment of December 4, 1991. Series C No. 11, para. 6 and *Gangaram Panday Case. Preliminary Objections.* Judgment of December 4, 1991. Series C No. 12, para. 6, in which the Government of Suriname named as *ad hoc* judge, Antonio Cançado Trindade, a national of Brazil. It is interesting that in the latter two cases, a jurist of a nationality other than that of the State concerned was named, who in both cases concurred in the judgment of the Court and in the *Gangaram Panday Case* even contributed additional arguments to reject the preliminary objections interposed by the State that had named him. In the *Maqueda Case*, Argentina did not take advantage of the invitation of the President of the Court since it had arrived at a friendly settlement with the complainant and the Commission had withdrawn the application.

right under Article 31 to appoint an *ad hoc* judge, that State must notify the Court of its intention as soon as possible. Similarly, if a State party decides not to appoint an *ad hoc* judge on the condition of reciprocity, that State must also notify the Court of its intention as soon as possible. In addition, when the reasons for the participation of an *ad hoc* judge no longer exist, that judge ceases to sit on the Court.

What is even more curious and certainly damaging for the proper and impartial administration of justice is that when the first three cases were submitted to the Court, which were against Honduras, despite the fact that the Court had a judge of Honduran nationality, Jorge Hernández Alcerro, who had recused himself, the President of the Court informed the Government of Honduras that, in accordance with Article 10.3 of the Statute, it had the right to appoint an *ad hoc* judge, at which time the government appointed Rigoberto Espinal Irías.[90] An identical situation occurred in the Las Palmeras Case in which Judge de Roux, a Colombian national, recused himself and in accordance with Articles 19 of the Statute and 19 of the Rules, the President of the Court invited Colombia to appoint an *ad hoc* judge, at which time it named Julio Barberis.[91] Although the Convention provides that the judge who is a national of one of the States parties in a case submitted to the Court maintains his right to hear the case, it does not provide for the possibility of replacing temporarily one of the members of the tribunal for another of the same nationality in the case of recusal or disqualification. Therefore, and without prejudice to other considerations that might exist, the Court's decision has no legal justification.

The Court had an excellent opportunity to reverse this absolutely reproachable practice in the Cesti Hurtado Case in which, at the invitation of the President of the Court, the State appointed David Pezúa Vivanco as *ad hoc* judge.[92] When he resigned this appointment for reasons of

90. I/A Court H.R., *Velásquez Rodríguez Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 4; *Fairén Garbi and Solís Corrales Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 2, para. 4 and *Godínez Cruz Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 3, para. 4.

91. *Paniagua Morales et al. Case, supra* note 76, para. 1 of the considerations.

92. I/A Court H.R., *Cesti Hurtado Case. Preliminary Objections*. Judgment of January 26, 1999. Series C No. 49, paras. 15 and 16.

incompatibility with his position as Executive Secretary of the Executive Commission of the Judiciary of Peru,[93] the Court initially dictated a resolution by which it decided "to continue hearing the case with its actual composition."[94] Unfortunately, after that transcendental decision that eliminated the figure of *ad hoc* judge at least in that case, the Court almost immediately returned to its previous practice when, after the State requested the Court to rule that it proceed to appoint a new *ad hoc* judge, in the hearing on the merits held on May 24, 1999 the Court accepted the incorporation of Alberto Bustamante Belaunde as *ad hoc* judge. Nonetheless, when Peru decided to withdraw its acceptance of the Court's jurisdiction, Mr. Bustamante made public declarations supporting that decision. As a result of those declarations, on August 12, 1999 Mr. Bustamante resigned as *ad hoc* judge "due to the irreversible incompatibility that (he found) between the normal, fluid and irrecusable exercise of this appointment and (his) publicly known position with regard to the decision of the Peruvian Government to withdraw from the contentious jurisdiction of the Court."[95]

Curiously, in the Cantos Case there is no evidence that the Court, its President or its Secretary invited the State concerned to appoint an *ad hoc* judge. The decision on preliminary objections simply mentions that "on May 19, 1999, Argentina appointed Julio A. Barberis as *ad hoc* Judge."[96] Just like that. In contrast, in the cases against Trinidad and Tobago, although it had been formally invited to appoint an *ad hoc* judge, the State did not avail itself of this right.[97] Similarly, in the Juan Humberto Sánchez Case, although the State was granted an extension to name an *ad hoc* judge, it did not do so.[98]

Such a broad interpretation and such an extensive use as the Court has made of the institution of *ad hoc* judge is not only contrary to the letter

93. *Ibid*., para. 25.
94. I/A Court H.R., *Cesti Hurtado Case*. Order of January 19, 1999, operative para. 2.
95. I/A Court H.R., *Cesti Hurtado Case*. Judgment of September 29, 1999. Series C No. 56, para. 34.
96. I/A Court H.R., *Cantos Case. Preliminary Objections*. Judgment of September 7, 2001. Series C No. 85, para. 15.
97. *Hilaire Case. Preliminary Objections, Constantine et al. Case. Preliminary Objections* and *Benjamin et al. Case. Preliminary Objections, supra* note 86, paras. 18, 20 and 16, respectively.
98. I/A Court H.R., *Case of Juan Humberto Sánchez*. Judgment of September 1, 2003. Series C No. 99, para. 14.

and spirit of the Convention but even to the international practice observed both by the Permanent Court of International Justice and by the International Court of Justice, which have emphasized the strictly exceptional character of *ad hoc* judges and the fact that this figure cannot be given a more extensive application than that expressly provided for in the texts that authorize it.[99]

Considering that this practice directly benefits States, the fact that it has not been challenged by any of the States parties to the Convention is not at all surprising. This tolerance does not create legal consequences that would justify it *a posteriori*. The Commission, for its part, does not appear to have realized its inappropriateness and, if it has, it has not opposed its application in situations that go against the underlying principles of the Convention. This does not excuse the Court, whose composition has changed and now includes judges who have not had any responsibility for this erroneous practice, from modifying an interpretation that does not correspond to the letter or spirit of the Convention or from giving precise reasons for its basis.

In any event, the right to appoint an *ad hoc* judge gives an undue advantage that is contrary to the spirit of the Convention in the framework of a system designed precisely to protect the individual from the organs of the State. In this context, its function is not to maintain a supposed procedural balance between the parties since the Commission does not enjoy this same right. Since the appearance of independence, impartiality and objectivity, and therefore its subjective perception in the heart of the social group, is important, even in the case of controversies among States and although the persons appointed objectively meet all of the required moral and professional conditions to be a titular judge, there will exist a subjective perception questioning the independence and impartiality of any *ad hoc* judge.

The Court's practice has been that a State does not have to request or propose the incorporation of an *ad hoc* judge in order that, if his

99. PCIJ, Order (Right to appoint judge *ad hoc*), October 31, 1935, series A/B, No. 65, p. 70 *et seq.* and International Court of Justice, *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, request for advisory opinion, Order, of January 29, 1971, p. 13 and Advisory Opinion in the same case, of June 21, 1971, pp. 25-27.

appointment is appropriate, it be accepted by the tribunal and he begin to hear a case. Under Article 18 of a former version of the Court's Rules, the President, acting through the Secretariat, invited a State that had a right to appoint an *ad hoc* judge to do so within thirty days after the agent received the written invitation. In the current version of Article 18.1 of the Rules, in cases arising under Article 55.2 and 55.3 of the Convention and Article 10.2 and 10.3 of the Statute the President, acting through the Secretariat, advises the States mentioned in those provisions of their right to appoint an *ad hoc* judge within thirty days following notification of the application of the case. A State with the right to appoint an *ad hoc* judge that fails to make use of this right within that period is deemed to have waived that right. However, the Court has not strictly observed this time limit. In the Durand and Ugarte Case after the expiration of this period, the President at the request of the State extended the period to appoint an *ad hoc* judge.[100] Also in the Ivcher Bronstein Case, one month after the notification of the application, the Agent of the State requested an extension "for a reasonable time" to appoint the *ad hoc* judge, to which the Court responded by granting an additional thirty days.[101]

It is surprising that the Rules give a question of this importance, which should be considered by the full Court, to the President. Moreover, although it is the Court that should determine in each case whether, under the Convention, a State has the right to appoint an *ad hoc* judge, except for the reparations stage of the Caballero Delgado and Santana Case in which the Court invited Colombia to appoint an *ad hoc* judge,[102] the Court has not commented on the manner in which the President has applied this provision. This practice is quite different from that of the International Court of Justice which, after receiving a State party's proposal to appoint an *ad hoc* judge, examines whether the State meets the conditions for the exercise of this right and ensures that the person proposed meets the

100. I/A Court H.R., *Durand and Ugarte Case. Preliminary Objections*. Judgment of May 28, 1999. Series C No. 50, paras. 12 and 14.

101. *Ivcher Bronstein Case. Competence*, *supra* note 84, para. 48

102. I/A Court H.R., *Caballero Delgado and Santana Case. Reparations*. Judgment of January 29, 1997. Series C No. 31, para. 4. It is noteworthy that this is the only case in which the full Court has invited a State to name an *ad hoc* judge. Judge Rafael Nieto Navia, a national of Colombia, who had heard the initial phase of the case as President of the Court, was named by the State as *ad hoc* judge.

requisites to be a judge. The *ad hoc* judge cannot assume his functions until that tribunal adopts a declaration that expressly approves him.[103] In contrast, Rafael Nieto, a former President of the Court, has recognized that at least on one occasion an *ad hoc* judge has not met the necessary conditions required by the Convention,[104] but there is no indication that on such an important matter he or the full Court demanded strict compliance of the provisions of the Convention.

The Court had the opportunity to comment on this issue, although without entering into the merits, in the Paniagua Morales *et al.* Case when Guatemala attempted to replace its *ad hoc* judge without any explanation. The Court stated that *ad hoc* judge Larraondo Salguero had already joined the Court and had even participated in the adoption of a resolution in the case. The Court stated that it did not know of any reason that would prevent him from continuing to hear the case and, therefore, held that he could not be replaced.[105] The Court also noted that the person who had been proposed to replace him had previously been named as an adviser of the State for the public hearing on the preliminary objections and that this fact, *per se*, represented a clear case of incompatibility under the terms of Article 18.c of the Court's Statute, which states that the position of judge of the Court is incompatible with that of other positions or activities that "might prevent the judges from discharging their duties, or that might affect their independence or impartiality."[106] In the Baena Ricardo *et al*. Case, in which Panama had appointed Rolando Adolfo Reyna-Rodríguez as *ad hoc* judge, he informed the Court that he had acted as President of Group No. 4 of the Conciliation and Decision Board in the claim of one of the petitioners against a State enterprise (which he rejected for lack of jurisdiction) and that he would hold "a position relative to International Maritime Affairs of the Republic of Panama" for which he asked the Court to determine whether these facts were grounds for disqualification. With

103. *See* the opinion of Thomas Buergenthal in the sense that the Court is empowered to reject an *ad hoc* judge who does not meet the essential conditions to assume such a position. *The Inter-American Court of Human Rights*, in THE AMERICAN JOURNAL OF INTERNATIONAL LAW, vol. 76, No. 2, 1982, p. 235.

104. Rafael Nieto Navia, *La Corte Interamericana de Derechos Humanos*, in ESTUDIOS BÁSICOS DE DERECHOS HUMANOS, compiled by Rodolfo Cerdas Cruz and Rafael Nieto Loaiza, Serie Estudios de Derechos Humanos, Tomo I, San José, Costa Rica, 1994, p. 260.

105. *Paniagua Morales et al. Case*, *supra* note 76, para. 3 of the considerations.

106. *Ibid*., para. 4 of the considerations.

this information and the express request for a decision on whether that would bar him from being an *ad hoc* judge, the Court issued a resolution whereby it declared that he could not undertake the position of *ad hoc* judge in that case and decided to continue hearing the case with the composition of the Court as it existed at that time.[107]

In resolving questions submitted to the Court's consideration, *ad hoc* judges participate on an equal basis as titular judges. In addition, Article 10.5 of the Court's Statute grants *ad hoc* judges the same privileges and immunities as titular judges and they have the same responsibilities and disciplinary regime. As Judge Cançado Trindade has correctly stated, once sworn and integrated into the Court, an *ad hoc* judge cannot be removed by one of the parties.[108]

An element that should be kept in mind is that the circumstances that led to the appointment of an *ad hoc* judge may no longer exist. In this respect, Article 35.6 of the Rules of the International Court of Justice provides that, if the reasons for naming an *ad hoc* judge no longer exist, that judge ceases to form part of the tribunal.

***iii. Aptness for the position.*** *Ad hoc* judges must meet the same conditions as titular judges. Nevertheless, in their case there is a greater need that the person appointed meet the conditions of independence and impartiality that are indispensable to sit on the Court. The International Court of Justice has held that States should not name as an agent, advisor or lawyer those who, during the previous three years, have been judges of that Court or have participated as *ad hoc* judges in another case before the Court or have been Registrar, Deputy Registrar or a high official of the Court.[109] The absence of a similar practice in the inter-American system has regrettably allowed those who have just concluded their mandates as judges to be named *ad hoc* judges or as advisors to a State party to a controversy before the Court.

107. I/A Court H.R., *Baena Ricardo et al. Case*. Judgment of February 2, 2001. Series C No. 72, paras. 16 and 33-36.

108. *See* the separate opinion of Judge Cançado Trindade in the *Paniagua Morales et al. Case*, *supra* note 76, para. 2.

109. International Court of Justice, Procedural Instructions, of February 7, 2002, Directives Nos. VII and VIII.

### *c) Interim judges*

The Convention does not provide for the eventuality that the work of the Court might be suspended due to a lack of a quorum, which could be the result of vacancies because of resignation, death or permanent disability that might occur before the normal expiration of a judge's term but less than a year before the election of a replacement. To correct this situation and prevent delays in the Court's work, the Statute includes the figure of *interim judges*. Although the constitutionality of this figure may be open to question since it is not provided for in the Convention, the States parties did not object to it when they adopted the Statute at the OAS General Assembly.

Article 6.3 of the Statute[110] provides that, whenever it is necessary to preserve the quorum of the Court, the States parties at a meeting of the OAS Permanent Council, at the request of the President of the Court, shall appoint one or more interim judges who shall serve until such time as they are replaced by elected judges. In order to facilitate appointing these judges, the Statute has given this task to the Permanent Council, which meets on a regular basis, and not the General Assembly, which meets only once a year.

Article 17 of the Rules grants the interim judges, in principle and except for the limitations expressly stated when they are appointed, the same rights and attributes as titular judges.

## *2. THE REGIME OF INCOMPATIBILITIES*

The independence and impartiality of the judiciary is highly important under the Convention. On the domestic plane, Article 8 provides that every person has the right to be heard by an independent and impartial tribunal, the meaning of which has been sufficiently developed by the doctrine and the jurisprudence.[111] That is the least to be expected of an

110. Which was adopted by the OAS General Assembly, which means that, in any event, it has the approval of the parties to the Convention.

111. *See* Héctor Faúndez Ledesma, ADMINISTRACIÓN DE JUSTICIA Y DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS, Universidad Central de Venezuela, Caracas, 1992, pp. 228-241.

international body, the mission of which is precisely to oversee the effectiveness of the rights guaranteed by the Convention. What a former judge of the Israeli Supreme Court has said in the sense that "it is self-evident that no international tribunal could impose any moral or legal authority unless it first insures the independence and impartiality of its members,"[112] is self-evident and should not leave any doubts or even be open to discussion.

In order to establish a solid base for the authority and prestige of the Court and to create confidence and credibility in its members, the Convention attempts to give the Court an image of probity by precluding the carrying out of activities that are irreconcilable with the function of a judge. Article 71 of the Convention provides that the position of judge is "incompatible with any other activity that might affect his independence or impartiality," which is repeated in the Statute. The purpose of this provision is to reinforce and strengthen the exercise of the judicial function by offering the most absolute guarantee of independence and impartiality inherent to the judiciary. The judges, therefore, cannot carry out any other public function of a political or administrative nature or any other type. In developing the scope of Article 71, Article 18 of the Statute establishes that the position of judge is incompatible with that of a) a member or functionary of the Executive Branch (with some exceptions), b) an official of international bodies and c) any other position or activity that might prevent the judges from discharging their duties or that might affect the independence, impartiality, dignity or prestige of the office.

Regarding the incompatibility of this position with other functions in a State party, the Statute contains some important limitations –and omissions– with respect to the terms of Article 71, which could lead to malicious and biased interpretations that would allow, in violation of the letter and spirit of the Convention, a judge to hold other public positions or carry out activities within the structure of the State. In this respect, being independent means mainly, although not exclusively, that the judge

112. *See* Haim H. Cohn, *International Fact-Finding Processes*, in THE REVIEW, International Commission of Jurists, No. 18, June 1977, p. 43.

is not bound by the orders and instructions of the State of which he is a national or any other State.[113]

The Statute expressly provides for the incompatibility of the position of judge with that of member or high official of the Executive Branch, but subjects it to two important exceptions: positions that are not under the direct control of the Executive Branch[114] and diplomatic agents who are not Chiefs of Mission to the OAS or to any of its member States. With respect to this latter exception, it is difficult to understand what other diplomatic agents (such as Chief of Mission of a State to the UN or to UNESCO), who are called upon to carry out equally political functions and who have to have the confidence of their respective Heads of State, do that make them less dependent on their government, which could be brought before the Court for a violation of human rights guaranteed by the Convention.[115] The Convention not only prohibits the ties of dependence that the judge might have with the OAS but, above all, with a State party in any manner that might interfere with making independent and impartial decisions.

Curiously, the well-documented letter of resignation as judge of the Court, submitted on July 20, 1979 by Ambassador Miguel Rafael Urquía, who was then the Permanent Representative of El Salvador to the UN, contradicts the standard subsequently adopted in the Court's Statute. In his lengthy note, Ambassador Urquía understood that a diplomatic post is one of those activities that might affect the independence and impartiality of a judge and that would be hard to exclude from the scope of Article 71.[116] After pointing out the importance attributed to the European Convention and the functioning of its institutions in the *travaux préparatoires* of the American Convention, Ambassador Urquía recalled

113. *See* Felix Ermacora, *Partiality and impartiality of Human Rights Enquiry Commissions of International Organizations*, in RENÉ CASSIN AMICORUM DISCIPULORUMQUE LIBER, vol. I, Pédone, Paris, 1969, p. 70.

114. Whatever sense is given to this expression, it implies an extraordinary hierarchical subordination, notwithstanding that in the framework of the presidential regime every official of the Executive Branch, with the sole exception of the President, is subordinated to an official of a higher hierarchy.

115. Unless among the positions held by the first judges who had the mission of drafting the Statute there was an incompatibility of this nature and that, for a misunderstood condescension with a colleague, was not included as an incompatibility.

116. *See*, the referred to note, reproduced in OAS/Ser.P/AG/Doc.1085/79, add. 1, of October 2, 1979, para. 6.

that, before the first election of the judges of the European Court of Human Rights, the Consultative Assembly of the Council of Europe expressly discussed the compatibility of the position of judge with the holding of a diplomatic post and the opinion prevailed that such a circumstance was incompatible with the independence required of a judge.[117] In contrast, Judge Piza Escalante, who at the moment of his election (the same election in which Mr. Urquía was elected) was the Ambassador of Costa Rica to the UN, did not think it necessary to resign either of the positions and participated in preparing the draft Statute that, *inter alia*, governs cases in which the regime of incompatibilities under Article 71 is applied. This shameful and lamentable fact has led Carlos García Bauer to harshly criticize the wording of Article 18, which distorts and denaturalizes the provisions of Article 71, accommodating its wording to what, under incidental circumstances "would be convenient to those who at that moment were members of the Court and initiated its activities."[118]

Moreover, Article 18 does not contain any explicit reference to the incompatibility of the position of judge with that of a member of the judiciary or legislature of a State party. The Statute's silence on this issue is extraordinarily serious and important since, after all, a State party might violate the rights guaranteed by the Convention, not only through acts of the Executive Branch but also through those of the other branches of government.

In addition to the judicial guarantees set forth in Article 8 of the Convention, the right of judicial protection found in Article 25 and the right to access to domestic courts that would remedy violations of the rights guaranteed in the Convention,[119] many of the Convention's rights contain additional guarantees that require the intervention of the judiciary. In those cases, without going into the mechanisms under domestic law for the selection of judges and that certainly might affect their independence in adopting a decision and without thinking the worst, it would at least be

117. *Ibid*., para. 5.

118. *La Corte Interamericana de Derechos Humanos*, in REVISTA DE LA ASOCIACIÓN GUATEMALTECA DE DERECHO INTERNACIONAL, Vol. 2, No. 3, Guatemala, 1984, p. 7. In fact, it must be noted that the definitive text adopted by the OAS General Assembly does not exactly correspond to either of the two alternatives on incompatibilities in the draft Statute presented by the Court.

119. An implicit right under Article 46.1.a of the Convention.

ingenuous to ignore precisely who exercises the judicial functions that might compromise the international responsibility of the State in cases of violations of the Convention. It is interesting to observe that most of the cases that have been brought before the European Court of Human Rights and the former European Commission deal with the violation of judicial guarantees. It is also noteworthy that this incompatibility arises from the exercise of the judicial function itself in a State party and it is not necessary that it is that judge who is directly responsible for a violation of judicial guarantees in his country. The fact that in order to be a judge of the Court it is necessary to "possess the qualifications required to exercise the highest judicial functions" of the State of which he is a national or of that which proposes him cannot reasonably be interpreted to require, or permit, the holding the two positions at the same time.[120] The logic of this incompatibility has been recognized in domestic law, particularly in federal States and even in some cases at the constitutional level. For example, Article 34 of the Constitution of Argentina provides that "the judges of the Federal Courts may not serve at the same time on the Provincial Court." Unfortunately, the States parties to the American Convention have not avoided this type of incompatibility in selecting the judges of the Inter-American Court, not caring about their independence and creating at least the appearance of a lack of impartiality.

On the other hand, as the States parties have undertaken to adopt the legislative or other measures necessary to give effect to the rights and freedoms guaranteed in the Convention,[121] members of legislatures may also compromise the international responsibility of the State, either by omission in not adopting the pertinent legislation or by action in adopting laws manifestly incompatible with the Convention.

In order that the legitimacy and authority of the institution and the high moral authority of its members not be doubted, it would be very advisable that the Court amend its Statute to reflect faithfully the letter

120. A different interpretation would not appear to be in keeping with the principles that, in classical international law, led to the institution of the immunity of jurisdiction of States, because, although it is not a national tribunal judging the conduct of a third State, it is a situation in which a State is judged by those who are, at the same time, judges of national tribunals of another State.

121. Article 2 of the Convention.

and spirit of the Convention. As long it does not, it is important to note that the Convention has not left the solution of a such a delicate question to the discretion of the Court and that the golden rule on this issue is established in Article 71 of the Convention, which makes the position of judge incompatible with any other position or activity that might affect his independence or impartiality, a question that cannot be interpreted other than in good faith and by excluding native malice. The primary purpose of this provision is to exclude from the Court anyone who holds a public position or in any way is beholden to a State party, whether by having political, administrative, legislative or judicial functions and might, thus, seek and receive instructions of the State of which he is a national or which he serves or because he might feel inclined to decide according to the interests of that State. In this connection, it should be recalled that Article 55.1 of the Convention allows the judge who is a national of a State party to a case submitted to the Court to hear the matter. This provision only makes sense in the framework of a strict application of the regime of incompatibility established by the Convention, which does not allow anyone to be a judge who is at the service of a State party, even other than that of his nationality.

This interpretation is confirmed by the practice of other international tribunals, which does not allow a judge to hold a public office in a State party. Article 16 of the Statute of the International Court of Justice, for example, establishes that no member of the Court may exercise "any political or administrative function" and Article 20.3 of the European Convention provides that the members of the tribunal may not "engage in any activity which is incompatible with their independence, impartiality or the demands of a full-time office." Article 4 of the Rules of the European Court also clearly state that "a judge may not exercise his functions while being a member of a government or while he holds a position or exercises a profession that is susceptible to affect the confidence in his independence." In a more categorical way, the Central American Court of Justice did not allow the holding of any "public position" while being a judge of that Court.

The rule found in Article 71 of the American Convention is complemented by Article 18.c of the Court's Statute, which extends the

incompatibility to any other position or activity that would prevent the judges from discharging their duties or that might affect their independence or impartiality or the dignity and prestige of their office. It is obvious that being a judge on the Inter-American Court while sitting as a judge of a tribunal of a State party or while a member of any legislative body at the national level, in addition to affecting the independence and impartiality of his duties, degrades the dignity and prestige of the office, extending a black cloud over the Court itself. The independence of the judiciary is too important with respect to the structure of the Court for the Court simply to be silent or elude an exhaustive examination of this issue, placing in doubt *the high moral authority* of those who sit on it. It would be absurd to require strict guarantees of independence and impartiality for national judges that the Inter-American Court is not in a position to observe with respect to its own members. No tribunal has the luxury not to apply rigorously all of those provisions that tend to erase any shadow of a doubt on the rectitude and independence of its members, in particular, and on its legitimacy as a collegial body charged with judging in accordance with the law the cases that are submitted to it.

In order to create the objective conditions that would ensure the independence and impartiality of the judges, Article 16 of the Statute of the International Court of Justice provides that "no member of the Court may exercise any political or administrative function, nor engage in any other occupation of a professional nature."[122] Similarly, under Article 4 of the Statute of the Court of Justice of the European Communities, the judges of that tribunal may not hold "any political or administrative office," nor engage, without authorization of the Court, "in any occupation, whether gainful or not." In this connection, Article 6 of the Court of Justice of The Andean Community provides that "the judges shall enjoy full independence in the exercise of their functions. They may not perform any other professional activities, either paid or free of charge, except for teaching; they shall refrain from any act that is incompatible with the nature of their position."

122. It would appear unnecessary to point out that the Statute of the International Court of Justice is an integral part of the Charter of the United Nations, signed in San Francisco on June 26, 1945.

While such an absolute formula would be healthy, it could not be included in the American Convention because, unlike the judges of the International Court of Justice or those of the Court of Justice of the European Communities or the Court of Justice of The Andean Community, the judges of the Inter-American Court are not full-time nor do they receive a salary that would allow them not to engage in other economic activities. They do not receive a salary from the OAS but rather receive, in addition to a per diem and travel expenses when pertinent, honoraria that are determined in accordance with the obligations and incompatibilities that the Statute imposes and taking into account the importance and independence of their office.[123] The draft Statute that the Court submitted to the OAS General Assembly in October 1979 included two options, one of which provided that it be a permanent Court with full-time judges. This proposal was rejected for financial reasons and especially because it was thought that the workload of the Court at that moment did not justify it. Nevertheless, foreseeing a possible change in circumstances that would mean an increased workload, it was decided that the judges should remain at the disposal of the Court and travel to its seat or wherever it is meeting as often and for as long as necessary.[124] In any event, the President must be available on a permanent basis,[125] although the interpretation that has been given to this provision does not obligate him to reside at the seat of the Court nor does it prevent him from engaging in other activities compatible with his position. The American Convention, therefore, does not prevent a judge from engaging in commercial, entrepreneurial or even professional activities, as long as they do not affect his independence or impartiality, as would certainly be the case in holding a public position. The judges are not free to assume just any other occupation and it is absolutely prohibited to sit on an international tribunal called upon to judge the behavior of States while continuing to serve a State, particularly at levels of great responsibility, whether as part of the executive, legislative or judicial branches. It would be absurd to pretend that whoever serves a State party, whether a member of the administration, a judge or a legislator, could sit in judgment of the conduct of other States or his own.

123. Article 17 of the Statute of the Court.
124. Article 16 of the Statute of the Court.
125. Article 16.2 of the Statute of the Court.

The Court of Justice of the European Communities has interpreted this incompatibility to include the duty "to behave with integrity and discretion as regards the acceptance, after (the judges) have ceased to hold office, of certain appointments and benefits," which would exclude the possibility of appearing as a lawyer or advisor before the Court.[126] While the American Convention does not have a similar provision, it appears reasonable to hope that those who have been judges will at least wait a reasonable period before appearing, either as lawyers or advisors, before the Court on which they once served. In our opinion, this reasonable period should be at least three years in order to allow a change in the composition of the Court, although that might not necessarily occur because of the possibility of re-election.

As another guarantee of its independence, the Court itself is called upon to decide on any incompatibility that might affect one of its members with the aim of preventing the judge from being removed by a political body. If such incompatibility exists at the moment of assuming the position of judge, the person elected has the right to choose between one and the other function. If the question arises after assuming the position, under Article 18 of the Court's Statute a declaration of incompatibility would result in the automatic dismissal of the judge and the imposition of the applicable liabilities, but would not invalidate the acts and decisions in which the judge in question participated. To the extent that this provision assumes that it is a question of incompatibility, it appears to us that when the Court declares an incompatibility with respect to recently elected judges, they should have the option of choosing between one and the other position.

### *3. IMPEDIMENTS AND DISQUALIFICATIONS*

In addition to the aforementioned incompatibilities, the Court's Statute provides very general provisions on impediments and disqualifications that might affect the judges and prevent their participation in a particular case.

126. *See*, in this respect, L. Neville Brown and Francis G. Jacobs, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, second edition, Sweet & Maxwell, London, 1983, p. 37.

Under the terms of Article 19.2 of the Court's Statute, impediments and excuses should be filed prior to the holding of the first public hearing in the case. However, if the grounds for the impediment or excuse were not known at that time, such grounds should be presented to the Court at the first opportunity, so that it might rule on the question.

### *a) Impediments*

Article 19 also provides that judges may not participate in matters in which they or their families have a direct interest or in which they have previously participated as agents, advisors or lawyers or as members of a national or international tribunal or an investigatory commission or in any other capacity, in the judgment of the Court.

These impediments apply to all judges, whether they are titular, *ad hoc* or interim judges or even titular judges whose mandate has expired but who, under Article 54.3 of the Convention, retain their competence and continue to hear the cases in which they have participated and that are pending.[127] Thus no person who is a judge may participate in a decision of a matter in which he has a particular interest or in which he has previously participated in any capacity that would place in doubt his impartiality or his appropriateness.[128]

On the other hand, in accordance with the spirit of the Statute and with generally recognized principles of law, the nature of this impediment is not limited to situations in which, directly or indirectly, the judge has an interest or has participated previously in the same matter. In fact, the impediment is even extended to other situations, such as when a judge has participated or is participating other than as a member of the Court[129] but the result of which might appear to be favored by what is decided in the case currently before the Court, although only as precedent.

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127. In previous paragraphs, in commenting on Article 54.3 of the Convention we have referred to the interpretation that the Court has given to the expression "in the state of sentencing" and that should be understood as the equivalent of "cases still pending."

128. In this same sense, Article 17 of the Statute of the International Court of Justice provides that the members of that Court may not exercise functions of agent, advisor or lawyer in any matter nor may they participate in the decision of any matter in which they have formerly participated as agents, advisors or lawyers of any of the parties or as members of national or international tribunals or an investigatory commission or in any other quality.

129. As an agent, advisor, lawyer, member of national or international tribunals, member of investigatory commissions, advisor or in any other condition.

If a judge believes that he is in one of the situations indicated in Article 19 or for any reason feels that he should disqualify himself from participating in a decision of the Court on a specific matter, he should inform the President, who may accept or reject such excuse. When the President does not accept the excuse, the full Court decides on the disqualification.[130]

Under Article 19.2 of the Rules, impediments and excuses should be filed prior the holding of the first public hearing of the case. However, if the grounds for the impediment or excuse were not known until later, such grounds should be presented to the Court at the first opportunity so that it may rule on the matter immediately. In application of this provision in the Durand and Ugarte Case, according to a footnote at the beginning of the judgment on preliminary objections, Judge Jackman "recused himself as a judge in this particular case owing to the fact that, as a member of the Inter-American Commission on Human Rights, he had participated in various phases of the Commission's proceedings on the case."[131] There is no indication in the proceedings in this case or any indication that, under the terms of the Statute, the President accepted this excuse.

In the reparations stage of the Caballero Delgado and Santana Case, the representatives of the victims requested the Commission to recuse *ad hoc* judge Nieto Navia. This communication was transmitted to the Court without the endorsement of the Commission and the Court merely took note of receipt of the document without ruling on it and without examining *de oficio* whether there was any impediment for Mr. Nieto Navia to join the Court.[132]

### *b) Disqualifications*

Pursuant to the Statute, if the President of the Court considers that "a judge has cause for disqualification or for some other pertinent reason

130. Although both the Statute and the Rules of the Court refer to excuses as if they were different than impediments and disqualifications, it appear to us that they simply reflect a subjective appreciation on the part of the judge who for some reason would be impeded from participating in hearing the matter or that would disqualify him.

131. *Durand and Ugarte Case. Preliminary Objections, supra* note 100, footnote following an indication of the Court's composition for this case.

132. *Caballero Delgado and Santana Case, Reparations, supra* note 102, para. 11.

should not take part in a given matter, he shall advise him to that effect." In the event that the judge disagrees, the Court decides.[133] Under Article 19.3 of the Rules, when, for any reason, "a judge in not present at one of the hearings or at other stages of the proceedings, the Court may decide to disqualify him from continuing to hear the case, taking all of the circumstances it deems relevant into account."

An unusual situation occurred in the request for provisional measures in the Reggiardo Tolosa Case that might have fallen under the aforementioned rule. The President of the Court, Judge Nieto Navia, recused himself from hearing the request because of his "condition as a member and President of the Argentine-Chilean Arbitral Tribunal for determining the limit between Mile Post 62 and the Monte Fitz Roy."[134] The situation referred to by Judge Nieto is not expressly provided for by Article 19 of the Statute and does not appear to be a case that would require his disqualification since it did not concern a previous ruling on the matter submitted to the Court. Judge Nieto was obviously not a member of an international tribunal that was considering precisely the same matter submitted to the consideration of the Court (Art. 19.1 of the Statute) nor is it evident that he should not have heard the matter (Art. 19.2). In any event, this is a question that, although posed by a judge who felt that he should disqualify himself, it should have been ruled on by the Court.[135] It is interesting that the Court merely took note of the disqualification of Judge Nieto without commenting on its appropriateness and without considering the negative effect that such a liberal or perhaps indifferent interpretation of this provision might have on the quorum and functioning of the tribunal. Similarly, in the Constitutional Court and Ivcher Bronstein Cases against Peru, Judge Hernán Salgado Pesantes, a national of Ecuador, recused himself from participating in the drafting and adoption of the

133. *See*, in this same sense, the formula employed by Article 24 of the Statute of the International Court of Justice.

134. *See* the communication of Judge Nieto Navia, transmitted by fax on November 12, 1993. *See*, also, I/A Court H.R., *Provisional measures requested by the Inter-American Commission on Human Rights with respect to Argentina. Reggiardo Tolosa Case*, Order of January 19, 1994, para. 2 of the expository part.

135. Pursuant to Article 19.1 of the Statute of the Court, the impediments are qualified "at the judgment of the Court" and Article 19.2 and 19.3 expresses that with respect to impediments, excuses or disqualifications "the Court shall decide."

decision on the Court's competence to hear both cases[136] without giving the grounds for disqualification and without the Court commenting on it.

Article 19.3 of the Court's Rules adds an element in the area of disqualifications by indicating that when, for whatever reason, "a judge is not present at one of the hearings or at other stages of the proceedings, the Court may decide to disqualify him from continuing to hear the case, taking all of the circumstances it deems relevant into account." In interpreting this provision, the Court has held that its purpose is to ensure judicial efficacy and equality between the litigants so that, if at all possible, only judges who had participated at all stages of the proceedings decide the case.[137] While the Court has not invoked this provision nor expressly pointed out that there were grounds for a disqualification to participate in the judgment, this circumstance was alleged in the Neira Alegría *et al*. Case. *Ad hoc* judge Orihuela Ibérico argued that Judge Pacheco, who had not participated in the hearings of the case, should not form part of the quorum for the adoption of the judgment.[138] It is interesting to note that, for reasons beyond his control, Judge Pacheco could not be present during part of the Fifty-second Regular Session and thus did not participate in the deliberations or sign the judgment on the preliminary objections.[139]

Article 4.3 of the Rules allows for a limited disqualification if the President, or any judge called upon to exercise the functions of the presidency, is a national of one of the parties to a case before the Court or in special circumstances in which he considers it appropriate to relinquish the presidency for that case. As the judges are elected in their personal capacity and not as representatives of the States of which they are nationals, this rule does not prevent a judge from hearing the case, but because the President has important procedural powers and in order to offer sufficient

136. *Ivcher Bronstein Case. Competence*, *supra* note 84 and I/A Court H.R., *Constitutional Court Case, Competence*, Judgment of September 24, 1999. Series C No. 55, footnote to the first paragraph of both judgments regarding the composition of the Court.

137. *See Neira Alegría et al. Case, supra* note 50. para. 18.

138. *Opinion of the ad hoc judge on the so-called judgment of the I/A Court H.R., Neira Alegría et al. Case*, of January 19, 1995, appended to the Order in that case. This is a peculiar declaration since *ad hoc* judge Orihuela Ibérico did not participate in the judgment of the Court and, therefore, this is not a separate or dissenting opinion.

139. *See Cantos Case*, *supra* note 96. Footnote to the first paragraph regarding the composition of the Court.

guarantees of equality among the parties to the litigation, the presidency is relinquished in that particular case. This provision was applied in the Caballero Delgado and Santana Case, which was initiated by an application against Colombia filed on January 15, 1993. Subsequently, on July 12, 1993 Judge Nieto Navia, a Colombian national, was elected President of the Court and relinquished the presidency of the case to Judge Picado, who at the time was Vice President.[140] Also on September 16, 1997, in the Suárez Rosero Case, Judge Salgado Pesantes, a national of Ecuador, relinquished the presidency of the case to Vice President Cançado Trindade.[141]

### *4. ITS COMPETENCES*

In order to protect human rights in the inter-American system, the Court has a contentious jurisdiction that is limited to the States parties to the Convention that have expressly conferred this attribute[142] and an advisory jurisdiction that extends to all of the members of the system.

The Court has contentious jurisdiction to hear any case "concerning the interpretation or application of the provisions of (the) Convention that are submitted to it" by the Commission or by the States parties that have recognized, or recognize, as binding its jurisdiction by means of a special declaration or a special agreement.

The Court also has advisory jurisdiction to interpret the Convention or other treaties concerning the protection of human rights in the American States. The Court may offer its opinion at the request of any OAS member State as well as any OAS organ listed in Chapter X of the Charter within its sphere of competence. The Court may also issue its opinion on the compatibility of the laws of any OAS member State with the Convention or other human rights treaties. Finally, the Court has held that this power

140. *See* I/A Court H.R., *Caballero and Delgado Case*. Judgment of December 8, 1995. Series C No. 22, para. 12. Subsequently, by Order of the President of June 22, 1994 and due to the resignation of the Vice President as a judge of the Court, the presidency for this case was ceded to Judge Fix-Zamudio.

141. I/A Court H.R.,*Suárez Rosero Case*. Judgment of November 12, 1997. Series C No. 35, footnote to the first paragraph regarding the composition of the Court.

142. Although it is well to remember that the Commission may invite a State party that has not accepted the jurisdiction of the Court to do so for a specific case. *See* Article 62.2 of the Convention and Article 50.3 of the Rules of Procedure of the Commission.

is not to be interpreted restrictively and that, therefore, it may consider the compatibility of draft laws with the Convention.[143]

### *5. ITS ORGANIZATION AND FUNCTIONING*

It is clear that the operational aspects of the functioning of the Court cannot be underestimated since the decisions that it adopts in this area are an important factor in making the system effective.

#### *a) Its seat*

Pursuant to Article 58 of the Convention, the Court has its seat at the place determined in an OAS General Assembly by the States parties to the Convention. The States parties chose San José, Costa Rica and, therefore, the Court was established and functions there. The Court, however, may meet in the territory of any OAS member State, regardless of whether it is a party to the Convention, when a majority of the judges so decides and with the permission of the respective State. In fact, at the invitation of the Government of Argentina, the Court held its Eleventh Regular Session from October 1 to 10, 1984 in the city of Buenos Aires. The States parties to the Convention may, in the OAS General Assembly, with the vote of two-thirds of its members, change the seat of the Court.

The fact that the Commission and the Court have their seats at different geographical locations has a negative influence on the fluidity that should exist in communications between them and imposes an additional burden on the individuals and non-governmental organizations that, having submitted a claim to the Commission, must follow-up on it if the case is submitted to the Court.

To guarantee its proper functioning, on September 10, 1981 the Court and Costa Rica signed an agreement that stipulated the privileges and immunities of the Court, its judges and personnel, as well as those of the persons appearing before the Court. In this agreement, Costa Rica promised to make available an adequate site for the Court, a promise that was kept

143. I/A Court H.R., *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, paras. 25-30.

by contributing the funds necessary to buy the building that the Court had been occupying as its seat in San José since June 1980.

***b) Its human and financial resources***

With respect to the Court's personnel, the Court elects its Secretary, who must reside at the seat of the Court and attend the meetings that it holds elsewhere. The Secretary is elected for a period of five years. He may be re-elected and also may be removed by the Court. The Secretariat is established under the responsibility and competence of the Court and functions under the direction of the Secretary, in accordance with the administrative standards of the OAS General Secretariat in all that is not incompatible with the independence of the Court. The OAS Secretary General appoints the Court's staff in consultation with the Secretary of the Court.

The Court has had a very small staff, with only 34 positions, two of which are vacant, one temporarily, two are financed by the European Union, two are volunteers from universities or non-governmental organizations and another two are financed by the Inter-American Institute of Human Rights. Thus, at the time of publication there are only 26 employees of the Court who are financed by the OAS budget and one of them is not a permanent staff member. In the short term, this staff could prove to be insufficient to attend to the constantly increasing volume of work due to a greater utilization of the system created by the Convention. In the report on the Court's activities during 1989 to the Committee on Juridical and Political Affairs of the OAS General Assembly, its President emphasized that the Court was in a grave situation that could lead to its paralysis as a consequence of personnel needs[144] and that the appointments of a Secretary and Deputy Secretary had not fully overcome this difficulty.

Although the Court administers its own budget, it lacks sufficient financial autonomy. While the Court prepares its own draft budget, it must be submitted to the OAS General Assembly for final approval.[145] During its short existence, the budget of the Court has been very small and

144. I/A Court H.R., ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1989-1990, General Secretariat of the Organization of American States, Washington, D.C., 1992, p. 12.

145. Article 26 of the Statute of the Court.

occasionally has been subjected to notable reductions from one year to the next, which have seriously affected the discharge of its duties. Thus, in the report on Court's activities during 1987 to the Committee on Juridical and Political Affairs, the President emphasized the precarious financial situation of the Court and urged the Assembly to approve an increase in its budget so that the work of the Court was not paralyzed.[146] For 1995, the amount assigned to the Court was $585,700.[147] The budget approved for the calendar year 2000 was $1,114,900, which was still insufficient to attend to the important tasks that it had been given. For 2003 the budget was $1,420,400 and that adopted for the following year was $1,391,300.

The lack of sufficient financial resources, added to the eventual budgetary reductions, resulted in the cancellation of regular sessions and the suspension of the hearings that had already been convoked.[148]

### *c) The internal organization*

The Court was charged with drafting its own Statute, although it had to submit it to the approval of the OAS General Assembly, which could make the changes that it saw fit. The General Assembly in October 1979 made important changes to the draft that the Court had presented. As with the case of the Commission, the Court may draw up its own Rules.

The judges elect a President and Vice President, whose mandate is two years, with the possibility of re-election. Their terms begin on the first day of the first session of the corresponding year. The election takes place at the last regular session of the Court the previous year. The election of these officers is by secret vote of the titular judges present and at least four votes are needed to elect. If this number is not reached, an election, which is decided by majority vote, takes place between the two judges who had received the most votes. A tie is resolved by seniority.

146. I/A Court H.R., ANNUAL REPORT OF THE I/A COURT H.R. 1988, General Secretariat of the Organization of American States, Washington, D.C., 1988, p. 9.

147. In previous years, this budget was as follows: 1988, $300,400; 1989, $312,300; 1990, $360,600; 1991, $392,700; 1993, $518,500 and 1994, $505,500.

148. Which meant that due to budgetary reductions the Court had to suspend its Forty-eighth Regular Session, including, *inter alia*, the suspension of the hearings that had been convoked on the merits of the Mayagna Community Case. I/A Court H.R., *The Mayagna (Sumo) Awas Tingui Community Case*. Judgment of August 31, 2001. Series C No. 79, para. 46.

The President represents the Court, presides over the sessions and submits to its consideration the matters that are on the agenda, directs and promotes the work of the Court, rules on points of order that arise during the sessions, unless a judge requests that such question be submitted to the decision of the majority, and reports on the activities that he has carried out in the exercise of the presidency since the previous session.[149]

There is a Permanent Commission, comprised of the President, the Vice President and the judges that the President deems advisable according to the needs of the Court, which assists the President in the exercise of his functions. The Court may also establish other commissions for specific matters, which, in urgent cases and when the Court is not in session, may be named by the President.[150]

Notwithstanding the attributes of the Permanent Commission or of the other commissions that under the Rules may be established for specific matters, the Court meets in plenary and there is no provision for chambers.[151] The current composition of the Court of only seven judges and the text of Article 56 of the Convention, which sets the quorum for the deliberations of the Court at five judges, excludes the possibility that the Court meet and decide in chambers. With its current volume of contentious cases, requests for provisional measures and advisory opinions, which will undoubtedly increase, functioning in plenary may become an important limitation to the efficacy of the work of the Court.

### *d) The quorum*

Unlike the quorum of the Commission, the Convention sets the quorum required for the deliberations of the Court at five judges,[152] which, in an international tribunal composed of only seven members, could pose practical difficulties.[153] On the other hand, Article 15 of the Court's Statute provides that decisions are taken by a majority of the judges present and that in the event of a tie the President has a casting vote. Neither the

149. Article 4 of the Rules of the Court.
150. Article 6 of the Rules of the Court.
151. *See*, in this sense, Articles 26 and 29 of the Statute of the International Court of Justice.
152. Article 56 of the Convention.
153. In fact, during 1990 the Court had to cancel, for lack of a quorum, its Twenty-second Regular Session and its Tenth Special Session.

Convention nor the Statute specifies whether, for the effects of a quorum, *ad hoc* judges should be counted, but it should be understood that, as they have the same prerogatives as titular judges and as there is no express provision to the contrary, they should also count for the effects of the quorum. The Rules of the International Court of Justice, however, provide that *ad hoc* judges are not taken into account for purposes of a quorum.[154]

With respect to the reception of testimonial or expert evidence, the Court decided at its meeting on June 26, 1996 that this may be done in the presence of one or more of the judges in a public hearing at the seat of the Court or *in situ*.[155]

### *e) The function of the Secretariat*

Pursuant to Article 59 of the Convention, the Court establishes its Secretariat, which functions under the direction of the Secretary, in accordance with the administrative norms of the OAS General Secretariat in all that is not incompatible with the independence of the Court. The OAS Secretary General appoints the Secretariat staff in consultation with the Secretary. Article 58.2 and 58.3 of the Convention provides that the Court elects its Secretary, who must reside at the seat of the Court and must attend the Court's meetings outside the seat (and it may be presumed that he must attend the meetings that the Court holds at its seat). These provisions have been developed and complemented by Article 14 of the Statute, which adds that the Secretariat functions "under the immediate authority of the Secretary," who is a person of confidence of the Court, of exclusive dedication, who has his office at the seat of the Court and who must attend any meetings that the Court holds outside the seat. It also provides for a Deputy Secretary, who assists the Secretary in his work and who replaces him during his temporary absences.

Under Article 7 of the Court's Rules, the Secretary must have the legal qualifications required for the position, have a good command of the working languages of the Court and the experience necessary to carry out

154. Article 20.3 of the Rules of the International Court of Justice, of April 14, 1978, with the amendments introduced by the Court on December 5, 2000.

155. I/A Court H.R., ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1996, General Secretariat of the Organization of American States, Washington, D.C., 1997, p. 155.

his functions. The Secretary is elected for a period of five years and may be re-elected. However, the Secretary may be removed at any time, if the Court so decides. To elect and remove the Secretary a majority of no fewer than four judges in secret ballot in the presence of a quorum is necessary. Under Article 8 of the Rules, upon the proposal of the Secretary the Deputy Secretary is named as prescribed by the Statute. If the Secretary and Deputy Secretary are unable to exercise their functions, the President may appoint an interim Secretary. In the temporary absence of the Secretary and Deputy Secretary from the seat of the Court, the Secretary may name a staff lawyer to be in charge. According to Article 4.2 of the Rules, the Secretary or Deputy Secretary may be delegated by the President to represent the Court.

The Secretary and Deputy Secretary "take an oath or make a solemn declaration before the President of the Court to discharge their duties faithfully, and to respect the confidential nature of the facts that come to their attention while exercising their functions." This also applies to the Secretariat staff on assuming their positions, even if they are called upon to perform interim or transitory functions. If the President is not present at the seat of the Court, the oath or declaration is taken before the Secretary or the Deputy Secretary. In the spirit of this provision in the Las Palmeras Case the then Deputy Secretary, Pablo Saavedra, disqualified himself from participating because he had been involved in the case as a staff member of the Commission.[156]

In accordance with Article 10 of the Rules, the functions of the Secretary are: a) communicate the judgments, advisory opinions, orders and other rulings of the Court, b) keep the minutes of the meetings of the Court, c) attend the meetings of the Court held at its seat or elsewhere, d) deal with the correspondence of the Court, e) direct the administration of the Court, pursuant to the instructions of the President, f) prepare the drafts of the working schedules, rules and regulations, and budgets of the Court, g) plan, direct and coordinate the work of the staff of the Court, h) carry out the tasks assigned to him by the Court or by the President and i) perform any other duties provided for in the Statute or in the Rules. In sum, the

156. I/A Court H.R., *Las Palmeras Case.* Judgment of December 6, 2001. Series C No. 90, second footnote.

Secretary is the regular channel of communication to and from the Court, between it and the parties in a case and between the Court and the OAS General Secretariat.

### *f) The sessions*

Pursuant to Article 11 of the Rules the Court holds the regular sessions that are necessary during the year for the full exercise of its functions on the dates that the Court decides at its immediately previous regular session. The President in consultation with the Court may change the dates of those sessions when exceptional circumstances require it. In accordance with Article 12, special sessions are convoked by the President on his own initiative or at the request of a majority of the judges.

The hearings that are held during the sessions are public and take place at the seat of the Court. When exceptional circumstances justify it, the Court may hold private hearings or hearings outside the seat and decides who may attend them. Even in those cases, summary minutes are taken of the meetings in the terms of Article 43 of the Rules. The Secretariat records the hearings and annexes a copy of the recording to the file. The agents, delegates, victims or alleged victims, their next of kin or their duly accredited representatives receive a copy of the recording of the public hearing at the end of the hearing or within the following 15 days.

In 1998 the tribunal held four regular sessions and two special sessions. In contrast, in 2002 it held only four regular sessions. The exact dates of each session are set by the Court itself in its immediately prior session, but may be changed by the President in the event of special circumstances. At the request of a majority of the judges or on his own initiative, the President may convoke special sessions to hear requests of provisional measures. However, the Court has had to cancel a previously scheduled session for budgetary reasons, as was the case with its Forty-eighth Regular Session, which was supposed to have been held in June 2000.[157]

157. *The Mayagna (Sumo) Awas Tingui Community Case*, *supra* note 148, para. 46.

### *g) The internal practice*

Article 14.2 of the Rules provides that the Court deliberates in private and its deliberations are secret. Only the judges participate in the deliberations but the Secretary and the Deputy Secretary, as well as such Secretariat staff as necessary, may also be present. Anyone else may be admitted by special decision of the Court, after having been sworn or made a solemn declaration. Any question that is to be put to a vote is formulated in precise terms in one of the working languages. At the request of any judge, the text is translated by the Secretariat to the other working languages and distributed before the vote. The minutes of the deliberations are limited to a mention of the subject of the debate, the decisions adopted, the dissenting or concurring votes and any statements requested to be included in the minutes.

The President submits the questions to a vote point by point. The vote of each judge is affirmative or negative and there is no provision for abstaining. The voting is done in inverse order of the precedence established in Article 13 of the Statute. Decisions are taken by a majority of the judges present at the time of the vote. In the case of a tie, the President has a casting vote.

## *6. THE DISCIPLINARY REGIME*

Article 20 of the Statute provides that the judges and staff of the Court must conduct themselves in the performance of their duties and at all other times "in a manner that is in keeping with the office of those who perform an international judicial function (and are) answerable to the Court for their conduct, as well as for any violation, act of negligence or omission committed in the exercise of their functions."

Under the Statute, the disciplinary authority with respect to the judges lies with the OAS General Assembly, which exercises it at the request of the Court, comprised for this matter of the remaining judges.

The disciplinary authority with respect to the Secretary lies with the Court and with the Secretary for the other staff members, with the approval

of the President. Its Statute provides that the Court issue the disciplinary rules, subject to the applicable administrative norms of the OAS General Secretariat.

Except for Article 4 of the Rules, which grants the President the function of deciding "points of order that may arise during the meetings of the Court," there are no precise provisions on disciplinary matters for the agents, assistants and advisors of the parties, the witnesses or experts, or the other persons who participate in the proceedings.

The application of this type of measure was posed in the first cases against Honduras as a result of the perjury committed in testimony before the Court by Lt. Col. Alexander Hernández, who had categorically denied belonging to Battalion 316, which had been accused as being responsible for forced disappearances, and who later admitted in radio interviews in Honduras that he had been the commander of that Battalion. The Lawyers Committee for Human Rights, a non-governmental organization based in New York, noted that such an admission contradicted his sworn testimony and stated that, to maintain the seriousness of its proceedings, the Court should demand that Honduras punish the officer with the sanctions contemplated for the crime of perjury in its domestic legislation or that it initiate criminal charges against him for the crime of perjury. Although this information was transmitted to the Government of Honduras, the Court rejected the petition of the Lawyers Committee, which as an *amicus curiae* could collaborate with the Court in the study and resolution of the matters submitted to its jurisdiction, but could not present petitions that might obligate it to act or decide in one way or another.[158]

In the Genie Lacayo Case, the Government of Nicaragua requested that the Court admonish José Miguel Vivanco, one of the assistants of the Commission in the case, for having, in a press release of Human Rights Watch/Americas, utilized expressions that attacked the Government, which maintained that it was a question of order and discipline arising from the judgment on preliminary objections in the case. Mr. Vivanco argued that his statements, in addition to being a legitimate exercise of freedom of

158. Order of the Court of July 21, 1989 in the *Velásquez Rodríguez, Fairén Garbi and Solís Corrales* and *Godínez Cruz Cases*.

expression guaranteed by Article 13 of the Convention, were made as a representative of Raymond Genie and in the name of Human Rights Watch/ Americas and not in his role as assistant of the Commission. Admitting that the representatives of the parties to a proceedings should during and after the proceedings and regardless of their nature mutually respect the honor of the other party, be courteous and display good manners without affecting the legitimate right of opinion and dissent, the Court refused to process the Government's request, stating that its Rules reserved to the President all decisions on points of order but only when they are brought up during sessions of the Court, which was not the case here.[159]

With regard to the behavior of the parties, the President of the Court observed that certain terms utilized in the brief of preliminary objections submitted by the Government of Guatemala in the Blake Case were inappropriate, unnecessary and contrary to type of language that should be employed by the parties. He, therefore, ordered those terms, which were not in keeping with the respect due the Court and the Commission as organs of the inter-American system, be stricken from the brief and requested that in the future the Government show the consideration that parties to the proceedings should exhibit at all times.[160]

### *7. THE WORKING LANGUAGES*

The official languages of the Court, according to Article 20 of the Rules are those of the OAS, to wit: Spanish, English, Portuguese and French.

Article 20.3 provides that the working languages are determined at the beginning of the examination of each case, unless it is necessary to continue using those that the Court had employed previously.[161] In a

159. I/A Court H.R., *Genie Lacayo Case*. Judgment of November 29, 1995. Series C No. 30, para. 1 of the expository part and paras. 1, 2, 4 and 5 of the considerations.

160. Order of the President of the Court of January 30, 1996 in the *Blake Case*, considerations and operative paras. 1 and 2.

161. It previously provided that the working languages would be those that the Court decided each year and in a former version of the Rules indicated that the working languages would be those that the Court decided every three years, according to the languages spoken by the judges. Moreover, this lapse of three years coincided with the partial renovation of the judges of the Court, which allowed it to take into consideration changes in the languages spoken by the judges.

specific case, however, the Court may adopt as a working language that of any of the parties as long as it is one of the official languages. The Court may authorize anyone who appears before it to speak in his own language, if he does not have a sufficient command of the working languages. In that case, the Court takes the necessary steps to assure the presence of an interpreter to translate that testimony into the working languages. The interpreter must take an oath or make a solemn declaration to discharge his duties faithfully and to keep confidential the facts that he learns while exercising his functions. The working languages have been Spanish and English, with Spanish being dominant, which is reflected in the final paragraph of the judgments and advisory opinions where it is indicated that they have been issued in Spanish and English, the official version being Spanish in all the judgments adopted to date. In the Court's eighteen advisory opinions, all have been issued in Spanish and English, with the official version being Spanish, except for the advisory opinion on the effect of reservations on the entry into force of the Convention,[162] the text of which was prepared by Judge Buergenthal and in which case the official text is in English.

Article 32 of the Rules states that an application is filed with the Secretariat in the working languages of the Court. If it is presented in only one of the working languages, the proceedings are not suspended but the translation into the other languages must be done within thirty days. In addition, the working languages are determined at the beginning of the proceedings, unless it is necessary to continue utilizing those that the Court was already employing (Article 20.3 of the Rules).

As of April 1999, of the twenty-one countries that had accepted the jurisdiction of the Court only four are not Spanish-speaking (Barbados, Brazil, Haiti and Suriname).[163] In addition, given the fact that most of the judges' mother tongue has been Spanish,[164] it is easy to understand the

162. I/A Court H.R., *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Arts. 74 and 75). Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2.

163. Trinidad and Tobago, which was the only English-speaking country that on adhering to the Convention on May 28, 1998 accepted the Court's jurisdiction, notified its denunciation, or rather its withdrawal, of the American Convention.

164. Among the exceptions are initially Judge Buergenthal, of the United States, and since January 1, 1995 Judges Jackman, of Barbados, and Cançado Trindade, of Brazil.

predominance of that language. It is not surprising that, in dealing with countries such as Suriname, whose official language is neither English nor Spanish, when requesting copies of the official texts of the Constitution and pertinent laws and criminal procedure of the country, the Court has asked that the texts be "duly translated into Spanish."[165]

In spite of the preference expressed for the Spanish language, in the Villagrán Morales *et al.* Case against Guatemala the Commission filed the application in English and the State was notified in that language. However, six months later and more than two months after the State replied to the application, a translated version was forwarded to the State.[166] In this same case, the Commission presented its observations to the preliminary objections of Guatemala in English but unlike what occurred with the application, these was not forwarded to Guatemala until the Commission presented a Spanish translation.[167] In the Castillo Petruzzi *et al*. Case, in which the Court had requested the Commission to send it the minutes of the session in which it was decided to refer the case to the Court, when the State in question objected that the minutes furnished by the Commission were in English, the Secretariat of the Court, acting on instructions of the President, sent a translation to both parties in the case.[168]

It is curious to observe that, in the case of the advisory opinion on the international responsibility for the promulgation and enforcement of laws in violation of the Convention, the observations of Brazil were received in Portuguese and transcribed in the Opinion in that language that, despite being an official language of the Court, was not at that moment a working language.[169]

The Court may authorize anyone who appears before it to speak in his own language if he does not have a sufficient command of one of the

165. I/A Court H.R., *Gangaram Panday Case*, Judgment of January 21, 1994. Series C No. 16, para. 33.
166. *Ibid*., para. 11.
167. I/A Court H.R., *The "Street Children" Case (Villagrán Morales et al.). Preliminary Objections*. Judgment of September 11, 1997. Series C No. 32, paras. 4 and 12.
168. I/A Court H.R., *Castillo Petruzzi Case*. *Preliminary Objections*. Judgment of September 4,1998. Series C No. 41, paras. 45 and 47.
169. I/A Court H.R., *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (Arts. 1 and 2 American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 14.

working languages. In such a case, the Court must take the necessary steps to assure the presence of an interpreter to translate the testimony into the working languages.

Considering the possible use of more than one working language, in all of its judgments, resolutions and orders the Court must state which is the authentic text and that, with the exception indicated, has been Spanish.

## C. RELATIONS BETWEEN THE COMMISSION AND THE COURT

The fact that the Convention has divided the competences of the promotion and protection of human rights between the Commission and the Court[170] makes it necessary to ascertain whether there exists a hierarchy or subordination between these two organs and the degree of coordination that should exist between their activities because, at least under the Convention, the relations between the Commission and the Court require perfect coordination and cooperation, making it essential that each of them strictly respects the sphere of competence of the other. This implies, *inter alia*, defining the nature of the functions that belong to each organ, which of these do not exactly coincide and which in the case of the Commission are broader than those that have been assigned to the Court since they include both the promotion and protection of human rights that, unlike the Court's competences, allow it to act *ex oficio* without waiting for a request by third parties.

Article 51 of the OAS Charter provides that the Commission is an autonomous body of the Organization and is governed by the norms of the Charter and by the American Convention. The Court, however, is not an organ of the OAS but derives its existence from the Convention and is governed exclusively by it.

There is no doubt that the functions of the Court are strictly judicial. The characterization of the functions of the Commission, which cover both the promotion and protection of human rights, is a matter that has

170. In contrast to the function of promotion of human rights, which has been entirely granted to the Commission.

already been discussed and need not be repeated. In this respect, we only wish to recall that while some of its attributes are diplomatic or political, others are typically jurisdictional.

### *1. COMPLEMENTARY AND NOT RIVALS*

For the examination of petitions or communications that contain complaints of a violation of the Convention, the functions of the Commission and of the Court closely complement each other. While their initial study is conferred on the Commission, this does not preclude the possibility that a case be submitted to the contentious jurisdiction of the Court. The procedure before the Commission is an indispensable preliminary stage in order for a matter to come before the Court. In exercising its function of interpreting the Convention, the Court has correctly attributed to the Commission a clear auxiliary role in the administration of justice, as a sort of *Ministerio Público* of the inter-American system.[171] In any event, this is a function that poses difficulties and has not been free of criticism. While admitting that the role of the defender of the *public interests* of the system, as the watchdog of the correct application of the Convention, is reserved to the Commission, it has been argued that, if it also has the function of defending the interests of the victims as an *intermediary* between the victims and the Court, it perpetuates this undesirable ambiguity that should be avoided.[172]

It may also be said that the Commission does not just receive the petitions that are presented to it. It exercises some exclusive competences to decide on the content of those petitions,[173] but in other cases it acts only as the first jurisdictional body[174] since the Court may review its actions if the matter is referred to it. In any event, the Commission serves as a filter of the petitions that are presented to it and which may eventually reach the Court.

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171. *In the Matter of Viviana Gallardo et al., supra* note 14, para. 22.

172. *See* the vote of Judge Cançado Trindade, in I/A Court H.R., *Castillo Páez Case. Preliminary Objections*. Judgment of January 30, 1996. Series C No. 24, para. 16, note 11 and in the *Loayza Tamayo Case. Preliminary Objections.* Judgment of January 31, 1996. Series C No. 25, para. 16, note 12.

173. For example, in declaring the inadmissibility of a petition.

174. Particularly, in determining whether there has been a violation of the Convention.

This complementariness and separation of functions implies that once the Commission has referred a case to the Court, the Commission's competence to continue to hear the matter automatically ceases. In the words of the Court, "the presentation of the demand before the Court carries with it, *ipso jure*, the end of the proceedings by the Commission."[175] However, the Commission has not strictly observed this rule, as was shown by the experience in the Cayara, Maqueda and El Amparo Cases.

### *2. COOPERATION AND COORDINATION*

With respect to the processing of petitions or communications, the fact that the functions of the Commission and the Court are mutually complementary also implies that both organs must closely cooperate and coordinate in performing their labors.

Notwithstanding the fact that both the Commission and the Court have been assigned some functions that are not shared, exclusivity in the exercise of these functions does not imply that they are unrelated to those that correspond to the other organ of control of the system. In fact, they are closely related and some are a prelude to the function of the others or are a necessary condition for the performance of the other. Judge Cançado Trindade has emphasized that the principal concern of the Court and the Commission should be not the zealous internal distribution of attributes and competences in the jurisdictional mechanism of the Convention, but rather in the adequate coordination between the two organs of international supervision so as to ensure the most effective protection possible of human rights.[176]

In the framework of this cooperation, the Commission has made it clear that it is not completely subordinated to the Court. In the Constitutional Court Case, in answer to a request of the Secretariat of the Court that the Commission send the original file, the Commission refused to comply and pointed out that, under Article 73 of its Rules, it "only sends the copies of the file that it deems pertinent." Subsequently, the

175. *Velásquez Rodríguez Case*. *Preliminary Objections*, *supra* note 90, para. 75.
176. *See supra* note 172, para. 10 in both cases.

Secretariat, on the instructions of the President, requested some documents from that file and informed that the Commission's communication would be placed before the Court for the relevant effect. The Commission sent only part of the documentation requested.[177]

### *3. JUDICIAL CONTROL OF THE ACTIONS OF THE COMMISSION*

In the first cases against Honduras, the Commission argued that the Court is not an appellate court of the Commission's acts and that, therefore, the Court has limited jurisdiction that prevents it from reviewing all steps of compliance with the requirements of admissibility of a petition addressed to the Commission or the procedural norms applicable to the different stages that it must complete in processing a case.[178] The Court indicated that this position was not in accord with the Convention whose terms authorize the Court in the exercise of its contentious jurisdiction to decide all questions relating to the interpretation or application of the Convention[179] and that the broad terms in which the Convention is drafted indicates that the Court exercises full jurisdiction on all issues in a case. It is, therefore, competent both to decide whether there has been a violation of the rights or freedoms recognized in the Convention, to adopt in such a case the appropriate measures, to interpret the procedural elements that justify its hearing a case and to verify compliance of all procedural norms involved in the interpretation or application of the Convention.[180]

The Court has stated that it does not act, with respect to the Commission, in a proceeding of review, appeal or any other type. Its competence to consider and review *in toto* the acts and decisions of the Commission derives from its character as the sole judicial organ, which while it ensures a greater judicial protection of the human rights recognized

177. I/A Court H.R., *Constitutional Court Case*. Judgment of January 31, 2001. Series C No. 71, para. 29.

178. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 90, paras. 28, 33 and 31, respectively.

179. *Ibid*., paras. 29, 34 and 32, respectively.

180. *Ibid*.

in the Convention, it also ensures the States that have accepted its jurisdiction that the norms of the Convention will be strictly observed.[181]

Without denying that the Commission possesses some jurisdictional attributions, it is obvious that in this area it is subordinated to the decisions of the Court. The Court cannot abdicate its powers, especially those regarding the interpretation of the Convention, and it has the authority to comment on and examine the legality of the Commission's acts, extracting the legal consequences that it considers appropriate if they are not adopted in accordance with the provisions of the Convention. This, of course, does not deprive the Commission of its political competences under the Convention or the margin of discretion that it naturally has in their exercise.

There is no doubt that the Commission's functions correspond in an appreciable measure to a necessary political activism to promote human rights, a task that it exercises by weighing the timeliness and advisability of its acts and in finding solutions based on respect for human rights. It is, however, evident that, with respect to the several judicial functions that the Convention confers on the Commission, in the final analysis the judicial control of the exercise of those attributes corresponds to the Court.

On the other hand, once the Commission has completed its examination of a petition and notwithstanding its competence to issue final conclusions, it is the Court that ultimately decides on the existence of a violation of human rights protected by the Convention, orders the enjoyment of the right or freedom violated be ensured to the victim and orders, if necessary, the consequences of the measure or the situation that made up the violation of those rights be corrected and the payment of a just indemnification to the victim. The Commission is obligated to find a solution based on respect for human rights and on the alternative that is most favorable for the protection of those rights,[182] a question that cannot ignore the greater effectiveness of a judicial decision.

The Court is not obligated to follow a decision of the Commission on the meaning and scope of the provisions of the Convention. This is an

181. *Ibid*.

182. I/A Court H.R., *Certain Attributes of the Inter-American Commission on Human Rights* (Arts. 41, 42, 44, 46, 47, 50 and 51 American Convention on Human Rights). Advisory Opinion OC-13/93 of July 16, 1993. Series A No. 13, para. 50.

attribute that, with respect to the authorized and binding interpretation of the Convention, corresponds uniquely to the Court and that, therefore, has binding legal effects on both the Commission and the States parties to the Convention. Whether it is a question of its political or judicial powers, the Commission has the duty to adjust its actions to the terms of the Convention as interpreted by the Court in the exercise of both its contentious or advisory jurisdictions.

### *4. THE COURT AS A DECISIVE BODY*

There is no doubt that the Court, as the jurisdictional organ charged with authoritatively interpreting the text of the Convention and other treaties concerning the protection of human rights in the American States, is the decisive body in all controversies in this area.

It is the Court that issues definitive judgments on the complaints that are presented to the Commission and that are referred to the Court's contentious jurisdiction. In filing applications with the Court, the Commission is accepting that the Court has the last word. It is the Court that, in examining those applications, decides on the legality of the Commission's actions in a particular case. It is the Court to which States have recurred to consult it on certain attributes of the Commission[183] and on the nature of the reports issued by the Commission.[184] This fact appears to have been admitted even by the current Government of Venezuela, headed by Hugo Chávez, which in a dispute with the Commission inquired of the Court as to whether there is an organ with competence to control the legality of the actions of the Commission.[185]

183. *Ibid*.

184. I/A Court H.R., *Reports of the Inter-American Commission on Human Rights* (Art. 51 American Convention on Human Rights). Advisory Opinion OC-15/97 of November 14, 1997. Series A No. 15.

185. *See* the text of the request in the Order of the President of the Court of December 19, 2003, Request for an Advisory Opinion by Venezuela, para. 1 of the expository part.

# Second Part

# THE COMPETENCES OF THE CONVENTION'S ORGANS

The Convention grants its organs three types of competence: a) for the promotion of human rights, which has different forms and which is exclusively the domain of the Commission, b) for the protection of human rights, which the Commission and the Court share and c) an advisory function that, for the authorized interpretation of the Convention and other treaties concerning the protection of human rights in the hemisphere, has been assigned to the Court.[1]

With regard to the promotion of human rights, Article 41 of the Convention entrusts the Commission with the functions of: a) developing an awareness of human rights among the peoples of America, b) making recommendations to the OAS member States to adopt progressive measures in favor of human rights, c) preparing the studies and reports that it considers advisable in the performance of its duties, d) requesting the governments of the member States to furnish it with information on the measures that they have adopted in the field of human rights and e) responding, through the OAS General Secretariat, to inquiries of the member States on human rights matters and providing the advisory services that they request.[2] These are, obviously, functions of great importance, the relevance and transcendence of which cannot be ignored. However, since they are eminently political and diplomatic their examination is beyond the aims of this study.

There are procedural differences between the treatment of individual complaints of human rights violations and that of claims referring to the global situation of human rights in a specific country, known as *general cases*. These country reports fall within the Commission's competence as an OAS organ and have played a crucial role in the protection of human

1. Although Article 41.e of the Convention grants the Commission the power "to respond … to inquiries made by the member States (of the OAS) on matters related to human rights," this is a type of advisory function that the Commission should offer, within its possibilities, to the States that so request. By its nature, it provides a way for the Commission to promote human rights and, therefore, is part of its function of promotion.

2. As may be seen, Article 41 of the Convention sets forth in clauses a) through e) the functions and powers that were originally attributed to the Commission by Article 9 of the Statute adopted by the OAS Council on May 25, 1960.

rights, especially prior to the entry into force of the American Convention or before its ratification by countries under dictatorships.[3] The two procedures are not completely separate but rather are complementary because, regardless of the treatment that is given to individual petitions under the contentious procedure, the Commission may also consider those claims as part of its study of the general human rights situation in a specific country.[4] We, however, will concentrate on the procedure for individual complaints as it is the central mechanism for the protection of the human rights embodied in the Convention.

## A. THE CONTENTIOUS JURISDICTION

In view of the central role that the Convention gives to individual petitions and eventually to State communications, this Second Part will analyze the stages of the contentious procedure under the Convention for these petitions and communications.

The Convention's control mechanism is composed mainly of a system of individual *petitions* and of State *communications*. Although these procedures are not original in that they had already existed under the European Convention for the Protection of Human Rights and Fundamental Freedoms,[5] their revolutionary impact on international law has been truly remarkable. In the first place, the procedure of State communications breaks with the traditional rules of diplomatic protection[6] in that it permits States parties to formulate complaints against other States for human rights violations without the requirement of a relationship, such as nationality, between the complainant State and the victim of the violation.[7] Moreover,

3. Among these latter, particular mention should be made of I/A Commission H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN ARGENTINA AND REPORT ON THE SITUATION OF HUMAN RIGHTS IN CHILE, General Secretariat of the Organization of American States, Washington, D.C., 1980 and 1985, respectively.

4. *See*, for example, I/A Commission H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN HAITI OF 1990 OR REPORT ON THE SITUATION OF HUMAN RIGHTS IN PANAMA of 1989, General Secretariat of the Organization of American States, Washington, D.C.

5. Signed in Rome on November 4, 1950.

6. An institution that is still in operation, but is designed to protect foreigners and not the nationals of the State whose responsibility is being questioned.

7. It appears unnecessary to emphasize that, in making use of this right, the State is not defending its right but rather is acting in defense of the norms of international law. These are norms that are obligations *erga omnes*, unlike those that are based on reciprocity and only generate rights with respect to those States that have assumed the same obligation.

in granting the individual direct access to international bodies without a State as an intermediary, the right of individual petition definitively ended the notion that had existed until the end of the Second World War that denied that the individual was the subject of international law.[8] The last step of this evolutionary process contains two elements of fundamental importance: a) the creation of mechanisms of collective guarantee for making effective human rights, which includes the right of individual petition found in the Convention and b) the objective nature of the States' obligation to respect human rights, which, as *jus cogens*, are part of the international *ordre publique* and impose on the States the duty to respect those rights, whether or not they are expressly obligated to do so by treaty. The true dimension and transcendence of this change has not yet been perceived at the local level, where judges often continue to adhere to anachronistic judicial ideas that are fortunately outdated.

Semantically, like the European Convention and the International Covenant on Civil and Political Rights, complemented by its Optional Protocol, the American Convention does not use the term *denunciations* or *complaints* (individual or State), which is what they really are, but calls them something less harmful and offensive to the dignity of the State denounced by identifying individual (or group) complaints as mere *petitions* and State complaints as simple *communications*. Nevertheless, the use of a less precise name for these recourses does not in any way diminish their nature as true *complaints* or *denunciations*. Moreover, Article 44 of the Convention refers to "petitions … containing denunciations or complaints."

### *1. THE RIGHT OF INDIVIDUAL PETITION*

There is no doubt that Article 44 has a fundamental importance in the structure of the Convention and, by permitting access to the international

8. This is part of a much more complicated process, the roots of which extend back to treaties to protect minorities and to abolish slavery and the formation of international humanitarian law. After the end of the Second World War, this transformation was reflected first in the identification of the individual as having international obligations, as seen in the Statute of the Nuremberg Tribunal, followed by the Charter of the United Nations and the recognition of the individual as having rights derived directly from international law and later by the adoption of the European Convention on Human Rights and the creation of mechanisms of collective guarantee for the realization of those rights. *See*, Héctor Faúndez Ledesma, *La evolución del Derecho Internacional y la condición juridica del individuo*, in SUMMA, a book in honor of the Procuraduría General of Venezuela on its 135th anniversary, Caracas, July 1998, pp. 403-479.

organs established to oversee fulfillment by the States of their obligations under the Convention, has a greater transcendence than any of its other norms. This provision incorporates an autonomous right that may be described as a guarantee for the exercise of the other rights protected by the Convention and even assists the Commission in carrying out its other functions under Article 41 of the Convention and under its Statute. It not only permits access of individuals to international bodies but, above all, requires that States allow the exercise of this right and remove any obstacles to it. This is an element that has been examined both by the former European Commission and the European Court of Human Rights, which have not only underscored the importance that its exercise not be impaired but also that the effectiveness of this recourse not be made illusory.[9] According to Judge Cançado Trindade of the Inter-American Court, "Article 44 cannot be analyzed as if it were a provision like any other of the Convention, as if it were not related to the obligation of the States Parties of not creating obstacles or difficulties to the free and full exercise of the right of individual petition, or as if it were of equal hierarchy as other procedural provisions. The right of individual petition constitutes, in sum, the cornerstone of the access of the individuals to the whole mechanism of protection of the American Convention."[10] Since the difference between the rights of the individual and the State is precisely the central element in the event of a human rights violation, the right of individual petition before international bodies is the individual's best guarantee that his rights are respected and that, in the event of their violation, he obtain reparations. In granting this procedural initiative to the individual, who ostensibly is the weakest point in the vertical relationship between him and the State, the Convention has been given an agile and dynamic mechanism that, in the opinion of Cançado Trindade, "reflects the specificity of the International Law of Human Rights, in comparison with other solutions proper to Public International Law. … Without the right of individual petition, and the consequent access to justice at the international level, the rights enshrined into the American Convention would be reduced

9. *See* European Court of Human Rights, *Case of Cruz Varas and others v. Sweden*, judgment of March 20, 1991, paras. 92, 93 and 99.

10. Concurring opinion in I/A Court H.R., *Castillo Petruzzi et al. Case, Preliminary Objections*, Judgment of September 4, 1998, Series C No. 41, para. 3.

to a little more than a dead letter. It is by the free and full exercise of the right of individual petition that the rights set forth in the Convention become effective. The right of individual petition shelters, in fact, the last hope of those who did not find justice at the national level."[11]

While essentially dealing with the same type of institution established in the European Convention, there is a radical difference with respect to the holder of this right under the different treaties. Article 44 of the American Convention provides that any person or group of persons or any non-governmental organization legally recognized in one or more of the OAS member States may present *petitions* that contain *denunciations* or *complaints* of violations of the Convention by any State party. For OAS member States that are not parties to the Convention, Article 20.b of its Statute authorizes the Commission to "examine communications submitted to it." The aforementioned Article 44 makes automatic or mandatory for the State, for the sole reason of being a party to the Convention, the right of individuals or groups as well as non-governmental organizations recognized in a member State to present petitions that contain complaints of violations of the Convention. This provision differs from the original design of the European Convention that granted the right of individual petition only as an optional procedure and required an express declaration by the State party accepting the jurisdiction of the organs of that Convention to examine such petitions.[12] The African Charter on Human and Peoples' Rights,[13] although representing a much more recent regional system and while permitting the African Commission to examine communications coming from sources other than States, does not grant the right of individual petition as a means of guaranteeing the rights recognized in the Charter. Instead it contemplates non-compulsory proceedings, similar to that of Resolution 1503 of the UN Economic and Social Council,[14] which allow

11. Ibid., paras. 34-35.
12. With the entry into force of Protocol No. 11 to the European Convention, the European Court of Human Rights is competent to receive and examine individual petitions that contain complaints of violations of the human rights set forth in that Convention by any of the States parties, without the necessity of an additional declaration by those States.
13. Adopted June 26, 1981, at the Eighteenth Conference of the Heads of State and Government of the Organization of African Unity, held in Nairobi, Kenya.
14. Adopted May 27, 1970, at the XLVII Session of the Economic and Social Council.

the Commission to consider at its discretion communications presented by non-State sources.[15]

### *2. STATE COMMUNICATIONS*

With respect to *communications* presented by a State party that allege a human rights violation in the territory of another State party, Article 45 of the Convention establishes that any State party may, when it deposits its instrument of ratification, declare that it recognizes the Commission's competence to receive and examine communications in which a State party alleges that another State party has violated human rights recognized in the Convention. The scheme of the American Convention also differs in this aspect from that of the European Convention, as the latter contemplates a system of State complaints that is automatic. In contrast, the American Convention allows them as an option if the State expressly accepts it by means of a declaration made at the time of the deposit of its instrument of ratification or adhesion or at any other time.[16] Declarations recognizing this competence may be made for an indefinite time, for a specific period or only for specific cases and are deposited with the OAS General Secretariat, which forwards a copy to the OAS member States. The scheme adopted by the American Convention probably finds its explanation in the existence of a hegemonic power in the region and the fear, justified or not, of the Latin American States that a provision similar to that of the European Convention would serve as a pretext for new interventions in what they considered their internal affairs.

Pursuant to Article 48 of the Commission's Rules, a communication presented by a State party that has accepted the Commission's competence to receive and examine communications against another State party is forwarded to the latter, whether or not it has accepted the Commission's competence. If that jurisdiction has not been accepted, the communication is transmitted so that the State might exercise its option under Article 45.3

15. *See* Article 55 of the African Charter of Human and Peoples' Rights.

16. To date (April 2004), only Argentina, Chile, Colombia, Costa Rica, Ecuador, Jamaica, Peru, Uruguay and Venezuela have accepted the competence of the Commission to hear communications of another State party that alleges a violation of the human rights guaranteed by the Convention.

of the Convention to recognize it for that specific case. When a State in question accepts the Commission's competence to examine a communication of another State party, the processing of the case is governed by the provisions on individual petitions submitted to the Commission that invoke the Convention or other applicable related instruments.

### *3. THE PROCEDURE*

In both individual petitions and State communications the Commission follows essentially the same procedure, which is governed by Articles 48 to 50 of the Convention. A contentious case begins with the following common stages: a) the establishment of its *jurisdiction* to examine the case that has been lodged with it, b) a decision on the *admissibility* of the petition or communication, c) the *establishment of the facts* that have given rise to the petition or communication, d) the *mediation* stage with the Commission's efforts to arrive at a friendly settlement between the parties and e) the *decision* of the Commission in a report containing conclusions and recommendations. In the event that the other conditions are fulfilled, the case may only be referred to the Court when these stages have been completed.

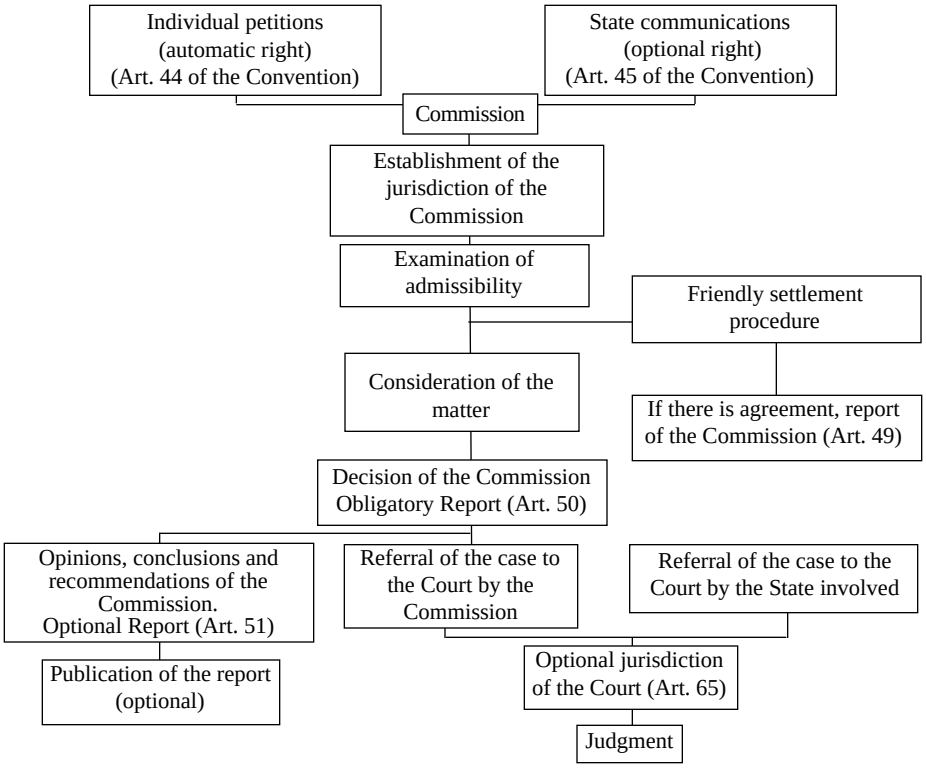
Although there are no differences derived from the *individual* or *State* nature of the petition or communication that sets in motion the machinery of the Convention, the procedure followed depends on other variables relative to the Court's jurisdiction and the standing of those who have access to it. It must be emphasized that the Court lacks competence, *ipso jure*, and in order for it to hear a case the State in question must have expressly recognized its jurisdiction, whether by a special declaration or by a special agreement.[17] If the State in question has subjected itself to the Court, the Commission or a State involved in the case must decide to refer it to the Court.[18] Therefore, if the State in question has not accepted the Court's jurisdiction or if neither the Commission nor the State involved

17. *See*, in this sense, Article 62 of the Convention.
18. *See* Article 61 of the Convention, which provides that "only States parties and the Commission shall have the right to submit a case to the Court" and Article 51 of the Convention, which reserves to the Commission and to the State concerned the right to refer a matter to the Court.

in the case[19] deems it necessary or advisable to refer the matter to the Court, the proceedings conclude in the Commission with its opinions, conclusions and recommendations.[20]

The following diagram attempts to show, simply and schematically, the procedure followed at the initial and final stages for petitions and communications submitted to the organs of the American Convention:

**Diagram No. 1**
**Procedure for the processing of individual petitions and State communications**




19. The defendant State and the complainant State if it is a State communication or simply the defendant State when the proceedings have been initiated by an individual petition.

20. *See* Article 51.1 and 51.2 of the Convention.

## B. THE ADVISORY JURISDICTION

Because of its impact on the interpretation of the Convention, another aspect of fundamental importance refers to the Court's advisory jurisdiction. This Second Part will analyze the Court's function in this area and the manner in which it has interpreted it.

The transcendental importance of the Court's advisory jurisdiction is unquestionable. On the one hand, it is derived from the fact that the authorized interpretation of the Convention and of other treaty obligations undertaken by the States parties in the area of human rights has been conferred on the Court. On the other hand, its importance has to do with the practical possibilities that it offers as a means to ensure the fulfillment of human rights, other than in contentious proceedings, and with the probability that, precisely for that reason, the Court's holdings will be better received by the States.

# Chapter V

## ESTABLISHING THE JURISDICTION OF THE COMMISSION

Although the Commission has occasionally confused the rules that govern its jurisdiction with the conditions for the admissibility of a petition,[1] in processing an individual petition or a State communication it must ensure that the procedural requirements set forth in the Convention in this area have been fulfilled.

In establishing its jurisdiction to consider a case that has been submitted to it, the Commission must examine the following aspects: i) the nature of the *persons* who intervene in the procedure, either as complainant or defendant, ii) the *matter* that is the subject of the petition or communication, iii) the *place*, or the jurisdiction, where the acts that are the subject of the complaint occurred and iv) the *moment* in which the alleged violation of the human rights protected by the Convention occurred with regard to the entry into force of the Convention by the State concerned.

### A. JURISDICTION *RATIONE PERSONAE*

In the inter-American system, the Commission's competence to consider a petition or communication with respect to the parties that intervene in the procedure must be analyzed on the basis of three criteria: the conditions of the defendant, the requirements to be a complainant and the nature of the alleged victim of the violation.

1. *See, e.g.,* I/A Commission H.R., Resolution No. 15/89, Case 10.208, presented by Salvador Jorge Blanco against the Dominican Republic, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1988-1989, General Secretariat of the Organization of American States, Washington, D.C., 1989, p. 103, para. 20 of the conclusions.

### *1. JURISDICTION WITH RESPECT TO THE DEFENDANT*

It has already been sufficiently emphasized that human rights are the rights of the individual vis-à-vis the State. It is the State, and only the State, that can violate human rights. In its Annual Report for 1984-1985, the Commission pointed out that it had received numerous complaints of human rights violations attributed to irregular armed groups that were then operating in Nicaragua. The Commission reiterated what it had observed in its 1980 report on the situation of human rights in Argentina in the sense that it could not comment on this type of violation since it had been "established to control the behavior of governments in the field of human rights and it was for that purpose that the Commission procedures were established."[2] In keeping with this precedent, in a case referring to Guatemala the Commission observed that, in the event of reciprocal incriminations, it could not open an investigation in which the government was the complainant because its function is not to process cases against groups accused of subversion but rather against contracting States.[3]

The first aspect that the Commission examines in establishing its jurisdiction is the identity of the defendant, which must be a State party to the Convention against which individual petitions may be made automatically[4] or under its Statute an OAS member State.[5] This duality of the system of individual petitions has been integrated by Article 23 of the Commission's Rules that is applicable to all OAS member States, whether or not they are parties to the Convention. This provision provides that petitions may be presented to the Commission "concerning alleged violations of a human right recognized in, as the case may be," the American Convention or the American Declaration. The Commission has thus essentially, but not entirely, established the same procedure for violations protected by the Convention and those recognized by the Declaration.

2. I/A Commission H.R., ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1984-1985, General Secretariat of the Organization of American States, Washington, D.C., 1985, p. 164 *et seq*.

3. I/A Commission H.R., Report No. 6/91, Case No. 10,400, Guatemala, adopted February 22, 1991, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1990-1991, General Secretariat of the Organization of American States, Washington, D.C., 1991, p. 220, para. 90.

4. Article 44 of the Convention and Article 19.a of the Statute of the Commission.

5. Article 20.b of the Statute of the Commission.

State communications only concern States parties to the Convention. Unlike individual petitions for which the Commission has automatic jurisdiction for the mere fact that the State concerned has ratified the Convention, in the case of State communications the State must, in addition to having ratified the Convention, have expressly declared that it accepts the Commission's jurisdiction to receive and examine communications of other States parties on the basis of reciprocity. It may, therefore, only be exercised by States parties that have made a similar declaration accepting the Commission's jurisdiction to receive and examine communications of other States parties. The explanation for this more rigid system for State communications, unlike the more liberal system for individual petitions, may be the fear that such a mechanism could be employed as an instrument of intervention to achieve political, rather than humanitarian, ends.[6]

The declarations of recognition of the Commission's jurisdiction to receive State communications may be made for an indefinite time, for a specified period or for a specific case. To date, only Costa Rica, Chile, Ecuador, Jamaica, Peru, Uruguay and Venezuela have made an unequivocal declaration accepting the Commission's jurisdiction to receive and examine communications of other States alleging a violation of the rights guaranteed in the Convention. Argentina and Colombia made declarations recognizing the Commission's jurisdiction for an indeterminate period subject to strict reciprocity for cases concerning the interpretation or application of the Convention,[7] without referring to Article 45 and without mentioning the right of other States, obviously under the condition of reciprocity, to submit communications to the Commission alleging a violation of the rights enshrined in the Convention. The declaration of Bolivia, accepting the

6. *See*, in this respect, Thomas Buergenthal, *El sistema interamericano para la protección de los derechos humanos*, in ANUARIO JURÍDICO INTERAMERICANO 1981, General Secretariat of the Organization of American States, Washington, D.C., 1982, p. 134. The situation was reversed in the original text of the European Convention of Human Rights, automatically conferring jurisdiction on the former Commission to receive State communications and subjecting the Commission's right to receive individual petitions to the express acceptance by the State.

7. While in these two latter cases there is no mention that this declaration is made pursuant to Article 45 of the Convention or permitting the Commission to receive communications presented by other States parties denouncing the violation of human rights recognized in the Convention, it must be observed that this is the only case in which the Convention requires an express recognition of the *Commission's jurisdiction* and the only case in which those declarations may have an *effet utile*.

Court's jurisdiction, recognizes the "competence of the Inter-American Court of Human Rights, in accordance with Articles 45 and 62 of the Convention," the first of which refers to the competence of the Commission to receive and examine complaints of other States, which may eventually reach the Court.

The idea that petitions or communications may only be directed against a State party to the Convention or an OAS member State alleging a violation of a right found in the Convention or in the American Declaration is based not only on a literal reading of Articles 44 and 45 of the Convention but also from the very essence of human rights since what justifies the existence of international organs of human rights protection, such as the Commission, is the need to have a body to which one can turn when human rights have been violated by State agents or organs.[8] Obviously, there may be many reasons to attribute to the State in question the responsibility for these violations. The Commission has found a government "responsible for the acts that have, through commission or omission, led to disappearance of the persons covered by this denunciation, since such acts involved persons or agents who … operated within or by the authority of that government or with its acquiescence."[9]

### *2. JURISDICTION WITH RESPECT TO THE COMPLAINANT*

Although not the first to do so, the American Convention offers the possibility for individuals and States to present complaints of human rights violations against a State party to the Convention. What is notable is that in the former case the Commission may examine an individual petition as a matter of right simply because the State concerned has ratified the Convention. In the latter case, however, its competence to consider inter-

8. I/A Commission H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN ARGENTINA 1980, General Secretariat of the Organization of American States, Washington, D.C., 1980, p. 26.

9. I/A Commission H.R., Resolution No. 4/87, Case 7.864, Honduras, adopted March 28, 1987, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1986-1987, General Secretariat of the Organization of American States, Washington, D.C., 1987, p. 74.

State communications depends on the consent of the State, as manifested by an express declaration to that end.[10]

It would seem to be unnecessary to emphasize the importance that permitting individuals to submit their complaints directly against a State has for the efficacy and smooth functioning of the system as an instrument to safeguard human rights. It would also appear to be unnecessary to insist on the disadvantages of a system of human rights protection that is based on complaints that States present against other States, given all the considerations of the political costs that such a decision involves for the complainant State and assuming such a State would have an interest in protecting the rights of an individual with whom it has no ties and who may not even be one of its citizens.

The American Convention is much more liberal regarding individual petitions than other international instruments, granting a true *actio popularis* with respect to violations of human rights. Article 44 of the Convention provides that "any person or group of persons" or any non-governmental body legally recognized in one or more of the OAS member States may present a complaint, which does not have to be lodged by the victim of the alleged violation. Moreover, the petitioner does not have to be the victim's representative or someone directly related to him or have his express or tacit consent. In a case in which the Government of Uruguay argued that the alleged victim "never gave consent for his case to be presented to the Inter-American Commission on Human Rights," the Commission held that the person who makes the complaint of a human rights violation does not need the authorization of the victim.[11] In the Commission's recent practice, there is the example of the complaint in the Ivcher Bronstein Case that was initially introduced by a Peruvian Congressman, then

10. In the original scheme of the European Convention on Human Rights, these two procedures were exactly reversed, that is, while the jurisdiction of the European Commission to receive State complaints was automatic (being sufficient that both the complainant State and the defendant State had ratified the Convention), its competence to examine individual petitions was optional and depended on an express declaration by a State party. With the entry into force of Protocol No. 11 on November 1, 1998, individuals automatically acquired direct access to the Court, which became the sole organ of the European system.

11. I/A Commission H.R., Resolution No. 59/81, Case 1.954, Uruguay, adopted October 16, 1981, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1981-1982, General Secretariat of the Organization of American States, Washington, D.C., 1982, p. 96.

presented by the Bar Association of Lima and only later by the person affected.[12]

With regard to the system of collective guarantee of human rights, Article 23 of the Commission's Rules provides that any person or group of persons or non-governmental organization legally recognized in one or more of the OAS member States may present petitions to the Commission in their own name or in that of third persons alleging a violation of a human right recognized in, as the case may be, the American Declaration, the American Convention, the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights, the Protocol to the American Convention to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, their respective provisions, the Commission's Statute and its Rules of Procedure. The petitioner may designate, in the petition itself or in another submission, a lawyer or other person to represent him before the Commission. What is most notable is that these petitions may be presented by a person in his own name or in that of a third person, without the need for any kind of relationship between the alleged victim and the petitioner. Therefore, the *locus standi*, that is, the standing to recur to the Commission and be heard by it, is not conditioned or subject to special qualifications or limited in any way, making possible a more effective protection than that under the European Convention, which requires that the petitioner be the alleged victim of the violation. In the Hilaire Case, the petitioner who presented the complaint against Trinidad and Tobago was the British law firm of Simmons and Simmons,[13] which is not even located in the Americas or in any of the OAS member States.

This very liberal construction of the right of individual petition has an extraordinary importance in cases in which the victim has been subjected to pressures not to denounce his case before international bodies or is

12. I/A Court H.R., *Ivcher Bronstein Case*. Judgment of February 6, 2001. Series C No. 74, paras. 6 and 8.

13. I/A Court H.R., *Hilaire Case. Preliminary Objections*. Judgment of September 1, 2001. Series C No. 80, para. 3.

simply not in a condition to do so, permitting it to be done by a third person even against the will of the person directly affected. Inexplicably, in a recent case the State concerned argued that "an alleged legal entity under non Peruvian private law and/or third persons who are unidentified or whose identity is not known to the Peruvian State and who presumably are not of Peruvian nationality" lacked standing to question sovereign acts of the Peruvian authorities.[14] This objection was rejected outright by the Court, which pointed out, *inter alia*, that the complainant was a group of persons and that, therefore, one of the requirements for standing under Article 44 of the Convention was satisfied.[15] On this point, Judge Cançado Trindade has emphasized the autonomy of the right of individual petition vis-à-vis the domestic law of the States, observing that, even if in a specific legal system an individual is prevented from taking judicial steps on his own, he may always do so before the organs established by the American Convention.[16]

Neither does the exercise of this right depend on whether the alleged victim has behaved in accordance with domestic law. The Court has held that the commission of an illegal act on the part of individuals "would result in the intervention of the regular courts for a judgment as to the liability of those who committed it, but will not override the human rights of the accused nor deprive them of the possibility of access to organs of international jurisdiction."[17]

Pursuant to the aforementioned rule and although in the context of the Convention the victim must be a physical person,[18] the petitioner may be a non-governmental body, the only requirement of which is that it be legally recognized or registered in one or more of the OAS member States. It is significant that it is not required that the non-governmental organization be registered in a State party to the Convention but rather that it be recognized in *any* OAS member State. In applying this provision, the

14. I/A Court H.R., *Castillo Petruzzi et al. Case. Preliminary Objections*. Judgment of September 4, 1998. Series C No. 41, para. 81.a.

15. *Ibid*., para. 82, which remands to para. 77.

16. *See* his concurring opinion in *ibid.*, para. 27.

17. *Ibid*., para. 84.

18. *See*, in this respect, the sub-section that follows on the Commission's jurisdiction regarding the alleged victim of the violation.

Commission has rejected a petition, observing somewhat ironically that it could not consider a complaint of an organization such as the *Unidad Revolucionaria Nacional Guatemalteca* because it could not admit complaints from guerilla organizations that "are not recognized under the law."[19] Other than this requirement, the *locus standi* of non-governmental organizations is not subject to the internal laws of the State in which they are recognized nor to the provisions of their own norms. Nonetheless, bearing in mind that the general rule is that a petition may be submitted by "any person or group of persons," the requirement of recognition or registration for non-governmental organizations is not crucial because, in the event of not being legally recognized or registered in an OAS member State, as a *group of persons* they do not have to meet any special requirement or condition. This has been the criterion of the Commission, which has been ratified by the Court, with respect to complaints presented by non-governmental organizations whose recognition is not easily verifiable.[20] In the Castillo Petruzzi *et al.* Case, the State concerned argued that the non-governmental body that had submitted the claim had not been accredited as legally recognized by Chile nor had the person who had acted in the name of the organization been authorized by the internal norms of the organization or by an express power for that purpose.[21] The Commission indicated that it had always "broadly interpreted Article 44 so as to not require the existence of a power of attorney or a specific representation; it is sufficient that the action is taken by a group of persons."[22] The Court confirmed the reasoning of the Commission, expressing that

> irrespective of the examination that it could make, if it were necessary, of the existence and authority of FASIC and of the person who took

19. Resolution No. 6/91, Case 10.400, Guatemala, adopted February 22, 1991, in I/A Commission H.R., ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1990-1991, *supra* note 3, p. 220, para. 90.

20. *See*, in this respect, Edmundo Vargas Carreño, *Algunos problemas que presenten la aplicación y la interpretación de la Convención Americana sobre Derechos Humanos*, in LA CONVENCIÓN AMERICANA SOBRE DERECHOS HUMANOS, General Secretariat of the Organization of American States, Washington, D.C., 1980, p. 159.

21. *Castillo Petruzzi et al. Case. Preliminary Objections*, *supra* note 14, para. 76.a.

22. *Ibid*., para. 76.b.

> action in its name, it is clear that Article 44 of the Convention permits any group of persons to lodge petitions or complaints of the violation of the rights set forth in the Convention. This broad authority to make a complaint is a characteristic feature of the system for the international protection of human rights. In the present case, the petitioners are a "group of persons" and therefore, for the purpose of legitimacy, they satisfy one of the possibilities set forth in the aforementioned Article 44. The evident authority in this instance makes it unnecessary to examine the registration of FASIC, and the relationship that said foundation has or is said to have with those who act as its representatives. This consideration is strengthened if it is remembered that, as the Court has stated on other occasions, the formalities that characterize certain branches of domestic law do not apply to international human rights law, whose principal and determining concern is the just and complete protection of those rights.[23]

These considerations are just as valid with respect to complaints submitted against a State party for the violation of the rights protected by the Convention as it is for complaints against an OAS member State that has not ratified the Convention for the violation of the rights contained in the American Declaration.

It is important, for practical purposes, to specify what is understood under the Convention by "non-governmental organization." After the adoption of the Charter of the United Nations, whose Article 71 provides that "the Economic and Social Council may make suitable arrangements for consultations with non-governmental organizations which are concerned with matters within its competence," the Council, in applying this provision, has clearly defined what is a non-governmental organization. In a very broad interpretation of the Convention, the Inter-American Commission has considered that companies or "'private juridical persons' may be assimilated to the notion of 'non-governmental entity legally recognized'" by any OAS member State.[24] Despite the clear language of

23. *Ibid*., para. 77.

24. I/A Commission H.R., Report No. 39/99, Complaint MEVOPAL, S.A., Argentina, adopted March 11, 1999, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1998, General Secretariat of the Organization of American States, Washington, D.C., 1998, p. 297 *et seq*., para. 12.

the Convention, it is plausible to assume that those who submit a petition in the name of a company or a juridical person may be characterized as "any person or group of persons" and thus qualified to present a complaint to the Commission. However, by permitting their access to the Commission, those bodies, which have a profit motive, are then being considered as non-governmental organizations, one of the elements of which is precisely being non-profit. It cannot be assumed that the drafters of the Convention used this expression carelessly, giving it the same meaning and scope as a *juridical person* or *entities of private law*, without being aware of the special role of non-governmental organizations as members of civil society that articulate the common interests of its members, which are completely different than commercial interests.

In any event, what is evident is that, with this reference in Article 44 to non-governmental organizations, *a contrario sensu* the Convention has plainly excluded the possibility that State bodies, including Ombudsmen, present complaints against their own States or other States. This, however, does not prevent the Commission, in the exercise of its jurisdiction as an organ of human rights protection, from acting on its own initiative when it deems it appropriate based on information that it has received from reliable sources.

In order that a State communication be admitted it is necessary that, in addition to the express declaration of the State in question accepting the Commission's jurisdiction to receive communications from other States, the State filing the communication has also accepted the Commission's jurisdiction to process communications that other States present against it. The procedure for State communications only applies to States that have assumed *the same obligation* and that, therefore, may make reciprocal claims before the Commission. Unlike the right to individual petition, which is reserved to any person or group of persons and almost any non-governmental organization, the right to present State communications denouncing a State for the violation of human rights guaranteed by the Convention is restricted to those States that have in turn accepted the Commission's jurisdiction to receive communications that accuse them of having violated the Convention. Unlike what happens in other international bodies, when these requirements have been satisfied the State in question

does not have to demonstrate any *special interest* to legitimate its intervention in the case.[25]

An aspect that is not covered by the Convention is the presentation of a claim by the very State that has allegedly violated a human right, a situation that, although it appears improbable, was presented in The Matter of Viviana Gallardo *et al*. On this occasion, the Government of Costa Rica attempted to submit a case directly to the Inter-American Court expressly waiving, *inter alia*, the procedures before the Commission and requesting collaterally that the case be remitted to the Commission for a decision as to whether there was a violation by Costa Rican authorities of the human rights guaranteed by the Convention in the case of the death of Viviana Gallardo and the injuries to her cell-mates. Since the Court accepted the collateral petition, the case was brought before the Commission at the initiative of the State against which the petition was directed. The Commission declared it inadmissible, not because of the identity of the claimant but because the information received from the government showed that it had acted in conformity with the existing legal provisions and had punished with the full force of the law the person responsible for the acts denounced.[26]

In addition to the aforementioned mechanisms provided by Articles 44 and 45 of the Convention, Article 24 of its Rules provides that the Commission may, *motu proprio*, initiate the processing of a petition that satisfies, in its view, the requirements. In a previous version of its Rules, Article 26.2 provided that the Commission could, *motu propio*, take into consideration any available information that appeared appropriate and that contained the necessary elements to initiate the processing of a case that satisfied, in its view, the requirements. Despite the semantic difference between these two versions of the Rules, the Commission may on its own initiate a proceeding against a State, taking into account, for example,

25. On the other hand, in the cases on South West Africa, the International Court of Justice rejected the complaints of Ethiopia and Liberia and held that they did not have a legal right or interest related to the complaint. South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa)(1960-1966), Second Phase, judgment of July 18, 1966, para. 99.

26. I/A Commission H.R., Resolution No. 13/83, In the Matter of Viviana Gallardo *et al*., Costa Rica, adopted June 30, 1983, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1982-1983, General Secretariat of the Organization of American States, Washington, D.C., 1983, pp. 49-53.

reliable press accounts that have not been contradicted by other evidence. Given its compatibility with the terms of Article 44, this provision of the Rules is also perfectly in line with Article 41 of the Convention, which states that the Commission has as its principle function that of promoting "respect for and defense of human rights." In a case against Guatemala, the Commission refused to process a complaint of the *Unidad Revolucionaria Nacional Guatemalteca* because it was "not recognized under the law," but clarified that the Commission had already opened the case, *motu propio,* under its Statutory powers in view of the seriousness of the matter when the petition of the URNG was received.[27] For reasons that are not relevant to analyze here, the Commission has not always correctly utilized this power. For example, in the Blake Case, in spite of the fact that the Commission found as proved the disappearances and deaths of Nicholas Blake and Griffith Davis, the recommendations that it made to the State referred only to the former. The Court expressed its surprise that, given that the remains of two persons were found and that those of Mr. Davis were identified before those of Mr. Blake, the Commission did not make use of its authority under Article 26.2 of the Rules, which authorized it to act, *motu propio,* even when there was no express petition on behalf of Mr. Davis and who was not included in the complaint. According to the Commission, this was due to the fact that the family of Mr. Davis showed no interest in initiating an action before the Commission.[28] The Commission, however, cannot ignore its function to oversee the protection of human rights, irrespective of the desires or the indifference of the victim or his family.

A current practice, certainly not prohibited by the Convention and implicit in the right to petition set forth in Article 44 of the Convention, consists in joining a petition with one already presented by another person or group of persons.[29] In the practice of the Commission in order for a person who adheres to a case to become a co-petitioner and be kept informed of developments in the case it is necessary that the original

27. Resolution No. 6/91, *supra* note 3, p. 221, para. 91.
28. I/A Court H.R., *Blake Case.* Judgment of January 24, 1998. Series C No. 36, para. 85.
29. I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community Case.* Judgment of August 31, 2001. Series C No. 79, para. 12.

petitioner agree in writing. If the co-petitioner desires information on what has been done prior to his intervention, he must so request in writing. To avoid possible confusion, the Commission's Secretariat attempts to channel all information through the original petitioner as occurred in the Barrios Altos Case, where, by note to the Commission of June 11, 1997, the petitioners requested that the Center for Justice and International Law and the Legal Defense Institute be included as co-petitioners.[30]

### *3. JURISDICTION WITH REGARD TO THE PRESUMED VICTIM*

Although, in principle, a complaint requires a victim, it should be noted that it is not necessary that there be an effective link between the author of the petition and the victim of the violation being denounced. The notions of author and victim are different in the inter-American human rights system. They may sometimes be the same person, but they may also be different persons who do not have a personal relationship.[31] This means that the presumed victim does not have to consent to the presentation or processing of a complaint, a criterion that has been expressly confirmed by the Commission.[32] In fact, the Commission processed the Ivcher Bronstein Case as a result of a complaint by a Peruvian Congressman and the Dean of the Lima Bar Association before Mr. Ivcher requested a hearing of the Commission when he was made the principal petitioner.[33] Similarly, a case as important as that as the Constitutional Court Case was submitted to the Commission not by the Justices of that tribunal who were removed in violation of their human rights but by 26 members of the Peruvian Congress.[34] Nonetheless, the distinction between *victim* and *petitioner* may have important procedural consequences,[35] which are reflected not

30. I/A Court H.R., *Barrios Altos Case*. Judgment of March 14, 2001. Series C No. 75, para. 13.
31. Report No. 39/99, *supra* note 24, p. 297, para. 13.
32. Resolution No. 59/81, *supra* note 11, pp. 93 and 97.
33. I/A Court H.R., *Ivcher Bronstein Case. Competence.* Judgment of September 24, 1999. Series C No. 54, paras. 3 and 5.
34. I/A Court H.R.,*Constitutional Court Case. Competence*. Judgment of September 24, 1999. Series C No. 55, para. 3.
35. For the moment, it is enough to point out that Article 28 of the Commission's Rules requires the names of the author of the petition and the alleged victim of the violation.

only with respect to the contents of the complaint but also with respect to discontinuing it, in the effect of discontinuance and in the friendly settlement procedure.

A Commission practice, which is hard to justify in practical terms and not very convincing in legal terms, is that if after a petition has been introduced, a person or group of persons presents a new complaint based on the same acts, the latter must have a power of attorney or an authorization from the original petitioners in order to be included as co-petitioners of the case.[36] In our opinion, it is illogical and appears to be contrary to the spirit and the letter of Article 44 of the Convention that the first complainant acquires a sort of right of domination over the case, without considering how he might proceed, including discontinuing or abandoning the case and without considering that, as an organ of protection of the system, the Commission's task is to oversee the fulfillment of the commitments undertaken by the States parties[37] and, in the case of acts that are a violation of those commitments, to reach a solution based on respect for human rights.[38]

What we wish to emphasize is that the presumed victim of the violation must be, in any case, a physical person. Article 1.1 and 1.2 of the Convention provides that the States undertake to respect the rights and freedoms that it guarantees "to all persons subject to their jurisdiction" and that under the Convention person means "every human being." The Commission confirmed this principle in a case regarding the expropriation of the Banco de Lima, when it held that the system of human rights protection in the hemisphere is limited to the protection of natural persons and does not include legal entities. The Commission observed that, while it can protect the rights of an individual whose property has been confiscated, it does not have competence in the case of the rights of legal entities, such as corporations or, as in this case, a banking institution.[39] Similarly, in the Tabacalera Boquerón Case, the Commission pointed out

36. *See, e.g.,* a reference to this practice of the Commission in *Castillo Petruzzi et al. Case. Preliminary Objections*, *supra* note 14, para. 4.

37. Article 33 of the Convention.

38. Article 48.1.f of the Convention.

39. Report No. 10/91, Case 10.169, Peru, adopted February 22, 1991, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1990-1991, *supra* note 3, p. 426 *et seq*.

that the protection granted by the inter-American system is limited solely to natural persons and excludes legal entities, since these are not protected by the Convention and, as such, cannot be victims of a human rights violation.[40] In a complaint presented by the Argentine company MEVOPAL, the Commission concluded that, although the company alleged that it was the victim, it did not have jurisdiction *ratione personae* because legal entities are excluded from the protection granted by Article 1.2 of the Convention. According to that provision, the person protected by the Convention is "every human being" (*todo ser humano* in Spanish and *tout être humain* in French) and, therefore, the Commission held that the Convention grants its protection to physical or natural persons, excluding legal entities from its application. This interpretation is confirmed by the verification of the true meaning that is given to the phrase 'person' means every human being" with the text of the Preamble to the Convention, which recognizes that the essential rights of man are "based upon the attributes of the human personality" and reiterates the necessity of creating conditions that permit every person to achieve "the ideal of free men enjoying freedom from fear and want."[41] It is obvious that the Commission has not paid the proper attention to the rights of shareholders, who also may be affected in the case of measures taken against a corporation. In contrast, in a case brought before the International Court of Justice on behalf of shareholders of a corporation, although it rejected the case because the complaining State lacked *jus standi*, the Hague Court left it clear that the protection of the human rights of the shareholders could pose problems of the denial of justice, an issue also considered under the European Convention on Human Rights.[42] Even though in the Tabacalera Boquerón Case the petition was presented on behalf of the company and its owners or shareholders, the Commission observed that the party directly affected by the domestic judgments was the company itself, which had suffered damages to its assets, and that in the domestic proceedings the shareholders had never been

40. I/A Commission H.R., Report No. 47/97, Tabacalera Boquerón, S.A., Paraguay, adopted October 18, 1997, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1997, General Secretariat of the Organization of American States, Washington, D.C., 1997, p. 225 *et seq.*, paras. 25 and 35.

41. Report No. 39/99, *supra* note 24, p. 297 *et seq*., paras. 2 and 17.

42. International Court of Justice, *Barcelona Traction, Light and Power Company, Limited* (New Application: 1962), (Belgium v. Spain)(1962-1970), Second Phase, Judgment of February 5, 1970, paras. 90-91.

mentioned as victims of any violation of their rights so what was at issue was not the individual property rights of the shareholders but the commercial rights and assets of the company, which the Commission was not empowered to protect.[43] In the MEVOPAL Case, the Commission observed that it was evident that the alleged victim was a legal entity and not a physical or natural person, that the violations claimed in the petition referred to acts or omissions of the Argentine authorities that presumably caused damage to the company and that the domestic remedies were lodged and exhausted by the company as a legal entity. The Commission also observed that the petition had not alleged or proved that the company shareholders or any other physical person had been victims of violations of their human rights nor was it alleged that any physical or natural person had exhausted the domestic remedies or had complained to the national authorities or had explained any impediment for not having done so.[44]

Assuming a much more flexible attitude than the Commission, the Court has also ruled on the question of the jurisdiction of the organs of the Convention with respect to the rights of legal entities. In the Cantos Case, Argentina argued that under Article 1.2 of the Convention, which provides that "for the purposes of this Convention, 'person' means every human being," as well as the aforementioned jurisprudence of the Commission, the Convention was not applicable to legal entities and that, therefore, the companies of José María Cantos, which had different forms of ownership, were not protected by Article 1.2.[45] The Court observed that, in general, the rights and obligations attributed to companies become rights and obligations of the physical persons who comprise them or who act in their name or representation and that, under the Vienna Convention on the Law of Treaties, the interpretation of the State would lead to unreasonable results because it would mean removing the Convention's protection from an important group of human rights. The Court considered that while the figure of legal entities was not expressly recognized by the American

43. Report No. 47/97, *supra* note 40, p. 225 *et seq*., paras. 25 and 35.
44. Report No. 39/99, *supra* note 24, p. 297 et *seq*., para. 18 and 19.
45. I/A Court H.R., *Cantos Case. Preliminary Objections*. Judgment of September 7, 2001. Series C No. 85, paras. 27-30.

Convention as it was by Protocol No.1 of the European Convention on Human Rights, this did not limit the possibility of an individual under certain circumstances to resort to the inter-American system to enforce his fundamental rights even when they are covered by a legal figure or fiction created by the same legal system.[46] The Court cited the jurisprudence of the European Court in Pine Valley Developments, Ltd. And Others vs. Ireland, in which that Court held that, despite the fact that there were three petitioners (Pine Valley Ltd., Healy Holdings, the owner of Pine Valley, and Mr. Healy), the first two, which are legal entities, were no more than vehicles through which Mr. Healy, as a natural person, carried out a certain economic activity.[47] All of these considerations appear unnecessary since the Inter-American Court considered proved that Mr. Cantos had presented all the judicial and administrative remedies, except for a criminal claim and a writ of *amparo* filed in 1972 at the onset of the acts denounced, "in his own right and in the name of his companies."[48] Therefore, it might have been sufficient to reject the State's argument since both the original petition before the Commission and the case filed with the Court were based on a violation of the human rights of Mr. Cantos and that it was he who, acting "in his own name" and in the name of his companies, had lodged and exhausted the internal remedies. It remains to be seen what will be the effect of this judgment on future decisions of the Commission when a petition is presented in the name of a legal entity, that is, in the name of one of the *vehicles* through which physical persons carry out their economic or other activities that, regardless of what the European Convention might provide, according to the text of Article 1.2 of the American Convention appears to be excluded from its protection, which is restricted to human beings.

To the extent that harm done to a legal entity is the cause of a violation of human rights of a natural person, that person still has access to the Convention. Thomas Buergenthal gives the example of the proscription of a trade union, which as such is not protected by the Convention, but the

46. *Ibid*., paras. 27-29.
47. *Ibid*., para. 29. The reference is to European Court of Human Rights, *Pine Valley Developments Ltd. and Others*, Judgment of November 29, 1991, Series A no. 222.
48. *Ibid*., para. 30.

dissolution of which would be a denial of the right of association of its members, who may exercise the right of petition.[49]

## B. JURISDICTION *RATIONE MATERIAE*

With respect to the Commission's jurisdiction *ratione materiae*, there is a significant difference between the text of Article 44 of the Convention regarding the right of individual petition and Article 45 on State communications. While Article 44 appears to refer to *any* violation of the Convention, Article 45 refers only to violations of the human rights recognized in the Convention. The possibility of denouncing a State party to the Convention not only for the violation of the rights that it enshrines but also for the violation of any of its provisions is more than just of theoretical interest and has an extraordinary practical interest. It permits denouncing a State, for example, for not having fulfilled in good faith the obligations that it voluntarily undertook at the friendly settlement stage, which would imply a violation of Article 48.1.f of the Convention and the norm of *pacta sunt servanda*. Similarly, Article 44 implies that an individual may denounce the violation of Article 2 of the Convention when a State party does not adopt laws that may be necessary to give effect to the rights and freedoms guaranteed in the Convention or the violation of Article 29.b when it limits the enjoyment or exercise of rights recognized in its domestic laws or in the international treaties to which the State is a party or of Article 44 by restricting the right of individual petition or ignoring the legal consequences derived from the exercise of that right. Article 44 also implies the possibility of a violation of Article 27 of the Convention by a State that has suspended the obligations that it has assumed under the Convention for reasons other than those set forth in that provision or for different ends than those contemplated in it.

The Commission has admitted that, in individual petitions, Article 44 determines the scope of its jurisdiction as regards the subject matter.[50]

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49. *El sistema interamericano para la protección de los derechos humanos*, *supra* note 6, p. 123.

50. I/A Commission H.R., Report No. 10/96, Case 10.636, Guatemala, adopted March 5, 1996, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1995, General Secretariat of the Organization of American States, Washington, D.C., 1996, p. 132, para. 35.

In appearing not to understand the importance of the difference that exists in the texts of Articles 44 and 45 and giving Article 44 a restrictive interpretation that does not correspond to its literal reading, Article 27 of its Rules, entitled "Condition for Considering the Petition," provides that the Commission may only consider petitions on alleged violations of the human rights enshrined in the Convention and other applicable instruments. The determination as to which are these other instruments has been clarified by Article 23 of the Rules, which provides that the Commission is competent to consider the petitions submitted to it with respect to the alleged violation of any of the human rights recognized in, as the case may be, the American Declaration, the American Convention, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women and the respective provisions.[51] In the Baena Ricardo *et al.* Case, in the public hearing and in its final arguments the Commission argued in favor of the applicability of the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights based on the argument that, through the application of its Law 25, Panama had affected the exercise of the right to freedom of association (one of whose expressions is the right to strike), which is guaranteed by Article 8 of the Protocol. According to the Commission, although the Protocol of San Salvador entered into force on November 16, 1999 Panama had signed it in 1988, prior to the acts denounced, and therefore committed itself to refrain from acts that were against the object and purpose of the treaty since, according to the general principles of international law, the obligations of a State arise well in advance of its ratification of an international treaty. The Commission, therefore, considered that Panama was responsible for the violation committed by its agents subsequent to the signing of the Protocol since

51. The Rules of Procedure do not mention the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, adopted in Guatemala City on June 7, 1999, because it does not contemplate a role for the Inter-American Commission.

the actions of the State were not in keeping with the object and purpose of the Protocol with respect to the trade union rights of the dismissed workers.[52] The Court, however, observed that when the acts denounced occurred in this case, Panama had not yet ratified the Protocol and, therefore, it could not be accused of violating it, but that this did not override its duty, from the moment it signed the Protocol, to refrain from committing any act contrary to the object and purpose of the Protocol even before its entry into force.[53]

Contradicting the provisions of Article 44 of the Convention and confusing the jurisdiction *ratione materiae* with the conditions of admissibility of petitions, Article 47.b of the Convention provides that the Commission must consider inadmissible any petition that does not state facts that tend to establish a violation of the rights guaranteed by the Convention. In accordance with this provision, Article 34.a of its Rules requires that the Commission consider *inadmissible* any petition or case that does not state facts that tend to establish a violation of the rights referred to in Article 27 of the Rules.

Notwithstanding the foregoing, the Commission's role is to examine petitions that contain complaints of the violation of human rights, not any other kind of rights. In the Tabacalera Boquerón Case, concerning a trademark dispute between two companies, the Commission considered that the petition referred to a commercial matter in which human rights were not violated. In analyzing the merits of the issue and regardless of the nature of the parties, the accompanying documents led to the conclusion that the petition was a question of private international law and international commercial transactions, especially trademark law, where there were no violations of the rights of natural persons and, therefore, the subject matter of the complaint was not within the Commission's jurisdiction under the Convention and its Rules.[54]

On the other hand, jurisdiction *ratione materiae* requires an assurance that the petition or communication refers to the violation of a right protected

52. I/A Court H.R., *Baena Ricardo et al. Case.* Judgment of February 2, 2001. Series C No. 72, para. 95.
53. *Ibid*., para. 99.
54. Report No. 47/97, *supra* note 40, p. 225 *et seq*., para. 29.

by the Convention or another applicable international instrument to which the State in question has not made a reservation or, in the case of OAS member States that have not ratified the Convention, a right recognized in the American Declaration.[55] Pursuant to Article 27 of its Rules, the Commission may obviously only consider petitions of alleged violations of human rights guaranteed in the Convention and other applicable international treaties with respect to the States parties to those instruments. With respect to the States that are not parties to the Convention, pursuant to Article 49 of its Rules the Commission may only receive and examine petitions that contain complaints of alleged violations of the human rights found in the American Declaration. The Commission must, therefore, reject any petition or communication that denounces the violation of a right not protected by the Convention or by the Declaration, even when the rights might be recognized by domestic laws or by obligations assumed under other international instruments. The foregoing must be understood notwithstanding Article 29.b of the Convention, which provides that no provision of the Convention may be interpreted to restrict the enjoyment or exercise of any right or freedom that may be recognized by virtue of the laws of any of the States parties or by virtue of any other treaty to which one or more States might be a party. The Commission and the Court have been very careful to avoid that they be used as a fourth instance to decide on the correct application of domestic law. In the case of Clifton White, a Jamaican citizen who alleged judicial error that resulted in his being condemned to death, the Commission held that it could not act as a "quasi-judicial fourth instance" with functions to review the decisions of national courts.[56] In this respect, Judges Cançado Trindade and Pacheco Gómez have stated that it is one thing to act as an appeals tribunal or a court of review of holdings of national courts on human rights matters, which the organs of the Convention are not permitted to do, and another thing to

55. *See*, in this respect, Article 44 of the Convention and Article 51 of the Commission's Rules with regard to the OAS member States that are not parties to the Convention. *See*, also, I/A Court H.R., *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, paras. 45-46.

56. I/A Commission H.R., Resolution No. 29/88, Case 9.260, Jamaica, adopted September 14, 1988, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1987-1988, General Secretariat of the Organization of American States, Washington, D.C., 1988, p. 159.

proceed, in the context of a case in which the existence of victims of a violation of human rights has been established, to the determination of compatibility with the provisions of the Convention of administrative acts or practices, national laws and decisions of national courts, which the organs of the Convention can and must do.[57]

The organs of the Convention lack jurisdiction *ratione materiae* to consider petitions or communications regarding the violation of a right that, despite being protected by the Convention, cannot be invoked against the State in question because it has made a legitimate reservation with respect to that right.[58] It is important to emphasize that, pursuant to its Article 75, the Convention may only be subject to reservations in conformity with the provisions of the Vienna Convention on the Law of Treaties. The Court has pointed out that the reference to the Vienna Convention "makes sense only if it is understood as an express authorization designed to enable the States to make whatever reservation they deem appropriate, *provided that the reservations are not incompatible with the object and purpose of the treaty*."[59] The organs of the Convention are competent to decide on that compatibility and on the scope of reservations. In its instrument of adhesion to the Convention, Trinidad and Tobago accepted the Court's jurisdiction with the *reservation* that it recognized the jurisdiction "only to such extent that recognition is consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago; and provided that any judgment of the Court does not infringe, create or abolish any existing rights or duties of any private citizen." It is not clear whether this was,[60] in effect, a reservation that restricted the

57. *See* his dissenting opinion in I/A Court H.R., *Las Palmeras Case*. Judgment of December 6, 2001. Series C No. 90, para. 13.

58. *See*, in this respect, the reservations made by Uruguay, which concern political rights as defined in Article 23 of the Convention; Argentina, with respect to Article 21 of the Convention; Barbados, referring to Articles 4 and 8; Mexico, on Article 23; Venezuela, on Article 8 with respect to trials in absentia and Dominica, referring to Articles 4 5, 8 21 and 27 of the Convention. Upon ratifying the Convention, Guatemala made a reservation with respect to the prohibition of the application of the death penalty in the case of common crimes related to political crimes but withdrew it on May 20, 1986. Trinidad and Tobago, in adhering to the Convention made a reservation on the prohibition of the application of the death penalty for persons over 70 years of age, but on May 26, 1998 denounced the Convention.

59. I/A Court H.R., *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Arts. 74 and 75). Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 35. (Emphasis added.)

60. Trinidad and Tobago *denounced* or withdrew from the Convention on May 26, 1998. Pursuant to Article 78 of the Convention, the withdrawal took effect on May 26, 1999.

commitment assumed by the State under the Convention by subjecting it to the internal law of the State and, if so, whether it was compatible with the object and purpose of the Convention or whether it was a condition of acceptance of the Court's jurisdiction not provided for in Article 62.2 of the Convention, whose scope is sufficiently clear. In the Hilaire Case, Trinidad and Tobago invoked this *reservation* arguing that it precluded the Court from hearing the case.[61] According to the Court, the question of the purported reservation by which Trinidad and Tobago accepted the Court's contentious jurisdiction must be settled by the Court. Moreover, the Court held that it was for the Court to interpret a declaration of a State, as a whole, that is in accordance with the canons and practice of international law, in general, and with the international law of human rights, in particular, that would grant the greatest degree of protection to the human beings under its guardianship.[62]

The Commission's jurisdiction *ratione materiae* is determined exclusively by the obligations assumed by the States under the Convention and other applicable international instruments and its exercise does not depend on the internal law of the States or the fact that the alleged victims have committed a crime. In a case in which the State concerned had alleged that the presumed victims had surreptitiously entered Peru and were dedicated to overthrowing the established order, associating themselves with a terrorist organization,[63] the Court emphasized that it could not and should not discuss or judge the nature of the crimes, certainly very serious, attributed to the alleged victims because it is called upon to decide on specific violations of the Convention with respect to all persons and regardless of the legality or illegality of their conduct from the perspective of the criminal norms that might be applicable under national laws.[64] The Court's function is to judge the conduct of States, not of individuals. However, it is possible that occasionally the Court must examine domestic laws, especially in the context of the right to be judged with the guarantees of due process, set forth in Article 8 of the Convention, or in the context of

61. I/A Court H.R., *Hilaire Case. Preliminary Objections*, *supra* note 13, paras. 29 No. II, 43 *et seq.* and 70 *et seq*.
62. *Ibid*., paras. 78-79.
63. *Castillo Petruzzi et al Case. Preliminary Objections*, *supra* note 14, para. 81.a.
64. *Ibid*., para. 83.

the right to a prompt, simple and effective remedy that protects persons from acts that violate their fundamental rights, found in Article 25 of the Convention.[65]

Notwithstanding the foregoing, in the Las Palmeras Case the Court, responding to the Commission's argument that among the provisions violated were the principles recognized in Article 3, common to all the 1949 Geneva Conventions and its request that the State be ordered to adopt the necessary reforms so that all military operations of the Armed Forces of Colombia "are conducted in accordance with the international instruments and custom, applicable to internal armed conflicts," resolved that the Commission and even the Court lacked competence to decide whether the acts are in violation of the Geneva Conventions and treaties other than the American Convention because the Court "only has competence to determine whether the acts or the norms of the State are compatible with the Convention itself, and not with the 1949 Geneva Conventions."[66] It is well to keep in mind that Article 29 of the Convention states that none of the treaty's provisions may be interpreted in the sense of "b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party" and "d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have." In view of the express text of Article 29, which confers on the Commission and the Court oversight functions with respect to the commitments assumed by the States parties to the Convention or to any other human rights treaty, there are no grounds for the *dictum* of the Court in the Las Palmeras Case.

The doctrine appears not to favor the right of individual petition with respect to economic, social and cultural rights. It has been traditional to think that, because they are to be implemented progressively, these rights are not enforceable and that, therefore, this system of supervision is not ideal to oversee the fulfillment of the obligations assumed in this area by

65. I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al. Preliminary Objections*. Judgment of June 21, 2002. Series C No. 94, para. 84.j.

66. I/A Court H.R., *Las Palmeras Case. Preliminary Objections.* Judgment of February 4, 2000. Series C No. 67, paras. 32-33.

the States. In addition, Article 26 of the Convention, while it obligates the States to adopt measures to the extent of available resources to achieve progressively the full realization of those rights, does not identify the economic and social rights but only refers to the standards set forth in the OAS Charter. Nevertheless, Article 44 of the Convention makes no distinction between the two categories of rights, but simply provides that any person may present to the Commission petitions that contain denunciations or claims of violations of the Convention, that is, of any of its provisions, by a State party. This interpretation does not appear to be incompatible with Article 27 of the Rules, which states that the Commission may consider petitions alleging violations of human rights embodied in the Convention and other applicable international instruments provided that these rights are defined, even indirectly, in the Convention.

That the Protocol of San Salvador on economic, social and cultural rights[67] expressly restricts the right of individual petition to trade union freedom and the right to education is not a sufficient reason, in our opinion, not to use it in conjunction with Article 44 of the Convention regarding violations of any of the Convention's provisions. In absence of an express text to the contrary, the Commission's jurisdiction *ratione materiae* to receive petitions or communications that denounce the violation of economic and social rights as recognized in Article 26 of the Convention or in other applicable norms is evident. We must bear in mind Article 29.a of the Convention, which states that none of the provisions of the Convention may be interpreted so as to allow a State party, group or person to restrict the enjoyment and exercise of the rights and freedoms recognized in the Convention or to limit them to a greater extent than the Convention itself permits. Article 44 confers a right of fundamental importance in permitting individuals to present petitions to the Commission, the exercise of which may not be restricted or limited more than what is provided for in the Convention itself. While it is true that the obligation assumed by the States in the area of economic, social and cultural rights is an obligation of behavior and not of results and only implies undertaking the measures

67. Signed in San Salvador, El Salvador on June 17, 1988 at the XVIII Regular Session of the OAS General Assembly and in force since November 16, 1999.

necessary to achieve progressively the full realization of those rights, it may also be true that the State fails in its obligations if it does not make a serious effort and does not adopt any measure toward that end or if the measures adopted notably diminish the enjoyment of those rights or if the actions taken by the State to assure the exercise of those rights are discriminatory.

Article 47.b of the Convention states that the Commission shall declare inadmissible any petition or communication that "does not state facts that tend to establish a violation of the rights guaranteed" by the Convention. This provision, however, must be read in conjunction with Article 29.b of the Convention since the former cannot be interpreted to restrict or exclude the enjoyment and exercise of any right or freedom that might be recognized by another treaty to which the State might be a party. In a case in which the petitioners argued that there had been extra-legal executions, disappearances, attempted assassinations and threats against members of the *Unión Patriótica* political party with the purpose of eliminating it, that these acts constituted the crime of genocide and that they be so declared by interpreting the American Convention in conformity with, *inter alia*, the Convention for the Prevention and Punishment of the Crime of Genocide, the Commission observed that the definition of genocide under the Genocide Convention did not include the persecution of political groups and concluded that the acts denounced did not characterize, as a question of law, a case that falls under the legal definition of genocide as defined by international law and, therefore, excluded this argument from its analysis of the merits of the case. The Commission, however, did not declare that, *ratione materiae*, it was prevented from examining a violation of rights derived from the Genocide Convention.[68]

With respect to the Commission's jurisdiction over the OAS member States that are not parties to the Convention, Article 20.a of its Statute obligates it "to pay particular attention to the task of observation of the human rights mentioned in Articles I, II, III, IV, XVIII, XXV and XXVI of the American Declaration of the Rights and Duties of Man." This

68. I/A Commission H.R., Report No. 5/97, Case 11.227, on admissibility, Colombia, adopted March 12, 1997, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1996, General Secretariat of the Organization of American States, Washington, D.C., 1997, pp. 102-105, paras. 21-26.

provision, however, only confers priority to the treatment of complaints that concern the rights found in those articles, but does not limit the Commission's jurisdiction to the monitoring of those rights. In its practice, the Commission has dealt with complaints that involve the violation of other rights recognized in the Declaration. In that respect, Article 23 of its Rules permits the Commission to receive and process allegations of violations of rights recognized in the American Convention, the American Declaration, any of the Additional Protocols to the American Convention or in any of the treaties that complement the inter-American system for the protection of human rights.

This stage of the proceedings only examines the complaint in its purely formal aspect to determine whether there is an apparent violation of a human right that, under the Convention or the OAS Charter, the State has promised to respect. The determination, therefore, of the jurisdiction *ratione materiae* does not imply an analysis of the merits of the petition or communication, a task that, in principle, is essentially for the Court. Although the Commission may eventually decide on the merits of the controversy,[69] it does not do so at this stage, the only function of which is to establish the Commission's jurisdiction with respect to the petition or communication that has been lodged with it.

## C. JURISDICTION *RATIONE LOCI*

Although there is no express provision that covers this issue, the Commission must establish its jurisdiction regarding the place in which the alleged violation of a right guaranteed in the Convention took place. Pursuant to Article 1, the States parties to the Convention promise to respect the rights guaranteed by the Convention and to ensure their free and full exercise to all persons "subject to their jurisdiction." Therefore, in principle, petitions or communications presented against a State for human rights violations committed outside their jurisdiction must be declared inadmissible for lack of jurisdiction regarding the place where they occurred. An example would be terrorist activities undertaken by a State

69. Article 51 of the Convention.

in the territory of another State, such as the assassination of political dissidents or kidnappings, that are not duly sanctioned by the Convention and would only be subject to the legal norms in the area of the international responsibility of the States.

Although it was not expressly invoked either before the Commission or before the Court, this element was considered in the Fairén Garbi and Solís Corrales Case in which it was alleged that the Government of Honduras was responsible for the disappearance of the victims. The Court held that the responsibility of the State had not been established because it was not possible to prove that these disappearances occurred in Honduras and, therefore, could be legally charged to that State.[70]

That the victim must be *subject to the jurisdiction of the State party* at the time of the violation is not relevant with respect to what later might have occurred. The Commission rejected the argument of the Government of Costa Rica that the case of Stephen Schmidt was moot because the petitioner, who claimed a violation of freedom of expression for having been prevented to work as a journalist, was not residing in Costa Rica at the time of the petition. According to the Commission, Mr. Schmidt had a serious, legitimate and actual interest because when the alleged violation occurred he was in Costa Rica and the Convention does not require that the person claiming a violation be in the State in question.[71]

In any event, we must remember that a State does not exercise jurisdiction only within its territorial borders, but also exercises personal jurisdiction over its nationals in foreign territory and functional jurisdiction at the seat of diplomatic and consular missions abroad as well as on its ships and airplanes that are beyond the territory of the State and with respect to military contingents that are abroad. In any of these situations, the violation of a right protected by the Convention with respect to persons subjected *to the jurisdiction of the State party* authorizes the lodging of petitions or communications against that State before the Commission.

70. I/A Court H.R., *Fairén Garbi and Solís Corrales Case.* Judgment of March 15, 1989. Series C No. 6, para. 157.

71. I/A Commission H.R., Resolution No. 17/84, Case No. 9178, Costa Rica, adopted October 3, 1984, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1984-1985, *supra* note 2, pp. 55-58.

## D. JURISDICTION *RATIONE TEMPORIS*

With respect to jurisdiction *ratione temporis*, when a violation of the Convention is alleged the Commission must ensure that the petition or communication concerns acts that occurred after the entry into force of the Convention with respect to the State in question and while it is in force. The Convention cannot be applied retroactively.

With respect to the obligations assumed by the States under the Convention, the organs established by the Convention obviously lack jurisdiction to receive petitions or communications regarding acts that occurred before the entry into force of the Convention or acts that happened after its entry into force but before ratification or adhesion of the Convention by the State in question and before its entry into force for that State. In any of these cases, these acts would not be protected *ratione temporis* by the Convention. Argentina used this argument in a case in which it pointed out that the acts that gave rise to the petition had occurred before the entry into force of the Convention with respect to the country and, thus, it could not have fulfilled the obligations of a treaty to which it was not a party. The Commission sustained the objection especially since, in ratifying the Convention, Argentina expressly made it clear that the obligations that it was undertaking would only have effect with regard to events that occurred subsequent to its ratification.[72] This matter came up again in other cases against Argentina, although the objection did not specifically question the Commission's jurisdiction, but rather the admissibility of the petitions based on the inapplicability of the Convention "as it concerned facts that occurred before the American Convention entered into force for the country."[73] Since the parties reached a friendly settlement, the Commission did not need to resolve this point.

Nevertheless, the Commission would have jurisdiction to receive a petition or communication that denounces a human rights violation that

72. I/A Commission H.R., Report No. 26/88, Case 10.109, Argentina, adopted September 13, 1998, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1997-1998, General Secretariat of the Organization of American States, Washington, D.C., 1998, p. 107, para. 4.

73. I/A Commission H.R., Report No. 1/93, Cases 10.288, 10.310, 10.436, 10.496, 10.631 and 10.771, Argentina, adopted March 3, 1993, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1992-1993, General Secretariat of the Organization of American States, Washington, D.C., 1993, p. 35.

occurred prior to the entry into force of the Convention for the State in question (for example, an illegal or arbitrary detention or a trial that has exceeded a reasonable length) provided that the violation has continued subsequent to the entry into force of the Convention for that State and only for the acts that occurred after that date. This issue was presented in a petition lodged against Argentina, which objected to an electoral law that reserved for the political parties the nomination of candidates for public office. Although the government argued that the acts that gave rise to the petition had occurred before the entry into force of the Convention with respect to the country, since the electoral law in force fell under the same principle the Commission interpreted that it had jurisdiction *ratione temporis* to hear the case.[74]

Similarly, in the case of a State refusing to provide an effective remedy for human rights violations occurring prior to the entry into force of the Convention, which have been protected by laws that involve some sort of amnesty or pardon,[75] we believe that the Commission is competent to receive the petitions or communications that denounce human rights violations arising from the application of these laws since that would constitute a denial of justice and favor the impunity of prior abuses that take place after the entry into force of the Convention for the State in question. This was the case of complaints to the Commission against Argentina, Uruguay and Chile that asserted that the amnesty laws for human rights violations committed during the dictatorial regimes in those countries were, *per se*, a denial of justice and an additional human rights violation. In the case of Chile, where the amnesty was decreed by the same government that benefited from it, the Commission observed that those favored by the amnesty were not foreigners or third parties but the very persons involved in the governing policies of the military regime and that it was one thing to affirm the need to legitimize the acts of society as a

74. Report No. 26/88, *supra* note 72, p. 107 *et seq*., paras. 4-6 of the conclusions.

75. Due, for example, to an amnesty law, under whatever name, such as the Law of Final Stop (Punto Final), adopted by Argentina in December 1986; the Law of Due Obedience, also adopted by Argentina in June 1987; Decree-Law No. 2191, adopted by the government of Pinochet in Chile in April 1978; the Law of Caducidad, adopted by Uruguay in December 1986 or the Law of Judicial Decongestion, adopted in Colombia in October 1991. It is also certainly relevant to know whether the amnesty law was adopted before or after the entry into force of the Convention.

whole taken to avoid chaos but it was another matter to extend the same treatment to those who collaborated with an illegitimate government in violation of the Constitution and the laws.[76] According to the Commission, amnesties render "ineffective and worthless" the international obligations that the States parties assume under Article 1 of the Convention and eliminate the most effective means to protect the rights guaranteed by the Convention, which would be the trial and punishment of those responsible.[77] According to the Commission,

> The self-amnesty was a general proceeding utilized by the State to refuse to punish certain grave offenses. In addition, due to the manner in which it was applied by the Chilean courts, the decree not only made it impossible to punish the parties who violated human rights, but also ensured that no accusation be leveled and that the names of those responsible (the beneficiaries) were not known, so that, legally, the culprits were considered as though they had committed no illegal act at all. The law of amnesty gave rise to a juridical inefficacy in regard to the offenses, and left the victims and the families with no judicial recourse whereby those responsible for the violations of human rights committed during the military dictatorship could be identified and made subject to the corresponding penalties.[78]

Just as the entry into force of the Convention marks for the States the point of departure from which acts that violate human rights may be brought to the attention of the Commission, denouncing the Convention puts an end to its jurisdiction to receive and process communications that allege violations of human rights in that State. Pursuant to Article 78 of the Convention, this denunciation may, however, only take place after a period of five years has lapsed from the Convention's entry into force and a State must give notice of one year, notifying the OAS Secretary General who informs the other parties. The first condition refers to the entry into force of the Convention as such, which occurred on July 18, 1978 and not

76. I/A Commission H.R., Report No. 36/96, Case 10.843, Chile, adopted October 15, 1996, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1996, *supra* note 68, p. 156, para. 29.

77. *Ibid*., para. 50.

78. I/A Commission H.R., Report No. 34/96, Cases 11.228, 11.229, 11.231 and 11.282, Chile, adopted October 15, 1996, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1996, *supra* note 68, para. 70.

with respect to its entry into force with respect to each State that subsequently ratifies it. As the five years have elapsed, any State may denounce the Convention. To date (February 2004), the only State to utilize this right has been Trinidad and Tobago, which denounced the Convention on May 26, 1998, to be effective one year later. In any event, the Commission retains its jurisdiction not only to continue hearing the cases pending at the time of the denunciation took effect but also to hear cases on alleged human rights violations occurring during the time that the Convention was in force for that State. In the James *et al*. Case, the Court indicated that the denunciation did not relieve the State of its obligations for acts that occurred before the denunciation was effective and that might be a violation of the Convention.[79] In fact, in the case of Trinidad and Tobago, the Commission introduced before the Court the Constantine *et al*. and Benjamin *et al*. Cases on February 22, 2000 and October 5, 2000, respectively,[80] when the State had already denounced the Convention, but that fact did not affect pending matters.

On the other hand, the reference point for the Commission's jurisdiction under its Statute for member States of the inter-American system that have not ratified the Convention is their OAS membership. The fact that the acts denounced have occurred before the entry into force of the Convention for a State party does not mean that a petition must be rejected because the Commission has jurisdiction under its Statute to consider the case. While admitting that the acts denounced may have occurred prior to the entry into force of the Convention, the Commission rejected the notion that OAS member States do not have international human rights obligations independent of the Convention and before it entered into force and underscored that ratification of the Convention "complemented, augmented or perfected the international protection of human rights in the inter-American system, but did not create them *ex*

79. I/A Court H.R., *Amplification of the Provisional Measures Requested by the Inter-American Commission on Human Rights with respect to the Republic of Trinidad and Tobago. James et al. Case*. Order of June 19, 1999, paras. 3 of the expository part and operative paragraph 3 .

80. I/A Court H.R., *Constantine et al. Case. Preliminary Objections*. Judgment of September 1, 2001. Series C No. 82, para. 1 and *Benjamin et al. Case. Preliminary Objections*. Judgment of September 1, 2001. Series C No. 81, para. 1.

*novo,* nor did it extinguish the previous or subsequent validity of the American Declaration."[81]

This superposition of jurisdictions, together with a procedure for individual complaints is, at heart, substantially the same in both subsystems. Establishing the Commission's jurisdiction *ratione temporis* has, therefore, not been very important and has not resulted in any decisions worthy of mention.

81. I/A Commission H.R., Report No. 74/90, Case No. 9850, Argentina, adopted October 4, 1990, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1990-1991, *supra* note 3, p. 71.

## Chapter VI

## CONDITIONS AND REQUIREMENTS FOR THE ADMISSIBILITY OF PETITIONS

Prior to the entry into force of the Convention, consideration of a petition was subject to a decision of the Commission's Secretariat to open a case. This practice could be justified by the Commission's powers under its Statute, which were eminently political and diplomatic and in which certain rights in the American Declaration of the Rights and Duties of Man were given priority over others that did not have the same degree of urgency. Political or timely reasons sometimes made it advisable that a petition not be considered in order to resolve the claim more discreetly or in order not to undermine the Commission's efforts to promote and protect human rights in the region. This is not the case under the Convention, which does not stipulate that the adoption of a decision to *open a case* is an indispensable procedural step before a petition may be considered nor does it give the Secretariat or the Commission discretion to decide which cases should be considered. When the Commission receives a petition, the Secretariat must register it and initiate a procedure that is strictly governed by Article 46 *et seq*. of the Convention, subject only to the condition that the Commission has jurisdiction to deal with the matter and that the petition is admissible. Unfortunately, the system has not operated exactly in the manner described and, pursuant to an internal memorandum, the Secretariat still insists on the need to adopt a decision to *open a case* before initiating its consideration. This practice, in addition to not being authorized by the Convention, excessively delays the proceedings,[1] deprives the petitioner of an effective international remedy and prevents the Commission's members from fully exercising their functions under the Statute and the Convention.

1. For example, the petition in the Benavides Cevallos Case was presented to the Commission on August 22, 1988 and the case was not opened until more than a year later, on October 24, 1989, when the pertinent information was sent to the State concerned. *See* I/A Court H.R., *Benavides Cevallos Case*. Judgment of June 19, 1998. Series C No. 38, para. 3.

The Court has held that there is a difference between the mere lodging of a claim with the Commission and initiating its consideration and has pointed out that, "strictly speaking, the receipt of the complaint, which derives from an act of the complainant, should not be confused with its admission and processing, which are accomplished by specific acts of the Commission itself, such as the decision to admit the complaint and, when appropriate, the notification of the State."[2] The Court, however, does not subject initiating the processing of a claim to the discretionary decision of the Commission, or much less to its Secretariat, on *opening* a case but rather to a decision that *admits* the claim, which the Court has held does not require an express declaration by the Commission.[3] Moreover, the ruling on admissibility requires that, once a complaint is received, it be processed to ascertain whether it is admissible.

After the Commission has established its jurisdiction to consider a petition or communication, it must determine whether the complaint meets the requisites and conditions of admissibility set forth in the Convention. Articles 46 and 47 of the Convention cover this issue, although in a rather complicated way. While the former lists the requisites for a petition or communication to be *admitted*, the latter enumerates the circumstances in which it is to be declared *inadmissible*.[4] The issue of the admissibility or inadmissibility of a petition or a communication does not correspond to different stages of the process but is, on the contrary, two sides of the same coin and has the purpose of ascertaining whether the requisites and conditions have been met in order to process it. Moreover, the texts of Articles 46 and 47 do not deal with this distinction between *requisites* and *conditions* of admissibility or the fact that the admissibility of individual petitions is treated differently than that of State communications.

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2. I/A Court H.R., *Castillo Petruzzi et al. Case. Preliminary Objections*. Judgment of September 4, 1998. Series C No. 41, para. 54.

3. I/A Court H.R., *Velásquez Rodríguez Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, paras. 39-41; *Fairén Garbi and Solís Corrales Case*. *Preliminary Objections.* Judgment of June 26, 1987. Series C No. 2, paras. 44-46 and *Godínez Cruz Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 3, paras. 42-44.

4. Article 47.b incorrectly mentions as a factor of inadmissibility that the petition or communication "does not state facts that tend to establish a violation of the rights guaranteed" by the Convention. In our opinion, this is a matter that concerns the competence of the Commission, which, pursuant to Articles 41.f and 44 of the Convention, may only receive and process "denunciations or complaints of violation of this Convention by a State Party."

Article 50 of the Commission's Rules attempts to unify the procedure for claims presented to the Commission by providing that the procedure for petitions referring to OAS member States that are not parties to the Convention is governed by Articles 28 to 43 and 45 to 47 of the Rules, which is the same as that for petitions referring to States parties to the Convention.

Pursuant to Article 47.c of the Convention, a petition or communication is inadmissible if it is manifestly unfounded or obviously out of order. At this stage, the Commission not only ensures that the procedural conditions set forth in the Convention are met, but also acts as a filter for the initial selection of those cases that, in its opinion, have a plausible basis and deserve its consideration. The admissibility phase may be described as the first hurdle that must be overcome before a claim may be examined, not from an eminently formal angle but rather with respect to its merits.

While Article 46 of the Convention refers to the formal requirements of admissibility, Article 47 lists the substantive conditions of admissibility, with the exception of Article 47.a, which concerns the absence of any of the requirements indicated in Article 46 and which might also be considered a purely formal requirement of admissibility.

Article XIV of the Inter-American Convention on Forced Disappearance of Persons provides that the Commission, when it receives a petition or communication on an alleged forced disappearance, request urgently and confidentially, through its Executive Secretariat, the State party to provide as soon as possible information on the whereabouts of the person who has allegedly disappeared and any other relevant information. This request is without prejudice to the admissibility of the petition.

## A. REQUIREMENTS OF THE PETITION

Article 27 of its Rules directs the Commission to consider petitions of alleged violations of the human rights recognized in the Convention and other applicable instruments with respect to the OAS member States only if they meet the requisites set forth in those instruments, its Statute

and Rules. In addition to the terms of Articles 46 and 47 of the Convention, Article 28 of the Rules provides that petitions addressed to the Commission must contain the following information: "a) the name, nationality and signature of the person or persons making the denunciation; or in cases where the petitioner is a nongovernmental entity, the name and signature of its legal representative(s); b) whether the petitioner wishes that his or her identity be withheld from the State; c) the address for receiving correspondence from the Commission and, if available, a telephone number, facsimile number, and email address; d) an account of the act or situation that is denounced, specifying the place and date of the alleged violations; e) if possible, the name of the victim and of any public authority who has taken cognizance of the fact or situation alleged; f) the State the petitioner considers responsible, by act or omission, for the violation of any of the human rights recognized in the American Convention on Human Rights and other applicable instruments, even if no specific reference is made to the article(s) alleged to have been violated; g) compliance with the time period provided for in Article 32 of these Rules of Procedure; h) any steps taken to exhaust domestic remedies, or the impossibility of doing so as provided in Article 31 of these Rules of Procedure; and i) an indication of whether the complaint has been submitted to another international settlement proceeding as provided in Article 33 of these Rules of Procedure."

The requirements of the Convention and the Commission's Rules that govern petitions will be analyzed in the following paragraphs. In order for a petition or a communication to be processed, the Commission must establish, either expressly or implicitly, the presence of the aforementioned requirements.[5] As the purpose of this procedure is to protect the human rights guaranteed by the Convention, the Commission has not been rigid or inflexible on the question of admissibility. If the Commission finds a petition to be incomplete, pursuant to Article 26.2 of its Rules it may notify the petitioner and request that it be completed.

5. Article 48.1.c of the Convention permits the Commission to declare inadmissible or out of order a petition or communication at a later stage of the proceedings on the basis of information or evidence subsequently received or simply due to a reconsideration of the facts.

Notwithstanding an initial declaration of admissibility, the Commission may at any time declare a claim inadmissible or out of order on the basis of information or evidence obtained at a later stage of the proceedings[6] or simply after reconsidering the same facts. The Commission may, thus, reconsider the admissibility of a claim jointly with the question of the merits.

### *1. FORMAL REQUIREMENTS*

The procedure to file petitions is rather simple. Article 27 of a previous version of the Rules of Procedure stated that petitions must be in writing. Although this is not an express requirement of the Convention, it may be found implicitly in Articles 46.1.d of the Convention and 28.a of the Commission's Rules, which require that the petitions be *signed*.

On exceptional occasions, the Commission has received oral complaints during its on-site investigations[7] and has even received and processed claims presented by telephone[8] when there are sufficient guarantees of the seriousness of both the claim and the petitioner. As an example of the informality of petitions, in a recent case against Colombia "acting on a request for urgent action from a reliable source … before receiving a formal communication from the petitioners" the Commission decided, *motu propio*, to forward the claim to the government in question and to request that "extraordinary measures be taken to protect the life and personal safety of the victims."[9]

In addition to being, in principle, in writing, the petition must contain an account of the acts denounced, indicating, if possible, the name of the victim of the violation and of any authority that is aware of the situation and data that serve to identify the petitioner. A model complaint drafted

6. Article 48.1.c of the Convention.

7. For example, I/A Commission H.R., Resolution No. 26/83, Case 5.671, Argentina, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1983-1984, General Secretariat of the Organization of American States, Washington, D.C., 1984, pp. 26-27.

8. I/A Commission H.R., Resolution No. 11/84, Case 9.274, Uruguay, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1984-1985, General Secretariat of the Organization of American States, Washington, D.C., 1985, p. 121.

9. I/A Court H.R., *Caballero Delgado and Santana Case. Preliminary Objections.* Judgment of January 21, 1994. Series C No. 17, para. 15.

by the Commission contains additional items of practical interest together with other elements that the Commission would find helpful but that, in our opinion, are not formal requirements and need not be included in the claim.

The simplicity of this recourse to an international body means that it is not necessary to have the aid of a lawyer for its presentation or for its processing. The petitioner may, however, appoint a lawyer to aid or to represent him before the Commission, either in presenting the petition or after it has been submitted.

### *2. IDENTIFICATION OF THE PETITIONER*

The communication must, in principle, be submitted in writing[10] and include the personal data of its author. The purpose of this requirement is to avoid anonymous complaints or denunciations, which are probably unfounded and abusive. It must be emphasized that once the claimant has been duly identified, the risk of reprisals by the State concerned certainly increase and this requirement might inhibit possible petitioners from denouncing a human rights violation.[11] It should be remembered, however, that Article 30.2 of the Rules establishes that, in forwarding the pertinent parts of the claim to the government of the State in question, the identity of the petitioner is not disclosed, unless it is expressly authorized. The wisdom of this rule is debatable because, if its purpose is to protect the petitioner, it appears that it is easier to do it openly, identifying him and requiring the State to adopt reasonable measures that are necessary to ensure his personal safety.

Article 46.1.6 of the Convention, governing individual petitions, requires that the claim contain "the name, nationality, profession, address and signature of the person or persons or legal representative of the entity

10. *See* Article 46.1.d of the Convention, which requires that the petition be signed.

11. *See, e.g.,* the arguments made by the dictatorship of Jean-Claude Duvalier in Haiti, defending itself against accusations of violations of human rights by claiming "the malevolent intentions of the anonymous claimant." *See* I/A Commission H.R., Case 1.944 in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1977, General Secretariat of the Organization of American States, Washington, D.C., p. 30.

that submits the petition." This provision, however, assumes that the author of the communication is a non-governmental organization and its wording may be construed to mean that, when it is a petition presented by "a person or group of persons," meeting this condition would not be indispensable. As has been pointed out, that has not been the interpretation of the Commission, whose Rules require the identification of the petitioner, even though it is not communicated to the State in question at the first stage of the proceedings.

A sample complaint drafted by the Commission's Secretariat, which should only be taken as a model, requires that the complaint indicate, in addition to the requisites of the Convention and the Rules, the age of the complainant, his civil status, the number of his identification document and a telephone number.[12] Although this information is not required by the Convention or the Rules, it could be of considerable practical importance, either to permit an expeditious communication with the petitioner or to prove the occurrence of the alleged violation,[13] making it advisable to include it in the identification of the petitioner.

### *3. IDENTIFICATION OF THE ALLEGED VICTIM*

In its Rules and in its practice, the Commission has held that, under Articles 23, 28.e, 32.1 and 34.a of its Rules, every petition must identify a specific victim of a violation of the Convention. This practice should be seen as a requirement that each petition be based on the existence of a specific victim, although he need not be specifically identified. In the Las Palmeras Case, the Commission processed a complaint in which there were unidentified victims,[14] which is not provided for in any provision of the Convention. In fact, a literal reading of Articles 44 and 45 of the Convention leads to a different conclusion. While Article 45 of the Convention provides that, under the conditions indicated therein, States

12. BASIC DOCUMENTS ON HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, General Secretariat of the Inter-American Commission on Human Rights, Washington, D.C., 1996, p. 219.

13. For example, if an aged petitioner claims to have been subjected to torture or cruel treatment, that fact might make reproachable the use of the methods that in other circumstances might be tolerable.

14. I/A Court H.R., *Las Palmeras Case.* Judgment of December 6, 2001. Series C No. 90, para. 5.

may submit to the Commission communications in which it is alleged that another State has committed violations of a human right recognized in the Convention, Article 44 does not require that, in order for an individual to present a claim to the Commission, he must allege a violation of human rights but rather it is sufficient to denounce the violation of any of the provisions of the Convention. While Article 47.b of the Convention provides that the Commission must declare inadmissible any petition that does not state acts that characterize a violation of the human rights recognized in the Convention, this provision must be interpreted in the light of the object and purpose of the Convention, taking into account its context and bearing in mind the principle of *pro homine*. Of course, the interpretation most favorable to the individual is that the system's organs of protection ensure that the States fulfill the obligations they have assumed under Articles 1 and 2 of the Convention, that the individual has the right to demand that the Convention be fully respected and that the States adopt the legislative and other measures as may be necessary to give effect to the rights and freedoms recognized in the Convention.

When there are justifiable reasons, the identity of the victims may be kept confidential. In a case in which Argentina was denounced for inspecting the vaginas of women who visited a jail, at the request of the petitioners and in view of the nature of the alleged violation and the fact that one of them was a minor, the Commission chose not to identify them.[15]

### *a) De jure violations of the Convention*

The object and purpose of the Convention, as expressed in its Preamble, is to consolidate in the Americas a system of personal freedom and social justice based on respect for human rights and the Preamble also affirms that "the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy" all of his human rights. The inevitable conclusion, therefore, is that it should not be necessary to wait until there is a specific human rights violation in order to object to laws the mere existence of which threaten the exercise of those rights. It must be borne in mind that, under Article

15. I/A Commission H.R., Report No. 38/96, Case 10.506, Argentina, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1996, General Secretariat of the Organization of American States, Washington, D.C., 1997, p. 52.

33 of the Convention, the Commission and the Court have competence to deal with matters relating to the compliance of the commitments undertaken by the States parties to the Convention. Among those commitments is the general obligation, set forth in its Article 2, to adopt the laws and other measures that are necessary to give effect to the rights and freedoms recognized in the Convention. This obligation includes, according to the Court's jurisprudence, the obligation to refrain from passing laws that infringe on those rights or impede their free exercise and to repeal or amend those that do. Otherwise, a State violates Article 2.[16]

More than a decade ago, in an advisory opinion on the Commission's attributes, the Court held that there were many ways that a State could violate an international treaty and, specifically, the Convention. It could do so, *inter alia*, by adopting norms that are not in keeping with its obligations under the treaty. In those circumstances, according to the Court, there is no doubt that the Commission has the same powers that it has with regard to any other type of violation and can express itself in the same way as in other cases. The fact that they are domestic laws and that those laws have been adopted in accordance with the Constitution is meaningless if they are used to violate a right or freedom protected by the Convention. The Court has held that the Commission's attributes are not in any way restricted by how the Convention is violated.[17] On the international plane, what is important to determine is whether a law violates the international obligations assumed by the State under a treaty. According to the Court, the Commission may and should do this when it analyzes the claims presented to it on violations of the human rights and freedoms guaranteed by the Convention.[18] To process an individual petition, there must be an allegation that there has been a violation of the Convention by a State. This is a requirement of admissibility and the Commission is authorized to determine whether a violation has truly occurred. The Commission is also empowered to determine whether an internal norm violates the

16. I/A Court H.R.,*Case of Hilaire, Constantine and Benjamin et al.* Judgment of June 21, 2002. Series C No. 94, para. 113.

17. I/A Court H.R., *Certain Attributes of the Inter-American Commission on Human Rights* (Arts. 41, 42, 44, 46, 47, 50 and 51 American Convention on Human Rights). Advisory Opinion OC-13/93 of July 16, 1993 (hereinafter cited as *Certain Attributes*). Series A No. 13, paras. 26-27.

18. *Ibid*., para. 30.

Convention. According to the Court, a domestic norm cannot receive a different treatment than an act[19] and the Commission's power to decide that a norm of domestic law, as in the case of any other act, violates the Convention is derived from its principal function of promoting the observance and protection of human rights.[20] In its advisory opinion The International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention, the Court maintained that the mere enactment of a self-executing law that violates the Convention is an infringement of individual or collective human rights.[21] Curiously, in its judgment in the Genie Lacayo Case the Court appeared to distinguish between provisions that had been applied and those that had not in deciding, in the case of Decrees 591 and 600 that had not been applied, not to consider them since a decision on their compatibility with the Convention would be an abstract analysis that was beyond the purview of the Court.[22] This distinction was criticized by Judge Cançado Trindade, who pointed out that the Court was thus limiting itself to the point that it could not decide on the legislative obligations of the State in question. In his opinion, the mere existence of a law enables the victims of violations of the human rights protected by the Convention to require that the law be adapted so as to be compatible with the provisions of the Convention and, therefore, the Court is obligated to decide on the question without having to wait for additional damage because of the continued application of the law.[23]

Its more recent jurisprudence suggests that the Court has adopted the position that a law may, *per se*, contravene the Convention, thus engaging the organs of control of the Convention. In the Suárez Rosero Case, the Court held that a law of a State could, *per se*, violate the Convention, whether or not it was applied in a particular case. A section of the law would have left prisoners who had broken the Law on Narcotic and Pyschotropic Substances without legal protection with respect to the

19. *Ibid*., para. 34.
20. *Ibid*., para. 37.
21. I/A Court H.R., *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (Arts. 1 and 2 American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 43.
22. I/A Court H.R., *Genie Lacayo Case*. Judgment of January 29, 1997. Series C No. 30, para. 91.
23. *See* his dissenting opinion in I/A Court H.R., *Genie Lacayo Case. Application for judicial review of the Judgment of January 29, 1997*. Order of the Court of September 13, 1997. Series C No. 45, para. 10.

right of personal freedom. According to the Court, that provision "deprives a part of the prison population of a fundamental right, on the basis of the crime of which it is accused and, hence, intrinsically injures everyone in that category" and, thus, violates, *per se*, Article 2 of the Convention, whether or not it was enforced.[24] This position was reiterated in the Castillo Petruzzi *et al*. Case.[25]

In the Barrios Altos Case, the Court held that the adoption of self-amnesty laws was incompatible with the Convention and did not comply with the obligation to adapt the domestic legislation to the Convention, as established in its Article 2. According to the Court, States parties have the duty to take all measures to ensure that no one is deprived of judicial protection and the right to a simple and effective recourse, in the terms of Articles 8 and 25 in relation to Articles 1.1 and 2 of the Convention. According to the Court, "self-amnesty laws lead to the defenselessness of victims and perpetuate immunity; therefore they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation." The Court, therefore, held that, due to the manifest incompatibility of self-amnesty laws with the Convention, such "laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases" of violations of the rights set forth in the Convention.[26] In his concurring opinion, Judge Cançado Trindade pointed out that self-amnesty laws, by leading to impunity and injustice, are flagrantly incompatible with the international norms of human rights protection and are, thus, violations *de jure* of the rights of the human person. These laws affect non-derogable rights, which are the minimum universally recognized rights and fall in the ambit of *jus cogens*. According to Cançado Trindade, these laws are the source of an

24. I/A Court H.R., *Suárez Rosero Case.* Judgment of November 12, 1997. Series C No. 35, para. 98.
25. I/A Court H.R., *Castillo Petruzzi et al. Case*. Judgment of May 30, 1999. Series C No. 52, para. 205.
26. I/A Court H.R., *Barrios Altos Case*. Judgment of March 14, 2001. Series C No. 75, para. 205.

international illicit act from the moment of their adoption "and irrespectively of their subsequent application," therefore, "their being in force creates *per se* a situation which affects in a continuing way non-derogable rights, … which belong to the domain of *jus cogens*."[27]

Applying this same criterion to the Case of Hilaire, Constantine and Benjamin *et al*., although 31 of the presumed victims had not yet been executed, the Court found a violation of Article 2 of the Convention by virtue of the fact that the mere existence of the Offense of Crimes Against the Person Act was, *per se*, a violation of that Article.[28] The Court held that the State should refrain from applying the aforementioned law and within a reasonable period amend it, in the terms stated in the judgment, to comply with the international standards of human rights protection.[29] According to the Court, the manner in which the crime of murder was punished under the Act was, *per se*, a violation of the Convention and the State must refrain from applying the Act and must amend it to comply with the rights to life, personal integrity, fair trial and due process recognized in the Convention.[30]

In the "Last Temptation of Christ" Case, the Court recalled that a State's general obligations under Article 2 include, *inter alia*, the adoption of measures to suppress norms of any type that imply a violation of the Convention.[31] According to the Court, Article 2 establishes the general obligation of each State party to conform its domestic law to the Convention's provisions in order to guarantee the rights recognized by it. This means that the State must adopt the measures so that the Convention's provisions are effectively complied with in their domestic legal order and that such measures are only effective when the State adapts its actions to the Convention's standards of protection.[32]

Everything stated by the Court would be illusory if, in cases of violations *de jure* of the Convention, individuals could not denounce the

27. *See* his concurring opinion in *Barrios Altos Case*, *supra* note 26, paras. 6, 10 and 11.
28. *Case of Hilaire, Constantine and Benjamin et al., supra* note 16, para. 116.
29. *Ibid*., para. 223, operative paragraph 8.
30. *Ibid*., paras. 211-212.
31. I/A Court H.R., *"The Last Temptation of Christ" Case (Olmedo Bustos et al.)*. Judgment of February 5, 2001. Series C No. 73, para. 85.
32. *Ibid*., para. 87.

violation of its provisions and could not request that a State be required to adopt the measures necessary to adapt its domestic law to the Convention and to ensure that its actions are in accordance with the Convention's standards of protection. It would be absurd to pretend that, because a law did not apply to a specific case and did not result in a specific victim, a State could be said to be complying with its general obligations under Articles 1 and 2 of the Convention and that it need not repeal the provisions of its domestic law that are incompatible with the Convention in order to ensure the effective exercise of the rights set forth in the Convention. The application of norms directly affecting the enjoyment and exercise of the human rights of specific persons only adds to the violation of the Convention that occurred when norms that are incompatible with the values of the Convention were adopted. According to Judge García Ramírez, current President of the Inter-American Court, a law that is contrary to the Convention "may be challenged on jurisdictional grounds before its implementation produces consequences which may give rise to a concrete case."[33] In his concurring opinion, García Ramírez stated that a law may be a violation, *per se*, of the rights to life, nationality, juridical personality, property, family, integrity, among others, even when it has not been applied in a concrete case, because the mere existence of the law, from the time that it was enacted, leaves the protected interest exposed, compromised and in danger. In fact, judicial protection can and often anticipates the case where someone fears the application of the law in question and takes precautions against it. His opinion goes on to assert that "it is not only the act perpetrated which is impugned but that norm which authorizes its future execution as well. These are the parameters within which constitutional justice operates. The inter-American system moves in that direction when it opens the door to adopting provisional measures, whether preventive or precautionary, to avoid irreparable damage being inflicted on persons."[34]

Unfortunately, this is not the position of the Commission, which still insists that there must be a specific victim in each individual petition. This would mean that there is no violation of the Convention unless the law has resulted in a violation of the rights of a person. For the Commission,

33. Concurring opinion in *Case of Hilaire, Constantine and Benjamin et al. supra* note 16, para. 6.
34. *Ibid*.

it is not sufficient that a domestic law violates the obligation to respect and ensure established by Article 1 of the Convention, even though that law threatens and inhibits the exercise of a right, affecting the juridical security of everyone.

***b) The protection of collective or diffuse interests***

As a consequence of requiring that a petition be individualized, that is, naming the victims, it would appear that it is not possible to make a claim on behalf of an indeterminate group of persons who have specific characteristics that identify them and who share a common interest with regard to the respect and guarantee of one or more human rights. Although this situation is not exactly what the doctrine has characterized as collective or diffuse interests, which, as the names indicate, refer to an indivisible interest without having a sole and identifiable holder but rather concern a collective body, there are situations in the law of human rights that are closely related and that require special treatment.

For example, even though the right to life is an individual right, its threat may fall on a group of individuals, as in the case of genocide or persecution for political or other reasons, where it is impossible or very difficult to identify all those who are threatened in the enjoyment and exercise of their rights. An action directed to protecting some of the members of a group would leave the others unprotected, even though this is not the purpose of the Convention.

The Commission seems to have accepted that, at least in certain circumstances, a petition may be lodged in favor of an indeterminate group of persons. It requested of the Court provisional measures in favor of Haitians and Dominicans of Haitian origin who were subject to the jurisdiction of the Dominican Republic and who risked being expelled or deported collectively. In addition to the practical difficulty of naming each one, in reformulating its original request the Commission informed the Court that it had learned the identity of some of the alleged victims, who had consented that they be named in the context of that request, suggesting that many of them did not consent.[35] During the public hearing

35. I/A Court H.R., *Request for Provisional Measures by the Inter-American Commission on Human Rights on behalf of Haitians and Dominicans of Haitian Origin in the Dominican Republic*, Order of August 7, 2000, paras. 1 and 2 of the expository part.

convoked by the Court, the Commission argued that the request was in favor of a group, the members of which were not all named because State practice made it impossible to distinguish the individual members and because they did not present themselves as individual members due to fear and that the inter-American human rights system was not capable of processing individual complaints for each member of the group.[36] The Dominican Republic submitted a brief in which it claimed that provisional measures could not be adopted unless the identity of the persons who risked suffering irreparable harm was revealed because such measures in favor of the unnamed persons would only hinder the State from exercising its right to protect its borders and to control the legal status of those who enter its territory or who live there.[37] Accepting this argument, the Court held that those in danger of suffering irreparable harm must be identified individually and that it was not feasible to order provisional measures without specific names to protect generically everyone in a given situation or affected by certain measures.[38] The Court, however, in requiring detailed information on the situation of the inhabitants of the border communities or *bateyes* who might be subject to forced repatriation, deportation or expulsion,[39] eased its standard for provisional measures. Citing Judge Jessup's dissent in the 1996 South West Africa Case, Judge Cançado Trindade observed that international law had recognized "a right of action without having to prove an individual harm or an individual substantive interest, distinct from the general interest."[40] Judge Cançado Trindade admitted that there is a difference between requesting provisional measures for a community of indeterminate character and requesting them for a community or group whose members could be individualized.[41] The Court, however, has not suggested that these requirements, which appear to be necessary for a request for provisional measures, be extended rigorously to the petitions that are presented to the Commission.

In the request for provisional measures in the Peace Community of San José de Apartadó Case the decisions of the Court, particularly the

36. *Ibid*., Order of August 18, 2000, para. 11.c of the expository part.
37. *Ibid*., para. 14.i of the expository part.
38. *Ibid*., para. 8 of the considerations.
39. *Ibid*., operative paragraph 10.
40. *Ibid*., para. 19 of the concurring opinion.
41. *Ibid*., para. 21 of the concurring opinion.

concurring joint opinion of Judges Abreu Burelli and García Ramírez, made a substantial contribution, but not regarding the determination of the requirements of a petition. The Commission had requested provisional measures on behalf of the inhabitants of the Peace Community in order to protect their lives and personal integrity. The Commission reported that it had been informed that 47 members of the Community had been killed within a period of nine months and pointed out a series of other physical attacks and threats against Community members, as well as incidents in which their houses were burned down, their goods destroyed and their animals killed.[42] In his Order, the President of the Court recalled that on other occasions the Court had considered it essential to individualize the persons who were in danger of suffering irreparable harm in order to confer protective measures. He pointed out, however, that "the protective measures adopted by the State in compliance with the decisions issued by the Court or its President are expected to benefit other people of the same community that may be in the same situation of vulnerability and risk."[43] In the public hearing, the Commission argued that the purpose of the requested measures was to protect the life and personal integrity of the members of the Community, which was located in the region of Urabá, Antioquía, one of the epicenters of the internal armed conflict that was taking place in Colombia, and that the Community, founded in 1997, was composed of approximately 1,200 members who had been constantly menaced by paramilitary violence and stigmatization. According to the Commission, the Community was governed by the principles of neutrality with respect to all armed actors, it had no direct or indirect participation in the war, it refused to bear arms and did not offer or manipulate information in favor of any of the armed actors. The Community was governed by a local council, composed of eight peasants elected democratically for terms of three years. The Commission indicated that, in its attempt to identify the Community members in order to present the request for provisional measures, it could only obtain a list of 189 persons, which was not an accurate count since most of the Community members did not authorize

42. I/A Court H.R., *Request for Provisional Measures by the Inter-American Commission on Human Rights with respect to Colombia. Case of the Peace Community of San José de Apartadó*, Order of the President of October 9, 2000, paras. 1 and 2 of the expository part.

43. *Ibid*., para. 7 of the considerations.

their names to be made public because they feared that it would stigmatize them more and would lead to more violence. In any event, the Commission presented a series of elements that permitted the collective identification of the Community members. One of these elements was geographic since the Community was located in a specific place –in the Municipality of Apartadó, formed by 32 surrounding trails. In the second place, the Community was governed by a series of norms, including a statute, and had a system of representation. Moreover, its members had a personal identification document. According to the Commission, the precautionary measures requested by it had been in force for three years and the State had not challenged them nor had it alleged problems in identifying the persons that it had to protect. The Commission was convinced that the State understood the collective dimension of the problem, knew which persons it had to protect, understood the geographical limits and the element of belonging to the Community, as well as its mechanisms for functioning, and thus requested that the urgent measures ordered by the President be ratified and extended to everyone in the same situation of vulnerability and risk.[44] The Court took note of the Commission's assertion that many members of the Peace Community did not wish to be identified for fear of reprisals and indicated that, although it had previously deemed it essential to individualize the persons who were at risk of suffering irreparable harm in order to grant them protective measures, this case had special characteristics that differentiated it from that precedent. The Court, therefore, decided to order protective measures in favor of the persons already individualized in the urgent measures ordered by the President and extend "any measures as may be necessary to protect … all of the members of the Community."[45] In their separate opinion, Judges Abreu Burelli and García Ramírez observed that the justified interest in preserving rights determines that the Convention requires only certain objective conditions for the adoption of provisional measures –that there exist extreme seriousness and urgency, which has to do with the characteristics of the act feared and its imminence, but that there were no other requirements that might delay or obstruct the issuance of such measures

44. *Ibid*., Order of November 24, 2000, para. 9.a, c, i, j, k and n.
45. *Ibid*., paras. 6 and 7 of the considerations and operative paragraph 3.

and, therefore, place in greater risk the human rights meant to be protected. According to Judges Abreu Burelli and García Ramírez, it is true that in most cases it is possible to identify, individually, the potential victims of the violation that is meant to be prevented. However, there are other assumptions where, at least temporarily, this precise individualization is difficult.[46] In their opinion,

> that situation is similar in some ways to that raised under the concept of diffuse interests: a plurality of individuals share a certain interest that is juridically relevant and that requires public protection, although none of them may be considered as a holder of a subjective right of the measure that is sought or the legal right that is relied upon, or that said entitlement may not be attributed in such a way as to exclude other persons who are in the same situation. Under these circumstances, any of them may appear before the proper organ and request the adoption of measures or decisions that preserve the common interest. In such case, an *actio popularis* or a class action would be available in line with the characteristics that this matter has in the specific circumstances in which it is raised.[47]

According to Judges Abreu Burelli and García Ramírez, this decision provides a clear standard of protection that reasonably extends the reach of provisional measures and greatly enhances the preventive purposes of this type of measure by enabling it to reach a plurality of persons, who although they have not been previously individualized are potential victims of acts of the authority or persons associated with it. Therefore, belonging to that group of potential victims, the beneficiaries of the provisional measures, is not the result of the precise knowledge of each individual, by name, but of objective criteria that, when the measures are executed, permits individualizing the beneficiaries. It is a question of understanding the danger risked by the members of the community and not only some individuals, as generally occurs. It is necessary, however, to take into account that the potential victims might choose not to provide their names given the real risk to which this identification might expose them and, even more, to the irreparable harm that is intended to be avoided.[48]

46. *Ibid*., paras. 2 and 3 of his separate opinion.
47. *Ibid*., para. 4.
48. *Ibid*., paras. 6 and 8.

Many of the Court's holdings on provisional measures in the Peace Community Case, particularly those of Judges Abreu Burelli and García Ramírez, could be applied in certain circumstances, cautiously and *mututatis mutandi*, to the requirements of the petitions that are presented to the Commission denouncing human rights violations that affect indeterminate groups of persons.

## B. CONDITIONS OF ADMISSIBILITY OF A PETITION

In addition to the requirements already mentioned, a petition must meet other conditions in order to be admitted. These conditions refer to the circumstances that surround the introduction of the petition or communication and concern the exhaustion of domestic legal remedies, its timely presentation, the absence of *litis pendencia* before another international body, the fact that it has not already been resolved or that it is obviously not out of order or manifestly groundless.

### *1. EXHAUSTION OF DOMESTIC LEGAL REMEDIES*

Pursuant to the Convention,[49] in order that a petition or communication be admissible the domestic legal remedies must have been pursued and exhausted in accordance with generally recognized principles of international law.[50] With respect to the OAS member States that have not ratified the Convention, Article 20.c of its Statute charges the Commission, as a requisite to examine the communications that it receives, to verify "whether the domestic legal procedures and remedies of each member State … have been duly applied and exhausted." Article 31 of the Rules repeats the requirement that, in order to rule on the admissibility of a matter submitted to its consideration, the Commission must verify

49. Article 46.1.a of the Convention.

50. With the creation of the institution of "diplomatic *amparo*," which was established so that a State could protect its nationals who were abroad, arose the requirement of the exhaustion of domestic remedies as a condition precedent to the intervention of the State taking up the claims of its nationals vis-à-vis the other State.

whether the domestic legal remedies have been pursued and exhausted in accordance with the generally recognized principles of international law.

This rule comes from classical international law, as a facet of the institution of diplomatic protection that permits a State to take up as its own the claims of its nationals against third States. This intervention, however, is only possible after the individual has, *inter alia*, exhausted domestic legal remedies, a condition precedent to finding the international responsibility of a State. The International Court of Justice has held that the standard that local remedies must be exhausted before international proceedings may be initiated is a well-established rule of customary law.[51]

Notwithstanding the logical justification of this requirement, the exhaustion of internal remedies is one of the conditions of admissibility that is the most difficult to apply and that is the most controversial with regard to interpreting its nature, scope and effect. This is because, in addition to the question of the efficacy of such remedies, the time that the remedies consume and the eventual roadblocks to their use that a State may interpose, it is not easy to determine the remedies that were available in each case or to establish those that the petitioner was effectively obligated to exhaust.

This requirement may, in a certain sense, be understood as the counterpart to the right of individual petition. In agreeing that individuals or groups of individuals may present to the Commission petitions claiming violations of rights recognized in the Convention, the States did so on the condition that the claimant had previously exhausted domestic remedies.[52] This rule implies the obligation of the States parties to furnish effective judicial remedies pursuant to Article 25 of the Convention[53] and that some of those remedies –such as habeas corpus or the judicial guarantees– cannot be suspended even in a state of emergency.[54] The Court has held that the

51. International Court of Justice, *Interhandel case (Switzerland v. United States of America), (Preliminary Objections)*, judgment of March 21, 1959, I.C.J. Reports, 1959, p. 27.

52. *See*, in this respect, Antonio Cançado Trindade, *El agotamiento de los recursos internos en el Derecho Internacional de los Derechos Humanos*, Fourth Interdisciplinary Course on Human Rights, IIHR, San José, Costa Rica, August 18-30, 1986, cited by Mónica Pinto, LA DENUNCIA ANTE LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, Editores del Puerto S.R.L., Buenos Aires, 1993, p. 58.

53. I/A Court H.R., *Velásquez Rodríguez Case. Preliminary Objections*; *Fairén Garbi and Solís Corrales Case*. *Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections*, *supra* note 3, paras. 39-41, 44-46 and 42-44, respectively.

54. *See*, in this respect, I/A Court H.R., *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights). Advisory Opinion OC-8/97 of January 30, 1987 (hereinafter

right of every person to a simple and prompt remedy or any other recourse to a competent judge or court to protect him from acts that violate his fundamental rights is "one of the basic pillars not only of the American Convention but also of the rule of law itself in a democratic society, within the meaning of the Convention." Therefore, Article 25, which guarantees the right to that type of remedy, is closely related to the general obligation in Article 1.1 of the Convention by attributing protective functions to the internal law of the States parties.[55] According to the Court's jurisprudence, States are responsible to provide by law and to ensure the due application of effective remedies and guarantees of due process of law before the competent authorities that would protect everyone subject to their jurisdiction from acts that violate their fundamental rights or that lead to the determination of their rights and obligations.[56] In the Five Pensioners Case, the Court, in ascertaining that for almost eight years the State had not executed judgments issued by its own courts, found a violation of the right to an effective, simple and prompt remedy that protects individuals from acts that violate their fundamental rights under Article 25 of the Convention.[57] The exhaustion of internal remedies, therefore, may also be seen as an element in favor of the individual since a more efficient functioning of the domestic legal system would ensure prompt reparation for the right violated and would not be seen as a delaying measure or a mere privilege that the State offers. What is not yet contemplated is that, like one of the procedural remedies of the European Community Law, the individual request the national courts that they submit to the Inter-American Court, as a preliminary question, the determination of the applicable law.

Domestic remedies must, of course, be exhausted in their entirety. A decision on a mere facet of the proceedings or an interlocutory decision that does not terminate the process is not sufficient. In a case against the Dominican Republic, the Commission held that the remedies exhausted

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cited as *Habeas Corpus*). Series A. No. 8, paras. 27, 36 and 42 and *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987 (hereinafter cited as *Judicial Guarantees*). Series A No. 9, paras. 25 and 38.

55. I/A Court H.R., *Ivcher Bronstein Case.* Judgment of February 6, 2001. Series C No. 75, para. 135.

56. *Judicial Guarantees, supra* note 54, para. 23 and *Case of Baena Ricardo et al. Competence.* Judgment of November 28, 2003. Series C No. 104, para. 79.

57. I/A Court H.R., *Case of the "Five Pensioners."* Judgment of February 28, 2003. Series C No. 98, paras. 138 and 141.

by the claimant were "incidental matters" that arose in the course of the proceedings and that were related to the main question. In its opinion, incidental issues are unforeseen procedural obstacles or essential elements that must be clarified if the substance of the matter is to be logically reached and that although interlocutory decisions had the same purpose they did not exhaust internal legal remedies, since there was no final decision that has the effect of *res judicata*.[58] If, however, the petitioner has pursued the available remedies and there is a denial of justice because the judicial authorities have not acted, this circumstance alone has been sufficient for the Commission to consider that the remedies available to the claimant have been exhausted.[59]

In the context of the Convention, as in classical international law, the purpose of the prior exhaustion of local remedies is to avoid claims being submitted to the international jurisdiction that could be resolved on the national level. If the claims can be adequately satisfied under domestic law, they cannot be deemed to be violations of the international law of human rights, whose protective mechanisms are merely subsidiary to domestic law and are only for cases where available remedies do not exist or those that exist are inadequate or ineffective.

The Preamble to the Convention states that the international protection of human rights reinforces or complements "the protection provided by the domestic law of the American States." This idea has been repeated and developed by the Court in holding that "the rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international proceeding. This is particularly true in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction."[60] The Court has also stated that "the rule which requires the

58. I/A Commission H.R., Resolution No. 15/89, Case 10.208, Dominican Republic, adopted April 14, 1989, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1988-1989, General Secretariat of the Organization of American States, Washington, D.C., 1989, p. 101, paras. 11 and 14.

59. I/A Commission H.R., Resolution No. 18/87, Case 9.426, adopted June 30, 1987, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1986-1987, General Secretariat of the Organization of American States, Washington, D.C., 1987, p. 134, para. 7 of the considerations.

60. I/A Court H.R., *Velásquez Rodríguez Case*. Judgment of July 29, 1988. Series C No. 4, para. 61; *Godínez Cruz Case*. Judgment of January 20, 1989. Series C No. 5, para. 64 and *Fairén Garbi and Solís Corrales Case*. Judgment of March 15, 1989. Series C No. 6, para. 85.

prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it *before it has had the opportunity to remedy them* by internal means."[61] Agreeing with the Court, the Commission has asserted that "the effect of the rule of the prior exhaustion of domestic remedies is to assign to the jurisdiction of the Commission an essentially subsidiary role."[62]

### *a) The critical moment*

Subjecting the right of petition to the prior exhaustion of domestic legal remedies first requires defining the critical moment when these remedies must be exhausted. In principle, the rule appears to indicate that local remedies be pursued before recourse to the international level. Article 46.1.a of the Convention, however, only states that in order for a petition or communication to be admitted by the Commission the internal legal remedies must have been pursued and exhausted. This provision does not require that the remedies be exhausted before presenting the petition but before the Commission admits the petition. This is what the Court held in a case in which the State objected that the petition had been received when a criminal proceeding was still pending against the alleged victims. According to the Court, if the Commission received the claim when the proceedings were pending a final decision before the military court, "the mere filing of it did not amount to the Commission's commencement of the processing of the matter." The Court observed that the processing began several months after the presentation of the claim when there was already a definitive decision of the military court of last instance and that it was then that the Commission informed Peru that the claim had been submitted so that the State might present the defense that it deemed relevant.[63]

It is possible, although it happens infrequently, that after a petition has been declared admissible or at least been processed, the petitioner or the victim pursues a domestic remedy. Although this could, in principle,

61. I/A Court H.R., *In the Matter of Viviana Gallardo et al.* Decision of November 13, 1981. Series A No. G 101/81, para. 26. (Emphasis added.)
62. Resolution No. 15/89, *supra* note 58, p. 100.
63. *Castillo Petruzzi et al. Case. Preliminary Objections, supra* note 2, paras. 52, 54 and 55.

be seen as an admission that there were remedies available, it does not necessarily mean that the petition should be rejected as inadmissible. Those remedies could be for a supervening event or could be inadequate or ineffective and, therefore, not the type that must be exhausted. While the Commission was considering the Mayagna Community Case, the petitioners presented a writ of *amparo* and then a request for the execution of a prior judgment. The State alleged that the internal legal remedies had not been exhausted and that, therefore, the petition must be declared inadmissible. When the State made the allegation, almost a month had passed and the writ of *amparo* had not been resolved and it had been more than a year since the request for the execution of the judgment. Therefore, the Court rejected these arguments of the State and proceeded to adopt its judgment.[64]

***b) The nature of this institution***

Notwithstanding that the State's obligation to provide local remedies is a guarantee for the individual, the fundamental issue posed by the prior exhaustion of domestic remedies is defining whether this is a requisite or condition of admissibility of the petition or whether, on the contrary, it is the right of a State that it may, therefore, waive.

When Article 46.1.a of the Convention provides that in order for a petition or communication to be admitted by the Commission its author must have pursued and exhausted the domestic legal remedies, it seems to indicate the existence of a condition for the admissibility of the petition or communication, regardless of the position assumed by the State denounced. The fact that this provision requires that domestic legal remedies be pursued and exhausted "in accordance with generally recognized principles of international law" adds a new dimension to the analysis of this aspect of the problem. The issue is whether, in accordance with those principles of international law, this rule is not so much a condition of admissibility but a right of the State in question and that if the State does not wish to waive the rule it must invoke it explicitly.

In the inter-American system, the question of a waiver by the State of the rule of the prior exhaustion of internal legal remedies was posed for

64. I/A Court H.R.,*The Mayagna (Sumo) Awas Tingni Community Case*. Judgment of August 31, 2001. Series C No. 79, paras. 23-25.

the first time in the Matter of Viviana Gallardo *et al*., where the Government of Costa Rica submitted the case directly to the Inter-American Court, expressly waiving, *inter alia*, compliance with that requirement. At that time, the Court observed that

> under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defense and, as such, waivable, even tacitly.[65]

In support of its position, the decision cites the judgment of the European Court of Human Rights in the De Wilde, Ooms and Versyp Case, which holds that a waiver, once made, is irrevocable.[66]

Conceived as a right of the State and not as a condition of admissibility of a petition, the rule of the exhaustion of domestic legal remedies was also considered by the Court, although tangentially, in a case in which a writ of habeas corpus was presented on behalf of one of the victims but not the other, despite the fact that the allegations mention "the young Carmen." The Court held that, since the government had not invoked this fact in its written submissions on preliminary exceptions, the Court did not have to decide that specific issue as it considered the State's silence an implicit waiver.[67] In more recent cases, the Court has stated that, to challenge a petition's admissibility before the Commission, the State concerned had "the obligation to invoke explicitly and in a timely manner the rule of non-exhaustion of domestic remedies."[68] The Court

65. *In the Matter of Viviana Gallardo et al.*, *supra* note 61, para. 26. The holding of the Court in that matter was confirmed in the *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections*, *supra* note 3, paras. 88, 87 and 90, respectively.

66. *Ibid*.

67. I/A Court H.R., *Caballero Delgado and Santana Case. Preliminary Objections*. *supra* note 9, para. 66.

68. I/A Court H.R., *Castillo Páez Case. Preliminary Objections.* Judgment of January 30, 1996. Series C No. 24, para. 41 and *Loayza Tamayo Case. Preliminary Objections*. Judgment of January 31, 1996. Series C No. 25, para. 41.

has held that an extemporaneous allegation of the failure to exhaust domestic remedies may be understood to be an implicit waiver of the requirement[69] and that the mere mention of the evolution of pending proceedings is not sufficient for the respective exception to be considered pursued, since it may be waived expressly or tacitly.[70] According to the Court, in not alleging the failure to exhaust domestic legal remedies while the case was before the Commission, the State waived a means of defense that the Convention establishes on its behalf.[71]

Since it is a right that may be waived even tacitly[72] there is a proper time to exercise it, which is at the admissibility stage before the Commission. If by negligence, carelessness or ignorance of its lawyers, the State does not allege the failure to exhaust internal remedies at that stage of the proceedings, it is tacitly admitting the lack of such remedies or their timely exhaustion and it is prevented from using this argument later before the Commission or the Court. The fact that the Commission may rule on the admissibility of a petition or communication at any stage of its proceedings because of supervening information or evidence[73] does not change the aforementioned conclusion since that power may only be exercised with respect to the requisites of admissibility that are independent of the State's conduct and the absence of those requisites prevents consideration of the petition or communication.

On the other hand, in view of the nature of this rule and regardless of whether it is considered a condition of admissibility or a right of the State, it has the particularity that, once the failure to exhaust internal remedies is proved, there is nothing to prevent the petition from being introduced and admitted when the remedies have been exhausted. According to the Commission "when a petition has been ruled inadmissible because domestic remedies have not been exhausted, it remains open to the complainant to bring the matter again before the Commission if he can show that those remedies have been exhausted."[74]

69. *Ibid*., paras. 43 and 43, respectively.
70. *Ibid*., paras. 44 and 44, respectively.
71. *Castillo Petruzzi et al. Case. Preliminary Objections, supra* note 2, para. 56.
72. *Caballero Delgado and Santana Case. Preliminary Objections*. *supra* note 9, para. 66 and *Castillo Petruzzi et al. Case. Preliminary Objections, supra* note 2, para. 56.
73. Article 48.1.c of the Convention.
74. Resolution 15/89, *supra* note 58, p. 103.

### *c. The characteristics of the remedies that must be exhausted*

The remedies referred to in Article 46 of the Convention are those of the internal jurisdiction and correspond to a judicial authority established previously by law and whose decisions are enforceable. Actions or petitions before administrative authorities, which are certainly not judicial remedies and the examination of which lacks the characteristics referred to, especially the degree of discretion in responding to them, are not included. In its preliminary objection the Loayza Tamayo Case on the failure to exhaust internal remedies the State argued that the petitioner had access to effective remedies before the competent authority, including the possibility of appealing to the Ministry of Interior (*Ministerio Público*) to obtain its approval of the remedy to protect the rights recognized in the Convention, the *Ministerio Público* being an autonomous organ of the State with the responsibility to promote on its own or at the petition of one of the parties "the protective remedy to defend the legitimacy of civic rights and public interests protected by law."[75] The Court did not refer to this point but simply rejected the objection for not having invoked the non-exhaustion of domestic remedies in an express and timely manner.[76] In its brief on the preliminary objections, the Commission pointed out that "the effective remedy referred to in Article 25 of the Convention must be exercised before judges and courts; it is jurisdictional in nature, inasmuch as it may not be lodged with the Ministry of the Interior since that would make it a petition before an organ outside the judicial system."[77]

The remedies that must be exhausted are obviously those of the State that has been accused of the human rights violations. In a case referring to claims arising from the military action of the United States that took place in Panama in December 1989 with the object of overthrowing and capturing Manuel Antonio Noriega, the Government of the United States objected to the admissibility of the petition arguing that the legal remedies of Panama had not been exhausted. The Commission observed that the obligation to exhaust domestic remedies does not require the petitioners to exhaust the available remedies in a State against which it has not pursued a remedy.

75. *Loayza Tamayo Case. Preliminary Objections*, *supra* note 68, para. 37.a.
76. *Ibid*., paras. 41-46.1.
77. *Ibid*., para. 38.d.

The Convention and the Commission's Rules state clearly that the remedies that must be exhausted are those of the legal system of the State that allegedly committed the violation. In this case, that State was the United States and the obligation to exhaust the domestic remedies referred only to the remedies existing in the legal system of that country.[78]

In any event, the remedies that must be exhausted are those that are appropriate in the precise context of the alleged human rights violation. In a case in which a detainee had been denied the benefit of release, the Commission indicated that this was an issue in the trial of the petitioner and that, therefore, with respect to this point, the requirement of the exhaustion of domestic remedies had been met with the request for release and the resolutions that denied it. The claimant had also filed an appeal under the Code of Criminal Procedure to the Supreme Court, which was also rejected. With these measures, the Commission held that the actions that the petitioner could take domestically were exhausted, thereby fulfilling the requirement of the exhaustion of domestic remedies, without prejudice to continuing the proceedings in which these issues were raised.[79]

On the other hand, there is no duty to exhaust absolutely every judicial remedy available, including those of a special nature that are not apt to remedy the alleged harm. The Court has distinguished between ordinary and extraordinary remedies, suggesting that there is only the obligation to exhaust the former. In the Cantoral Benavides Case, the Court held that it was demonstrated that the victim "made use of all of the domestic remedies, including the writ of review, *which is extraordinary in nature*."[80] In his dissenting opinion, Judge Vidal Ramírez went further and argued that the writ of review was an extraordinary remedy, not preclusive, which under Peruvian laws could be filed at any time and did not have the potential or

78. I/A Commission H.R., Report No. 31/93, Case 10.573, United States, adopted October 14, 1993, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, General Secretariat of the Organization of American States, Washington, D.C., 1994, p. 332 *et seq*., footnote 20.

79. I/A Commission H.R., Resolution No. 17/89, Case 10.037, Argentina, adopted April 13, 1989, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1988-1989, *supra* note 58, p. 36, para. 6 and p. 58, second conclusion.

80. I/A Court H.R., *Cantoral Benavides Case. Preliminary Objections*. Judgment of September 3, 1998. Series C No. 40, para. 33. (Emphasis added.)

legal efficacy to be considered a remedy of the domestic jurisdiction that had to be exhausted.[81]

In order that there be an obligation to exhaust them, domestic remedies, whether ordinary or extraordinary, must be such that they may be considered a remedy for the legal situation violated. Article 46.1.a of the Convention requires that the domestic legal remedies be exhausted "in accordance with generally recognized principles of international law." In the opinion of the Court, these principles refer not only to the formal existence of such remedies but also that they are adequate and effective, as can be seen from the exceptions in Article 46.2.[82]

***i. Adequate remedies.*** The purpose of this rule is to provide the State with the opportunity to remedy, through its own means, the legal situation violated. Domestic remedies must, therefore, be of such a nature as to provide effective and adequate means to reach that result. Before the Court rules on the matter, the Commission has already had the opportunity to express its opinion on the nature of the remedies that must be exhausted. In a case in which the Government of Argentina argued that the victim had available the writ of review, the Commission observed that it applied exclusively to the consequences of the proceedings, such as the reduction of a sentence or the elimination of a crime but not the invalidation of the process that resulted in the sentence.[83] In a case against Colombia, the Commission also rejected the arguments that the domestic legal remedies had not been exhausted since a Criminal Court had reopened the investigation into the assassination of the victim, because in the judicial proceedings the accused soldiers had been expressly excluded from the investigation and from any possible declaration of guilt or punishment.[84]

The Court has held that available remedies are adequate when they are

81. *Ibid*., dissenting opinion of Judge Vidal Ramírez, para. 1.2.

82. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 60, paras. 63, 66 and 87, respectively.

83. I/A Commission H.R., Resolution 15/87, Case 9.635, Argentina, adopted June 30, 1987, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1986-1987, *supra* note 59, p. 59, para. 7 of the considerations.

84. I/A Commission H.R., Resolution No. 1/94, Case 10.473, Colombia, adopted February 1, 1994, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 78, p. 111 *et seq*., para. 3.a of the considerations.

> suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable.[85]

In its more recent jurisprudence, the Court has held that, for such remedies to exist, it is not enough that they be included in the Constitution or in the law or that they be formally admissible, they must be truly appropriate to establish whether there has been a human rights violation and to provide the proper means to remedy it.[86] It is not necessary, therefore, to exhaust every domestic remedy, only those that are adequate for the particular situation. In its first cases against Honduras, the Court held that, in the case of a person allegedly detained by State authorities, the writ of habeas corpus would normally be appropriate to find him, to verify whether he has been legally detained and eventually to obtain his release. If this writ, however, requires the identification of the place of detention and the authority that ordered it, the writ would not be adequate to find a detainee held clandestinely by State authorities since in such cases there is only hearsay evidence of the detention and the whereabouts of the victim are unknown.[87] This finding has been repeated in recent cases in which the Court has held that habeas corpus represents, among the non-derogable judicial guarantees, the best means to guarantee a detainee's freedom, to control respect for his life and integrity and to prevent his disappearance or that his place of detention remain unknown, as well as to protect him from torture and other cruel, inhuman and degrading treatment.[88] A civil proceeding to obtain a death certificate based on the

85. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 60, paras. 64, 67 and 88, respectively.

86. *See, e.g., Ivcher Bronstein Case*, *supra* note 55, para. 136; I/A Court H.R., *Cantoral Benavides Case*. Judgment of August 18, 2000. Series C No. 69, para. 164 *and The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 64, para. 113.

87. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 60, paras. 65, 68 and 90, respectively.

88. *See, e.g.*, I/A Court H.R., *Durand and Ugarte Case.* Judgment of August 16, 2000. Series C No. 68, para. 103; *Bámaca Velásquez Case*. Judgment of November 25, 2000. Series C No. 70, para. 192 and *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003. Series C No. 99, para. 122.

disappearance, the function of which is to allow the next of kin to dispose of the assets of the person presumed dead or to enable the widow to remarry, is not an adequate remedy to find the disappeared person or to obtain his freedom, if he is still alive and is detained.[89] Notwithstanding that decision, several years later, in the Durand and Ugarte Case Peru argued that the petitioners had not availed themselves of the regular courts and had disregarded their rights under the Civil Code by not requesting a certificate of presumed death, which would have given them an expeditious way for claiming their inheritance. The Court recalled its prior judgment on the forced disappearance of persons, pointing out that, in such cases, habeas corpus would normally be the appropriate writ to find a person presumably detained by the authorities, to verify whether he is legally detained and, if so, to obtain his release. In any event, the Court emphasized that, according to its repeated jurisprudence, the writ of habeas corpus must be capable of producing the result for which it was designed. The Court considered that these findings were applicable to the disappearance of victims and that the procedures mentioned by the State (declaring the person missing or presumably dead) were designed to serve purposes related to inheritance and not to clarify a disappearance that was a human rights violation and, therefore, they were not suited to achieve the result sought.[90] Bearing in mind the privation of freedom and the later disappearance of the victims, the Court held that the writ of habeas corpus filed on their behalf constituted the remedy to determine whether the domestic legal remedies had been exhausted.[91]

Curiously, this precedent was ignored in the Las Palmeras Case, in which the Court accepted as sufficient the decisions of an administrative tribunal that held Colombia responsible for the death of five of the victims in that case and ordered the State to pay compensation for pecuniary and non-pecuniary damages to the next of kin. Since the Commission was aware of these decisions when it filed the application, the Court wondered what the Commission was seeking when it requested that Colombia again

89. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 60, paras. 64, 67 and 88, respectively.

90. I/A Court H.R., *Durand and Ugarte Case. Preliminary Objections*. Judgment of May 28, 1999. Series C No. 50, paras. 31.b, 34 and 35.

91. *Ibid*., para. 37.

be declared responsible for the death of these persons. The Court rejected the Commission's argument that a domestic court could only declare the domestic responsibility of the State and that the finding of international responsibility was reserved for an international tribunal.[92] Due to the complementary nature of the protection that the inter-American system offers to the domestic law of the States, the Court held that when a question has been definitively resolved on the domestic level, it is not necessary to submit it to the Court for its approval or confirmation. Since the decisions of a Chamber of Colombia's Council of State were not challenged by the parties, the Court held that the State's responsibility had been established by virtue of the principle of *res judicata*.[93] To accept this reasoning of the Court is to accept any decision of a national court, no matter how fraudulent and even though it was not the appropriate body to punish those directly responsible for the human rights violations, since in this case the decisions of the Chamber were limited to awarding monetary damages. Judges Cançado Trindade and Pacheco Gómez, in a separate opinion, stated that it was essential for the Court to determine the State's international responsibility under the Convention without it being necessary to remit the case to the decision of the national tribunals and that a State's legal responsibility domestically does not necessarily coincide with its responsibility under international law. In their opinion, the two decisions of the Contentious-Administrative Chamber of the Council of State were a positive step in declaring the State's patrimonial responsibility for the death of some of the victims and the State's administrative responsibility for the death of others. However, in the light of the Convention, the decisions of that Chamber did not appear to them to be sufficient nor much less definitive.[94]

In its observations to the written submissions on preliminary objections in the Castillo Páez Case, the Commission argued that the proceedings before the First Criminal Chamber of the Superior Court against two policemen for the alleged crime of abuse of authority, violence and resisting arrest was not a trial tending to identify those responsible for

92. *Las Palmeras Case*, *supra* note 14, para. 32.
93. *Ibid*., paras. 33-34.
94. *Ibid*., paras. 2 and 3 of his separate opinion.

the detention and subsequent disappearance of the victim and, therefore, was not a remedy that had to be exhausted.[95] Having rejected the objection for the failure to exhaust domestic remedies for being out of time,[96] the Court did not rule on this matter that, in any event, responded perfectly to its findings in the first cases against Honduras.

On the other hand, while it is possible that there may in general be adequate remedies to correct the violation, those remedies may not be available in a particular case. With respect to a person deprived of his freedom, the Commission argued before the Court that no appropriate remedy existed since he was being tried pursuant to two Decree-Laws that prohibited the filing of the writ of habeas corpus on behalf of persons on trial for the crimes of terrorism or treason.[97]

***ii. Effective remedies.*** The Court's consistent jurisprudence has held that domestic remedies must be effective, that is, capable of producing the result for which they have been designed.[98] According to the Court, States have the responsibility to enact and ensure the due application of effective remedies and guarantees of due process of law before the competent authorities that protect all persons subject to their jurisdiction against acts that violate their fundamental rights or that entail the determination of their rights and obligations.[99] State responsibility does not terminate when the competent authorities issue their decision or judgment, since the State must guarantee the means to execute those decisions.[100]

A judicial remedy in a particular case does not necessarily have to produce a favorable result for the person who has invoked it in order to be effective. According to the Commission, "the mere fact that a domestic remedy does not produce a result favorable to the petitioner does not, in and of itself, demonstrate the inexistence or exhaustion of all effective

95. *Castillo Páez Case. Preliminary Objections, supra* note 68, para. 38.b.
96. *Ibid*., paras. 41-46.1.
97. *Cantoral Benavides Case. Preliminary Objections, supra* note 80, para. 29.a.
98. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 60, paras. 64, 67 and 88, respectively.
99. *Durand and Ugarte Case, supra* note 88, para. 121.
100. *Case of Baena Ricardo et al. Competence, supra* note 56, para. 79.

domestic remedies. For example, the petitioner may not have invoked the appropriate remedy in a timely fashion."[101]

In the opinion of the Court, "procedural requirements can make the remedy … ineffective: if it is powerless to compel the authorities; if it presents a danger to those who invoke it; or if it is not impartially applied."[102] According to the more recent jurisprudence, it is not sufficient that the remedies exist formally, they must produce results or responses to the violation of the rights recognized in the Convention in order to be considered effective. Those remedies that, because of the general conditions in the country or even because of the particular circumstances in a case, are illusory cannot be considered effective.[103] The Court has held that the State is obligated to create the necessary conditions so that every available remedy is effective.[104] In a complaint concerning the violation of political rights, the Commission, in referring to the efficacy of the available remedies, held that the handling of challenges under the applicable electoral laws and the arguments of the Government of Mexico were extremely formalistic and that when priority is given to procedure over substance the system could fail to produce results and the investigation of the acts may never occur. According to the Commission, "while laws stipulating the procedural rules are important and necessary, it is no less important that these rules produce results, so that remedies may be adequate and effective. Otherwise, they would be vitiated and the objective they were created to achieve would not be accomplished."[105]

In the Juan Humberto Sánchez Case, the Court held that when the victim was arbitrarily detained, as part of a pattern of extra-legal executions, it was not possible for him to file on his own a simple and effective remedy that would allow him to assert his right to personal liberty and that would

101. I/A Commission H.R., Report No. 27/93, Case 11.092, Canada, adopted October 6, 1993, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 78, p. 58, para. 28.

102. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 60, paras. 66, 69 and 91, respectively.

103. *Bámaca Velásquez Case*, *supra* note 88, para. 191; *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 64, para. 114; *Case of the "Five Pensioners," supra* note 57 and *Case of Juan Humberto Sánchez*, *supra* note 88, para. 121.

104. *Case of Bulacio*, Judgment of September 18, 2003. Series C No. 100, para. 127.

105. I/A Commission H.R., Report No. 14/93, Case 10.956, Mexico, adopted October 7, 1993, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 78, p. 259.

possibly have prevented the violations of his rights to humane treatment and life. According to the Court, he was in the hands of State agents and, therefore, the State had the responsibility to create the necessary conditions so that a remedy would be effective.[106] In the opinion of the Court, the lack of efficacy of habeas corpus in Honduras was demonstrated by the testimonial and documentary evidence in the file, including the statements of the then National Commissioner for Human Rights, who had stated that writs of habeas corpus were ineffective because the judiciary was influenced by the military.[107]

The Court has held that in order to comply with the right to access to justice it is not sufficient that there be a final ruling in the respective proceeding that declares rights and obligations or provides protection to certain persons, it is also necessary that there are effective mechanisms to execute those decisions or judgments so that the rights are effectively protected.[108] According to the Court, "the lack of effective domestic remedies renders the victim defenseless and explains the need for international protection. Thus, whenever a petitioner alleges that such remedies do not exist or are illusory, the granting of such protection may be not only justified, but urgent."[109] In the opinion of the Court, in order to preserve the right to an effective remedy in the terms of Article 25 of the Convention, it is crucial that the remedy be exercised in accordance with the rules of due process, set forth in Article 8 of the Convention, which includes access to legal aid.[110]

The Court has held that the lack of an effective remedy against violations of the rights recognized in the Convention is a violation of the Convention by the State party responsible. In its opinion, in order for such a remedy to exist, it is not enough that it be included in the Constitution or in the law or that it be formally admissible, it must be truly appropriate to establish whether there has been a human rights violation and to provide

106. *Case of Juan Humberto Sánchez, supra* note 106, para. 85.
107. *Ibid*., para. 123.
108. *Case of Baena Ricardo et al. Competence, supra* note 56, para. 82.
109. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 3, paras. 93, 92 and 95, respectively.
110. *Case of Hilaire, Constantine and Benjamin et al., supra* note 16, para. 148.

the proper means to remedy it. Therefore, those remedies that, because of the general conditions in the country or even because of the particular circumstances in a case, are illusory cannot be effective.[111] According to the Court, remedies are illusory when they are shown to be ineffective in practice, when the judiciary lacks the necessary independence to decide impartially or the means to execute its decisions, when there is a denial of justice, an unwarranted delay in the decision and when the alleged victim lacks access to a judicial remedy.[112] In the Juan Humberto Sánchez Case, the Court referred to the ineffectiveness of the domestic remedies in the context of a pattern of repeated and systematic violations of human rights, which prevented prosecuting and punishing those responsible. According to the Court, the death of the victim occurred within a pattern of extra-legal executions, which were also characterized by impunity, in which the domestic remedies were not effective, the judicial investigations were gravely deficient and the elapse of time played a fundamental role in erasing all evidence of the crime, which made illusory the rights to defense and judicial protection in the terms of Articles 8 and 25 of the Convention.[113]

The effectiveness of these remedies must be interpreted in the terms of the judicial guarantees that, under Article 8 of the Convention, grant every person the right to the substantiation of any criminal accusation made against him or in the determination of his civil, trade union, fiscal or any other kind of rights or obligations. In particular, the efficacy of those remedies must be evaluated in the terms of the right that, under Article 8.1, every person has to a hearing with due guarantees and "within a reasonable time." The Convention does not define the limits of what is considered *reasonable* in evaluating a remedy or the substantiation of a judicial proceeding as a whole. That must be evaluated by the organs of the Convention in each case, taking into account its complexity, the judicial activity of the interested party and the behavior of the judicial authorities.[114] If the national courts, in deciding these remedies, have exceeded the periods set by law, these remedies cannot be said to be effective. An excessive

111. *Judicial Guarantees, supra* note 54, para. 24.
112. *Ivcher Bronstein Case, supra* note 55, paras. 136 and 137.
113. *Case of Juan Humberto Sánchez, supra* note 106, para. 135.
114. *Genie Lacayo Case, supra* note 22, para. 77; *Suárez Rosero Case, supra* note 24 and *Case of Hilaire, Constantine and Benjamin et al., supra* note 16, para. 143.

delay in deciding a judicial remedy means that it would not be effective to produce the result for which it was established. In its submissions in the Blake Case, the Commission argued that the right to a trial within a reasonable time established in the Convention is based, *inter alia*, on the need to avoid undue delays that result in a deprival and denial of justice with respect to individuals who claim a violation of rights protected by the Convention.[115] In the Ivcher Bronstein Case, the Court observed that the national courts that decided the judicial remedies interposed by the victim did not satisfy the minimum requirements of independence and impartiality, established in Article 8.1 of the Convention as essential elements of due process, that would have led to a decision based on the law and that, therefore, those remedies were not effective. According to the Court, the facts in that case indicated that the judicial remedies pleaded by the victim to defend his economic rights were not simple and prompt but, on the contrary, took an unduly long time to decide, unlike the consideration given to the actions filed by the minority shareholders of the company, which were decided promptly. Moreover, the civil and criminal complaints lodged against the victim and his family, company officials and lawyers as a consequence of which the freedom of some them was restricted and the permanence in the country of others was discouraged, reflected a situation of persecution and denial of justice.[116] In the Mayagna Community Case the Court reiterated that the writs of *amparo* were illusory and ineffective if there was an unwarranted delay in deciding them.[117]

The Court has referred to the existence of merely formal remedies that are systematically rejected[118] for trivial reasons or without an examination of the merits or if there is a practice or a policy ordered or tolerated by the public authorities, the effect of which is to hinder certain persons from invoking domestic remedies that are normally available to

115. I/A Commission H.R., *Application to the Inter-American Court of Human Rights*, Case No. 11.219 (Nicholas Chapman Blake), August 3, 1995, p. 32.

116. *Ivcher Bronstein Case, supra* note 55, paras. 139-141.

117. *The Mayagna (Sumo) Awas Tingni Community Case, supra* note 64, para. 134.

118. For example, during the military dictatorship of Augusto Pinochet in Chile, the writ of *amparo* that traditionally had been effective in cases of unlawful or arbitrary detentions, no longer was for political leaders, since the courts were satisfied with the simple denial that those persons were being detained by the military or police authorities, rejecting the writs without conducting any independent investigation.

everyone. In such cases, in the opinion of the Court, to invoke these remedies is no more than a senseless formality and the exceptions of Article 46.2 would be fully applicable, excusing the obligation to exhaust domestic remedies that, in practice, would not fulfill their purpose.[119] The most obvious proof of the ineffectiveness of domestic remedies would be the existence of systematic and generalized human rights violations in a country and the corresponding lack of investigations and punishment by the judicial bodies.

In the Castillo Páez Case, with respect to a remedy that the government alleged was available and which in its opinion should have been exhausted, the Commission argued, *inter alia*, that it was not effective. In the opinion of the Commission, there was no obligation to go to the Constitutional Court since the lower courts had granted the writ of habeas corpus on behalf of the victim. In addition, this proceeding would have been ineffective since the Supreme Court of Peru had irregularly admitted hearing the matter in overturning the decision of the Eighth Court of Appeals, which had confirmed the decision of the judge accepting the writ of habeas corpus, since the Supreme Court could legally only rule on a decision of an inferior court that had denied the writ of habeas corpus, which in this case had been granted.[120] In rejecting outright the exception of the failure to exhaust domestic remedies for being untimely,[121] the Court did not rule on the effectiveness of this remedy. It did so, however, in the Durand and Ugarte Case in which it held that, in cases of the forced disappearance of persons, the writ of habeas corpus is normally the appropriate means to find a person presumably detained by the authorities, to verify whether he is being held illegally and, if so, to obtain his freedom. Nevertheless, the Court was careful to hold that habeas corpus must also be effective, that is, capable of producing the result for which it has been designed.[122]

119. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 3, paras. 68, 71 and 93, respectively.

120. *Castillo Páez Case. Preliminary Objections, supra* note 68, para 38.c.

121. *Ibid*., paras. 41-46.1.

122. *Durand and Ugarte Case. Preliminary Objections, supra* note 90, para. 34.

In the Constitutional Court Case, the State asserted before the Commission that the petition was inadmissible since writs of *amparo* were pending in the domestic courts.[123] The petitioners argued that the remedies available under domestic law were neither adequate nor effective and that they were, therefore, not obligated to exhaust them. They particularly questioned the independence of the lower courts charged with resolving writs of *amparo* due to the strong political interference in the reorganization of the judiciary. They also alleged that this lack of independence of the judiciary was shown by the rotation of judges who ruled against the interests of the government. Moreover, the petitioners pointed out that the actions of guarantee initiated by the victims in the domestic jurisdiction must ultimately reach the Constitutional Court, whose members were prevented from deciding, in accordance with procedural standards, for having participated in the acts giving rise to the complaint. It was also noted that the deadline to resolve those actions of guarantee had long passed and that the justices named in the petition had been removed by the Congress on May 28, 1997 and, almost a year later, there still had not been a final ruling on the writ. Finally, the petitioners alleged that the deactivation of the Constitutional Court made impossible the functioning of the body that ruled on the constitutionality of the laws, as well as the right of all citizens to have an independent and impartial court.[124] The Commission stated that, from the record of the case, it could be concluded that the domestic remedies had been neither prompt nor effective in protecting the rights of the justices who had been dismissed, that there had been an unwarranted delay in processing the writs of *amparo* filed by the victims and that the failure to resolve the complaints affected both the justices and the functioning of a fundamental body in the Peruvian legal system, as is the Constitutional Court, and, therefore, it declared the case admissible.[125] This decision was confirmed by the Court, which expressed the view that the proceedings that were followed at the different levels that considered the writs of *amparo* exceeded the reasonable period guaranteed by the Convention and that the writs were illusory and ineffective if during their

123. I/A Commission H.R., Report No. 35/98, Case 11.760, Manuel Aguirre Roca, Guillermo Rey Terry and Delia Revoredo de Mur, Peru, adopted May 5, 1998, para. 11.

124. *Ibid*., para. 13-14.

125. *Ibid*., para. 30.

processing there was an unwarranted delay of the decision.[126] The Court considered that, given the facts of the case, the failure of the remedies filed against the decision of the Congress that removed the justices of the Constitutional Court was due to considerations that were not strictly juridical since it was proved that those who were members of the Court and dealt with the writs of the removed justices were the same persons who participated or were involved in the impeachment proceedings in the Congress. Thus, in keeping with the Inter-American Court's criteria and the requirements for the impartiality of the judge, it could be said that the decision on the writs of *amparo* did not meet the requirement of the impartiality of the Constitutional Court that heard them. The remedies filed by the alleged victims were, therefore, not capable of producing the result for which they were designed and were condemned to failure, as in practice happened.[127]

The Commission has also rejected the effectiveness of a remedy, holding that it was "illogical and juridically anomalous" to require a person who questions the double jeopardy to which he had been subjected that he exhaust the domestic remedies in a proceeding to which he had objected from the beginning and in its totality.[128]

On the other hand, although it is not necessary, for purposes of admissibility to exhaust domestic remedies that are not adequate and effective, the Court has held that consideration of the existence and activity of domestic courts is relevant to the decision on the merits of a petition, since it is related to the conduct of the State in question and serves to determine whether the State has complied with its obligations to protect the rights recognized in the Convention.[129]

### *d) Exceptions to the rule*

The rule of the prior exhaustion of domestic remedies cannot be raised so as to be an insurmountable obstacle to access to the Commission.

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126. I/A Court H.R., *Constitutional Court Case*. Judgment of January 31, 2001. Series C No. 71, para. 93.

127. *Ibid*., para. 96.

128. *Cantoral Benavides Case. Preliminary Objections, supra* note 80, para. 29.b.

129. *See*, in this respect, *Caballero Delgado and Santana Case. Preliminary Objections*, *supra* note 9, para. 67.

In this respect, the Court has held that "the international protection of human rights is founded on the need to protect the victim from the arbitrary exercise of governmental authority. … The rule of prior exhaustion must never lead to a halt or delay that would render international action in support of the defenseless victim ineffective. This is why Article 46.2 of the Convention sets out exceptions to the requirement of recourse to domestic remedies prior to seeking international protection."[130]

Article 46.2 provides that the petitioner is excused from meeting this requirement in three circumstances: "a) the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them and c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies." It is obvious that this last exception is closely related to the appropriateness and effectiveness that, according to the Court, domestic legal remedies must have.

The exception in Article 46.2.b contemplates two different hypotheses: preventing or denying the alleged victim access to the domestic legal remedies and preventing the alleged victim from exhausting them.

The only exceptions to the rule of the exhaustion of domestic legal remedies are those set forth in the Convention. There are no others. In a case in which the claimants made a vague reference to a lack of advice and resources, the Commission considered that, even though they were morally understandable, those circumstances, *per se*, without articulating them and without showing that they were one of the specific exceptions, did not have the juridical merit of abrogating clear provisions of the Convention. Therefore, the Commission argued that, in such a case, it was not the responsibility of the State, either by action or omission, to challenge the act to which the petitions took offense.[131]

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130. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 3, paras. 93, 92 and 95, respectively.

131. I/A Commission H.R., Report No. 90/90, Case 9.893, Uruguay, adopted October 3, 1990, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1990-1991, General Secretariat of the Organization of American States, Washington, D.C., 1991, p. 89, para. 22.

***i. The non-existence of due process of law.*** The Commission has had the opportunity to rule on this exception to the exhaustion of domestic remedies set forth in the Convention and in its Rules, which basically implies that in processing such remedies the judicial guarantees inherent in the administration of justice were not observed. This circumstance is closely related to the right to be heard by an independent and impartial court and with the judicial guarantees set forth in Article 8 of the Convention that refer to the conditions that a tribunal must meet, the characteristics of trials and the other essential guarantees to ensure an adequate defense of the rights and obligations that are being heard judicially. According to the Commission, the rule of the exhaustion of internal remedies means that a State is not only obligated to offer effective judicial remedies but also to guarantee that they are substantiated in accordance with the rules of due process of law. The non-existence of due process within the jurisdiction of a State weakens the efficacy of the remedies provided under domestic law to protect the rights of individuals.[132]

In the exercise of the powers under its Statute, the Commission ruled on the lack of remedies to exhaust in a case presented against the United States by a non-governmental organization for the bombing of a mental hospital in Grenada. The petitioners claimed that there were no domestic remedies to exhaust due to the *ad hoc* nature of the program of compensation of the United States, the evident failure of the government of that country to contact the victims incapacitated by the incident and the unwillingness of the government to compensate those victims after the *ad hoc* program of compensation had expired. The Commission concluded that the domestic remedies could not be pursued and exhausted under the terms of Article 31.2.a of its Rules, which excuses the exhaustion of the remedies when the State does not afford due process of law for the protection of the rights alleged to have been violated.[133] In a case against Colombia, the Commission also excused the petitioners from having to

132. I/A Commission H.R., Report No 1/95, Case 11.006, Peru, adopted February 7, 1995, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1994, General Secretariat of the Organization of American States, Washington, D.C., 1995, pp. 83 and 96.

133. *See* the decision of the Commission on admissibility, Case 9.213, presented by the Disabled Peoples' International et al. vs. the United States, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1986-1987, *supra* note 59, p. 192.

exhaust domestic remedies, by considering that it was obvious that the petitioners were not able to secure an effective protection by the local judiciary that, despite the irrefutable evidence at its disposal, exonerated the police officials responsible for the acts that gave rise to the claim and ordered that the case be dismissed.[134] With respect to a judicial proceeding concerning the investigation into an assassination, which expressly excluded from the investigation any possible declaration of guilt or punishment for the soldiers involved, the Commission decided that this situation was one of the exceptions to the rule of the exhaustion of domestic remedies since due process for the protection of the right that was allegedly violated did not exist.[135]

This does not necessarily imply the rupture or the absence of the rule of law but simply the absence of the essential judicial guarantees in a specific case. Of course, the absolute rupture of the rule of law characterized, *inter alia*, by the lack of an independent judiciary is an extreme situation that also means the non-existence of due process. In this respect, the Commission has stated that the effective observance of judicial guarantees is based on the independence of the judiciary, derived from the classical separation of powers, because in order to protect the rights of individuals vis-à-vis State action, it is essential that one of the State bodies has the independence that would allow it to judge both the actions of the Executive Branch and the constitutionality of the laws and even the decisions of its own members. An independent judiciary is, therefore, an essential requisite for the practical observance of human rights in general.[136] In a case against El Salvador in which the petitioners had argued that they were not obligated to exhaust domestic remedies because, during the period in which the acts occurred, the system of justice did not offer the necessary guarantees to be able to comply with the requirement of the Convention, the Commission observed that the record did not contain elements to disprove the petitioners' argument and that, on the contrary,

134. *See* I/A Commission H.R., Report No. 1/92, Case 10.235, Colombia, adopted February 6, 1992, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1991, General Secretariat of the Organization of American States, Washington, D.C., 1992, p. 41.

135. *See* Report No. 1/94, *supra* note 84, p. 111, para. 3.a of the considerations.

136. I/A Commission H.R., SEVENTH REPORT ON THE SITUATION OF HUMAN RIGHTS IN CUBA, General Secretariat of the Organization of American States, Washington, D.C., 1983, p. 65 *et seq.*

there were sufficient reasons to concur with what they had contended. The Commission recalled that it had repeatedly stated that serious problems existed in the administration of justice in El Salvador during the period in question and concluded that it was not appropriate to apply the requirement of the exhaustion of domestic remedies because attempts to exhaust them would be fruitless.[137]

In its Report on the Situation of Human Rights in Peru, the Commission observed that on April 5, 1992 when the Government of Peru reorganized the judiciary, the Offices of the Attorney General and the Comptroller General, security forces, supported by tanks, occupied and blocked entry to the Palace of Justice and the locales of the other institutions. According to the Report, the following day the President of Peru announced the dismissal of judges and justices effective April 9 by Decree-Law 25,423, which removed 13 justices of the Supreme Court, while Decree-Law 25,422 dismissed eight members of the Constitutional Court and Decree-Law 25,424 removed members of the National and District Judiciary Councils. Two days later, the Comptroller General and the Attorney General were dismissed by means of Decree-Laws 25,419 and 25,420 and the Judicial Office and the Court Attorney were suspended for ten days, leaving only investigative judges and prosecutors. By Decree-Law 25,445 of April 23, 134 persons, among them judges of Superior Courts, prosecutors, judges of the Judicial Districts, provincial prosecutors and judges of Children's Courts of the Districts of Lima and Callao were dismissed. The same Decree-Law expressly precluded the possibility that the dismissed judges avail themselves of the writ of *amparo* to invalidate the law.[138] This Report acquired special relevance in the case of former President Alan García, in which the Commission broadly examined the absence of due process of law in a context that, in our opinion, may be characterized as one of breaking the rule of law. The Commission analyzed the violation of internal norms for naming and removing judges, the circumstance that, after the massive dismissal of those judges, the Executive Branch proceeded to name new

137. I/A Commission H.R., Report No. 13/96, Case 10.948, El Salvador, adopted March 1, 1996, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1995, General Secretariat of the Organization of American States, Washington, D.C., 1996, p. 104, paras. 9-11.

138. I/A Commission H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN PERU, General Secretariat of the Organization of American States, Washington, D.C., 1993. p. 18.

judges in violation of the norms of the Constitution and the external pressures on the judiciary. Quoting its Report, the Commission observed that such a situation eliminated, in practice, the separation of powers and, as a result, concentrated powers in the Executive Branch, which had the effect of a greater subordination of the judiciary to the Executive Branch. According to the Commission, since the judges were dismissed without any type of proceedings and their replacements were named exclusively by decision of the Executive Branch, it could affirm that there did not exist in Peru guarantees to shield the judiciary from external pressures. Moreover, the lack of proceedings in the dismissal of the members of the judiciary allowed the judges who continued in office and the newly named judges to believe that they were at the mercy of decisions of the Executive Branch. Such considerations led to the conclusion that by removing a significant number of judges and by appointing new judges without observing constitutional procedures, Peru had seriously compromised the independence and impartiality of its courts and had failed to guarantee due process of law. In the specific case of Alan García, the Commission pointed out that the lack of independence and impartiality of the Peruvian courts prevented him from having his rights protected domestically. After denying the accusations that had been made against him and after the Attorney General and most of the judges of the Supreme Court had been dismissed, their replacements, named by the exclusive decision of the Executive Branch, declared null and void all acts of the proceedings and initiated a new criminal case against the petitioner. Thus, the same Court, for the sole reason of the replacement of the majority of its members, overturned its decision with respect to the same case, the same acts, and the same irregularities on which it had already ruled. The replacement of most of the members of the judiciary by the exclusive decision of the Executive Branch, together with the manner in which this situation directly affected the petitioner, therefore, allowed the Commission to conclude that, since the Peruvian courts were not independent and impartial, the procedural measures to protect the rights of the individual were ineffective to achieve the result for which they had been designed.[139]

139. Report No. 1/95, *supra* note 132, pp. 92-98.

In a press release of March 10, 2003 on the progressive deterioration of the rule of law in Venezuela, the Commission observed with concern the provisional status of members of the judiciary and indicated that temporary judges do not enjoy the right of job stability, which seriously affected the autonomy and independence of the judiciary. According to information available to the Commission, almost three years after the reorganization of the judiciary, more than 70% of the judges were still temporary. In the same press release, the Commission pointed out what it considered to be the most significant aspects of the institutional crisis in Venezuela, emphasizing in the first place the lack of independence of the judiciary. In a press release of March 12, 2004 expressing its concern for the rule of law in the region, the Commission again referred to the fragility of the judicial system in Venezuela, caused in part by the fact that 80% of the judges were temporary. In addition to the circumstances pointed out by the Commission, there were others that were equally relevant, such as the restructuring of the judiciary that meant the irregular removal, through forced retirement or transfers to distant zones that was a form of indirect dismissal or summary proceedings without judicial guarantees (sometimes simply by a letter from the President of the Supreme Court) of 780 of the 1950 judges who made up the judiciary. The temporary judges, who could be removed at any time, did not enjoy the independence necessary to decide matters that were submitted to them without considering the political interests of the regime. In this whirlwind of political and institutional changes generated by what President Hugo Chávez has called the "Bolivarian revolution," one of the judges of the Supreme Court and member of the Constitutional Chamber, Judge Delgado Ocando, in a speech of January 11, 2001, in inaugurating the judicial year, stated that the jurisprudence of the Constitutional Chamber must adhere to what he called "the progressive political project." Moreover, in a radio and television program on Sunday, December 15, 2002 President Chávez stated that he had ordered the military not to obey any judicial order that was contrary to his precise instructions. This message meant that the few judges who still dared to issue rulings contrary to the interests of the government were dismissed and that their decisions were not obeyed. One of the most notable cases was the absolutely irregular dismissal on October 30, 2003 of all of the judges of the First Contentious-Administrative Court after some key

decisions against the government. Five months later, at the time of this writing (March 25, 2004) their replacements had not been named, thus shuttering the court-house and depriving access to justice to any person who might have a claim against the administration and also to an effective, simple and prompt remedy to all those who had matters pending in that court. These circumstances were argued before the Commission in a hearing on admissibility held March 4, 2004 in the case of petition P-073/03 of General Carlos Alfonzo Martínez. In addition to the aforementioned elements, there were allegations of the arbitrariness of his detention, that he was not informed at the time of the detention of the reasons for the detention or the authority that had ordered it and that he had gone two months without being brought before a competent court. The Commission in its press release of March 10, 2003 stated that the detention of General Martínez for more than two months, without having been charged criminally, was a serious violation of the rights to personal freedom and due process. Moreover, there had been a writ of habeas corpus, ordering the immediate end of any measure that would deprive General Martínez of his freedom. That judicial order was not obeyed and the military authorities in charge of his detention refused even to receive it, which was also the case with a writ of *amparo* that another court had issued that ordered that the disciplinary proceedings that had been initiated against him be suspended. On February 4, 2003 the Supreme Court ordered that General Martínez remain detained for 30 more days while the Attorney General determined whether he could be accused of some crime. In the hearing on admissibility, it was held that these circumstances, together with the lack of independence and impartiality of the court, made the process no more than a mere formal proceeding in which the accused had already been found guilty and was, thus, an exception of the non-existence of due process of law.

***ii. The lack of access to available remedies.*** Article 46.2.b of the Convention refers to a denial of access to domestic remedies in a specific case, which implies a State action that physically blocks access to the domestic remedies or that there are objective or subjective circumstances that make such access impossible.

In a case involving extra-legal executions in which the government informed the Commission that the victims were terrorists killed by other

terrorists, that the case was not being investigated and that it was considered closed, the Commission decided that, since the investigation had been closed, the claimant did not have access to domestic legal remedies and, therefore, was entitled to the exception in Article 37.2.b of its Rules and proceeded to examine the complaint.[140]

In the case of the murder of Myrna Mack, the Commission stated that the police investigation was obviously negligent in preserving and gathering the evidence that would tend to clarify the acts denounced and to identify those responsible. The evidence that the police did not compile and protect might have shed light on the participation of suspects other than Jesús Beteta Alvarez in the first judicial proceedings and would have provided more elements to try them in the second trial. The petitioner requested of the administrative and judicial authorities access to the evidence, basing her petitions on Guatemalan law and filing every appropriate remedy to obtain the documentary or other evidence that the officials of the EMP (Presidential High Command) and the army had. These requests were rejected on formalistic grounds and without a serious response by the judicial authorities. Even after the Appeals Court finally ordered that the requested evidence be turned over, the government refused to provide some evidence. In addition, the testimony of at least five witnesses considered by the petitioners to be of vital importance could not be used because some had left the country and others had refused to confirm what they had already declared. In these circumstances the Commission did not insist on the exhaustion of domestic legal remedies because the petitioners proved that they did not have effective access to those remedies.[141]

In a case in which the petitioner did not make a complaint before the national courts since, as a practical matter, women in Peru who had been raped by members of the security forces or the police were not able to obtain a remedy for the violation of their rights, the Commission, based

140. I/A Commission H.R., Resolution No. 19/87, Case 9.429, Peru, adopted June 30, 1987, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1986-1987, *supra* note 59, pp. 124-126, paras. 3 and 6 of the expository part and para. 7 of the considerations.

141. I/A Commission H.R., Report No. 10/96, Admissibility, Case 10.636, Guatemala, adopted March 5, 1996, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1995, *supra* note 137, pp. 134-135, paras. 41, 42 and 45.

on the credibility of the allegations, presumed that the victim did not have access to an effective remedy that would repair the human rights violation to which she was a victim.[142]

In the case of former president Alan García, after the army had searched his home with the purpose of arresting him, his wife tried several times to file a writ of habeas corpus on his behalf but her attempts were frustrated by the presence of army troops in the Palace of Justice, which blocked her from entering or contacting the judges. The Commission concluded that the victim did not have access to a simple and prompt remedy that would protect his rights. The Commission stated that the obligation to guarantee access to a prompt and effective remedy, such as habeas corpus or *amparo*, to protect individual freedom is not limited to periods of political stability but must also be granted in emergency situations.[143]

On the other hand, the Commission has also admitted petitions in which the victim was not able to avail himself of the remedies established domestically due to a subjective element –a well-founded fear to file a complaint for the violation of his rights– and an eminently objective element –the inability of the judiciary to resolve his situation. In the opinion of the Commission, the subjective aspect is obvious since the victim not only had a well-founded fear of reliving his experience of being detained, tortured, interrogated, threatened, sent to a military court and finally imprisoned, a fear that was compounded by being told not to return to his home, which had been broken into and searched and his clothes thrown in a vacant lot. With respect to the inefficiency of the judiciary, the Commission mentioned as the most serious problems the corruption of the public officials and their lack of independence. A well-founded fear to file a complaint and the corruption and lack of independence of the judiciary led to the conclusion that the exceptions to the exhaustion of domestic remedies, set forth in Article 46.2 were applicable, although it did not specify which of them.[144]

142. I/A Commission H.R., Report No. 5/96, Case 10.970, Peru, adopted March 1, 1996, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1995, *supra* note 132, pp. 179 and 192.

143. Report No. 1/95, *supra* note 132, pp. 85-89.

144. I/A Commission H.R., Report No. 5/94, Case 10.574, El Salvador, adopted February 1, 1994, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 78, pp. 177-178, para. 5.f-i.

***iii. The impossibility to exhaust the available remedies.*** The Commission has declared cases admissible in which the military police have been charged with the investigation of acts in which the same military unit has been accused of the violations denounced. In the opinion of the Commission, the inertia of the military in this and other cases clearly demonstrated an unwillingness to investigate, prosecute and punish those responsible for the violations and, therefore, it was not possible for the petitioners to exhaust domestic remedies.[145]

In the case of various Haitians who had been arbitrarily detained, tortured and mistreated by members of the Haitian Armed Forces, the Commission recalled that, in its 1992 Report on the Situation of Human Rights in Haiti, it had pointed out the institutionalized and unpunished practice of violence and corruption by members of the army and the police, whose function is precisely to protect the guarantees of the Haitian people, and that the judicial authorities had not been efficient or decisive in resolving the investigations on those violations. According to the Commission, those acts proved the existence of a practice or policy ordered or tolerated by the public authorities, the effect of which was to prevent the use of the domestic remedies and, therefore, the requirement of the exhaustion of domestic remedies established in Article 46 of the Convention was not applicable.[146]

While not within the context of the remedies that must be exhausted under Article 46.1.a of the Convention, but with respect to Articles 8 and 25 of the Convention, in the Hilaire, Constantine and Benjamin *et al.* Case the Court observed that although there was a formal right in the legal system of the State to present a constitutional motion, some of the victims were "impeded the use of this recourse by not providing the accused with the proper legal aid that would have allowed them to effectively exercise it, and the recourse was consequently rendered illusory."[147]

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145. I/A Commission H.R., Resolution No. 19/89, Case 10.117; Resolution No. 20/89, Case 10.118 and Resolution No. 21/89, Case No. 10.119, Suriname, adopted September 27, 1989, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1988-1989, *supra* note 58, pp. 132-133.

146. I/A Commission H.R., Report No. 9/94, Cases 11.105, 11.107, 11,110-11,114, 11.118, 11.120, 11.122 and 11.102, Haiti, adopted February 1, 1994, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 78, p. 227 *et seq*., paras. 5-7.

147. *Case of Hilaire, Constantine and Benjamin et al., supra* note 16, para. 152.b.

The removal of the judges of the First Contentious-Administrative Court of Venezuela on October 30, 2003 who, at the time of writing, had not been replaced, in addition to the human rights violation of those judges who had been removed by an inappropriate body without legal proceedings and without the guarantees of due process, also poses important problems of access to justice. Removing the judges without replacing them has the effect of blocking the resolution of pending matters and denying those involved the possibility of exhausting their remedies. In physically closing the only court that hears disputes between private persons and the State administrative bodies, the former were prevented access to a court that existed legally but that, in fact, had been eliminated. That meant that many remedies against acts of the State administrative bodies were prescribed without it being the fault of those who felt that they were affected.

In any event, the voluntary absence from the territory of the State by a petitioner cannot, *per se*, be considered a circumstance that prevents the exhaustion of domestic remedies.

***iv. Unwarranted delay in the decision.*** In the first cases against Honduras, the Court held that "the rule of the prior exhaustion must never lead to a halt or delay that would render international action in support of the defenseless victim ineffective. This is why Article 46.2 of the Convention sets out exceptions to the requirement of recourse to domestic remedies prior to seeking international protection, precisely in situations in which such remedies are, for a variety of reasons, ineffective."[148]

The Commission has not defined the standards for assuming an unwarranted delay in resolving a remedy, a question that must be determined by weighing the particular circumstances in each case. However, on the basis of its evaluation and although it did not indicate the elapsed time since the filing of the respective remedies, the Commission has not insisted on the exhaustion of internal legal remedies in cases of unwarranted delay, holding that regardless of whether the domestic

148. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 3, paras. 93, 92 and 95, respectively.

remedies have been exhausted, when the internal investigation of the case has suffered an undue delay, the government cannot use that to suspend the Commission's processing of a petition.[149] According to the Commission, it is not necessary to wait until the domestic legal remedies have been exhausted, as had been argued by the State, in a case in which the "sluggishness" of the investigation and lack of results were a clear case of undue delay in the administration of justice, which, in fact, implied a denial of justice.[150] In a case in which the Commission considered that there had been an unwarranted delay in the domestic proceedings, it held that the mere fact that the domestic remedies were being pursued did not mean that the Commission could not examine the case. Otherwise, the State could conduct ineffective and inefficient investigations and judicial proceedings, prolonging them unreasonably in order to avoid the intervention of the organs of the inter-American system. When there is no effective access to the internal legal remedies and there has been a delay in the application of justice, the prior exhaustion of domestic legal remedies cannot prevent an allegation of a human rights violation from being submitted to the Commission.[151]

The concept of unwarranted delay may, however, be too subjective or ambiguous and, therefore, it must have elements that make it more tangible. In the first place, the amount of time to process a judicial remedy, considered alone, may be excessive if it exceeds the period established in the internal law for a decision for such a remedy. In the second place, with respect to a reasonable period for the proceedings, repeating the criteria of the European Court, the Inter-American Court has held that the following aspects must be taken into account: a) the complexity of the matter, b) the judicial activity of the interested party and c) the behavior of the judicial authorities.[152]

The Commission did not have any difficulty in admitting a petition, and concluding that there had been an unwarranted delay in the

149. Report No. 1/92, *supra* note 134, p. 42.

150. I/A Commission H.R., Report No. 1787, Case 9.425, Peru, adopted March 28, 1987, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1986-1987, *supra* note 59, p. 118, para. 6 of the considerations.

151. Report No. 10/96, *supra* note 141, pp. 134-135, paras. 43-45.

152. *Genie Lacayo Case, supra* note 22, para. 77; *Suárez Rosero Case, supra* note 24, para. 72 and *Case of Hilaire, Constantine, Benjamin et al., supra* note 16, para. 143.

administration of justice, in which it was contended that the alleged victims had waited six years and four months after being tried and two years and four months after having been acquitted by a Permanent War Council for the consultation with the Superior Court.[153] In a case in which the Commission found that, two years after the events occurred, the government had only indicated that the matter was still in the investigative stage, it was not appropriate to await the exhaustion of domestic legal remedies, as the government had requested, because the sluggishness of the investigation and lack of results were a clear case of unwarranted delay in the administration of justice that implied a denial of justice and prevented clarification of the allegations.[154] In the case of 21 peasants in Peru, the Commission observed that several complaints had been brought before the *Ministerio Público*, in its role of protector of the rights of citizens and its prosecutorial role, which enabled it to bring criminal charges before the judicial authorities, and that, despite the fact that investigations had shown that the executions were attributable to an Army patrol, more than four years had elapsed without formal charges because, *inter alia*, the military authorities, who were under the Executive Branch, refused to identify those responsible. With this background, the Commission resolved that the time that had elapsed without there having been an investigation by the Peruvian authorities created a situation of unwarranted delay in resolving those remedies.[155] The Commission, in a case against Colombia, did not accept the argument that the domestic remedies had not been exhausted because they were still pending more than five years after the massacre without any internal investigation in spite of the evidence that had shown that State agents were involved and would have resulted in their punishment. The Commission held that there was an unwarranted delay in the administration of justice, applying the theory of the eternal and ineffective remedy.[156] In a case concerning some books that had been

153. I/A Commission H.R., Resolution No. 2/84, Case 9.058, Venezuela, adopted May 17, 1984, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1984-1985, *supra* note 8, p. 131 *et seq*.

154. Resolution No. 17/87, *supra* note 150, p. 118.

155. I/A Commission H.R., Report No. 1/96, Case 10.559, Peru, adopted March 1, 1996, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1995, *supra* note 137, p. 146.

156. I/A Commission H.R., Report No. 2/94, Case 10.912, Colombia, adopted February 1, 1994, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 78, p. 148, para. 3.c-e of the considerations.

confiscated in Grenada, although the petitioners had gone to the Supreme Court challenging the constitutionality of the British Colonial Law of 1951 by which the books were prohibited, the government did not argue that the domestic remedies had not been exhausted or that they were pending decision but stated that the authority to prohibit certain publications was established by law and attached a copy of the legal provisions that granted certain public officials the power to enforce the law and the laws establishing the internal remedies and pertinent proceedings. However, the Commission held that the petitioners had exhausted the internal remedies since there had been an unwarranted delay on the part of the Supreme Court of Grenada to hand down a definitive judgment on the claim that had been presented seven years before.[157]

Reinforcing the Commission's practice regarding the principle of the reasonable period established in the Convention, the Court has held that writs of *amparo* are illusory and ineffective if there has been an unwarranted delay in granting them.[158] Such a delay, in addition to being a violation of the Convention, excuses the petitioner from having to exhaust domestic legal remedies in order for the petition to be admissible. The Court held that in the case of Juan Humberto Sánchez there had been an unwarranted delay in resolving the domestic remedies since, while the criminal court investigations had begun in October 1992, the intellectual and material authors of the extra-legal execution of Mr. Sánchez had not been punished as of the date of its judgment in June 2002. According to the Court, the necessary conditions must be maintained on the international plane so that the procedural rights of the parties are not diminished or unbalanced and that the purposes for which the different proceedings were designed are attained.[159] The Court held that it was the State's responsibility to show and prove that it had needed more than a reasonable time, in principle, to issue a final judgment in a specific case.[160]

157. I/A Commission H.R., Report No. 2/96, Case 10.325, Grenada, adopted March 1, 1996, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1995, *supra* note 137, pp. 118-119, paras. 2, 3 and 5.

158. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 64, para. 134.

159. *Case of Juan Humberto Sánchez*, *supra* note 88, para. 67.

160. *Case of Hilaire, Constantine and Benjamin et al.*, *supra* note 16, para. 145.

The fact that the petitioner is excused from exhausting domestic remedies does not free the State from its obligation to provide effective, simple and prompt remedies nor does it prevent the Commission, before ruling on the admissibility of a petition, from requesting information on the status of the domestic judicial proceedings.[161]

***v. The development of jurisprudence.*** In interpreting Article 46 of the Convention, the Court has adopted a very broad and flexible standard, bearing in mind the protection of the individual. In this spirit, the Court has interpreted the exceptions to the rule of the prior exhaustion of domestic legal remedies established in Article 46 in such a broad way to suggest that they are merely illustrative –and not exhaustive– opening the door for other exceptions.[162]

Within this very liberal interpretation of Article 46.2, the Court has indicated, in an advisory opinion, that if an indigent needs legal assistance to protect a right guaranteed by the Convention and his poverty prevents him for obtaining it, he is relieved of exhausting domestic remedies.[163] The Court also concluded that "where an individual requires legal representation and a generalized fear in the legal community prevents him from obtaining such representation, the exception set out in Article 46.2.b is fully applicable and the individual is exempted from the requirement to exhaust domestic remedies."[164] Neither is it necessary in cases of systematic human rights violations that are based on discrimination to exhaust domestic remedies because it may be assumed that, under such circumstances, they would not be adequate, much less effective.

Although it is not exactly a new exception to the rule of the prior exhaustion of domestic remedies, the Commission has held that the rule is not applicable in *general cases* of human rights violations, as opposed to individual cases. This exception is justified when an analysis of the global

161. *The "Street Children" Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, para. 24.

162. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 3, paras. 87, 86 and 89, respectively.

163. I/A Court H.R., *Exceptions to the Exhaustion of Domestic Remedies* (Arts. 46(1), 46(2)(a) and 46(2)(b). Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11, para. 31.

164. *Ibid*., para. 35.

situation of human rights in a specific country shows that the rule of law does not exist or that there is no due process or that the internal legal remedies are not adequate or effective and, therefore, it would merely be a delaying step to require their exhaustion.

It may very well be that there exists a combination of the different exceptions to the rule of the exhaustion of domestic legal remedies found in the Convention and the Commission's Rules. The Commission has decided that the victim of a violation was unable to exhaust domestic legal remedies because he was in a situation contemplated in Article 46.2.b and 46.2.c of the Convention. To arrive at this conclusion, the Commission considered that, due to the loss of his claim and the failure to take any action to remedy the situation and because his lawyer was subjected to different acts of harassment that hindered his work, the victim was unable to exhaust domestic remedies and the Commission found that, due to those irregularities, there was an unwarranted delay in resolving those remedies.[165] In its advisory opinion on The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, the Court indicated that in order that there be due process of law it is necessary that the defendant be able to exercise his rights and defend his interests effectively and in full procedural equality with others.[166] According to the Court, without countervailing measures "one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages."[167] In the opinion of the Court, in order that a judicial proceeding have guarantees it is necessary that it contain everything essential to protect, ensure and assert the right or exercise thereof.[168] That is, there are conditions that must be complied with to ensure the adequate defense of those whose rights or obligations are under judicial consideration.[169]

165. I/A Commission H.R., Resolution No. 29/86, Case 9.102, Nicaragua, adopted April 16, 1986, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1985-1986, General Secretariat of the Organization of American States, Washington, D.C., p. 98 *et seq*.

166. I/A Court H.R., *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, para. 117.

167. *Ibid*., para. 119.

168. *Habeas Corpus, supra* note 54, para. 25.

169. *Judicial Guarantees, supra* note 54, para. 28.

The exceptions established in the Convention and the Commission's Rules are undoubtedly associated with the characteristics that the Court believes that domestic remedies must have. The lack of remedies is linked with the existence of inadequate remedies to protect the legal situation violated just as preventing access to existing remedies and an unwarranted delay in the decision are associated with the ineffectiveness of such remedies.[170]

### *e) The burden of proof*

Another important aspect, which appears decisive in this area, is to define who has the burden of proof and who must prove the effectiveness and exhaustion of domestic remedies.

The burden of proof with regard to the prior exhaustion of domestic remedies has been distributed equally between the claimant and the State in question. The petitioner must prove either the exhaustion of domestic remedies or the existence of an exception found in the Convention. If the petitioner has resorted to the international plane, it is because he believes that he has exhausted domestic remedies or because it has been impossible to exhaust them or because he believes that such remedies are non-existent or that in the domestic legislation there is no due process of law for the protection of the right or rights that have allegedly been violated. Having exhausted domestic remedies, in presenting his petition or communication the claimant must furnish a copy of the respective judgments. The exhaustion, however, is not easy to prove and it may be that the claimant is not in a position to present conclusive proof on the matter. The Rules, therefore, provide that if a State argues that domestic remedies have not been exhausted, it must show both the existence and the effectiveness of such remedies. Article 31.3 of the Rules provides that, when a petitioner alleges the impossibility of proving the fulfillment of the requirement of the exhaustion of domestic remedies, the State must show what remedies have not been exhausted, unless that can be clearly concluded from the file of the case. In the absence of other evidence, the lack of response by

170. *See*, in this respect, LA DENUNCIA ANTE LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, *supra* note 52, p. 62.

the State to the Commission's requests for information has allowed the presumption that there were no domestic remedies to exhaust.[171]

Given a State's response that indicated that the case had been clarified as being a death due to a military engagement, the Commission concluded that the domestic remedies had already been exhausted.[172] In another case, the response of a State admitting that it considered it improbable that the petitioners could win in the national courts since the doctrine of sovereign immunity prevented them from hearing complaints against a third State, the Commission concluded that the national courts of Panama and the United States were fora that were not available to the petitioners to process their claims.[173]

In the opinion of the Court, the exhaustion of domestic remedies is not, in principle, a requirement the fulfillment of which the Commission must prove but rather the State must specifically indicate the remedies that must be exhausted.[174] Applying this standard to a case in which a State did not oppose the admissibility of a complaint for failure to exhaust domestic remedies, the Commission considered that it could presume that the State had implicitly waived its right.[175] As to when to make this argument, the Commission has expressed the view that if a State does not challenge the exception to the non-exhaustion of domestic remedies before the Commission, it cannot do so later before the Court, as it would then be extemporaneous.[176]

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171. *See, e.g.*, the Resolution of the Commission in Case 7.473, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1981-1982, General Secretariat of the Organization of American States, Washington, D.C., 1982, pp. 35-36. *See*, also, Report No. 9/91, adopted February 15, 1991, which orders the publication of several reports against Peru, in which is expressed that the lack of response to the requests for information of the Commission leads to the presumption that there were no internal remedies that had to be exhausted. ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1990-1991, *supra* note 131, p. 251 *et seq*.

172. I/A Commission H.R., Report No. 3/94, Case 10.242, El Salvador, adopted February 1, 1994, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 78, p. 161.

173. Report No 31/93, *supra* note 84, p. 329 *et seq*.

174. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections*, *supra* note 3, paras. 88, 87 and 90, respectively.

175. I/A Court H.R., Report No. 11/92, Case 10.284, El Salvador, adopted February 4, 1992, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1991, *supra* note 133, p. 139.

176. I/A Court H.R., *Gangaram Panday Case. Preliminary Objections*. Judgment of December 4, 1991, Series C No. 12, paras. 39-40.

The Court has also held that if a State proves the existence of specific domestic remedies that were available, the burden of proof is inverted and the claimant must demonstrate that those remedies were exhausted or invoke one of the exceptions of Article 46.2 of the Convention. In a warning clearly directed to the Commission regarding its examination of admissibility, in the first cases that it heard the Court stated that "it must not be rashly presumed that a State Party to the Convention has failed to comply with its obligation to provide effective domestic remedies."[177] Under this standard, once a State has shown the availability of domestic remedies for the exercise of a right protected by the Convention, the burden of proof passes to the claimant, who must show the applicability of one or more of the exceptions of Article 46.2.[178] The Court's more recent decisions, however, suggest that the State must also show the effectiveness of the alleged remedies. In the Castillo Petruzzi *et al*. Case, the Court observed that the State did not explore the applicability of habeas corpus and *amparo*, nor did it demonstrate that those remedies were adequate and available. In the opinion of the Court, the State must prove the effectiveness of the domestic remedies that it claims are available.[179]

A too rigorous and inflexible application of these standards could void the effectiveness of international petitions as a last resort to protect the rights recognized in the Convention. Edmundo Vargas has stated that the requirement of the exhaustion of domestic remedies is a question of reconciling State sovereignty with effective international protection. If the requirement is completely eliminated it violates State sovereignty, but if the obstacles are too rigid for the admissibility of a complaint it emasculates the role of the international organ charged with defending human rights.[180] This rule, therefore, cannot be interpreted to permit a State to evade its international obligations or to impede the individual in

177. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 60, paras. 61, 64 and 60, respectively.

178. *Exceptions to the Exhaustion of Domestic Remedies*, *supra* note 163, para. 41.

179. *Castillo Petruzzi et al. Case. Preliminary Objections*, *supra* note 2, para. 63; *Castillo Páez Case. Preliminary Objections*, *supra* note 68, para. 40 and *Loayza Tamayo Case. Preliminary Objections*, *supra* note 68, para. 40.

180. *Algunos problemas que presentan la aplicación y la interpretación de la Convención Americana sobre Derechos Humanos*, in LA CONVENCIÓN AMERICANA SOBRE DERECHOS HUMANOS, General Secretariat of the Organization of American States, Washington, D.C., 1980, p. 160 *et seq*.

the enjoyment and exercise of the rights and freedoms recognized in the Convention.[181]

### *f) The competent bodies*

In principle, it is for the Commission to decide whether the domestic remedies have been exhausted. The Court may, however, be competent to rule on this matter if a) there are discrepancies with respect to the criteria of the Commission, b) for any reason the Commission has not ruled on the matter or c) the State has not interposed in a timely fashion before the Commission the exception of the non-exhaustion of domestic remedies or did not do so in a manner sufficiently explicit but did so before the Court.

According to the initial criterion of the Court,

> the question of whether the requirements of admissibility of a complaint before the Commission have been complied with is a matter that concerns the interpretation or application of the Convention, specifically its Articles 46 and 47, and is therefore, *ratione materiae*, within the scope of the Court's jurisdiction. However, because we are dealing with the admissibility requirements of a complaint or application before the Commission, it is in principle for the Commission in the first place to pass on the matter. If, thereafter, in the course of the judicial proceedings there is a dispute relating to the question of whether the admissibility requirements before the Commission have been complied with, it will be for the Court to decide, which for that purpose it has the power to accept or reject the views of the Commission in the manner analogous to its power to accept or reject the Commission's final report.[182]

According to the Court, although the exhaustion of domestic remedies is a requisite of admissibility before the Commission, the determination of whether those remedies have been interposed and exhausted or one of the exceptions to exhaustion is present is a question that concerns the interpretation or application of the Convention that, as such, falls within the contentious jurisdiction of the Court, which may

181. Article 29.a of the Convention.
182. *In the Matter of Viviana Gallardo et al., supra* note 61, para. 27.

resolve this matter either as a preliminary objection or together with the merits of the controversy.[183]

This position is not shared by Judge Cançado Trindade, who argues, *inter alia*, that the Convention has divided the powers of its organs so that it is the Commission, and not the Court, that rules on the admissibility of petitions or communications, a decision that is final with respect to the exhaustion of domestic remedies. According to Judge Cançado Trindade, the purpose of the rule of the exhaustion of domestic remedies is to offer the State, at the admissibility stage, the opportunity of remedying the alleged violation before the international body begins its examination of the merits of the complaint.[184] A proceeding that permits the re-examination of the admissibility of the petition would appear to be incompatible with the ultimate goal of the Convention, which is the protection of the individual. Moreover, it is not an exaggeration to say that the reopening and reconsideration by the Court of a question of pure admissibility, already examined and decided by the Commission, divides the process into a kind of "stagnant compartments" that takes away its agility and transparence.[185]

It must be agreed that, when the Commission has rejected this exception because of the lack of available domestic remedies or has established that the State authorities have prevented access to them and this exception is joined to the question of the merits of the complaint, it is difficult to think that the Court would lack competence to decide this matter and to re-examine the Commission's decision. In its judgments in the Castillo Páez and Loayza Tamayo Cases, the Court completely rejected the preliminary objection of the failure to exhaust domestic remedies for being extemporaneous[186] without entering into a consideration of what

183. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 3, paras. 84, 83 and 86, respectively.

184. *See* the separate opinion of ad hoc judge Cançado Trindade, especially paras. 6 and 7, in *Gangaram Panday, Preliminary Objections, supra* note 176. *See*, also, his dissenting opinion in I/A Court H.R., *Genie Lacayo Case*, Order of May 18, 1995 (Art. 54.3 American Convention on Human Rights), paras. 12-14 and his separate opinions in the *Castillo Páez Case. Preliminary Objections, supra* note 68 and the *Loayza Tamayo Case. Preliminary Objections, supra* note 68.

185. Dissenting opinion of Judge Cançado Trindade in *Genie Lacayo Case*. Order of May 18, 1995, *supra* note 184, para. 14.

186. *Castillo Páez Case. Preliminary Objections, supra* note 68, paras. 41-46.1 and the *Loayza Tamayo Case. Preliminary Objections, supra* note 68, paras. 41-46.1.

remedies were available according to the government and without deciding on whether such remedies were adequate or effective. The Court reversed its previous position and clearly assumed the position firmly defended by Judge Cançado Trindade. The Court has maintained this same position in more recent cases, holding that, if the State has not questioned the exhaustion of domestic remedies before the Commission, it is estopped from doing so before the Court.[187] Agreeing with the argument of Judge Cançado Trindade, we believe that the position adopted by the Court in the aforementioned cases strengthens the system of human rights protection by avoiding that the Court be converted into an appeals court of the admissibility decisions of the Commission and allowing it to concentrate more on the examination of questions of substance to fulfill more promptly and with greater security its role of interpreting and applying the Convention, determining whether violations of the Convention have occurred and their juridical consequences.[188] However, in its recent judgment in the Juan Humberto Sánchez Case, the Court changed its position, pointing out "its inherent authority to exercise its jurisdiction *in toto* in the proceeding followed before the bodies of the inter-American system for protection of human rights, without this involving review of the proceeding carried out before the Commission in a case that has been submitted to the Court."[189] The Court held that it is competent to decide whether there has been a violation of any of the rights and freedoms recognized in the Convention, to adopt the appropriate measures derived from such a situation, to rule on procedural matters that are the basis for it to hear the case and to verify compliance with all procedural norms involved in the interpretation and application of the Convention.[190]

On the other hand, whether it is a condition of admissibility of the petition or whether the competent body to hear it is the Commission, the Court has held that the State must clearly object at the first stages of the proceedings before the Commission.[191] In our opinion, these "first stages

187. *Durand and Ugarte Case, Preliminary Objections, supra* note 90, para. 38.

188. *See* the dissenting opinion of Judge Cançado Trindade, especially paras. 3 and 9 in the *Castillo Páez Case. Preliminary Objections*, *supra* note 68 and the *Loayza Tamayo Case. Preliminary Objections*, *supra* note 68.

189. *Case of Juan Humberto Sánchez, supra* note 88, para. 64.

190. *Ibid*., para. 65.

191. *See, e.g.,* I/A Court H.R. *The Mayagna (Sumo) Awas Tingni Community Case. Preliminary Objections.* Judgment of February 1, 2000. Series C No. 66, para. 55.

of the proceedings" are when the State must respond to the petition. However, *ad hoc* judge Alejandro Montiel observed in Mayagna Community Case "a lack of precision in the expression, initial stages, since none of the instruments that regulate the proceeding to be applied to a petition before the Commission define which are these initial stages."[192]

### *g) The relationship with the merits of the petition*

According to the Court, the rule of the prior exhaustion of domestic remedies in the international law of human rights also has certain implications with respect to the States, obligating them to provide effective judicial remedies to the victims of violations of human rights that must meet the requirements of due process of law and must guarantee the free and full exercise of the rights set forth in the Convention. Therefore, the Court considered that "when certain exceptions to the rule of the exhaustion of domestic remedies are invoked, such as the ineffectiveness of such remedies or the lack of due process of law, not only is it contended that the victim is under no obligation to pursue such remedies, but, indirectly, the State in question is also charged with a new violation of the obligations assumed under the Convention. Thus, the question of domestic remedies is closely tied to the merits of the case" and they must be examined together.[193] In the opinion of the Court, the right of everyone to a prompt and simple remedy or to any other effective recourse to the appropriate judge or court that protects him against acts that violate his basic rights is one of the fundamental pillars not only of the Convention but also of the rule of law in a democratic society and that this right is intimately linked to the general obligation assumed by the States under Article 1.1 of the Convention, which assigns functions of protection to the domestic legislation of the States.[194] In the Bulacio Case, the Court considered proved that, in spite of various judicial actions, there was no final judicial

192. *Ibid*., para. 3 of his separate opinion.

193. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections*, *supra* note 3, paras. 90, 91 and 93, respectively. It would appear unnecessary to note this *lapsus* in the judgment of the Court in that the rule to which reference is made requires the *exhaustion* of internal remedies and not their *non-exhaustion*. Similarly, under the Convention or any other, it is States that contract international obligations and not the *Convention*.

194. I/A Court H.R., *Castillo Páez Case*, Judgment of November 3, 1997. Series C No. 34, paras. 82-83; *Suárez Rosero Case*, *supra* note 24, para. 65; I/A Court H.R., *Blake Case*. Judgment of January 24, 1998. Series C No. 36, para. 102; I/A Court H.R., *The "White Van" Case (Paniagua Morales et al.)*. Judgment of March 8, 1998. Series C No. 37, para. 164 and *Castillo Petruzzi et al. Case*, *supra* note 25, para. 184.

decision on the set of facts investigated and observed that nobody had been punished for those acts and that the impunity continued to cause suffering to the victim's next of kin.[195] With respect to pecuniary damages, the Commission indicated that a civil suit for financial compensation for the violations suffered by the victim depended on a criminal case in which, after 12 years, there was still no judgment that satisfied the requirements of justice.[196]

This was also the position of Judge de Roux in his dissent in the Cantoral Benavides Case. He stated that the allegations about the criminal proceedings to which the victim had been subjected had a broad basis and there was practically no aspect of those proceedings that was not criticized and censured. The issue of due process was at the center of the case and the proceedings that constituted "remedies of the domestic jurisdiction" for the purposes of the case were questioned in the complaint and were defended by the State. Evidence had not been received or evaluated that would permit clarification of the contents of the judicial decisions adopted in the case and of the motions filed against them and their conformity to the Convention. In the opinion of Judge de Roux, the Court should have joined the exception of the failure to exhaust domestic remedies to the merits because, having established the non-existence of due process of law, the claimant is exempted from exhausting the remedies of the domestic jurisdiction and because under those conditions it was not possible to decide on those matters at the stage of preliminary objections.[197]

Claiming an exception to the rule of the exhaustion of domestic remedies found in Article 46.2 of the Convention implies an additional violation of the rights established in the Convention that must be examined together with the grounds of the petition. According to the Court, Article 1 of the Convention obligates the States parties not only to respect the rights and freedoms that it guarantees but also to ensure their free and full exercise, which implies removing any obstacle that might exist to the

195. *Case of Bulacio*, *supra* note 104, para. 69.C.6 and 69.D.9.

196. *Ibid*., para. 82.

197. *Cantoral Benavides Case. Preliminary Objections*, *supra* note 80, dissenting opinion of Judge de Roux Rengifo. Given these circumstances, in the opinion of the dissenting judge, the judgment of the Court in the sense that the victim made "use of all the internal remedies, including the writ of review, which is extraordinary in character" (para. 33 of the judgment) is subject to too many shadows of uncertainty."

enjoyment of rights under the Convention. A State that tolerates circumstances or conditions that prevent individuals from having recourse to adequate domestic remedies to protect their rights is, therefore, a violation of Article 1.1.[198]

The Court has justified joining consideration of this exception to the merits of the petition, pointing out that it is precisely the lack of effective domestic remedies that places the victim in a state of defenselessness and justifies international protection. In the opiniµ of the Court,

> whenever a petitioner alleges that such remedies do not exist or are illusory, the granting of such protection may be not only justified, but urgent. In those cases, not only is Article 37.3 of the Regulations of the Commission on the burden of proof applicable, but the timing of the decision on domestic remedies must also fit the purposes of the international protection system. The rules of the prior exhaustion must never lead to a halt or delay that would render international action in support of the defenseless victim ineffective. This is why Article 46.2 of the Convention sets out exceptions to the requirement of recourse to domestic remedies prior to seeking international protection, precisely in situations in which such remedies are, for a variety of reasons, ineffective. Of course, when the State interposes this objection in timely fashion it should be heard and resolved; however, the relationship between the decision regarding applicability of the rule and the need for timely international action in the absence of effective domestic remedies may frequently recommend the hearing of questions relating to that rule together with the merits, in order to prevent unnecessary delays due to preliminary objections.[199]

According to the Court's most recent jurisprudence, the active protection of the rights set forth in the Convention is marked by the duty of a State to ensure the free and full exercise of the rights of all persons subject to its jurisdiction and requires the State to adopt the necessary measures to punish human rights violations and to prevent the violation of any of those rights by its security forces or third parties acting with its acquiescence. According to the Court, the right to effective judicial protection requires that judges direct the proceedings so as to avoid undue

198. *Exception to the Exhaustion of Domestic Remedies, supra* note 163, para. 34.

199. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 3, paras. 90, 91 and 93, respectively.

delays or obstacles that lead to impunity, frustrating the due judicial protection of human rights.[200] More categorically, in recent cases the Court has held that a prolonged delay in the proceedings may be a violation, *per se*, of judicial guarantees.[201] The Court has also observed that in order to determine whether a State has violated its international obligations by virtue of acts of its judicial bodies it may have to examine the internal proceedings. Citing the European Court, it has held that the function of an international court is to determine whether all the procedures and the way in which the evidence was produced were fair and in keeping with international standards.[202]

Naturally, the arguments in favor of joining the examination of the exception of the failure to exhaust domestic remedies and the merits of the complaint are as equally valid for proceedings before the Commission as before the Court.

A measure such as joining the preliminary objection to the examination of the merits, which is not the norm and which may have negative consequences for the alleged victim, may only be justified on an exceptional basis and must be well-founded.[203] Otherwise, it would imply ignoring the *pro homine* principle, which must guide the interpretation of the Convention, and would reduce the agility and transparency of the process, thus prejudicing the individual.

### *h) The effect on the right of petition*

Since this requisite is an obstacle to an individual's access to the Commission, the Court's jurisprudence has notably contributed to restricting the scope of its application. To the extent that the Convention requires that domestic legal remedies be pursued and exhausted "in accordance with generally recognized principles of international law," the Court has held that this reference is relevant not only in determining under which situations the petitioner is excused from exhausting domestic

200. *Case of Bulacio, supra* note 104, paras. 111 and 115.

201. *Case of Hilaire, Constantine and Benjamin et al., supra* note 16, para. 145.

202. *The "Street Children" Case (Villagrán Morales et al.), supra* note 161, para. 222; *Bámaca Velásquez Case, supra* note 88, para. 188 and *Case of Juan Humberto Sánchez, supra* note 88, para. 120.

203. *See,* in this respect, the dissenting opinion of Judge Cançado Trindade in the *Genie Lacayo Case*. Order of May 18, 1995, *supra* note 184, para.13.

remedies, but also in dealing with problems of how to prove non-exhaustion, who has the burden of proof and even what should be understood as domestic remedies.[204]

The effect of this condition of admissibility –or the right of the State in question– is substantially reduced because of the exceptions provided by the Convention and the requirements that, in the opinion of the Court, the domestic legal remedies must meet. This is not, therefore, an obstacle that cannot be overcome in exercising the right of petition before the Commission. According to the Commission, when a claim has been declared inadmissible for failure to exhaust local remedies, it is always possible that the claimant may resubmit the matter to the Commission if he is able to show exhaustion.[205]

### *2. THE TIMELY PRESENTATION OF THE PETITION*

Pursuant to Article 46.1.b of the Convention, to be admitted a petition must be presented to the Commission within six months of the date on which the alleged victim has been notified of the final judgment on the local level. Article 32.1 of its Rules stipulates that the Commission shall consider petitions lodged six months from the date on which the alleged victim has been notified of the decision that exhausted local remedies. These two conditions are closely linked. Therefore, in principle, the Commission cannot examine a case that has not been previously decided by the national courts.

In our opinion, in cases in which the original petition has been broadened, either to include other victims or to allege additional violations of the Convention, these changes must also be submitted within the period of six months established by the Convention.[206] In the Cantos Case,

204. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 3, paras. 87, 86 and 89, respectively.

205. Resolution 15/89, *supra* note 58, p. 103, para. 22 of the conclusions.

206. Of course, an amplification of the original petition should not be confused with the development and broadening of the legal arguments that sustain the petition and that, like the evidentiary elements available, may be presented at any stage of the proceedings.

however, the claimant, who had presented his petition on May 29, 1996, broadened it during the months of July and October of that year and the Commission forwarded the pertinent parts of the complaint to the State without ruling on the timeliness of the later filings.[207] On March 6, 1997 Mr. Cantos reported that he had been subjected to new and disproportionate fees, for which he requested provisional measures.[208]

While this rule places a deadline to denounce acts that might be a violation of the Convention, it does not affect legal issues, which are a matter for the Convention's organs. In the Hilaire Case, the State objected that one of the legal arguments of the petitioner –the violation of Article 4.1 of the Convention– had been presented in a supplementary complaint ten months after the final decision of the national courts and after the adoption of the report on admissibility of the original complaint. The State considered that the allegation was inadmissible under Article 46.1.b of the Convention and should be considered a separate complaint requiring a separate decision on admissibility.[209] In rejecting this argument, the Court distinguished between the complaint on the facts and the later allegations on the law. The Court observed that the original complaint contained all the facts needed to make a legal determination and neither Article 46.1 nor Article 32.c of the Rules then in force required specific mention of the provisions that were considered violated.[210]

The rule only concerns the admissibility of the complaint and it should not be confused with the jurisdiction *rationae temporis* of the Convention's organs, to which reference has already been made. While the latter is a matter of when the acts material to the complaint occurred, this rule deals with the period within which to present a claim to the Commission.[211]

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207. I/A Court H.R., *Cantos Case. Preliminary Objections*. Judgment of September 7, 2001. Series C No. 85, para. 4.

208. *Ibid*., para. 6.

209. I/A Court H.R., *Hilaire Case. Preliminary Objections*. Judgment of September 1, 2001. Series C No. 80, paras. 32-33.

210. *Ibid*., paras. 40-42.

211. In the Cantoral Benavides Case Peru argued, as a preliminary objection, that the petition was presented to the Commission out of time, asserting that when it was forwarded to Peru the six-month period of the Convention had expired. However, the Court did not agree with this argument since the complaint was presented to the Commission, which was the critical point to take into consideration, within the six months established in Article 46.1.b of the Convention. *Cantoral Benavides Case. Preliminary Objections*, *supra* note 80, paras. 36.a, 37.a and 39-40.

The six-month rule is closely related to the exhaustion of local remedies because, as has already been indicated, the violation of the human rights recognized in the Convention is considered to have been committed when the final decision of the local courts has been handed down and not when the acts that gave rise to the complaint occurred. Thus, when the six-month period begins to run is determined, in principle, in relation to the exhaustion of local remedies.[212] Both exceptions are obviously mutually exclusive so that it would be contradictory to argue that the petition was inadmissible because it had been presented after six months had already elapsed and then affirm that it was inadmissible because there were remedies pending.[213] On the contrary, if the State has argued that the petition is inadmissible because there are remedies pending, it cannot later argue that they have been presented beyond the period set in Article 46.1.b of the Convention. In the Durand and Ugarte Case in which the State claimed that the petition to the Commission had been filed extemporaneously and at the same time indicated that there were domestic remedies pending, the Court observed that this argument contradicted what the State had claimed regarding the failure to exhaust domestic remedies and that, as it had pointed out on other occasions, these contradictions did not contribute in any way to the principles of procedural economy and good faith that must be govern all proceedings before the Court. In any event, the Court held that the State should have claimed the expiration of the time limit at the initial stage of the proceedings by objecting to the petition presented to the Commission.[214]

This same connection with the exhaustion of domestic remedies suggests that the rule is not absolute and that it would not be applicable in cases where, in conformity with the Convention, there is no obligation to exhaust domestic remedies and in cases of a continuous and persistent

212. To determine what has been the final decision in a particular case is not easy. In the Cantoral Benavides Case, *ad hoc* judge Vidal Ramírez was of the opinion that the request for review was not one that the victim was obligated to exhaust, since according to Peruvian law its purpose was the elimination of the mistake in the judgment that put an end to the criminal proceedings and, therefore, did not have the potential nor the effectiveness to interrupt the period of six months to present the petition to the Commission. *Ibid*., dissenting opinion of Judge Vidal Ramírez, para. 1.2 and 1.3.

213. *See, e.g.*, the arguments of Peru in the Cantoral Benavides Case, *ibid*., paras. 4 and 9. *See* also the observation of the Court that such a contradiction does not contribute to procedural economy. *Ibid*., para. 38.

214. *Durand and Ugarte Case. Preliminary Objections, supra* note 90, paras. 55-56 and 58-60.

human rights violation. In the former, the petition may be presented directly to the Commission without the need to have exhausted domestic remedies because i) there was no due process of law for the protection of the rights violated, ii) the victim had no access to those remedies or was obstructed from exhausting them or iii) there was an unwarranted delay in ruling on the remedies. According to the Court's interpretation, the victim may present his petition before exhausting local remedies or before a final decision, especially if the remedies were inadequate or ineffective to protect the right violated. In the latter case, if the violation persists, the petition could be submitted more than six months after the adoption of the definitive decision. In the Myrna Mack Case, the Commission held that the rule that establishes that the petition must be presented within a period of six months from the date of notification of the definitive decision was not applicable because there was no definitive decision and that, in view of the exception to the exhaustion of internal remedies, the petition had been presented within a reasonable period.[215] In the case of a petition that referred to the alleged human rights violations of members of the *Unión Patriótica* political party that occurred between 1985 and 1993, the Commission rejected the argument that it did not meet the technical requirements of admissibility because it did not include information that would allow it to make a decision on compliance with the six-month period. The Commission held that the petition was presented within a reasonable period after the occurrence of the presumed violations, taking into account that they were allegedly linked to a pattern of persecution against members of that political party.[216]

The facts in a case may make it difficult to determine when the six-month period ends. Near the end of 1987, the Commission began to receive petitions against Argentina denouncing as a violation of various provisions of the Convention the promulgation of the laws of Final Stop (Punto Final) and Due Obedience (Obediencia Debida), enacted on December 24, 1986 and June 8, 1987, respectively, and their application by the judiciary. At the beginning of November 1989, some of the petitioners broadened their

215. Report No. 10/96, *supra* note 141, p. 133, para. 37.

216. I/A Commission H.R., Report No. 4/97, Admissibility, Case 10.636, adopted March 5, 1996, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1996, *supra* note 137, p. 115 *et seq.*, paras. 65-67.

claims for the same violations and against the effects of Presidential Decree of Amnesty No. 1,002 of October 7, 1989 that discontinued proceedings for those who had been tried for human rights violations but who had not benefited from the other two laws. The Commission joined these petitions and held that they had been presented within a reasonable period given the particular nature of the complaint in this group of cases and taking into account that the alleged violation did not occur at the same moment for all of the petitioners since each one was affected successively in time because the effect of the laws and the decree was that the cases against those charged with crimes were thrown out, trials underway were closed and it was impossible to present or continue cases.[217]

Not being obligated to exhaust domestic remedies, however, does not apparently exempt the claimant from presenting his petition within a reasonable period. Article 32.2 of the Commission's Rules provides that, in cases in which exceptions to the requirement of the exhaustion of domestic remedies are applicable, the petition must be presented within a reasonable period, as determined by the Commission, and that, for that purpose, the Commission must consider the date on which the presumed act occurred and the circumstances of each case. Except for the aforementioned considerations, the norm gives no precise indication as to what should be considered a reasonable period nor does it indicate the elements that the Commission should take into account in making such a determination. It does not, however, appear reasonable to punish, with a finding of inadmissibility, a person who has alleged that he is a victim of a violation of a right recognized in the Convention and who has put his faith in the local legal remedies, waiving his right to denounce the State in question even before exhausting those remedies. In any event, the Commission has held that, if there has not yet been a definitive decision in the State courts –in the understanding that, in the particular case, the petitioner is not obligated to exhaust the domestic remedies– this rule would not be applicable.[218]

217. I/A Commission H.R., Report No. 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311, Argentina, adopted October 2, 1992, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1992-1993, General Secretariat of the Organization of American States, Washington, D.C., 1993, p. 41 *et seq*., paras. 1, 3, 5 and 10.

218. Report 10/96, *supra* note 141, p. 133, para. 37.

On the other hand, if the Convention allows for the possibility that a State might interfere with access to domestic legal remedies, it could be assumed that the State might also impede access to the international organs. This circumstance must also be considered in establishing when the six-month or the reasonable period to present the petition begins to run. Obviously, the State may not invoke the expiry of this period if it has impeded the petitioner from presenting his complaint in a timely fashion or if it is a question of a continuous and persistent violation.

Although Article 46 of the Convention appears to be rather clear that in order to admit a petition it is necessary that it be presented within the six-month period, the legal nature of this period, whether it is prescriptive or peremptory, has been controversial. The difference is that, while prescription must be alleged expressly by the State, the Commission on its own must expressly declare the latter by declaring inadmissible any petition that is presented beyond this period. Moreover, while acts occurring after prescription may be expressly or tacitly revalidated by the party that would benefit, nothing can revalidate a claim presented after a peremptory period.

This rule apparently has the effect of establishing a deadline in order to ensure legal certainty, after which any claim of alleged violations of human rights recognized in the Convention would be inadmissible. Article 38 of its previous Rules inclined toward this position by providing that the Commission could not examine petitions submitted more than six months after the victim was notified of the definitive decision. The same conclusion may be drawn from Article 47 of the Convention, by which the Commission must declare inadmissible any petition or communication that lacks any of the requisites of Article 46, among which is the six-month period.

The Court had the opportunity to refer to this requirement in the Neira Alegría *et al*. Case in which the State interposed as a preliminary objection the Commission's lack of competence to hear the petition since it had been presented more than six months after the date of notification of the definitive decision. The Court rejected the objection on the basis of the principle of law known as estoppel, due to the contradictions of Peru, which initially argued before the Commission that the domestic remedies had not been exhausted and later affirmed the opposite before the

Commission and then the Court.[219] The Court also observed that, as the period depended on the exhaustion of domestic remedies, the State had the responsibility to demonstrate to the Commission that the period had expired.[220]

In support of the position that it is peremptory, it has been argued that, given its context within the Convention, this period determines the competence of the Commission in this area and, therefore, it cannot be modified by the organs charged with enforcing it.[221] On the other hand, invoking the principle of *pro homine*, Mónica Pinto is inclined to consider that it is a prescriptive period, an interpretation that would allow the Commission to evaluate the situation as to why access to the international body was obstructed within that period.[222] Of course, it may be assumed that, just as the State may obstruct access to its domestic remedies, it may also block an individual's access to the Commission or to other international bodies.

The Commission has accepted petitions that have been submitted with insignificant delays, as if they had been presented within the period established by Articles 45.b. of the Convention. In a case in which the definitive decision was handed down on April 11, 1996 and the petition was presented on the following October 17 and the petitioner had personally appeared at the Judicial Office of Bogotá to affirm that his petition was prepared by September 30, 1996, the Commission indicated that the delay in receiving the document in the Secretariat was not the fault of the petitioner and that it did not consider it so significant as to not admit the case.[223]

### *3. THE ABSENCE OF LITIS PENDENCIA*

Due to the coexistence of numerous international bodies, both universal and regional, with competence in the area of human rights, it is

219. I/A Court H.R., *Neira Alegría et al. Case. Preliminary Objections*. Judgment of December 11, 1991. Series C No. 13, paras. 28-29.
220. *Ibid*., para. 30.
221. *See* the dissenting opinion of ad hoc judge Orihuela Ibérico, *ibid*., point IV, para. 4.
222. LA DENUNCIA ANTE LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, *supra* note 52, p. 76.
223. Report No. 4/97, *supra* note 216, p. 95, para. 14.

theoretically possible that a claim before more than one of them could cause a jurisdictional conflict. So as to avoid simultaneous proceedings, Article 46.1.c of the Convention provides that in order for a petition to be admitted it cannot be pending in another international proceeding for settlement. Article 33 of its Rules also establishes that the Commission shall not consider a petition if its subject matter is pending in another proceeding before an international governmental organization of which the State concerned is a member.

The purpose of this provision is primarily one of procedural economy in that it attempts to avoid the duplication of procedures and the possibility of contradictory decisions in the same case. Although a coordination of efforts appears to be desirable when it is a matter of protecting human rights, if the case has already been submitted to another international body the Commission must reject it.

The mere fact, however, that a claim has been previously submitted to another international body is not an insurmountable obstacle in order that it be examined by the Commission. In effect, Article 33.2 of its Rules establishes that the Commission is not prevented from considering such petitions when a) the procedure before the other body is limited to a general examination of human rights in the State in question and there has been no decision on the specific facts that are the subject of the petition before the Commission or it will not lead to an effective settlement and b) the petitioner is the victim or family member of the violation denounced and the petition before the other international body has been presented by a third person or a non-governmental organization without the permission of the petitioner before the Commission.

For this to be an obstacle to a petition's admissibility, the subject matter must have been previously submitted to another international proceeding for settlement. If the other international body is not an international proceeding for settlement, the Commission may admit the petition. Interpreting Article 46 of the Convention, Article 33.2.a of its Rules provides that the Commission may consider a petition when the procedure before the other international organization or body is limited to an examination of the general human rights situation in the State concerned or when said proceedings do not lead to an effective settlement of the

violation denounced. To define what is an effective settlement of the matter, it is necessary to resort to the meaning and purpose of the American Convention, which is to remedy the breach of the right and award fair compensation to the victim.[224]

A second element to consider requires being precise as to what are the other international proceedings for settlement, for which the distinction between mechanisms of judicial and non-judicial control is especially useful. An example of an international proceeding for settlement would be that found in the International Covenant on Civil and Political Rights with respect to State communications and in its Optional Protocol for individual petitions. On the other hand, the procedure for receiving and processing individual petitions under Resolution 1503 of the United Nations Economic and Social Council, which is designed to consider communications on situations "which appear to reveal a consistent pattern of gross and reliably attested violations of human rights," since it does not attempt to resolve the particular situation of the complainant and to satisfy his claim is not an international proceeding for settlement and may, therefore, coexist in parallel to the examination of the same complaint before the organs of the American Convention.

This reason for inadmissibility may only be applied when it is the same subject matter that has been submitted to another international proceeding for settlement. It may, therefore, be assumed that, even when a petition based on the same acts has been submitted to another international proceeding for settlement, this would not be a sufficient reason not to receive it if the alleged victims are not the same or if the rights that have allegedly been violated, in one or the other case, are different. An example would be if one petition denounces *cruel treatment* and the other refers to *arbitrary deprivation of freedom*, we believe that the subject matter under consideration would not be the same. In this respect, the Commission has held that this principle must be interpreted restrictively and only in relation to those cases in which the petition is limited to "the same petition concerning the same individual."[225]

224. Article 63.1 of the Convention.
225. Report No. 5/96, *supra* note 142, p. 170.

Even if in both cases the violation of the same right is alleged, there might be subtle differences in a right in the different treaties and the guarantees included in this right. For example, the right to a fair trial, which is guaranteed both by Article 8 of the American Convention and by Article 14 of the Covenant on Civil and Political Rights, has a different dimension depending on the text. While the American Convention guarantees the accused person the right to communicate freely and privately with his lawyer, the Covenant does not expressly recognize this right. On the other hand, the Covenant ensures that nobody may be tried or punished again for a crime for which he has been convicted or acquitted and the American Convention apparently only recognizes this right for the acquitted.[226] In such cases, we believe the different international levels would not be dealing with the same *subject* and that it would not be appropriate that a petition submitted to the Inter-American Commission be ruled inadmissible because the nature of the international obligations assumed by the State, in one case or the other, would be different.

Since, under the American Convention, a group or a non-governmental organization may allege the violation of the human rights of several persons, we believe that a petition should not be declared inadmissible because *one* of the victims of that violation has previously gone to an international proceeding for settlement and that body would only be able to decide on the claim of the petitioner and not on those of the rest of the group. In the Durand and Ugarte Case the State claimed a duplication of procedures, arguing that the subject matter of this case was substantially the same as that of the Neira Alegría Case. The Court rejected this argument because it held that the petitions referred to different persons.[227]

Notwithstanding the aforementioned, Article 33.2.b of its Rules provides that, in the case of the duplication of proceedings, the Commission

226. In fact, as we have argued in another place, it might be claimed that the right to be heard "with due guarantees" found in Article 8.1 of the Convention carries with it implicitly the right not to be judged more than once for the same act. Otherwise, to submit a person already convicted to a new trial for the same acts that gave rise to the initial conviction, would be a cruel and inhuman treatment in violation of the guarantee found in Article 5.2 of the Convention. *See* Héctor Faúndez Ledesma, ADMINISTRACIÓN DE JUSTICIA Y DERECHOS INTERNACIONAL DE LOS DERECHOS HUMANOS: EL DERECHO A UN JUICIO JUSTO, Universidad Central de Venezuela, Caracas, 1992, p. 343 *et seq*.

227. *Durand and Ugarte Case. Preliminary Objections, supra* note 88, paras. 37, 62.d and 65.

may receive and examine a petition in which the petitioner or a family member is the alleged victim of the violation and the petition before another international organization has been presented by a third person or a non-governmental organization without the permission of the petitioner before the Commission.

From a practical point of view, there are many international proceedings for settlement, including, *inter alia*, procedures for petitions to UNESCO, the International Labor Organization, the Committee against Torture and the Committee for the Elimination of Racial Discrimination and, notwithstanding the communication that exists at the secretariat level, there is no practical way for the Inter-American Commission to know whether a petition on the same matter is pending before another international body.[228] The only means that the Commission has to learn of this circumstance is through the claim made by the State concerned. This circumstance has led the Commission to refuse to excuse itself from admitting and investigating a case before it was certain that the case was being examined and ultimately resolved by another international proceeding for settlement.

In a case that involved thirteen persons, some of whom turned up dead and others who were not heard from, in which the State requested that the Commission refrain from examining the petition because the matter was under consideration by the Human Rights Committee of the Covenant on Civil and Political Rights, the Commission, bearing in mind the aforementioned restrictions and forwarding this communication to the petitioners, requested that the government inform it of the date on which the UN Committee had taken note of the case and whether all of the names that appeared in the initial complaint submitted to the Commission were included in the case that was being examined by the Committee. Since the State later informed the Commission that the UN Committee was only examining the case of two of the alleged victims and that the others were under consideration by the UN Working Group on Forced and Involuntary Disappearances, the Commission admitted the petition with respect to the

228. *See*, in this respect, the opinion of Antonio Cançado Trindade, in La Protección de los Derechos Humanos en América Latina y el Caribe, preliminary version, UN document A/Conf.157/PC/63/Add.3 of March 18, 1993, p. 27 *et seq.*

latter since the case of those persons was not pending under another international proceeding for settlement as the study by the UN Working Group was not a circumstance that would prevent the Commission from receiving and deciding on the acts referred to in the petition.[229] In other cases in which the government claimed that the matter was being studied by the same UN Working Group, the Commission observed that, in accordance with the relevant resolutions of the UN Human Rights Commission, especially Resolution 20(XXVI) of February 29, 1980, the Working Group does not have the mandate to decide on specific acts of a case submitted to the Commission.[230] The Inter-American Commission should not be prevented from examining a situation when the proceedings before another international body are restricted to a general examination of the human rights situation in a State and there is no decision on the specific facts that gave rise to the petition presented to the Commission or the decision would not lead to an effective settlement of the violation denounced.[231] In a case in which a State had informed that the matter had been brought before the UN Human Rights Commission for its study, the Inter-American Commission pointed out that, since the mandate of the UN Commission covered only general situations of human rights, its consideration did not prevent processing the case under study.[232]

Notwithstanding the fact that, pursuant to the Convention, the Commission is competent to examine a case in which the petition has been submitted to it in the first place, some notable cases have been withdrawn from the Commission in order that another international body decide them despite the fact that they had first been presented to the Commission.[233]

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229. Report No. 1/92, *supra* note 134, p. 41.

230. *See, e.g.*, Resolution No. 33/88, Case 9.786, Peru, adopted September 14, 1988, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1988-1989, *supra* note 58, p. 34.

231. Resolution No. 30/88, Case 9.746, Peru, adopted September 14, 1988, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1988-1989, *supra* note 58, p. 31, clause f of the considerations.

232. Report No. 10/95, Case 10.580, Ecuador, adopted September 12, 1995, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1995, *supra* note 137, p. 85, para. 2 of the considerations on admissibility.

233. *See, e.g.*, the case of Raúl Sendic Antonaccio, in the observations of the UN Human Rights Committee in Case No. 63/1979, *Violeta Setelicch v. Uruguay*, in HUMAN RIGHTS COMMITTEE: SELECTED DECISIONS UNDER THE OPTIONAL PROTOCOL. UNITED NATIONS, NY, 1985, p. 101-105.

On the other hand, this cause of inadmissibility has a conditional or relative nature and is not peremptory since the Commission may inform the petitioner that his case will be declared inadmissible unless he withdraws it from the other international body, which would permit the Commission to examine the matter as soon as it was no longer pending before the other international body. In fact, when the petitioners do not expressly withdraw it, the practice of the Commission has been to continue to study the cases that might previously have been submitted to another international proceeding for settlement.

### *4. THE ABSENCE OF RES JUDICATA*

A petition or communication may also be declared inadmissible if it is proved that it is substantially the same as one already examined by the Commission or by another international body. Thus, a petition that is substantially the reproduction of a petition already examined will be rejected. This circumstance should be studied in connection with the aforementioned rule regarding matters that are *pending* before another international proceeding for settlement. Both rules should be interpreted restrictively in favor of the petitioner and have the common purpose of avoiding duplication of proceedings or the repetition of the same claim. The difference is that, in this case, it is not a *pending* matter but rather one that has been resolved[234] and, therefore, subject to the principle of *res judicata*. As a corollary of the foregoing, while a declaration of inadmissibility of a petition that is *pending* before another international body is merely conditional, decisions having the force of *res judicata* are peremptory and definitive. Article 33 of its Rules provides that the Commission shall not consider a petition if the subject matter essentially duplicates another petition already examined and resolved by the Commission or by another international governmental body of which the State concerned is a member.

That the same matter has already been examined by the Commission or another international body must be understood in the sense that it has

234. By the Commission itself or by another international body.

been previously resolved. In a case in which the State contended that the Commission had already examined, in a general report on that country, the allegations contained in the petition, the Commission correctly decided that neither the Convention nor its Rules required that a petition be declared inadmissible because its subject had already been treated in a general report. According to the Commission, the discussion of specific facts in a general report on a country is not a *decision* on the facts, as would be a final report on an individual petition in which the same, or very similar, facts were denounced. The Commission must be able to include in its general reports information even if it is related to a case already opened or one that could be presented in the future as an individual case. Otherwise, it would be forced to exclude from its general country reports the consideration of entire segments of the human rights situation in those countries. The Commission, therefore, did not accept the argument of the State and indicated that it could not omit in its general report information that it had received of allegations of serious political persecution and violence against members of the *Unión Patriótica* political party on the grounds that it might later be filed as an individual petition on those same facts. On the other hand, the inclusion of this material does not imply a decision not to consider that situation at a later date under the system for individual petitions.[235]

What this rule attempts to avoid is the utilization of the Convention's organs as a second instance to examine a petition that has already been decided on the international plane and that does not differ from a previous one either as to the acts denounced or to the rights allegedly violated.

With respect to a petition that denounced the violation of the human rights of Fernando Mejía and his wife, the State contended that the case was a duplication of a petition that had been considered by the Commission and included in Report No. 83/90, which was published in its 1990-1991 Annual Report. The Commission pointed out that Articles 47 of the Convention and 39 of its Rules recognized the principle of *res judicata* as

235. I/A Commission H.R., Report No. 5/97, Case 11.227, Admissibility, Colombia, adopted March 12, 1997, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1996, *supra* note 15, p. 115 *et seq*., paras. 68-76.

a condition for the admissibility of a petition and that under this principle no State may be subjected to the scrutiny of the Commission for claims that have already been examined by it or are under consideration by another international human rights body. According to the State, the Commission in that Report had condemned the State for human rights violations with respect to Mr. Mejía and that, pursuant to aforementioned norms, the Commission did not have jurisdiction to examine the issues that were included in the later petition. The claimants asserted that the first petition was presented to the Commission in the name of Mr. Mejía without the knowledge of his family and that the report issued by the Commission lacked a complete exposition of the facts and the law. With respect to the disappearance and death of Mr. Mejía, the Commission found that the second petition did not offer different elements than those considered in its Report No. 83/90 and that, therefore, it considered that it lacked competence to re-evaluate the human rights violations to which Mr. Mejía had been subjected. The Commission, however, decided that this rule should be interpreted restrictively and only with regard to those cases in which the petition is limited to the same claim regarding the same individual. Its application is, therefore, not extended to alleged violations of human rights on which the Commission or other similar body has not ruled, even when these are included in a petition that contains other issues that by their nature are inadmissible. Since, in addition to the human rights violations of Mr. Mejía, the complaint included alleged violations of the rights of his wife, with regard to the latter the Commission concluded that it was not prevented from examining them and that it had competence to rule on the matter.[236]

The considerations regarding petitions that are *pending* in another international proceeding for settlement also apply in a case in which the same subject matter has been previously examined by another international body. It is important to observe that, pursuant to Article 33 of its Rules, the Commission may admit and examine a petition if the proceeding before another organization has not led to a decision on the specific acts that were the object of the petition before the Commission or if such decision

236. Report No. 5/96, *supra* note 142, pp. 167-171.

has not led to an effective settlement of the violation denounced. Moreover, in our opinion and repeating what has been said with reference to the rule regarding petitions pending before another international body, a declaration of inadmissibility for this reason would require that the right protected by the Convention be identical to that found in the other instrument providing such international procedure for settlement because, although the right invoked might nominally be the same, if there are differences to its limits or contents then the petitions differ with respect to their legal grounds and obviously cannot be resolved in the same way.

Therefore, in addition to the identity of the dispute, this reason for inadmissibility requires a final decision, either of the Commission or of the other international body, which must have resolved in its entirety and effectively the matter that has been submitted to it.

### *5. THE APPROPRIATENESS AND BASIS OF THE PETITION*

Finally, pursuant to Article 47.c of the Convention, a petition is inadmissible if the petition itself or the response of the State indicates that the petition is manifestly unfounded or obviously out of order. Article 34.b of its Rules indicates that the Commission shall declare a petition or case inadmissible when it is manifestly groundless or out of order according to the statements of the petitioner or the State.

Unlike the other causes of inadmissibility, this one implies a decision on the merits of the complaint, which is done at that stage. To declare a petition inadmissible because it is manifestly groundless is to accept that the right allegedly violated is protected by the Convention, but that there is no violation because apparently that right is not applicable in the particular case, the claim does not fall within the content of that right, the exercise of the right is subject to a legitimate restriction or limitation or simply because the complaint is frivolous. After declaring a petition admissible, the Commission must rule on the merits of the case and at that stage it could conclude that there has not been a violation of the Convention. In other words, when, in a preliminary examination of the acts that gave rise to the petition and the rights alleged to have been violated, the

Commission declares that a petition is manifestly groundless, it is ruling on the merits of the complaint. This cause of inadmissibility must, therefore, be understood in terms of the rule of procedural economy, which seeks to avoid congesting the work of the Commission with frivolous and out of order petitions but to allow it to make a preliminary examination of a complaint in order to reject those that, at first glance, are manifestly groundless.

With this in mind, after ruling that a petition met the formal requisites of admissibility, in that same report the Commission decided that the acts and decisions of the judicial and administrative authorities of Costa Rica impugned by the petitioner were not a violation of the rights recognized in the Convention.[237] Recalling that it must declare inadmissible a petition that does not contain acts that would tend to be characterized as a violation of the Convention, the Commission stated that it must determine whether the acts denounced are truly a violation of the rights protected by Articles 21 and 24 of the Convention invoked by the petitioner. After analyzing the subject matter of the petition, the Commission concluded that it did not reveal a violation of the rights to property (Article 21), to equal protection (Article 24), to judicial guarantees (Article 8) and to judicial protection (Article 25) and ruled that the case was inadmissible.[238] In another petition, the Commission concluded that the petition did not reveal acts that tended to establish a violation of the principle of legality and retroactivity or of the rights to judicial guarantees and to a defense pleaded by the petitioner.[239]

In other words, the Commission may declare inadmissible a petition if it is obvious that the acts that gave rise to the complaint are not a violation of the Convention. In the Matter of Viviana Gallardo *et al.*, the information received by the Commission, particularly the judicial decisions regarding the person responsible for killing one victim and injuring others, led to the conclusion that Costa Rica had fully punished the person responsible for

237. Resolution No. 2/92, Case 10.289, Costa Rica, adopted February 4,1992, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1991, *supra* note 134, pp. 79-80, operative paras. 1 and 2.

238. Report No. 39/96, Case 11.673, Argentina, adopted October 15, 1996, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1996, *supra* note 15, p. 92, paras. 73-74.

239. Report No. 4/97, *supra* note 216, p. 98, para. 29.

the acts denounced and, therefore, the Commission found that the petition was manifestly out of order and ruled it inadmissible pursuant to Article 48.1.c of the Convention.[240] The resolution of the Commission in a complex case of bank fraud, in which a person was found guilty of cashing checks without funds, of fraud and of furnishing false information to banking institutions in order to obtain a loan is particularly illustrative. The Commission found that a violation of the principle *non bis in idem* was not proved and that the information provided by the petitioner and the State demonstrated that the petition was manifestly groundless.[241] In the Tabacalera Boquerón Case, the Commission observed that the petition referred to a mercantile case, especially about trademarks, in which two companies argued over the right to use the name of a cigarette, a matter that had been decided by the Paraguayan courts. In such circumstances, the Commission decided that a conflict about the right to property on a trademark dispute between two businesses was not, *prima facie*, a violation of Article 21 of the Convention since there was no question of State responsibility.[242]

Without citing a particular provision, the Commission also applied this rule to a complaint presented by Efraín Ríos Montt, former dictator of Guatemala, that the State had barred his candidacy for the Presidency of the Republic. While the Commission held that it had jurisdiction to hear the case, it decided that the petition was inadmissible because the acts denounced were not a violation of the rights recognized by the Convention.[243]

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240. Resolution No.13/83, In the Matter of Viviana Gallardo *et al.*, Costa Rica, adopted June 30, 1983, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1982-1983, General Secretariat of the Organization of American States, Washington, D.C., 1983, pp. 49-53, paras. 3 and 4 of the considerations and operative para. 1.

241. Resolution No. 24/88, Case 9.706, Mexico, adopted March 23, 1988, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1987-1988, General Secretariat of the Organization of American States, Washington, D.C., 1988, p. 172.

242. Report No. 47/97,Tabacalera Boquerón, S.A., Paraguay, adopted October 18, 1997, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1997, *supra* note 11, p. 225 *et seq*., paras. 31 and 33.

243. Report No. 30/93, Case 10.804, Guatemala, adopted October 12, 1993, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 78, p. 215. The two conclusions appear contradictory since, if the allegations do not result in a violation of the Convention, the Commission lacks competence *ratione materiae.* On the other hand, if what is desired to sustain is that the allegations were not a violation of a protected right, for example, political rights under Article 23 of the Convention, this is not appropriate in the admissibility stage but at a later stage, which implies the study of the facts and the law.

In another case, the Commission found that there was no violation of the judicial guarantees set forth in Article 8 of the Convention and that, from the evidence presented by the petitioner and by the State in question, the petition was manifestly groundless.[244] It should be pointed out, however, that, in keeping with the spirit of the Convention, a petition cannot be declared inadmissible that is not manifestly unfounded but that contains plausible legal arguments, the merits of which should be evaluated at another stage of the proceedings.

This type of determination may, undoubtedly, be very subjective and could deprive the individual affected of adequate protection. The Commission's decisions in this area have not been free of this irregularity. An example would be the case that alleged the violation of political rights and the rights to association and equal protection because the claimant was not allowed to enroll as an independent candidate for Congress because the law provided that the selection of candidates for public office was exclusively for political parties. The Commission rejected the petitioner's argument that it was necessary to be affiliated with a political party in order to be a candidate since that requirement was not provided for by law and the political parties could name independent candidates for the popular election. It concluded that the petition was manifestly groundless and ruled it inadmissible since it did not show acts that were a violation of the rights protected by the Convention.[245] There is some agreement that the examination of the facts by the Commission demonstrated that the petition plausibly involves the violation of rights protected by the Convention, although a study of the merits might lead to the conclusion that there was no violation, either because those rights were the object of legitimate restrictions established in the Convention or because the acts denounced are beyond the limits of the right protected. Although in both cases there should have been an examination of the merits and ideally a decision of the Court, in my opinion the Commission was too quick to hold that the petition was inadmissible for being manifestly groundless.

244. Resolution No. 24/88, *supra* note 244, p. 172.

245. Resolution No. 26/88, Case 10.109, Argentina, adopted September 13, 1988, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1987-1988, *supra* note 241, pp. 102-111.

A declaration of inadmissibility of a petition for being manifestly groundless cannot be confused with the plausibility of the allegation made in the claim. It should, therefore, be reserved for very exceptional cases in which a majority of the Commission's members solidly believes that the petition is absolutely out of order. The declaration of inadmissibility of a petition for being out of order should also be seen in conjunction with the decision of the national judicial authorities with respect to domestic remedies and with the effect that that decision has on the exercise of the rights protected by the Convention.

## C. THE DECISION ON ADMISSIBILITY

Unlike the practice of the former European Commission on Human Rights, which made an express decision on the admissibility of all petitions before initiating their examination on the merits, the Inter-American Commission has been less careful in this aspect and has not always adopted an express decision on the admissibility of the petitions presented to it. One explanation may be that until 1996 the Commission considered the admissibility of the petition jointly with the question of the merits. This practice was challenged by the Governments of Argentina and Uruguay in a request to the Court for an advisory opinion on whether, with respect to the admissibility of a petition, it was proper, as a matter of law, that the Commission, after having declared a petition inadmissible, decided to address the question of the merits in the same report.[246] On that question, the Court responded that "from the moment that the Commission declares a matter inadmissible, it lacks the competence to rule on the merits."[247]

On the other hand, while Article 47 of the Convention provides that the Commission "shall consider" inadmissible a petition that does not fulfill the conditions that the Convention establishes, that provision does not require an express and formal decision in ruling whether the petition is

246. *Certain Attributes*, *supra* note 17, para. 3.

247. *Ibid*., para. 42. Although the Court does not object to the Commission's other attributes, especially regarding making recommendations to the OAS member States (Article 41.b of the Convention), it stated that those attributes must be exercised through acts and proceedings separate from the regime of the examination of individual petitions or denunciations and in no way may be used to refer in disguised form to the merits of one or several individual cases declared inadmissible. *Ibid*., para. 44.

admissible.[248] The Commission's Rules did not include the requisite of an express decision on the admissibility or inadmissibility of a petition as an indispensable procedural step until the adoption of Article 37.1 of the current Rules. In addition, Article 36 of the Rules provides for a working group on admissibility, which meets before each session of the Commission to study the admissibility of the petitions and make recommendations to the full Commission.

In the Velásquez Rodríguez, Godínez Cruz and Fairén Garbi and Solís Corrales Cases, the Government of Honduras interposed as a preliminary exception the fact that the Commission, by not formally admitting the cases, omitted a requirement of the Convention to examine them. The Court adopted a different standard, which has the virtue of considering when it is necessary to have an express ruling of the Commission on the admissibility of a petition and when it is understood that the Commission admits them tacitly. In the opinion of the Court,

> there is nothing in this procedure that requires an express declaration of admissibility, either at the Secretariat stage or later, when the Commission itself is involved. In requesting information from a government and processing the petition, the admissibility thereof is accepted in principle. … An express declaration by the Commission is required if a petition is to be deemed inadmissible. No such requirement is demanded for admissibility. The foregoing holds provided that a state does not raise the issue of admissibility, whereupon the Commission must make a formal statement one way or the other. That issue did not arise in the instant case. … the Commission's failure to make an express declaration on the question of the admissibility of the instant case is not a valid basis for concluding that such failure barred proper consideration by the Commission and, subsequently, by the Court.[249]

What is required, therefore, is an express decision by the Commission when it considers a petition inadmissible, an obligation that, in principle,

248. In this respect, Article 48.1.a of the Convention appears to suggest that the admissibility of a petition or communication may be accepted implicitly, pointing out that if the Commission "recognizes" such admissibility it will request information from the government of the State responsible for the alleged violation.

249. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 3, paras. 39-41, 44-46 and 42-44, respectively.

has been observed by the Commission, although it has more than once failed to use precisely that expression.[250] Imitating its former European counterpart, there has been a greater inclination in recent years on the part of the Commission to adopt a preliminary decision on admissibility, taking into account the requirements and conditions established in the Convention. The report must, in any case, be communicated both to the State in question and to the petitioners.[251] Unlike the provision governing the Article 50 Report, there is nothing in the Convention that requires that this decision be kept confidential. Since 1997 a new chapter has been added to the Commission's Annual Report that includes the reports on admissibility or inadmissibility adopted by it. Making this information public undoubtedly contributes to more transparency of the Commision's procedures and to making the standards to admit a petition more explicit.

According to Article 37.3 of its Rules, the Commission, in exceptional circumstances and after having requested additional information from the parties, may open a case but defer consideration of its admissibility until the debate and decision on the merits. Strangely, in the Villagrán Morales *et al*. Case, the Commission decided on the admissibility of the petition in its Article 50 Report,[252] which is confidential and which, as such, was only sent to the Government of Guatemala.

Article 30 of its Rules governs the procedure for the admissibility of petitions presented to the Commission. That norm indicates that a request for information to the State in question does not prejudge the decision that the Commission may later adopt on the admissibility of the petition. In addition, the State has two months after receiving that communication, which includes the pertinent parts of the claim, to present its reply with its observations on the petition's admissibility. The Executive Secretariat may evaluate requests for extensions to the period that are duly founded, but cannot grant extensions that exceed three months from the date of the initial request for information.

250. Resolution 15/89, *supra* note 58, p. 103.

251. *See, e.g.*, the report that declared inadmissible the petition presented by Salvador Jorge Blanco, *ibid*., p. 103, para. 23 of the conclusions.

252. *The "Street Children" Case (Villagrán Morales et al.), supra* note 161, paras. 29-30.

Before deciding on the admissibility of a petition, the Commission may invite the parties to present additional observations, either in writing or at a hearing. For example, in the Ivcher Bronstein Case the Commission held two hearings on admissibility but did not adopt a specific report on the matter.[253] Article 37 of its Rules provides that, once the positions of the parties have been considered, the Commission rules on the admissibility of the matter and that its reports on admissibility and inadmissibility are public and are included in the Commission's Annual Report to the OAS General Assembly. Upon the adoption of the report on admissibility, the petition is registered as a case and the proceedings on the merits are begun. In exceptional circumstances and after having requested information from the parties pursuant to Article 30 of its Rules, the Commission may open the case but defer dealing with the question of admissibility until the debate and decision on the merits. A case is opened by sending a written communication to the parties.

Although it is not expressly provided for in the Rules, a State may object to the decision to admit a petition. It must be remembered that Article 48.1.c of the Convention provides that the Commission may declare a petition inadmissible or out of order on the basis of information subsequently received. The Government of the United States objected to the decision of the Commission to admit a case on the grounds that it should have been declared inadmissible for reasons of form and substance and that the procedure that the Commission used to arrive at the decision was incorrect and should be corrected. After examining the arguments of the State, the Commission reiterated that, in accordance with the terms of its mandate to admit and examine petitions, it was clearly authorized to admit and consider petitions that allege a violation of the rights recognized in the American Declaration.[254]

253. *Ivcher Bronstein Case, supra* note 55, paras. 10, 11 and 14.
254. Report No. 31/93, *supra* note 78, p. 332 *et seq*., footnote 20.

## Chapter VII

## THE REQUEST FOR PRECAUTIONARY MEASURES

Article 25.1 of the Commission's Rules of Procedure provides that "in serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to avoid irreparable damage to persons." The purpose of this provision is to prevent an imminent violation of human rights.

The Commission has employed several terms for this remedy, including, in addition to *precautionary measures*, which is the term employed in the Rules, *special measures of protection*, *urgent provisional measures* or simply *urgent measures*.[1] Article 74 of the same Rules refers to *provisional measures* when requested of the Court, as does Article 63.2 of the Convention.

The increase in the number of cases in which these measures have been applied, the importance that they have acquired in practice and the transcendence of this remedy has led the Commission, beginning in 1996, to include a special section on precautionary measures in its Annual Reports.

### A. THE PROCEDURAL STAGE TO REQUEST THE MEASURES

Given the seriousness and the urgency of the circumstances in which these measures may be indispensable, it is not necessary that there be a case pending before the Commission in order to request them nor do they have to be requested jointly with a claim of a human rights violation. Even when the case is not pending before the Commission, precautionary measures are appropriate whenever it appears from the allegations that

1. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1996, General Secretariat of the Organization of American States, Washington, D.C., 1997, pp. 26-35.

they are necessary to avoid irreparable damage. When they are requested jointly with a claim of a human rights violation or while a claim is under consideration by the Commission, granting this measure does not imply a prejudgment on the merits of the petition on which the Commission must make a final decision.

In the Hilaire Case, in transmitting to the State the pertinent parts of the petition, the Commission invoked precautionary measures and requested that the State, pursuant to Article 29.2 of the Rules then in force, stay the execution of Mr. Hilaire until the Commission had an opportunity to examine and rule on the case.[2] In the Barrios Altos Case, as a result of the petition against Peru presented on June 30, 1995 by the National Coordinator for Human Rights for having granted an amnesty to the State agents responsible for the assassination of 15 persons and the injuries to four others in the Barrios Altos incident, the Commission initiated processing of the case on August 28, 1995. However, on July 10, before the Commission had started this process, the petitioners requested precautionary measures to stay application of Law No. 26479 and to protect Gloria Cano Legua, the lawyer of one of the survivors of the massacre of Barrios Altos in the criminal proceedings against Army General Julio Salazar Monroe and others. This petition was accepted and four days later the Commission requested the State to adopt the pertinent measures to guarantee the personal integrity and the right to life of all of the survivors, their families and the lawyers involved in the case.[3]

## B. THEIR LEGAL GROUNDS

The Commission's legal grounds to adopt this type of measure is Article 33 of the Convention, which lists it as one of the organs with competence to deal with matters relating to the fulfillment of the commitments undertaken by the States parties to the Convention, and Article 41.b of the Convention, which grants the Commission, when it

2. I/A Court H.R., *Hilaire Case. Preliminary Objections*. Judgment of September 1, 2001. Series C No. 80, para. 3.
3. I/A Court H.R., *Barrios Altos Case*. Judgment of March 14, 2001. Series C No. 75, paras. 4-5.

considers it advisable, the authority to make recommendations to the member States for the adoption of appropriate measures to further the observance of human rights. Article 18.b of the Commission's Statute transcribes the text of Article 41.b and authorizes the Commission to make recommendations to the governments of the States so that they adopt progressive measures in favor of human rights and appropriate measures to promote their respect. As an attribute of the Commission under its Statute,[4] it is applicable to all OAS member States, whether or not they are parties to the Convention.

On the other hand, Article 19.a of its Statute enables the Commission to act, pursuant to the procedures established in Articles 44 to 51 of the Convention, on the petitions and other communications submitted to it. In our opinion, the exercise of this attribute implicitly includes the power to adopt the measures that are essential to ensure the effectiveness of what is finally determined in the proceedings. If not, by failing to avoid an irreparable harm, whatever decision or recommendation that the Commission might make with respect to these petitions would be frustrated.

## C. THEIR APPROPRIATENESS

Pursuant to Article 25.1 of the Commission's Rules, "in serious and urgent cases, and whenever it is necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons." This provision replaced Article 29.1 and 29.2 of the previous Rules, which provided that the Commission could take, on its own initiative or at the petition of a party, whatever action considered necessary for the carrying out of its functions. Among those measures, in urgent cases and whenever necessary to prevent irreparable harm to persons, the Commission could request that precautionary measures be adopted in the event that the acts denounced are true. The current Rules do not condition the applicability of precautionary measures to the

4. Article 18.b of the Statute of the Commission.

truth of the allegations, but simply to their necessity, given the information available.

Closely related to the adoption of the precautionary measures authorized by the Commission's Rules, Article 63.2 of the Convention enables the Commission to request "in cases of extreme gravity, and when it is necessary to prevent irreparable harm to persons" that the Court, in a matter that has not yet been submitted to its consideration, adopt the provisional measures that it deems pertinent. This possibility is included in Article 74 of the Commission's Rules, which implies that it has been designed to be independent to that found in Article 25.1 of the Rules.

Curiously, in its order on the provisional measures requested by the Commission in the Chunimá Case, the Court mentioned Article 29 of the Rules then in force but not Article 76 (now 74), which enabled the Commission to request the Court to order provisional measures in a case that had not yet been submitted to its consideration.[5] If the reference to Article 29 is not a *lapsus* or an error of transcription, as we believe it to be, regardless of what might have been the intention of the Court, such an order suggests that the Commission does not have independent powers to adopt precautionary measures.

Precautionary measures are normally ordered on behalf of duly identifiable or named persons. However, in exceptional circumstances they have been adopted on behalf of entire communities and not perfectly identifiable persons, such as the Mayan Indigenous Communities and their members in Belize,[6] Haitians and Dominicans of Haitian origin in the Dominican Republic,[7] the residents of the La Granja, Ituango Municipality of Antioquia, Colombia,[8] the Yakye Axa Indigenous Community of Paraguay[9] and the Afro-Colombian communities in 49 hamlets in the Naya

5. I/A Court H.R., *Provisional Measures Requested by the Inter-American Commission on Human Rights with respect to Guatemala. Chunimá Case.* Order of August 1, 1991, para. 6.a.

6. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 2000, General Secretariat of the Organization of American States, Washington, D.C., 2001, Vol. 1, p. 52.

7. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1999, General Secretariat of the Organization of American States, Washington, D.C., 2000, Vol. 1, pp. 57-58.

8. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 2001, General Secretariat of the Organization of American States, Washington, D.C., 2002, Vol. 1, p. 72.

9. *Ibid*., p. 82 *et seq.*

River Basin in Buenaventura, Colombia.[10] In other cases, precautionary measures have been granted on behalf of members of the Association of Relatives of the Victims of Trujillo residing in the town of Trujillo, Colombia as well as members of the permanent support team of the Inter-Congregational Commission of Justice and Peace, based in Trujillo,[11] the Congregation of the Vicentina Mission[12] of the Committee of Solidarity with Political Prisoners, especially those belonging to the Atlántico, Santander Norte and Tolima sections in Colombia,[13] the Committee of Relatives of the Detainee-Disappeared in Honduras,[14] the Organización Feminina Popular of Barrancabermeja, Colombia,[15] leaders and staff of the Regional Corporation for the Protection of Human Rights in Magdelena Medio, headquartered in Barrancabermeja, Colombia,[16] members of the National Coalition of Haitians' Rights[17] and the SEMBRAR Corporation of Colombia.[18] These measures have also been granted to protect the life and personal integrity of labor leaders and members of several Colombian trade unions,[19] and members of the Peasants' Association of the Valle del Río Cimitarra.[20] To this list may be added precautionary measures granted on behalf of other indeterminate groups of persons, such as the students of the chemistry and human sciences schools, the Young Communists Group and the Colombian Association of University Students and the lecturers, employees and workers belonging to SINTRAUNICOL, the trade union of the Industrial University of Santander, Colombia.[21] In other cases, they

10. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 2002, General Secretariat of the Organization of American States, Washington, D.C., 2003, Vol. 1, pp. 66-67.

11. *See*, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1999, *supra* note 7, Vol. 1, p. 55.

12. *Ibid*.

13. *Ibid*., p. 56.

14. *Ibid*., pp. 60-61.

15. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 2000, *supra* note 6, Vol. 1, p. 54.

16. *Ibid*.

17. *Ibid*., pp. 60-61.

18. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 2001, *supra* note 8, Vol. 1, p. 72 *et seq*.

19. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 2000, *supra* note 6, Vol. 1, pp. 54-55.

20. *Ibid*.

21. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 2001, *supra* note 8, Vol. 1, p. 71.

have been granted to the political prisoners of Buildings 1 and 2 of the National Model Prison in Bogotá[22] and the inmates of the Urso Branco jail in Brazil.[23] In all these cases, at the moment of executing the precautionary measures, it was possible to identify the beneficiaries of the measures.

The necessary elements of the precautionary measures set forth in Article 25.1 of the Rules are: a) the need to prevent irreparable harm to persons, b) the gravity and urgency of the case and c) that the purpose of the measure is precisely to prevent the irreparable harm from taking place. In fact, these three elements are closely related.

### *1. THE NEED TO PREVENT IRREPARABLE HARM TO PERSONS*

Article 25 of the Commission's Rules refers specifically to the need to prevent irreparable harm to persons. In our opinion, this concerns the type of human right threatened and its proximity to the core of the human personality. Not every threat to every human right justifies the adoption of precautionary measures. It is important to observe that Article 30.4 of the Rules provides that "in serious or urgent cases, or when it is believed that the life or personal integrity or security of a person is in real or imminent danger, the Commission shall request the promptest reply from the State, using for this purpose the means it considers most expeditious." This provision is a useful point of reference to determine what should be understood by "irreparable harm to persons" and suggests that it should be threats to life or personal integrity, to which should probably be added the treatment of persons and threats to personal liberty. On the other hand, a violation of the right to property, to the extent that it could be rectified by some alternative, would not qualify as a threat that would lead to the adoption of precautionary measures.

22. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 2000, *supra* note 6, Vol. 1, p. 53.

23. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 2002, *supra* note 10, Vol. 1, p. 64.

Read literally, Article 25.1 of the Rules provides that the adoption of precautionary measures is not appropriate when the threat of some harm is not directed to persons, but, for example, to things. It goes without saying that this provision does not refer to harm suffered by legal entities.

In order to prevent irreparable harm to persons, the Commission has granted precautionary measures to protect not only the life, physical integrity and personal liberty of persons, but also to prevent the expulsion of a person who was legally in a State party to the Convention, guarantee the full exercise of freedom of expression, establish the whereabouts of persons kidnapped by an armed band of civilians, guarantee free access to the courts of the State, guarantee medical treatment in the case of a person with AIDS, permit the departure from the country of a person whose passport had been voided, facilitate medical assistance to a detainee, guarantee freedom of expression to a person whose control of a television chain and radio station had been taken away, avoid the expulsion from a country of persons who, although they were born in the Dominican Republic, were denied the nationality of that country, guarantee the right to receive an education, cease the deportations of foreigners without the guarantees of due process, permit the return to their country of persons arbitrarily deported as foreigners, guarantee the exercise of political rights, protect the property of indigenous communities and preserve the identity of a young girl who had been separated from her biological parents.

The Commission has also adopted precautionary measures in cases in which the harm threatened is not as great as in threats to life and physical integrity and in which the harm is not necessarily irreversible. In some cases that apparently did not involve the need to prevent irreparable harm to persons since there was no danger to their life or physical integrity, the Commission had no qualms about considering the application of precautionary measures. For example, on October 2, 1992, the Commission, concerned about the difficult legal situation of the former President of Peru, Alan García, requested of the government of that country precautionary measures to guarantee respect for judicial guarantees in the proceedings against the petitioner.[24] On the other hand, in the case of the

24. Report No. 1/95, Case 11.006, Peru, adopted February 7, 1995, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1994, General Secretariat of the Organization of American States, Washington, D.C., 1995, p. 73.

petition filed by the former President of the Dominican Republic, Salvador Jorge Blanco, which asked for the suspension of a matter that was before the judiciary of that country, the Commission, on the grounds that the courts appeared to be impartial and independent, deemed that there was no reason to grant the request for precautionary measures. The Commission held that the purpose of these measures is to prevent violations of the human rights enumerated in the Convention and that there was no evidence that those rights were being threatened and that a decision on precautionary measures could not be adopted without entering into the merits of the complaint.[25] The Commission did apply precautionary measures in the case of the then wife of the President of Peru, Alberto Fujimori, who had alleged that a decision of the National Jury of Elections that did not allow her party *Armonía – Frenpol* to participate in the elections violated the right to participate in the electoral process established in the Convention. On the basis of Article 29 of the Rules then in force, the Commission ordered precautionary measures in the sense that the State provisionally register the rejected list, giving the government 15 days to gather and forward to it all of the information on which the decision of the National Jury of Elections was based, as well as the measures adopted in compliance with the Commission's decision.[26]

The Commission's practice also shows that there have been cases that apparently do not meet the requirements of the Rules, as is suggested by the following examples: applying precautionary measures to obtain the postponement of the judicial execution of the assets of a person while a friendly settlement was being sought,[27] suspending the concession given to a private company to carry out logging in the territory of a Nicaraguan indigenous community,[28] preventing the expulsion of a Peruvian journalist who was working in Panama as the Associate Director of *La Prensa* newspaper,[29] ensuring the measures adopted in the case of Baruch Ivcher

25. Resolution No. 15/89, Case 10.208, Dominican Republic, adopted April 14, 1989, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1988-1989, *supra* note 24, p. 102, operative paras. 16-17.

26. Resolution of the Commission, adopted February 14, 1995, cited by the Andean Commission of Jurists, in INFORMATIVO ANDINO, No. 99, Lima, February 27, 1995, p. 4.

27. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1997, *supra* note 1, p. 39.

28. *Ibid*., p. 46.

29. *Ibid*., p. 46 *et seq.*

Bronstein, who had been stripped of his Peruvian nationality and as a foreigner was in danger of losing his television station,[30] and those ordered in the case of a person who alleged that the immigration authorities did not allow him to enter his country.[31] None of the rights that the measures were intended to protect in those cases (property, freedom of expression, or the right to re-enter the territory of a State of which he is a national), as important as they may be, justified the application of the precautionary measures provided for in Article 29.2 of the Rules then in force, which were designed for urgent cases where it was necessary to "prevent irreparable harm to persons." In none of these cases the harm was truly irreparable since the exercise of the right violated could be re-established or the consequences of the violation could be indemnified and the harm did not gravely affect the person.

The fact that the requirements of Article 25.1 of the Rules were ignored and that they were not urgent cases that made precautionary measures necessary in order to prevent irreparable harm to persons does not mean that the Commission lacks the authority to adopt such measures. In fact, the aforementioned cases find their basis in the Convention. We cannot ignore the general powers of the Commission, which provide it appropriate legal grounds to take the action that it considers necessary to ensure the full enjoyment of human rights. Specifically, we must remember that Article 41.b of the Convention authorizes the Commission, when it considers it advisable, to make recommendations to the governments of the States parties to adopt the appropriate measures to further the observance of human rights.

### *2. THE GRAVITY AND URGENCY OF THE CASE*

In the context of the appropriateness of precautionary measures, the gravity and urgency of a case are closely related. If a case is sufficiently grave, it requires the adoption of precautionary measures. It is also true the other way around. The urgency that gives rise to the request for the

30. *Ibid*., p. 48.

31. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1996, General Secretariat of the Organization of American States, Washington, D.C., 1997, p. 31.

application of precautionary measures is the result of the gravity of the situation.

The gravity of a case is certainly linked to the nature of the threat to the person. In the context of Article 48.2 of the Convention,[32] in the case of Mario Eduardo Firmenich, a leader of the Montonero Movement who had been denied the benefit of release by an Argentine court, the Commission ruled that the allegation that this was a *grave and urgent* case was not sustainable since the record showed that the petitioner was not being subjected to cruel, inhuman or degrading treatment, that he was being defended by lawyers and that he enjoyed the necessary judicial guarantees for his defense in the legal proceedings.[33] It did not escape the attention of the Commission that the petitioner had been accused of the most serious crimes, one of "homicide with two aggravating circumstances" and another of "doubly aggravated homicide, kidnapping and extortion."[34]

### *3. THE NEED TO PREVENT IRREPARABLE HARM*

In a situation that appears to meet all the requirements –the urgency of the case and the need to prevent irreparable harm to persons– the Commission requested that precautionary measures be taken in the case of executions ordered by special courts in Guatemala at the beginning of the 1980s. These cases obviously concerned preventing an irreparable harm to persons who were about to be deprived of their life as a result of summary trials and were obviously urgent. In later cases, the Commission has, more properly, referred to the precautionary measures adopted with respect to persons "whose lives and physical integrity are gravely threatened."[35]

Taking into account this requirement, the Commission has invoked precautionary measures in cases that involve human rights defenders,

32. This provision provides that "in serious and urgent cases, only the presentation of a petition or communication that fulfills all the formal requirements of admissibility shall be necessary in order for the Commission to conduct an investigation with the prior consent of the state in whose territory a violation has allegedly occurred."

33. Resolution No. 17/89, Case 10.037, Argentina, adopted April 13, 1989, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1994, *supra* note 24, p. 66.

34. *Ibid*., p. 60.

35. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1996, *supra* note 31, p. 26.

witnesses to acts committed by police or military bodies, lawyers who have received death threats, persons who have been threatened to be deported to their country of origin with a risk to their lives and physical integrity and persons on death row.

## D. THEIR LEGAL NATURE

Precautionary measures are, in principle, merely recommendations, clothed in the authority of the organ that orders them. At the same time, they are more than a simple request that a State refrain from certain actions that might cause irreparable harm to persons or a mere suggestion to adopt measures directed to preventing this irreparable harm.

The fact that these precautionary measures ordered by the Commission are, in principle, a mere *recommendation* must be viewed with caution because, pursuant to Article 33 of the Convention, such measures are authoritative since they come from one of the organs of the system charged with overseeing compliance of the commitments made by the States parties to the Convention. Among those commitments is that found in Article 2 of the Convention that the States adopt the legislative or other measures as may be necessary to give effect to human rights. All States are certainly bound to take measures to ensure the life and physical integrity of those persons whose rights are threatened. On the other hand, when precautionary measures are requested with respect to a case before the Commission, the obligation of a State party is to comply in good faith with the commitments undertaken under the Convention, which impose on the States the duty to implement the precautionary measures requested by the Commission so that it, as one of the organs of protection of the system, might have the opportunity to examine the allegations contained in the petition and to issue a definitive decision.

Precautionary measures ordered by the Commission are derived from its attributes under the American Convention and its Statute. It must be remembered that Article 26 of the Vienna Convention on the Law of Treaties provides that every treaty is binding on the parties and must be performed by them in good faith. Article 31 of that Convention states, *inter alia*, that a treaty must be interpreted in good faith in the light of its

object and purpose. The first paragraph of the Preamble to the American Convention reaffirms the intention of its States parties to consolidate in the Americas, "within the framework of democratic institutions, a system of personal liberty and social justice, based on respect for the essential rights of man." The attributes of the Commission and the legal nature of its requests for precautionary measures must be interpreted with that fundamental objective in mind.

In a few cases, a State has refused to comply with the precautionary measures requested by the Commission. The first incident of this type was presented in the case of five persons who had been condemned to death and who had requested the adoption of precautionary measures to stay their execution until the Commission had the opportunity to issue the respective decisions with regard to the human rights allegedly violated. The State did not initially respond to the requests for precautionary measures, but later contended that the Commission did not have jurisdiction to prevent in any way the execution of a sentence authorized by the Constitution and the laws of Trinidad and Tobago that had been handed down by a court of competent jurisdiction and declared that according to its domestic law the State was free to carry out the death sentences.[36]

Although not in the context of precautionary measures, the Court has repeatedly held that the States parties must respect in good faith the provisions of the Convention, including those that facilitate the development of the procedures before the organs of protection of the inter-American system and that ensure that their goals be met.[37] Precautionary measures, in addition to having a preventive and protective purpose within the framework of the Convention, foster the effective development of procedures under the treaty, including the timely decisions of the Commission in the cases before it. If precautionary measures were not binding, the Commission's decisions on the merits of the case might remain empty of content.

36. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights with respect to the Republic of Trinidad and Tobago, James, Briggs, Noel, Garcia and Bethel Cases*. Order of the President of May 27, 1998, para. 3 of the expository part.

37. *See, e.g*., I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights with respect to the Republic of Trinidad and Tobago, James, Briggs, Noel, Garcia and Bethel Cases.* Order of June 14, 1998, para. 6 of the considerations.

## E. THE APPROPRIATE METHODS

The Commission's Rules do not indicate what type of measures the Commission may adopt as precautionary measures. Due to their very nature, however, these measures are only temporary and they may not continue beyond the moment when the Commission adopts a final decision on the case. As a corollary, ordering such measures does not prejudge the merits of the question. Moreover, pursuant to Article 25.1 of the Rules, these measures may only be applied, in principle, to prevent irreparable harm to persons.

The fact that precautionary measures are by nature temporary and cannot be prolonged indefinitely does not exclude the possibility that they be maintained while the situation that gave rise to them persists and may, exceptionally, have a long duration. For example, in the case of the Delegated Attorney General for Human Rights of Colombia, who in September 1994 was accused by a member of the Colombian Congress of giving aid to the guerrillas, thus exposing his life and physical integrity to danger given the domestic situation in that country, the Commission adopted precautionary measures in September 1994 and lifted them, in closing the matter, in January 1998.[38]

Occasionally the measures adopted are too late and, unless it is a question of a similar situation concerning other persons, it is difficult to detect their cautionary character. For example, on December 24, 1997 the Commission requested that Mexico adopt precautionary measures in connection with the massacre on December 22 in which paramilitaries killed 45 persons, including women and children. These measures could only refer to protecting the life and physical integrity of the survivors, conducting an immediate and serious investigation into the facts, punishing those responsible and taking measures to prevent the repetition of similar events in the region.[39]

Precautionary measures may require action on the part of administrative or judicial bodies, but as a general rule the Commission has not been very explicit in pointing out the specific body within the

38. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1997, *supra* note 1, p. 42.
39. *Ibid*., p. 46.

structure of the State that is responsible for executing the measures.[40] Except for the cases in which it has requested a stay of the execution of a person on death row, the Commission has not shown much imagination in indicating what specific measures should be adopted by the State, limiting itself to requesting the adoption of urgent measures "to ensure the life, physical integrity and personal security" of the person affected. In the Cesti Hurtado Case, the State was requested, as a precautionary measure, to inform the Commission whether it had complied fully with the decision regarding the writ of habeas corpus dictated in favor of the victim and, if not, to inform it what measures it had adopted in that respect.[41] The Commission, however, categorically avoided requesting that the writ of habeas corpus accepted by the courts in favor of the presumed victim be implemented.

## F. THEIR PROCESSING

As indicated, precautionary measures do not imply a prior proceeding before the Commission nor do they have to be presented together with a petition. In the latter case, the appropriateness of precautionary measures does not depend on whether the petition meets the requirements of admissibility. The Commission has on occasion expressly stated that it may adopt such measures "without opening a specific case,"[42] a practice that certainly does not correspond to the terms of the Convention, as none of its provisions authorizes the Commission to decide whether or not to open a case that is submitted to it. It is also true that, after receiving a petition and adopting precautionary measures, the Commission may decide that a petition is inadmissible. Most frequently, the Commission requests precautionary measures in cases under consideration. For example, in the Cantos Case, after filing his petition, Mr. Cantos submitted additional

40. *See, e.g*., the measures ordered by the Commission in the Caballero Delgado and Santana Case, cited in I/A Court H.R., *Caballero Delgado and Santana Case. Preliminary Objections*. Judgment of January 21, 1991. Series C No. 17, para. 15.

41. *See* the reference made to these measures in I/A Court H.R., *Cesti Hurtado Case. Preliminary Objections*. Judgment of January 26, 1999. Series C No. 49, para. 4.

42. *See, e.g.*, the precautionary measures adopted by the Commission in the cases of Ana María López or Leonor LaRosa Bustamante, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1997, *supra* note 1, pp. 47-48.

information in which he claimed that he had been subjected to "new and disproportionate rules for fees in the domestic sphere," for which he requested the adoption of precautionary measures. The Commission requested the State to adopt measures aimed at suspending the attachment of Mr. Cantos' property.[43]

Pursuant to Article 25.4 of the Rules, the granting of precautionary measures, as well as their adoption by the State, does not prejudge the merits of the question. As has been pointed out, these are temporary measures and their only purpose is to prevent irreparable damage that might make illusory a decision of the Convention's organs.

In processing a request for precautionary measures, the Commission may request information from the interested parties on any matter related to their adoption and effect.

The Commission has, at times, been somewhat reticent to adopt precautionary measures and occasionally has waited more than two years to do so. An example is the Mayagna Community Case, which was submitted to the Commission on October 2, 1995 and on three later occasions, alleging the threat of logging operations in indigenous lands. Although the petitioners requested the adoption of precautionary measures, it was not until October 31, 1997 that the Commission requested the State to adopt the measures that were necessary to suspend the concession that had been awarded to SOLCARSA, a logging company.[44]

The Commission may order these measures at the request of a party or at its own initiative, as occurred in the Caballero Delgado and Santana Case, in which "acting on a request for urgent action from a reliable source … before receiving a formal communication from the petitioners" the Commission transmitted the petition to the government in question and requested that it adopt the measures to protect the life and personal integrity of the victims.[45]

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43. I/A Court H.R., *Cantos Case. Preliminary Objections*. Judgment of September 7, 2001. Series C No. 85, para. 6.

44. I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community Case. Preliminary Objections*. Judgment of August 31, 2001. Series C No. 44, paras. 6, 7, 16, 18 and 20.

45. *See* the reference to these measures in the *Caballero Delgado and Santana Case. Preliminary Objections*, *supra* note 40, para. 15.

There are no formal requirements for a request for precautionary measures. For example, during the on-site investigation that the Commission conducted in July 1996, the Commission acceded to a request for precautionary measures in favor of José Nava Andrade and 15 other members of the *Organización de Pueblos y Colonias*, who had been kidnapped and tortured for their alleged ties to the Popular Revolutionary Army.[46]

Once the requisites of Article 25.1 of the Rules that it be an urgent case with the necessity to prevent irreparable harm to persons have been met, without the need for any additional requirement the Commission may request that precautionary measures be adopted. It is, obviously, not necessary before their adoption to show that the domestic legal remedies have been exhausted, since this circumstance would deny the nature of the exceptional remedy and make illusory its effectiveness in grave and urgent cases.

When the Commission is not in session, its Chairman or, in his absence, one of the Vice Chairmen consults the other members through the Executive Secretariat regarding the application of precautionary measures in a specific case and defines their nature. When it is not possible to consult within a reasonable period due to circumstances, the Chairman makes the decision in the name of the Commission and so informs the members.

Precautionary measures that have been adopted in favor of certain persons may later be extended to other persons. The measures may also be reiterated when the circumstances that gave rise to the petition that made it necessary to prevent irreparable harm persist.[47] Moreover, at any time the Commission may present new information to the State relating to the requested measures.

Closely related to the adoption of precautionary measures, in grave and urgent cases or when it is believed that the life and personal integrity (the previous version of the Rules also included the health of a person) are in imminent danger, Article 30.4 of the Rules authorizes the Commission

46. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1996, *supra* note 31, p. 32.
47. *Ibid*., p. 29.

to request a prompt reply from the government with respect to the case, using the means it considers the most expeditious. Although it is not indispensable, the Commission may set a short deadline to reply, which may be seven or 21 days and which should not be confused with the period to comply with the precautionary measures, which must be done immediately. In any event, the State may request an extension to inform the Commission on the measures adopted.

Although it is not expressly stated in the Rules, the Commission may on special occasions convoke the representatives of the State and the petitioner to a hearing on the requested precautionary measures. This was the procedure that was followed in the Gustavo Gorriti Case, in which the Commission appears to have used the request for precautionary measures to reach a prompt solution on the merits of the matter, placing itself at the disposal of the parties to achieve a friendly settlement of the matter.[48] It is important, of course, to remember that these procedures have different purposes and that it does not appear that the adoption of precautionary measures, in cases in which may be necessary to prevent irreparable harm to persons, is compatible with a negotiated settlement.

It is striking that, in the Loayza Tamayo Case, which had already been referred to the Court, the Commission ordered precautionary measures to halt the unjustified deterioration of the conditions of detention of María Elena Loayza Tamayo in violation of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations Economic and Social Council.[49] While it is obvious that the case was no longer under its jurisdiction, it is not conclusive that the Commission lacked competence to adopt precautionary measures with respect to a supervening act in the case. When the measure adopted by Peru did not produce the desired results, the Commission went to the Court, this time to request that it adopt provisional measures.[50]

48. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1997, *supra* note 1, pp. 46-47.
49. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1996, *supra* note 31, p. 35.
50. *Ibid*.

## G. ITS EFFICACY

These measures have been requested of various countries of the hemisphere, such as Argentina, Brazil, Canada, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, the United States and Venezuela, but not always with the same results.[51]

The utility or degree of effectiveness of precautionary measures depends solely on their juridical nature or on the specific type of measures ordered by the Commission. It also frequently depends on the greater or lesser willingness of the State in question to comply in good faith with the obligations that it has assumed under the Convention. In addition, when these measures are implemented, it is not always easy to determine if the result obtained is due to the adoption of precautionary measures by the Commission or to a political or some other factor.

The most obvious case in which the timely action of the Commission had full effect has been that of Gustavo Gorriti who, thanks to precautionary measures, was not immediately expelled from Panama and as a result of a friendly settlement reached with the Government of Panama was able to remain in the country and have his work permit renewed as a journalist.[52] Similarly, in the case of Manickavasgam Suresh, who was about to be deported from Canada to Sri Lanka, the Commission requested that the deportation be suspended while it investigated the allegations in the complaint. The deportation was suspended and the government reported that, as suggested by the Special Rapporteur on Torture of the United Nations Human Rights Commission, Canada obtained the assurances of the authorities of Sri Lanka that Mr. Suresh would not be subjected to torture or to any other cruel, inhuman or degrading treatment.[53] In a request for precautionary measures regarding El Salvador to protect the life and personal integrity of Mauricio García Prieto Hillerman, Gloria Giralt de García Prieto and Carmen de García Prieto, El Salvador informed the

51. *Ibid*., p. 25-32 and ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1997, *supra* note 1, pp. 36-49.

52. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1997, *supra* note 1, pp. 46-47.

53. *Ibid*., p. 39.

Commission on the investigations that were being carried out to clarify the death of Mauricio García Prieto Giralt and that the Director of National Police Force and other public officials had held a meeting with the claimants to implement a security plan designed to protect the life and physical integrity of those persons.[54] In the case of the precautionary measures adopted in favor of Ana María López, who was dying of cancer in a jail in Peru, the State, without referring to the request for precautionary measures, first informed on her medical condition and, some months later, announced that she had been pardoned.[55] In the case of the precautionary measures ordered on behalf of Judge Elva Greta Minaya, who had been criminally charged by the Attorney General for having granted a writ of habeas corpus that ordered the release of a person under arrest for terrorist activities, Peru informed the Commission that it was not appropriate to obey this request for precautionary measures because the decision to charge Judge Minaya had been annulled.[56] It is even possible that the measures adopted by the State go beyond that required by the Commission. In the case of the precautionary measures requested to preserve the life, personal security and integrity of Guarionex Villeta, who had been detained by the police of the Dominican Republic, the State informed one week later that Mr. Villeta had been detained in an investigation of drug trafficking and had already been released.[57]

They were also effective when ordered in favor of Bartola Ortiz and Carlos Orellana, who had been detained as a consequence of the publication of the "Black Book of Chilean Justice" by the journalist Alejandra Matus, for whom a request was also made to ensure her personal security and integrity as well as her freedom of expression and intellectual property rights. The State informed that the charges against Carlos Orellana and Bartola Ortiz had been dismissed and that there was no order of detention against Alejandra Matus. However, as to the right of intellectual property, the Chilean government argued that this exceeded the scope of protection

54. *Ibid*., p. 42 *et seq.*
55. *Ibid*., p. 47
56. *Ibid*., p. 48
57. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1996, *supra* note 31, pp. 29-30.

provided by the Convention.[58] Thanks to precautionary measures, the Government of Chile also rescinded the order of expulsion of three foreigners who had expressed their solidarity with the Pehuenches indigenous people by participating in a demonstration organized by the Pehuenches.[59]

In the case of the precautionary measures ordered by the Commission with respect to 27 AIDS patients who required medical treatment and medicine to strengthen their immunological systems and halt the development of their disease, El Salvador informed that, *inter alia*, the authorities were reviewing the medical records of the persons affected in order to evaluate the anti-retroviral therapy and the care needed for each case and that it was looking abroad for additional funds to provide the treatment.[60]

Although the Commission did not receive a reply to its request for precautionary measures in the case of Whitley Dixon, sentenced to death in Jamaica, the petitioners informed the Commission that the State had commuted the death sentence of Mr. Dixon.[61]

In February 1999, the Commission adopted precautionary measures to protect the life and physical integrity of three persons who worked in the General Department for Integrity in the Public Service of the Office of Comptroller-General of Nicaragua who had been threatened by President Arnoldo Alemán because of their professional work. In its report, after denying the threats attributed to the President, the government stated that, in compliance with the precautionary measures, it had increased the personal protection and security of those persons and, in the case of one of them, had provided five bodyguards, protected his residence and place of work and had investigated the threats.[62] In the case of Alvaro Robelo, whose passport had been annulled and who had received a death threat on the telephone, Nicaragua forwarded the request for precautionary measures

58. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1999, *supra* note 7, Vol. 1, pp. 54-55.
59. *Ibid*.
60. *Ibid*., p. 59.
61. *Ibid*., p. 61.
62. *Ibid*., p. 63.

to its Ministry of Government so that, in consultation with the interested parties, the necessary measures be implemented.[63]

In the case of Dicia Yean and Violeta Bosica, who had been denied Dominican nationality despite having been born in the Dominican Republic and that the Constitution of that country establishes the principle of *ius soli* and who claimed to be in imminent danger of being expelled from their country of birth, the Commission required the State to adopt precautionary measures to prevent their expulsion and to prevent Violeta Bosica from being deprived of her right to attend school and receive the education provided to other children of Dominican nationality. In a hearing convened by the Commission, the State reported that the measures requested by the Commission were being implemented. In the same hearing, the parties agreed to seek a friendly settlement through the good offices of the Commission.[64]

In other cases the precautionary measures requested by the Commission have not met the same fate and have been totally ineffective, either because the State did not respond opportunely or simply did not respond or because its reply was negative. Jamaica and Mexico had the habit of not responding or doing so tardily. Trinidad and Tobago responded negatively, alleging that the petitioner was using the Commission as a super-Court.[65] In a case of a person condemned to death, in which the Commission requested the United States to stay the execution, the government of that country simply informed that it had forwarded the request to the Attorney General of the State of Missouri and, one week later, stated that the person had been executed.[66] In the case of precautionary measures in favor of two death row prisoners in the Bahamas, requesting that their execution be stayed until the Commission could act on their petitions, the State informed that it had already waited a reasonable time for the Commission's recommendations and that it was not going to postpone further the process of its domestic law. On January 5, 2000 the

63. *Ibid*.
64. *Ibid*., pp. 57-58.
65. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1996, *supra* note 31, p. 49 *et seq.*
66. *Ibid*., p. 43.

petitioners informed the Commission that the previous day one of the persons protected by the precautionary measures had committed suicide while shaving. The other person was executed on January 6, 2000.[67]

During the government of Hugo Chavez, Venezuela has been another State that has refused to comply with the precautionary measures requested by the Commission. On radio and on television, the President has repeatedly disqualified the Commission and its Executive Secretary and has shown disrespect for the decisions of the Commission. According to the Agent of Venezuela accredited before the Inter-American Commission and the Court, Venezuela was obligated to comply with the decisions of the Court but even that obligation has its limits and conditions, since such decisions must be "taken with respect to due process and they must not be incompatible with our Constitution."[68] According to the Agent, the Commission is not a court and at most is an instructor, an inter-governmental body that must respect State sovereignty.[69]

A more unfortunate option is that in which the State simply does not recognize the competence of the Commission to adopt precautionary measures. With respect to the precautionary measures that the Commission requested Peru to adopt in the case of members of a non-governmental human rights organization (APRODEH) and other persons, Peru considered inappropriate and inadmissible that the Commission accept a request for precautionary measures that duplicated the processing of personal guarantees that the petitioners were seeking domestically and asked that the petition be filed.[70] Similarly, in a case of precautionary measures requested of Guatemala with respect to two persons condemned to death, the State replied that it would not implement the measures requested by the Commission.[71]

It appears obvious that, in extreme situations, precautionary measures may prevent the State from adopting an inappropriate decision or may

67. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1999, *supra* note 7, Vol. 1, pp. 53-54.

68. Interview in El Nacional of Caracas on January 27, 2004, p. A-6.

69. *Ibid*.,

70. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1997, *supra* note 1, p. 49.

71. *See* ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1996, *supra* note 31, p. 33.

persuade it to suspend the effects of a measure the legality of which has been questioned. Precautionary measures may thus prevent an irreparable harm from occurring or, if they do not, may be grounds to request the adoption of provisional measures by the Inter-American Court.

## Chapter VIII

## THE PROCEEDINGS BEFORE THE COMMISSION

The Commission, and especially its Executive Secretariat, cannot ignore or refuse to consider a petition that fulfills the requirements of admissibility. Opening a case is not discretional, subject to the whims or arbitrariness of the Secretariat staff on the basis of political or other considerations that are not the conditions and requirements for admissibility specifically established in the Convention. The Secretariat cannot take upon itself the power to decide whether to initiate proceedings for an individual case and whether to transmit the petition to the State concerned. This practice, which is absolutely incompatible with the terms of the Convention, finds its origins in the purely political or diplomatic functions of the Commission before the Convention entered into force. Those attributes, by their very nature, conferred on the Commission a broad margin of discretion in deciding whether to process the petitions that it received. To continue such an unwarranted practice after the entry into force of the Convention, which establishes the precise manner to deal with individual petitions, in addition to interfering with the Commission's functions, would, by closing its doors, deny the petitioner the possibilities offered by the inter-American system. Such a measure would paradoxically constitute a denial of justice in violation of the Convention precisely by one of the organs charged with overseeing its application. Nothing prevents the Secretariat from making a preliminary study of the petition and, based on its analysis, requesting additional information from the petitioner and making recommendations to the Commission. Pursuant to the terms of the Convention, the Commission is the only body that may rule on the form and merits of the petitions that it receives.

When the Commission receives a petition or communication, unless there are no grounds for its jurisdiction, the next step, which is indispensable, is to rule on its admissibility. After a petition is deemed admissible, the Commission establishes the facts that gave rise to the

petition. For this stage, the Commission's Rules, although found in different chapters, provide substantially the same procedure for petitions against a State party to the Convention as those that contain complaints against OAS member States that have not ratified the Convention.

## A. EXAMINATION AND INITIAL PROCESSING OF A PETITION

Article 26 of the Commission's Rules authorizes the Executive Secretariat to examine and begin to process the petitions presented to the Commission that fulfill the requirements of the Statute and Article 28 of the Rules. If a petition does not meet those requirements, the Executive Secretary may request the petitioner or his representative to complete the petition. Should the Secretariat have any doubt as to whether the requisites have been met, it consults the Commission.

The characteristics of an adversary proceeding before the Commission are most clearly seen at this stage. The Commission does not necessarily assume a completely passive role restricted to observing the activity of the parties, but may, on the contrary, take an active part in this procedure, which may even be considered inquisitorial.

In order to examine the allegations of the petitioner, the Commission must first request information from the State concerned, transcribing the pertinent parts of the petition or communication. Although this request for information is not technically an accusation, in practice it gives the State concerned an initial opportunity to defend itself against the allegations. When the information provided by the State is imprecise or insufficient, the Commission may, on its own initiative or at the request of the petitioner, require additional information.

The fundamental purpose of this step is to allow the Commission to establish factually the acts that gave rise to the petition so that it might evaluate them in the light of the obligations undertaken by the State in ratifying the Convention. The actions of the Commission at this stage of the proceedings are oriented, therefore, to establishing the facts of the matter that has been submitted to it.

It is useful to remember that, as has already been stated, the analysis of the facts may lead the Commission to conclude that the complaint lacks merit or that it should never have been admitted because grounds for its inadmissibility only became apparent at this stage. A petition, therefore, even at this stage of the proceedings may be declared inadmissible.

After the adoption of a report on admissibility, Article 37.2 of the Rules requires that the petition be registered as a case and that proceedings on the merits be initiated. In exceptional circumstances, the Commission may open a case but defer the question of admissibility until the debate and decision on the merits. Once this decision has been made, Article 38 of its Rules provides that the Commission, upon admitting the case, set a period of two months for the petitioners to present any additional observations on the merits. The pertinent parts of such observations are transmitted to the State concerned so that it might in turn present its comments within a like period.

## B. THE PROCEDURE BEFORE THE COMMISSION

It is the presentation of a petition to the Commission that unquestionably initiates the Convention's system of protection. The proceedings, which may be characterized as adversary, begin at that moment and turn on the content of the petition. In principle, that content –the acts denounced and the alleged victims– should remain unchanged for reasons of legal certainty. The Commission may in exceptional cases allow the original petition to be broadened provided that the rights of the defendants are not affected and that the periods established in the Convention for a petition to be admissible are complied with.[1]

Article 29 of its Rules authorizes the Commission, acting initially through its Executive Secretariat, to receive and to begin processing the petitions that are presented to it, as follows: a) receive and register the petition, record the date it is received and acknowledge receipt to the petitioner, b) if the petition does not meet the requisites of the Rules, the

1. *See, e.g.,* the request of the petitioners in the Castillo Petruzzi et al. Case that the complaint be broadened to include a victim who had not been listed in the original complaint, which the Commission granted. I/A Court H.R., *Castillo Petruzzi et al. Case. Preliminary Objections*. Judgment of September 4, 1998. Series C No. 41, para. 6.

petitioner or the representative may be requested to complete it in accordance with Article 26.2 of the Rules, c) if the petition presents different facts or refers to more than one person or to violations not connected in time or place, it may be divided and processed separately, provided that the requisites of Article 29 are met, d) if two or more petitions refer to similar fact situations, involve the same persons or reveal the same pattern of conduct, the Commission may join them and process them as a single case and e) in cases c) and d), the petitioners are notified in writing. In serious or urgent cases, the Executive Secretariat must immediately notify the Commission.

Although the main purpose of this stage is to establish the facts in order to arrive at some sort of conclusion and to allow the Commission to make the appropriate recommendations, incidental questions may be presented, especially those relating to the joinder of petitions that refer to the same matter.

### *1. SEPARATION OF THE CASES*

Article 29.1.c of the Rules provides for the possibility that the same petition may refer to distinct acts concerning more than one person and constituting several violations of the human rights set forth in the Convention, without there being any connection in time or place. Under that provision, if the petitions meet the requisites of admissibility applicable in each case, they are dealt with separately. This does not occur very often in the practice of the Commission, as we are unaware of any case in which the Commission has separated petitions.

This provision, however, should not be interpreted as requiring that the acts denounced, the alleged victims and violations in a petition must strictly coincide in time and place in order to be treated as a single case. In a case in which the State alleged "the aggregation of numerous individual communications not necessarily with any connection," the Commission recalled that it had processed individual cases involving numerous victims alleging human rights violations that had occurred at different times and places provided that it had been argued that the alleged violations had their origin in the same treatment. The Commission held that it "may process as a single case the claims of various victims alleging violations

arising out of the application of legislation or a pattern or practice to each of the victims without regard to the time and place in which the victims received this similar treatment." The Commission not only has refused to separate these cases but has also joined cases that have the same characteristics into a single case. Since the petitioners had alleged acts that tended to demonstrate that the victims had suffered violations as part of a pattern and practice of political persecution against members of the *Unión Patriótica* political party, the Commission ruled that there existed "the necessary connection between the numerous individuals and facts identified to allow them to be processed together."[2] According to the Commission, nothing in the Convention, its Statute or its Rules limits the number of claims or victims that may be considered in this manner.[3]

### *2. ACCUMULATION OF CASES*

For reasons of procedural economy and to facilitate the processing of individual petitions, Article 29.1.d of the Rules also provides for the inverse of the separation of cases by establishing that two petitions that refer to the same acts and individuals may joined and processed as a single case. It is obvious that the same procedure is applicable when there are more than two cases that deal with the same acts and individuals. The Commission has applied this rule with great flexibility, even in situations in which there are different petitioners (or their complaints have referred to different persons) but the allegations refer substantially to the same matter[4] or the petitions have some connection.[5] Petitions that are incompatible, *per se*, may obviously not be accumulated. This rule,

2. I/A Commission H.R., Report No. 5/97, Case 11.227, Admissibility, Colombia, adopted March 12, 1997, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1996, General Secretariat of the Organization of American States, Washington, D.C., 1997, pp. 108-109, paras. 39-42.

3. *Ibid*., p. 110, para. 48.

4. I/A Commission H.R., Reports on Cases 9.777 and 9.718, Argentina, adopted March 31, 1988, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1987-1988, General Secretariat of the Organization of American States, Washington, D.C., 1988, p. 25 *et seq*., paras. 2-5.

5. By way of example, a later case regarding the violation of judicial guarantees and procedural irregularities that allegedly occurred during the investigatory phase was joined to the complaint filed with the Commission on the massacre at El Amparo and registered as Case 10.602. *See* the communications sent to the complainants of the second petition by the Executive Secretariat of the Commission, dated September 4, 1990 and June 5, 1992.

however, has not been applied systematically and there have been occasions in which the Commission has informed the authors of a later petition that, to be included as co-petitioners in the case, it was necessary to have the consent or authorization of the original petitioners.[6]

The possibility of accumulating petitions that refer to the same acts is a rule of procedural economy that has the advantage of accelerating the procedure and of assuring that the petitions receive the same treatment. Their accumulation in a single case may also affect the merits of the matter and may suggest the existence of a systematic and generalized practice of human rights violations.

The rules on the accumulation of cases had a particular application in a series of complaints against Argentina regarding Law 23,492 of December 24, 1986, known as the Law of Full Stop (*Ley de Punto Final*), Law 23,521 of June 8, 1987, known as the Law of Due Obedience, and the Presidential Decree of Pardon of October 7, 1989, which barred the criminal prosecution of human rights violations committed during the military dictatorship. Some petitioners challenged only one of the laws, while others objected to both and there were those who argued that both laws and the Presidential Decree were incompatible with the Convention. The Commission decided that, in the six petitions that it had before it, the fundamental grievance was the same and the dispute was not on the facts but whether a type of law or decree was compatible with the Convention and it, therefore, decided to join the petitions and consider them as a single case.[7] A very similar situation was presented in the case of eight petitions against Uruguay, in which the legal effects of Law No. 15,848 and its application by the judiciary were claimed to be incompatible with the Convention, a case in which the Commission decided that the issue was basically the same and, therefore, joined them as a single case.[8]

6. *See, e.g.*, the processing that the Secretariat gave to the second group of complainants in the Castillo Petruzzi *et al.* Case, in spite of the fact that the second complaint included the name of a victim not listed in the original complaint. *Castillo Petruzzi et al. Case. Preliminary Objections. supra* note 1, para. 4.

7. I/A Commission H.R., Report No. 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311, Argentina, adopted October 2, 1992, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1992-1993, General Secretariat of the Organization of American States, Washington, D.C., 1993, p. 41 paras. 4-5.

8. I/A Commission H.R., Report No. 29/92, Cases 10.029, 10.036, 10.145, 10.305 and 10.372-10.375, Uruguay, adopted October 2, 1992, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1992-1993, *ibid.*, p. 154, para. 14.

In the Barrios Altos Case, which was initially brought by the National Human Rights Coordinator, then by the Pro-Human Rights Association, the Peruvian Commission of Human Rights and the Ecumenical Foundation for Development and Peace, the Commission decided to join the latter claims to the original complaint.[9]

The Commission did not apply these criteria in the Neira Alegría *et al.* and Durand and Ugarte Cases, both of which were based on acts that occurred in the *El Frontón* prison, and decided that it was not necessary to join the petitions. The State interposed a preliminary objection to the decision in the latter case, claiming that the Commission had not followed its own Rules. In its defense, the Commission contended that if the State had an interest in the joinder of the cases, it should have so contended in the proceedings before the Commission. The Court rejected the preliminary objection, pointing out that Article 40.2 of the Rules of the Commission then in force alluded to a duality of facts and of persons and that, while both cases might have involved the same acts, they differed with respect to the alleged victims.[10] It is true that, in contrast to the current Rules, the former version required the joinder of cases. Curiously, the Commission did not argue that what was being impugned was the way it worked nor did the Court examine its competence to oversee the interpretation and application of the Commission's internal rules, particularly on an aspect that, in principle, would not create rights for the parties involved.

In El Amparo Case involving the massacre of fishermen in the town of that name, the Commission joined to the original claim a later complaint on the compatibility of Article 54 of the Code of Military Justice of Venezuela, which had been applied in this case, with the Convention. The petitioners, however, alleged that it dealt with different acts –the first of which was a *de facto* violation of the Convention and the second a *de jure* violation– and unsuccessfully opposed the joinder of the cases.[11]

9. I/A Court H.R., *Barrios Altos Case*. Judgment of March 14, 2001. Series C No. 75, paras. 4, 7 and 9-10.

10. I/A Court H.R., *Durand and Ugarte Case. Preliminary Objections*, Judgment of May 28, 1999. Series C No. 50, paras. 41-44.

11. *See* the communications of September 4, 1990 and June 5, 1992 in Case 10.602, *supra* note 5.

The Commission has also had the opportunity to apply this rule –while not invoking it expressly– under its Statute in cases of systematic and massive violations of human rights in countries that, when the Commission adopted its decision, had not ratified the Convention. In one case the Commission noted that it had received a significant number of complaints that claimed that numerous Chilean citizens had been expelled from Chile and that the government had denied their re-entry pursuant to special provisions decreed under the state of emergency and, therefore, it issued one resolution with respect to all of the petitions.[12]

## C. THE REQUEST FOR INFORMATION AND THE ADVERSARY STAGE

The initial processing of the petitions that are received by the Commission is the responsibility of its Secretariat. Article 30 of its Rules authorizes the Commission, through its Executive Secretariat, to process the petitions that meet the requisites set forth in Article 28 of the Rules. The Secretariat transmits the pertinent parts of the petition to the State concerned. If the petitioner has so requested, his identity is kept confidential, but it is obvious that it must be divulged at some point during the proceedings.

The request for information does not prejudge a decision on admissibility that the Commission must later adopt. Under Article 30.3 of the Rules, the State must respond within a period of two months from the date that the request was transmitted. The Executive Secretariat is authorized to evaluate requests for an extension of that period that are duly founded, but not for more than three months from the date of the first request. With respect to the nature of this request for information and notwithstanding the suggestion that the procedure before the Commission is adversary, it should be noted that Article 48.1.a of the Convention does not refer to this processing as a mere forwarding to answer the complaint but rather characterizes it as a request for information by the Commission,

12. I/A Commission H.R., Resolution No. 24/82, Exiles, Chile, adopted March 8, 1962, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1981-1982, General Secretariat of the Organization of American States, Washington, D.C., 1982, pp. 62-65.

with which the States have the duty to cooperate. In its reports, the Commission has repeatedly emphasized the obligation of the States parties to the Convention to furnish the information that is requested of them within a reasonable period, as established by Article 48, or within the periods prescribed by the Commission.[13]

It is paradoxical that, notwithstanding the emphasis that the Convention places on the right of every person to a hearing within a reasonable time,[14] which is one of the commitments of the States that the Commission is charged with overseeing, the Rules do not set a maximum period for the Secretariat to carry out this function. As a practical matter, this simple processing may take a rather long time. For example, in the Castillo Petruzzi *et al.* Case the petition was submitted to the Commission on January 28, 1994 and transmitted to the State six months later, on June 29.[15] In the Cantoral Benavides Case the petition was received by fax on April 18, 1994 and the original two days later, but the pertinent parts of the complaint were not sent to the State until four months later, August 24.[16]

As to the moment in which the State concerned must furnish the requested information, Article 48 of the Convention establishes that it must be provided within a reasonable period set by the Commission after considering the circumstances of each case. This provision has not prevented the Commission from indicating a specific period in its Rules. In effect, Article 30.3 of the Rules grants the State a period of two months from the date that the pertinent parts of the complaint were transmitted to submit its response. The Executive Secretariat may evaluate requests for extensions of this period that are duly founded, but may not give extensions

13. *See, e.g.*, I/A Commission H.R., Report No. 9/92, Case 10.256, El Salvador, adopted February 4, 1992, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1991, General Secretariat of the Organization of American States, Washington, D.C., 1992, p. 123, para. 9 of the considerations; Report No. 9/93, Case 10.433, Peru, adopted March 12, 1993, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1992-1993, *supra* note 7, p. 115, paras. 10-11 of the considerations and Report No. 11/94, Case 11.128, Haiti, adopted February 1, 1994, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, General Secretariat of the Organization of American States, Washington, D.C., 1994, p. 245, para. 9.

14. Article 8.1 of the Convention.

15. *Castillo Petruzzi et al. Case. Preliminary Objections*, *supra* note 1, para. 3.

16. I/A Court H.R., *Cantoral Benavides Case. Preliminary Objections*. Judgment of September 3, 1998. Series C No. 40, para. 3.

that exceed three months from the date of the initial request for information. This provision implies a substantial change with respect to the period found in a previous version of the Rules of Procedure, Article 34.5 of which granted the State concerned 90 days from the date of the sending of the request by the Commission to furnish the requested information and allowed it to request an extension to submit the requested information. While the extension could not be for more than 30 days, in reality up to three extensions for the same period could be requested (or several for a shorter period), since the only condition was that, taken together, the extensions granted did not exceed 180 days from the date of the sending of the initial communication to the State concerned.[17] For example, in the Cantos Case, after notification of the complaint on June 13, 1996, the State requested several extensions, which were granted by the Commission. An answer was received on December 23, more than six months after the notification.[18] As a practical matter, the Commission granted these extensions almost automatically "in order not to restrict the accused State's right to reply."[19] The current Rules of Procedure have reduced this period to a maximum of three months.

In serious or urgent cases or when the life, personal integrity or health of an individual is in real or imminent danger, the Commission may request that the State respond as soon as possible, using the means that it considers the most expeditious.[20]

After the response of the State concerned is received but before deciding on the admissibility of the petition, the Commission may invite the parties to present additional observations, either in writing or at a hearing, pursuant to Chapter VI of its Rules. When the observations have been received or the period to receive them has elapsed, the Commission ascertains whether there still exists the grounds of the petition. If it considers that they do not exist, it closes the file.

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17. Article 34.6 of the former Rules of the Commission.

18. I/A Court H.R., *Cantos Case. Preliminary Objections*. Judgment of September 7, 2001. Series C No. 85, para. 5.

19. I/A Commission H.R., Resolution No. 14/85, Case 6.724, El Salvador, adopted March 5, 1985, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1984-1985, General Secretariat of the Organization of American States, Washington, D.C., 1985, p. 80, para. B of the considerations.

20. Article 30.4 of the Rules of the Commission.

The pertinent parts of any additional information or documentation received from the petitioner are sent to the State concerned, which has 30 days to provide its final observations. Although, in principle, the complaint and the response of the State should be sufficient at the written stage to establish the positions of the parties, it is not infrequent that the petitioners present additional information, sometimes on more than one occasion. The petitioners in the Hilaire Case sent their observations to the response of the State, which the Commission transmitted to the State with a request for a reply. The petitioners later presented a supplementary submission in which they furnished new evidence, as well as case law and other information on the admissibility of the petition, and the relief sought on behalf of Mr. Hilaire. This communication was transmitted to the State for its observations, which, in turn, were sent to the petitioners for their comments. The petitioners' response was transmitted to the State with a request for a reply. The State did not respond to this request. Nonetheless, the petitioners presented a second supplementary submission, which was forwarded to the State with a request for a response. Before this response was received, a third supplementary submission with appendices and later other submissions were delivered to the Commission, the pertinent parts of which were sent to the State with a request for observations, which were not forthcoming.[21]

The presentation of additional information is authorized by Article 30.5 of its Rules, which enables the Commission to invite the parties to present additional observations on the question of admissibility. Pursuant to Article 39.1 of its Rules, the Commission, after opening the case, prescribes a period of two months for the petitioners to present their additional observations on the merits of the complaint, the pertinent parts of which are transmitted to the State so that it might submit its observations within two months. Before deciding on the merits, the Commission may again invite the parties to submit additional written observations (Article 38.2 of the Rules). The purpose of hearings on petitions or cases is to receive the oral and written submissions of the parties regarding new facts or additional information that has been produced during the proceedings

21. I/A Court H.R., *Hilaire Case. Preliminary Objections*. Judgment of September 1, 2001. Series C No. 80, paras. 5-6 and 8-9.

(Article 62.1 of the Rules). It is obvious that this never-ending exchange of briefs causes unnecessary delays and may place in doubt the probity and good faith that the parties must observe. The Commission observed in one case that the petitioner had "continually introduced alleged 'new facts,' adding extemporaneous arguments and complaints that have drawn out the case beyond what is reasonable, and have delayed a final decision," circumstances that led the Commission to point out that "it concerns the probity and good faith that the parties to the proceedings before the Commission must observe … (which) the Commission did not say so earlier so that it could not be said that the right to self-defense had been abridged."[22]

If the State in question has not co-operated, the file is submitted to the Commission's consideration at its first meeting after the expiry of the period to submit information. Otherwise, the file is submitted when the period for the petitioner to present observations on the information furnished by the State or that for the State to present its final observations has elapsed, without having received either one.

While the Commission has a very passive role at this stage, the information obtained from the parties in this manner permits an initial determination and evaluation of the acts denounced. This confrontation between the petitioner and the State allows the Commission to determine whether the grounds that gave rise to the petition still exist. In practice, the intervention of the petitioner at this stage of the proceedings may be decisive either through the evidence presented or the orientation given to the proceedings by a request for certain actions. Of course, a lack of co-operation on the part of the State or the vagueness of the information that it furnishes may lead the Commission to play a more active role.

Under the terms of the Convention, when the requested information is received or the period has elapsed without having received the information, the Commission must ascertain whether the grounds that gave rise to the petition still exist. If they do not, the Commission closes the file.[23] On this point, what is required of the Commission appears to be a second examination of the admissibility of the petition in the light of the

22. I/A Commission H.R., Report No. 2/92, Case 10.289, Costa Rica, adopted October 3, 1984, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1991, *supra* note 13, p. 76, para. 14.b.

23. Article 48.1.b of the Convention.

additional information. This provision must be interpreted in relation to Article 48.1.c of the Convention, which states that the Commission may declare a petition inadmissible or out of order on the basis of later information or evidence and to Articles 31 and 30.6 of its Rules, which require the Commission to decide whether the domestic legal remedies have been exhausted and, at the same time, to examine other materials related to the admissibility or clear inadmissibility of the petition or whether there are grounds that would require closing the file.

The new Rules of Procedure make a distinction between the stages of admissibility and merits. Pursuant to Article 37.2, a petition is registered as a case and the procedure on the merits is opened after the adoption of the report on admissibility. Article 38.1 of the Rules provides that, upon opening a case, the Commission prescribes a period of two months for the petitioners to present additional observations on the merits. The pertinent parts of such observations are transmitted to the State in question so that it may present its comments within two months.

## D. THE ORAL STAGE: HEARINGS BEFORE THE COMMISSION

When the above steps have been completed, Article 38.3 of its Rules authorizes the Commission to convoke the parties to a hearing if it deems it necessary in order to advance its consideration of the case. Article 59 of the Rules provides that the hearing may be held at the Commission's initiative or at the request of an interested party. The decision to convoke a hearing is made by the Commission's Chairman, at the proposal of the Executive Secretary. In our opinion, because of the jurisdictional nature of the proceedings and the object of these hearings, the decision to convene hearings should not be discretional and a denial should be duly founded.

The purpose of the hearings may be very broad. Article 60 of the Rules provides that a hearing may be held to receive information from the parties with respect to a petition or a case being considered by the Commission, for follow-up to its recommendations, precautionary measures, or general or specific information related to human rights in one or more of the OAS member States. In addition, Article 62.1 of the

Rules states that the purpose of hearings on petitions or cases is to receive oral or written testimony from the parties on new facts and information additional to that which has been produced during the proceedings. The information may refer to the following matters, *inter alia*: admissibility, initiation or development of the friendly settlement procedure, verification of the facts, the merits, follow-up on recommendations or any other question concerning the processing of the petition or case. The purpose of these hearings, therefore, may not only be to hear arguments –on the facts or on the law– that the parties present, but also to receive testimony or evidence of any type. During the hearings, the Commission may ask the State in question for any pertinent information and receive, if so requested, the written or oral testimony offered by the parties.

Article 62.2 of the Rules states that requests for a hearing must be submitted in writing at least 40 days prior to the next session of the Commission and must indicate the purpose of the hearing and the names of the representatives of the party requesting the hearing.

If the Commission accepts the request or decides to hold the hearing on its own initiative, it must convoke the parties. If a duly notified party does not appear, the Commission holds the hearing anyway. The purpose of these hearings is to hear both parties in the case. It is not proper, nor is it provided for in the Rules, that the petitioners request that their complaint be heard separately in the absence of the State. Otherwise, the judicial guarantees that the Convention imposes on the States would not apply to the Commission or the Court and the principle of equality of the parties would not be respected. A State, obviously, cannot request that it be heard separately in a hearing that the petitioners cannot attend or before the petitioners have been heard. It is important to remember that the hearing –except in the case of general hearings– is part of the processing of a petition that allows the parties to present their arguments on the facts and on the law and to offer the evidence that they consider relevant. As part of this oral procedure, the State is expected to respond to the arguments of the petitioners and present its evidence. However, a State cannot hope to invert the procedure and appear first, in a closed hearing, in the absence of those who have denounced the State for human rights violations. Curiously, this is precisely the attitude that the Agent of Venezuela assumed in some

recent cases, asking to be heard before the petitioners, without them being present.[24] If a State has refused to participate in a hearing, this fact may, *per se*, be considered a violation of the obligations that the State assumed under the Convention, which imposes on it the duty to collaborate with the organs of protection of the system. Nothing, however, prohibits the parties, before or after the hearing, from presenting a brief with their allegations and observations. What is not permitted is that a State distort the proceedings, using the hearing that has been requested by the petitioners and granted for the presentation of their case, by requiring that it be heard first, in the absence of the petitioners.

The Commission must take the necessary measures to protect the identity of the experts and witnesses, if it considers such protection necessary. The Executive Secretariat informs the parties of the date, place and time of the hearing, giving at least one month's notice. This period may be shorter if the parties give their express consent. Under Article 61 of the Rules, the State in question must grant the pertinent guarantees for individuals who attend a hearing or who during the hearing present the Commission with information, testimony or proof of any nature. The State in question cannot prosecute witnesses or experts, nor take reprisals against them or their families for their testimony or opinions before the Commission.

During the hearings, the parties may present any document, testimony, report of experts or evidence. At the request of a party or on its own initiative, the Commission may receive the testimony of witnesses or experts. The parties are given a reasonable period to present their observations on the documentary evidence submitted during the hearings. The party that proposes witnesses or experts for a hearing must indicate such in its request, identify them and indicate the object of their testimony or expertise. In deciding on the request for a hearing, the Commission determines whether to receive the witness or expert testimony. The offer of testimony and expertise by one of the parties is notified to the other party but, in special circumstances, at the discretion of the Commission, in order to safeguard the evidence it may receive testimony in a hearing

24. This occurred, for example, in the hearings convened in the *Globovision* Case and in the case of General Carlos Alfonso Martínez of February 4, 2004.

without prior notification to the other party, while taking the necessary measures to assure procedural equality between the parties. One witness is heard at a time, while the others remain outside the hearing room. The witnesses may not read their testimony before the Commission. Before their testimony, the witnesses and experts must identify themselves and take an oath or swear to tell the truth. At the express request of the interested person, the Commission may keep confidential the identity of the witness or expert, when it is necessary for his protection or that of other persons.

Article 64 of the Rules also permits hearings of a general interest. In such a case, persons interested in presenting testimony or information on the human rights situation in one or more States or on matters of general interest must request a hearing through the Executive Secretariat, with the proper notice before the respective meeting of the Commission. The request must indicate the object of their appearance, a summary of the materials to be presented, the approximate time considered necessary for such purposes and names of the participants.

In order to take better advantage of its time and to hold as many hearings as possible, Article 65 of the Rules authorizes the Chairman to form working groups to hold hearings. The general rule is that the hearings are private, unless the Commission decides otherwise, a matter that has not progressed since the previous version of the Rules, which stated it expressly. On the other hand, hearings convoked with the specific purpose of examining a petition are held in the presence of the parties or their representatives. Although the participation of both parties in the hearing was the general rule, the prior version of the Rules allowed for an exception in the event that it was so requested by one of the parties and the Commission considered that there were reasons to make the hearing confidential.[25]

While one might think otherwise, given the adage that it is not enough to do justice but also that justice must be seen to be done –and unlike the hearings at the Court– those of the Commission are not public. Under Article 66 of the Rules, attendance at the hearings is limited to the

25. Article 67.3 of the former Rules of the Commission.

representatives of the parties, members of the Commission, Secretariat staff and the recording secretaries. The decision to admit other persons is for the Commission exclusively, which must inform, orally or in writing, the parties before the hearings begin.

Summary minutes are taken at each hearing and contain the date and hour that it is held, the names of the participants, the decisions taken and the commitments assumed by the parties. The documents presented by the parties at the hearing are annexed to the minutes, which are internal working documents of the Commission. If a party so requests, the Commission provides it with a copy unless, in its judgment, the contents might put individuals at risk. The Commission records the testimony presented during the hearings and makes the recordings available to the parties, if they so request.

The hearing is simply a resource that the Commission has to collect information and should not be seen as a procedural stage or an unavoidable step in the process. In the first cases against Honduras, in which the State filed a preliminary objection based on the fact that the Commission had not convened a hearing, which it claimed was obligatory, the Court held that a hearing was required only when the Commission found it necessary to complete the information presented by the parties or when the parties expressly requested it.[26]

## E. VERIFYING THE FACTS

The Convention provides that, in order to verify the facts, the Commission, with the knowledge of the parties, examines the matter presented in the petition or communication.[27] The Convention does not contemplate a distinct and separate stage of proof in the adversary proceedings, as has already been discussed. In principle, this is the moment to offer evidence or to request that evidence be sought.

26. I/A Court H.R., *Velásquez Rodríguez Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 53 and *Godínez Cruz Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 3, para. 56.

27. Article 48.1.d of the Convention.

On the other hand, while this is an eminently inquisitorial system in which the Commission has the greater role, there is a lack of sufficiently specific rules on the kind of evidence the parties may present, its formalities, the weighing of the evidence and which party has the burden of proof. All of these aspects have been taken up, with great flexibility, by the Commission's Rules and by its practice, in addition to certain standards that have been provided by the jurisprudence of the Court.

Pursuant to Article 67 of the Rules, the party that proposes the production of evidence at a hearing bears the expenses involved. In practice, this rule is the same for the evidence that is proposed or produced at the written stage.

### *1. BURDEN OF PROOF*

It is interesting to observe that, more than regulating the burden of proof between the parties, both the Convention and its Rules emphasize the Commission's function as the organ charged with verifying the acts denounced.[28] Nevertheless, Article 39 of the Rules refers, albeit tangentially, to the *onus probandi*, assigning a greater burden to the State in question. That provision states that, if in the maximum period fixed by the Commission, the State does not provide the requested information and as long as other evidence would not lead to a different conclusion, the acts denounced in the petition, the pertinent parts of which had been transmitted to the State, will be presumed to be true.[29]

In view of the obligation of the accused State under Article 48.1.d of the Convention to furnish the Commission with the necessary facilities to conduct an investigation, this presumption appears to be fair and reasonable. Given the broad investigatory powers that the Commission has under the Convention and that, in certain circumstances, allow the facts to be verified without the cooperation of the State in question, this

28. *See*, in this respect, Article 48.1.d of the Convention and Articles 34.5, 43-44 and 58 of the Rules of the Commission.

29. This type of presumption is not the same as that examined in the preceding paragraphs since its function is to shift to the State the burden of proof and does not presume the truth of some acts as a consequence of others that have been sufficiently established.

measure must not be applied in an absolutely mechanical manner that would place in doubt the facts thus verified. The absence of a response by a State does not justify a lack of action or paralysis by the Commission, which, as the organ charged with the protection of human rights, has the duty to respond promptly to the petitions that it receives. Unfortunately, all too often the Commission has not reacted in a manner expected of it. In the Durand and Ugarte Case the petition was sent to the State on May 19, 1987 with a request for information and although repeated three times the Commission did not receive a response from the State until September 29, 1989.[30] To wait more than two years for a response from a State to a petition that had been presented to the Commission on April 27, 1987 does not appear reasonable and is not compatible with the spirit and letter of the Convention. In keeping with the Commission's functions as an organ of protection of human rights, the presumption of the truth of the acts denounced established in the Rules shows that it is not the State in question that decides the time frame of the procedure. On the other hand, this presumption is a tool available to the Commission so that it may act promptly and adopt the measures necessary to respond in a timely fashion to the petitions that it receives.

The effect of a lack of response by a State may, up to a point, be compared to that of non-appearance by a State before the International Court of Justice. While the petitioner may request that Court to decide in favor of its allegations, before doing so the Court must assure itself that it not only has jurisdiction to hear the case but also that the complaint is duly founded both in fact and in law.[31]

### *2. METHODS OF GATHERING EVIDENCE*

To obtain the evidence necessary to verify the acts denounced, the Commission may resort to i) information that is provided by the parties to the controversy, ii) evidence obtained in hearings, private or public, with the parties present, convened to examine a petition or to verify the acts denounced and iii) a direct investigation of the facts, in exercise of its

30. *Durand and Ugarte Case. Preliminary Objections, supra* note 10, paras. 3-5.
31. Article 53 of the Statute of the International Court of Justice.

powers, including the possibility of making *in loco* visits to the territory of the State in which the alleged human rights violations occurred.

***a) Information provided by the parties***

In order to determine the facts in a case, the initial element available to the Commission is the information provided by the parties to the controversy. After admitting a petition or communication, the Commission requests information from the State allegedly responsible for the violation, transcribing the pertinent parts of the petition or communication. Pursuant to Article 30.2 of the Rules, in transmitting to the State that information, the Commission must omit any data that might serve to identify the petitioner, unless he has expressly authorized that his identity be revealed.

Given the tenor of Article 48.1.a of the Convention and the circumstances of each case, the Commission prescribes a reasonable period for the State to provide the information requested. Article 30.3 of the Rules establishes two months following the sending of the request as a reasonable period. However, as shown previously, this rule has two exceptions, which may reduce or extend this period.

The pertinent parts of the reply of the State, as well as any documentation, are communicated to the petitioners or their representatives with an invitation to furnish their observations within 30 days and to present any evidence that they have that would contradict the reply.[32] If the Commission receives new information or documentation from the petitioner, the pertinent parts of such material are transmitted to the State, which has two months to make its final observations.[33]

***b. Information obtained by the Commission***

Among the means available to the Commission to fulfill its function as an investigatory body, it is well to remember that Article 48 of the Convention requires the States to give the Commission the information that the latter requests and that this provision has been interpreted by the Commission as imposing an "international obligation to provide

32. Article 34.7 of the Rules of the Commission.
33. Article 38.1 of the Rules of the Commission.

information to the Commission."[34] The Commission may, thus, demand the presentation of documents or other evidentiary elements of which it is aware. In the opinion of the Court, the Convention gives the Commission an investigatory function of the allegations of human rights violations that must be carried out in every case, unless it is merely a question of law.[35] The Commission itself has observed that its investigatory role is to determine whether the acts of a State are in violation of a right protected by the Convention.[36]

### *c. On-site investigations*

One of the methods available to the Commission for gathering information is the so-called on-site investigation, which deserves special attention. Although this institution was initially used to prepare special reports on the status of human rights in a particular country, in the case of an individual complaint it provides a means to obtain first-hand information by visiting the place where the alleged violation occurred and to observe directly what is occurring in the country in question.

Under the terms of the Convention, the Commission, when it deems it necessary and advisable, may conduct an investigation for which it requests and is granted the necessary facilities by the State.[37] The Commission may request of a State any pertinent information and may receive the oral or written testimony that the parties present. Pursuant to Article 40 of its Rules, the Commission is empowered to conduct an on-site investigation for which the State is obligated to furnish all the pertinent facilities so that the visit is effective. In serious and urgent cases, the Commission may conduct such an investigation, with the consent of the State in whose territory the alleged violation took place, based only on the presentation of a petition or communication that meets all the formal

34. I/A Commission H.R., Report No. 75/90, Case 10.163, Peru, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1990-1991, General Secretariat of the Organization of American States, Washington, D.C., 1991, p. 361. This criterion is repeated in the same terms in Reports 76/90 to 89/90 against Peru, *ibid*., pp. 364-422.

35. I/A Court H.R., *In the Matter of Viviana Gallardo et al.* Series A. No.G 101/81, para. 22.

36. I/A Commission H.R., Resolution No 29/88, Case 9.260, Jamaica, adopted September 14, 1988, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1987-1988, *supra* note 4, p. 161, para. 6 of the considerations.

37. Article 48.1.d of the Convention.

requirements of admissibility. Article 51 of the Rules provides that on-site investigations are to be conducted by a Special Commission appointed for that purpose and that the Commission determines the number of its members and names its President. In cases of extreme urgency, those decisions may be made by the Chairman, subject to the approval of the Commission. Under the Rules, a member of the Commission who is a national or who resides in the territory of the State in question cannot participate in the visit. The Commission may also entrust the Secretariat with the visit.[38] This has led the Commission to distinguish between on-site investigations as such, which are the exclusive competence of the Special Commission, and simple visits that may be carried out either by a member of the Secretariat –as in the cases of El Salvador in February 1987 and Suriname in July of the same year– or by a Special Commission, such as occurred in the cases of Guatemala and Nicaragua in January of 1988.[39]

With respect to a plan of activities, pursuant to Article 53 of the Rules, the Special Commission organizes its activities and may assign any activity related to the mission to its members and, in consultation with the Executive Secretary, to staff or other necessary personnel. A State that invites the Commission to make an on-site visit, or grants its consent for a visit, ensures that the Special Commission has all of the facilities necessary to carry out its mission and specifically commits itself not to take reprisals of any kind against individuals or organizations that have cooperated with the Special Commission either by providing testimony or information.

With respect to verifying the allegations, in serious and urgent cases the Commission may conduct an investigation with the prior consent of the State in question based only on the receipt of a petition or communication that meets the formal requirements of admissibility.[40] In practice, the Commission begins by asking the State concerned to invite it

38. *See, e.g.*, the visit to El Salvador held September 15-21, 1987 for a special mission of the Executive Secretariat of the Commission, referred to in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1986-1987, General Secretariat of the Organization of American States, Washington, D.C., 1988, p. 223.

39. *See*, in this respect, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1987-1988, *supra* note 4, p. 20 *et seq*.

40. Article 48.2 of the Convention.

to carry out an on-site investigation. If such an invitation is not forthcoming within a reasonable period, the Commission then requests the consent of the State to make the visit.[41]

While it is rare for a State to refuse in express terms permission for the Commission to conduct a visit that would allow it to gather additional information on a case, the State sometimes remains silent. In the Mayagna Community Case, three days before the programmed visit by the Commission the State informed that the visit was not necessary because it was preparing a submission of additional material.[42] Although the consent of a State is a prerequisite for the Commission to carry out an on-site visit, it does not appear that the State has the right to deny arbitrarily this consent since the Convention imposes on the States parties the obligation to collaborate with the Commission and to furnish it all the facilities necessary to carry out its investigation.[43] An unjustified denial on the part of the State could, therefore, be interpreted as an undue obstacle to the fulfillment of the work of the Commission and may certainly be taken into account when a decision is made on the facts.

On-site investigations adhere to the following norms: a) the Special Commission or any of its members may interview, freely and in private, any person, group, entity or institution, b) the State must grant the necessary guarantees to those who furnish the Special Commission with information, testimony or proof of any nature, c) the members of the Special Commission may travel freely throughout the territory of the country, for which the government will grant all facilities, including the necessary documentation, d) the State must assure that local means of transportation are available, e) the members of the Special Commission must have access to the jails and all other places of detention and interrogation and may interview in private those detained or imprisoned, f) the State must provide the Special

41. On other hand, it is possible that the visit is the result of an invitation that has not been requested. Such was the case, for example, of the visit that took place in Panama between November 29 and December 7, 1977, in response to an invitation of the Head of Government, General Omar Torrijos, made on September 13 of that year when, not by mere coincidence, the United States Senate was debating the ratification of the Panama Canal Treaties.

42. I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community Case. Preliminary Objections*, Judgment of February 1, 2000. Series C No. 66, para. 16.

43. *See*, in this respect, Article 48.1.d of the Convention.

Commission with any documentation related to the observance of human rights that the latter considers necessary for the preparation of its report, g) the Special Commission may use any appropriate means for filming, photographing, gathering, documenting, recording or reproducing the information that it considers useful, h) the State must adopt the security measures necessary to protect the members of the Special Commission, i) the State must assure the availability of appropriate lodging for the members of the Special Commission, j) the same guarantees and facilities given to the members of the Special Commission must be extended to the Secretariat staff and k) the expenses incurred by the Special Commission, each one of its members and the Secretariat staff, are borne by the OAS, subject to the relevant provisions.[44]

It must be noted that almost all of the many on-site investigations conducted by the Commission have been carried out within the framework of an evaluation of the general situation of human rights in a specific country and only exceptionally as a resource to examine individual cases. This, of course, does not prevent the Commission during a visit to a country from verifying the allegations in a specific case directed against the country being visited.

On-site investigations should not be seen as a mandatory procedural stage. In the three cases against Honduras, the State objected that the Commission had failed in its obligation to conduct an on-site investigation to verify the allegations and that, pursuant to Article 48.2 of the Convention, this was a compulsory and indispensable step. After examining that provision, Article 18 of the Commission's Statute and Articles 44 and 55 to 59 of its Rules of Procedure then in force, the Court concluded that on-site investigations, as a method to verify the facts, are subject to the discretionary power of the Commission, whether acting on its own initiative or at the request of the parties, within the limits of the aforementioned provisions, and are not mandatory under the procedures established in the Convention.[45]

44. Article 55 of the Rules of the Commission.

45. *Velásquez Rodríguez Case. Preliminary Objections*, *supra* note 26, para. 49; I/A Court H.R., *Fairén Garbi and Solís Corrales Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 2, para. 54 and *Godínez Cruz Case. Preliminary Objections, supra* note 26, para. 52.

### *3. TYPES OF EVIDENCE*

One aspect that is not duly regulated concerns the different types of evidence that the parties may submit. In practice, the Commission has accepted any means that would aid it in its search for the truth, including public and private documents, testimony, presumptions that can be derived from other sufficiently accredited facts, even evidence that might not be accepted in the domestic law of the States or the admissibility of which might be objected to by the other party.

#### *a) Documentary evidence*

With respect to public documents, the Commission has considered texts of laws or administrative decrees, documents of administrative authorities, immigration registries, passports and decisions of national courts.

As to private documents, the Commission has received and considered private letters, photographs, recordings, press clippings and whatever other material that might serve to clarify the facts.

#### *b) Testimonial evidence*

An important element of evidence is certainly testimonial proof. Subject to its subsequent consideration and evaluation of the evidence, the Commission has been very liberal in admitting testimony and has not been bound by rules that do not allow certain persons to testify. Of course, receiving the testimony does not mean that its evidentiary value is not duly weighed and that the objections of the other party are not taken into account.

#### *c) Presumptions*

In addition to the aforementioned methods of gathering evidence, an examination of the evidence may permit the Commission to consider as proved acts that may be inferred from what has already been verified, that is, given a recognized fact, the Commission may presume as verified another that is not recognized but that usually follows the former and may plausibly be associated with it.

In view of the difficulty of proving any human rights violation, the Commission has used the presumption of proof on more than one occasion. In the case of a petition that claimed that the Government of Nicaragua was responsible for an article that accused the petitioner of being a CIA agent, the Commission held that "while no legal relationship exists between the magazine *Soberanía* and the Government of Nicaragua, the actions of the government enabled the magazine to make the accusations, since the control that the government exercises over the press under the current state-of-emergency powers meant that it is impossible to publish news, opinions or commentary that have not had the express approval of the government. Thus, publication of an accusatory article such as that which gave rise to Mr. Macias' denunciation must necessarily have been done with the consent of the Government of Nicaragua, particularly bearing in mind that the person involved had held high positions in the government, and that such a grave charge could not therefore go unnoticed."[46]

With respect to the exhaustion of domestic legal remedies, in one case, given the tenor of the responses of the State to the Commission's requests for information, the latter concluded that the parties attempting to ascertain the whereabouts of the victims had not been able to exhaust the legal remedies due to the negligence of the authorities charged with conducting the investigation, as these authorities had simply stated that the presumed victims were "recognized members of the People's Revolutionary Union (URP), a leftist terrorist faction operating in Honduras."[47]

In the cases of the forced disappearances of persons, the proof of State responsibility by means of presumptions has been particularly useful. In one case, the Commission observed that

> the procedure used in the abduction and forced disappearance of Mr. Cordova Aguilar, the fact that the judicial system is unable to protect and safeguard his rights, the Salvadoran Armed Forces' own agencies

46. I/A Commission H.R., Resolution No. 29/86, Case 9.102, Nicaragua, adopted on April 16, 1986, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1985-1986, General Secretariat of the Organization of American States, Washington, D.C., 1986, p. 98.

47. I/A Commission H.R., Resolution No. 4/87, Case 7.864, Honduras, adopted March 28, 1987, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1986-1987, *supra* note 38, p. 73.

> are incapable of remedying situations such as the one denounced and the frequency with which forced disappearances occur in El Salvador, as the Inter-American Commission on Human Rights has repeatedly established, lead to the conclusion that the Government of that country, through its security forces, is engaging in the practice of forced disappearances, since facts such as those denounced here cannot be isolated incidents caused by the excesses on one individual; instead they are the *modus operandi* of the institutions in question.[48]

Just as the Commission has considered that the frequency with which similar situations have occurred in a particular State is an element that allows for the presumption of the truth of a claim, it may be assumed that the existence of repeated claims against the same State that generally agree on the facts, although not duly proved, could also lead to a presumption of their veracity. Recourse to presumptions as a means of proof may also acquire considerable importance in States that are going through a period of political turbulence or that, pursuant to Article 27 of the Convention with its exceptions, have suspended the guarantees of human rights.

On the other hand, notwithstanding the role of the burden of proof in its practice, the Commission has also made the presumption when the information received from the State in question has been insufficient to shed light on the acts denounced and to refute the allegations of the petitioners[49] or simply denies the allegations contained in the petition.[50]

### *d) Presumption of the truth of the allegations*

In a matter that is closely related to the burden of proof, we must keep in mind the presumption of the truth of the acts denounced established

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48. I/A Commission H.R., Report No. 7/92, Case 10.211, El Salvador, adopted February 4, 1992, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1991, *supra* note 13, p. 96. *See*, also, Reports No. 8/92, Cases 10.227 and 10.323, 12/92, Case 10.323 and 15/92, Case 10.571, *ibid*., pp. 122, 145 and 166, respectively.

49. *See*, in this respect, Resolution No. 12/80, Case 3.358, Argentina, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1979-1980, General Secretariat of the Organization of American States, Washington, D.C., 1980, pp. 70-79 and Report No. 3/92, Case 10.003, El Salvador, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1991, *supra* note 13, p. 87 *et seq.*

50. *See*, *e.g.*, Resolution Nos. 38/82, Case 2.646, 39/82, Case 2.647, 40/82, Case 2.647, 40/82, Case 2.648, 41/82, Case 2.650 and 42/82, Case 2.652, Haiti, adopted March 9, 1982, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1982-1983, General Secretariat of the Organization of American States, Washington, D.C.,1983, pp. 82-83.

in Article 39 of the Rules for those cases in which the State does not cooperate and does not furnish, within the period stipulated, the information requested by the Commission provided that other evidence does not lead to a different conclusion and provided that the State has been warned that this might be the consequence of its lack of response to the request for information. This presumption is applicable not only in the case of a lack of response by the State but also in the case of an insufficient response that would contribute to conceding the truth of the affirmations of the claimant and demonstrate that the State had not investigated the complaint with the zeal that the case required.[51] The Commission has applied this presumption to situations in which the State, in spite of having had various opportunities to furnish information on the allegations, has simply claimed in all of its communications that the case was inadmissible without referring to the facts or the arguments of the petitioner. The Commission, however, has been very careful to point out that the mere fact that the State does not appear or does not provide information does not transform, *per se*, the allegations into truth, but rather it must analyze them in the light of certain criteria that would enable it to establish whether, under its Rules, there is other evidence that might lead to a different conclusion than that argued by the petitioners.[52]

In underscoring the relationship with the burden of proof, in a case concerning Suriname the Commission observed that the State had not furnished sufficient proof to refute the allegations of torture and denial of due process.[53] In a case in which information was repeatedly requested of a State and the only response was a very general one that did not contain sufficient information to refute the charges made by the claimant and in which the State did not allow a member of the Commission and a Secretariat staff member to visit the country to clarify certain aspects of the case, the

51. I/A Commission H.R., Report No. 1/91, Case 9.999, El Salvador, adopted February 13, 1991, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1990-1991, *supra* note 34, p. 95, para. 7 of the considerations.

52. I/A Commission H.R., Report No. 5/96, Case 10.970, Peru, adopted March 1, 1996, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1995, General Secretariat of the Organization of American States, Washington, D.C., 1996, p. 172 *et seq*.

53. I/A Commission H.R., Report No. 1/85 bis, Case 9.265, Suriname, adopted October 1, 1985, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1984-1985, *supra* note 19, p. 121, paras. 3-4 of the considerations.

Commission decided to presume the truth of the allegations.[54] The Commission held that the State, in addition to its obligation to ensure the rights set forth in the Convention, has the particular obligation, among others listed in Article 1 of the Convention, to establish the truth in those cases in which a person claims that his basic rights have been violated.[55]

This presumption does not authorize the Commission to ignore its other means of fact-finding under the Convention. It cannot invoke the presumption automatically, without an effort to determine what had occurred. The Commission has observed that its Rules restrict the presumption of the truth of the allegations to situations where other evidence would not lead to a different conclusion. In determining whether other evidence would lead to a different conclusion, the Commission cannot punish the petitioners by requiring a greater burden of proof than they would have had if the State had furnished the requested information in a timely fashion, thus giving the petitioners the opportunity to refute the State's reply and affording the Commission the opportunity to have a better appreciation of the facts through an adversary proceeding.[56] In a case that, in view of the time that had elapsed from the occurrence of the acts alleged and the Commission's repeated requests for information from those in power in Haiti without the latter responding in any way, the Commission concluded that the information received from various sources allowed it to corroborate that the majority of the human rights violations in 1992 occurred in a political context brought about by the efforts of those in power to maintain themselves in power.[57]

Pursuant to Article 39 of its Rules, the Commission has held that allegations are not presumed to be true for the mere fact that the State did not appear but only after an analysis of their consistency, credibility and

54. I/A Commission H.R., Resolution No. 10/86, Case 9.285, Nicaragua, adopted April 16, 1986, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1985-1986, *supra* note 46, p. 115 *et seq*., paras. 2-5 of the expository part, 1 and 4 of the considerations and operative para. 1.

55. I/A Commission H.R., Report No. 13/96, Case 10.948, El Salvador, adopted March 1, 1996, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1995, *supra* note 52, p. 105, para. 16.

56. *Ibid*., p. 106, para. 21.

57. I/A Commission H.R., Report No. 9/94, Cases 11.105, 11.107, 11.110-11.114, 11.118. 11.120, 11.122 and 11.102, Haiti, adopted February 1, 1994, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 13, p. 228 *et seq*., paras. 9 and 11 of the considerations.

specificity demonstrates that they may be presumed to be true. According to the Commission, the specific acts alleged by the petitioner are the main point of reference to determine whether there is *other evidence* that might lead to a different conclusion.[58] Thus, the Commission has refused to consider as proved acts that are not sufficiently specific in the petitioner's submissions because the dates on which they allegedly occurred were not mentioned or because they were not sufficiently detailed to permit an examination of their consistency and credibility.[59] Consistency results from a comparison of the information furnished by the petitioners and the appreciation that there are not any contradictions in the allegations and the evidence presented. The acts denounced may be shown to be credible after an evaluation of the available evidence, including their consistency and specificity, the latter referring to the detailed nature of the allegations. Taking into consideration these elements, in a case in which the State in question refused to discuss the petitioner's claims, the Commission found that they met the criteria of consistency, credibility and specificity and decided to presume them to be true.[60] With respect to the credibility of the version of the petitioner, the Commission observed that it had been corroborated by several inter-governmental and non-governmental organizations that had documented the existence of numerous rapes of women by members of the State security forces in which specific mention was made of the case of the victim, which was described as representative of the practice.[61]

In any event, we are dealing with a simple presumption of the truth of the acts denounced that does not include their legal qualification or the acceptance of the petitioner's claims. According to the Commission, there is no reason to presume the truth of the allegations if the two parties agree that the facts were not in controversy. The Commission, however, did clarify that in this case there was no logical or legal relationship between the presumption of the truth of the allegations and the request concerning the legal issues that were presented in the petition.[62]

58. Report No. 13/96, *supra* note 55, pp. 106-107, paras. 20 and 22-23.
59. *Ibid*., para. 24.
60. Report No. 5/96, *supra* note 52, p. 174.
61. *Ibid*.
62. I/A Commission H.R., Resolution No. 23/81, Case 2.141, United States of America, adopted March 6, 1981, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1980-1981, General Secretariat of the Organization of American States, Washington, D.C., 1981, p. 37, para. 11 of the considerations.

The fact that this presumption is not expressly included in the Convention has prompted States to question its use as *ultra vires*, not authorized by the Convention.[63] The Court, however, from its earliest jurisprudence has pointed out that the silence of the State or its elusive or ambiguous responses may be interpreted as an acceptance of the allegations, provided that the contrary does not appear from the evidence or does not result from judicial conviction.[64]

Article 53 of the Statute of the International Court of Justice is similar to that of Article 39 of the Commission's Rules in that, if one of the parties does not appear or does not defend its case, it permits the other party to request that the case be decided in its favor, in which case the Court must ascertain that it has jurisdiction and that the claim is well-founded as to the facts and the law. In applying this rule in the Corfu Channel Case, the ICJ held that Article 53 obligated the Court to examine the conclusions of the party that appeared, but did not obligate it to verify the truth of each detail that had been alleged by the latter –a task that in certain cases would be impossible without the cooperation of the defendant– and that it was sufficient that the tribunal has, by the means that it considers appropriate, the conviction that the conclusions of the petition were well-founded.[65]

### *4. WEIGHING THE EVIDENCE*

Just as there are few rules on the different aspects regarding the evidence, the Convention does not provide any norms for its evaluation. There are no evidentiary rules and the evidence may be evaluated liberally. This freedom to accept all types of evidence, however, must be tempered by the need to weigh reasonably the value of each piece of evidence.

In evaluating the evidence, the Commission must objectively take into account the independence and impartiality of its source. The

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63. *See, e.g.*, Thomas Buergenthal, *Judicial Fact-Finding: Inter-American Human Rights Court* and Tom Farer, *Finding the facts: The procedures of the Inter-American Commission on Human Rights of the Organization of American States*, in FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS, edited by Richard Lillich, Transnational Publishers, Inc., Ardsley-on-Hudson, New York, 1992, p. 264 *et seq.* and 279 *et seq.*,respectively.

64. I/A Court H.R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988. Series C No. 4, para. 138 and *Godínez Cruz Case*, Judgment of January 20, 1989. Series C No. 5, para. 144.

65. International Court of Justice, *Corfu Channel case*, Judgment of December 15, 1949, I.C.J. Reports 1949, p. 248.

Commission has held that the statements of governmental agents or policemen that deny the claims of the victim, considered within a generalized framework of arbitrary acts of authority and the impunity that existed in the State, lack objectivity, independence and impartiality.[66]

It is important to emphasize that if one of the parties to the proceedings has presented second-hand evidence that the opposing party has not been able to adequately examine, the Commission cannot give it the same weight as evidence that the parties have been able to challenge directly. In the case relating to the diplomatic and consular personnel in Tehran, although the International Court of Justice accepted the evidence presented by the United States in its Statement of Verification on the veracity of the press, radio and television reports, as illustrative of the type of treatment that some of the hostages had received,[67] it emphasized that those reports only corroborated the ample information coming from many sources and, therefore, it could not be concluded that, in the absence of other proof, the Court would have given such evidence the same weight or would have considered it decisive for the effects of determining eventual compensation.

In a decision that may be criticized in a system of protection of human rights, the Commission, invoking the principle of *ultra petita*, refrained from judging attacks against the victims because they were not mentioned in the claim, but pointed out that the information allowed it to establish a frame of reference and to determine within what context the alleged violation of human rights had occurred.[68]

## F. THE SPECIAL PROCEDURE

Article 48.2 of the Convention provides that "in grave and urgent cases" an investigation may be carried out with the prior consent of the State in which the violation is alleged to have been committed, upon the

66. I/A Commission H.R., Report No. 7/94, Case 10.911, El Salvador, adopted February 1, 1994, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 13, p. 193, para. 3.e of the considerations.

67. International Court of Justice, *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, paras. 12-13.

68. Report 11/94, *supra* note 13, p. 247, para. 18.

simple presentation of a petition that meets all of the requirements of admissibility.

This provision does not supersede the procedure set forth in Article 48.1 of the Convention. It simply refers to the Commission's attribute to conduct an investigation solely on the basis of the presentation of a petition or communication that meets all the formal requirements of admissibility. Thus, in order to carry out an investigation, the Commission need not have ruled on the admissibility of the petition. As it is a grave and urgent case, it is enough to present a petition that is not manifestly inadmissible. The sense of this provision is to allow the investigation to begin immediately upon the presentation of a petition. Otherwise, it would not have an *effet utile*. Also, the consent of the State in question is required in order to conduct an investigation in its territory, while for other types of investigations, the Commission does not need that consent. Article 40 of the Rules also provides that in grave and urgent cases the Commission may carry out an on-site investigation, with the prior consent of the State in whose territory it is alleged that there has been a violation of human rights, simply on the basis of a petition or communication that meets all of the formal requirements of admissibility.

In the case of Mario Eduardo Firmenich, a leader of the Montonero Movement, for whom an Argentine court had denied the benefit of release, the Commission did not consider this to be a serious and urgent case, since record showed that the detainee was not being subjected to cruel, inhuman or degrading treatment, that he was being defended by lawyers and enjoyed the judicial guarantees necessary for his legal defense.[69]

## G. WITHDRAWAL OF THE PETITION

An aspect that merits attention is the possibility of relinquishing, for whatever reason, a claim before the Commission. Pursuant to Article 35 of the Rules, the petitioner may withdraw, in writing, his petition at any moment. Since the Commission is an organ of protection of human rights,

69. I/A Commission H.R., Resolution No. 17/89, Case 10.037, Argentina, adopted April 13, 1989, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1988-1989, General Secretariat of the Organization of American States, Washington, D.C., 1989, p. 66.

such a manifestation by the petitioner is not binding on it. Therefore, a withdrawal is examined by the Commission, which may close the case or may continue its examination in the interest of protecting a certain right.

The withdrawal of a petition is generally the result of a solution reached outside the Commission. In the case of a petition presented by Disabled Peoples International against the United States for the bombing of an asylum for the mentally ill in Grenada on October 24, 1983, the petitioners informed the Commission that the issues that led to the filing of the petition had resulted in the construction of a new hospital to replace the one that had been destroyed and in the payment of a satisfactory compensation to the petitioners and the residents of the new installation with funds of the United States Agency for International Development. The Commission requested a clarification with respect to the withdrawal, to which it received a letter from the petitioners requesting that, for the reasons pointed out, the case be closed. With this information, the Commission expressed its satisfaction at the solution reached in the matter and closed the case. [70]

70. I/A Commission H.R., Report No. 3/96, Case 9.213 United States of America, adopted March 1, 1996, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1995, *supra* note 52, p. 116 *et seq*.

## Chapter IX

## THE CONCILIATION PROCEDURE

The mechanism of increasing intensity established in the Convention includes a conciliation procedure, the purpose of which is to resolve, on the basis of respect for human rights, the complaint of the petitioner without having to resort to a judicial decision. The Court has held that the Convention confers on the Commission, within its broad conciliatory mission, the important function of promoting friendly settlements with the advantage to the petitioner that this type of solution requires his consent to become effective.[1]

Article 50 of the Commission's Rules extends this stage of the proceedings, provided by the Convention for the States parties, to the OAS member States. In cases in which the State in question is not a party to the Convention, the Commission has placed itself at the disposal of the parties with the idea of reaching a friendly settlement on the basis of respect for the human rights recognized in the American Declaration.[2] The fact that this procedure is not expressly found in the Convention with respect to States that are not parties does not prevent the Commission, which pursuant to its Statute may recommend to the OAS member States that they adopt appropriate measures to further observance of human rights,[3] from attempting to arrive at a solution compatible with respect for human rights.

On the other hand, it is well to note that while its other proceedings have a markedly contentious character, even inquisitorial in some aspects, the Commission's function in this stage is strictly political and diplomatic.

The use of this institution as part of the system of human rights protection is not new since it is found in the European Convention for the

1. I/A Court H.R., *In the Matter of Viviana Gallardo et al*. Judgment of November 13, 1981. Series A No.G 101/81, para. 24.

2. For example, Report No. 28/93, Case 10,675, United States of America, Admissibility, adopted October 13, 1993, in Annual Report of the Inter-American Commission on Human Rights 1993, General Secretariat of the Organization of American States, Washington, D.C., 1994, p. 374, operative para. 3.

3. Article 18.b of the Statute of the Commission.

Protection of Human Rights and Fundamental Freedoms, Article 28 of which was the source for a similar provision in the American Convention. In addition, Article 42 of the International Covenant on Civil and Political Rights provides for a similar procedure for communications that a State submits against another State for a violation of rights set forth in that treaty.

## A. THE PURPOSE OF THIS PROCEDURE

In order to give the State in question a political way out, the American Convention, like the European Convention, attempts to protect human rights while avoiding, at all costs, a decision of the jurisdictional organ on the merits of a claim. It is within this context that the Convention grants the Commission a conciliatory function and requires it to place itself at the disposal of the interested parties with the idea of reaching a friendly settlement of the matter before issuing its conclusions and recommendations and before resorting to other more drastic solutions.[4] Moreover, this mechanism gives the petitioner, in principle, the possibility of a more prompt solution than he could receive by insisting on a decision of the Commission. For that reason, the OAS General Assembly has taken particular note of the progress made by the parties in arriving at friendly settlements based on respect for human rights.[5]

In any event, the purpose of this procedure is to reach a friendly settlement of a matter based on respect for the human rights set forth in the Convention, the American Declaration and other relevant international instruments.

On the other hand, it is obvious that the conciliatory procedure may be abused by the State by using it to prevent a public discussion of matters that transcend the particular interest of the petitioner and to avoid an embarrassing decision. The possibility also exists that a State agrees to this procedure as a mere delaying tactic and not as a way to find a

4. I/A Court H.R., *Caballero Delgado and Santana Case. Preliminary Objections.* Judgment of January 21, 1994. Series C No. 17, para. 27.

5. General Assembly of the OAS, Resolution of June 11, 1993, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 2, p. 15, para. 5.

satisfactory solution to the problems raised in the complaint. The Eleazar Mavares Case is very illustrative of this situation. In view of the offer of the good offices of the Commission dated June 15, 1994, the Government of Venezuela first requested information on the nature of the friendly settlement procedure and then rejected any possibility of such a settlement. The Government later signed, in principle, an agreement, with which it did not comply either with respect to the time limits or its content. Finally, weary of an unfruitful dialogue, the petitioners requested a hearing to indicate that they had not reached an agreement with the State and that the State was only using the procedure of conciliation as a delaying tactic. At the hearing, held on October 10, 1997, Venezuela, in partial fulfillment of the recommendations in the Commission's report, paid a compensation that it determined unilaterally without the consent of the petitioners or the Commission[6] and without recognizing responsibility for the acts denounced. All of these steps took almost three years and four months and had the effect that the case was not referred to the Court.[7] Even if a State acts in good faith, an offer of good offices by the Commission may have a delaying effect. For example, in the Cantoral Benavides Case the State requested an extension to the deadline set by the Commission to reach a friendly settlement, which was granted, and yet the State never responded.[8]

## B. ITS NATURE

The procedure of conciliation or friendly settlement established by the Convention is, in the first place, one of a political or diplomatic, and not a jurisdictional or quasi-jurisdictional, nature. In the second place, in

6. Although during the negotiations the petitioners had accepted the sum proposed by the government as indemnification, it was as part of a broader agreement that included measures of reparation other than the indemnification that the State had agreed to but then rejected. In not accepting the basket of measures, the conditions that made the proposed indemnification adequate no longer existed.

7. I/A Commission H.R., Report No. 49/96, Case 11.068, Eleazar Ramón Mavares vs. Venezuela, adopted October 17, 1997, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1997, General Secretariat of the Organization of American States, Washington, D.C., 1998, p. 844 *et seq.*, paras. 11, 13-14, 74-77, 136-137 and 150.

8. I/A Court H.R., *Cantoral Benavides Case. Preliminary Objections.* Judgment of September 3, 1998. Series C No. 40, para. 7.

spite of what might be suggested by a literal reading of the text of Article 48.1.f of the Convention, this procedure is also characterized as not being obligatory and it may be omitted in a particular case.

### *1. A POLITICO-DIPLOMATIC PROCEDURE*

As might be supposed, an attempt at a friendly settlement implies a process of negotiation between the State and the petitioner. This process, however, differs from traditional diplomatic negotiations, especially due to the unique situation of the petitioner directly confronting the State.[9] On the other hand, the procedure established in the Convention is similar to international mediation in that it involves the Commission's intervention as an intermediary between the claims of the individual and the position of the State. The Court has stated, in this respect, that the Commission has "a conciliatory function empowering it to propose friendly settlements as well as to make the appropriate recommendations to remedy the violation that it has found to exist."[10]

Whether the attempt at a friendly settlement established in the Convention is seen as a negotiation or as a process of mediation, it will only be successful if each party is willing to accept, even partially, the position and demands of the other party. If the State in question, thus, requests the Commission to invoke this procedure, it must be prepared to negotiate in good faith and be willing to make concessions. It is well to recall what the International Court of Justice stated in its judgment in the North Sea Continental Shelf Case, where it pointed out that parties that enter into negotiations must do so with a view to arriving at an agreement and not as a formal step that is a prior condition to reaching another step in the absence of an agreement. According to the ICJ, parties that intervene in negotiations are obligated to conduct themselves in such a way that the process makes sense and is meaningful, which would not be the case when one of them insists on its initial position without contemplating any change in it.[11] Recourse to this procedure, therefore, must involve a genuine effort

9. In diplomatic protection, the individual endorses his claim to the State of which he is a national and, if the State decides to make the claim its own, it presents it against the State that allegedly was responsible internationally. The conflict is between two States and the relationship is between States.

10. *In the Matter of Viviana Gallardo et al.*, *supra* note 1, para. 22.

11. International Court of Justice, *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, para. 85.a.

of negotiation and not be a mere delaying tactic or a reaffirmation of positions without intending to meet the opposing party part-way.

From a practical point of view and given its nature, the use of this mechanism involves a continual relationship between the Commission and the parties with a constant exchange of information and proposals in a way that does not exist in the ordinary jurisdictional proceedings of the Commission when it processes the petitions addressed to it.

### *2. A NON-COMPULSORY PROCEDURE*

Unlike the other procedural stages, the friendly settlement procedure is not obligatory, either for the Commission or for the parties that intervene in the proceedings before the Commission. Article 41.2 of the Commission's Rules provides that the friendly settlement procedure is initiated and continues on the basis of the consent of the parties and Article 41.4 indicates that the Commission may terminate its participation in the procedure if, *inter alia*, it finds that one of the parties does not consent to its application, decides not to continue or is not willing to reach a friendly settlement based on respect for human rights. The voluntary nature of this procedure also extends to the victim of the alleged violation or his next of kin. Thus, Article 41.5 of the Rules provides that, in the event of arriving at a friendly settlement, before adopting the respective report the Commission must verify whether the victim of the alleged violation or, if applicable, his next of kin has consented to the agreement.

As will be recalled, in the Matter of Viviana Gallardo *et al.* the Court held that "this process has the advantage of ensuring that the agreement requires his consent to be effective. Any solution that denies access to these procedures before the Commission deprives individuals, especially victims, of the important right to negotiate and accept freely a friendly settlement…."[12] This consent may also be subject to considerations that the parties impose in submitting to this procedure.[13]

12. *In the Matter of Viviana Gallardo et al., supra* note 1, para. 24.
13. *Cantoral Benavides Case. Preliminary Objections, supra* note 8, para. 7.

In delineating the meaning and scope of Article 48.1.f of the Convention, the Court has stated that its interpretation, within the context of the Convention, leads to the conclusion that the Commission's intervention as an agent of conciliation should be attempted only when the circumstances of the controversy make that option appropriate or necessary, elements that are subject to the Commission's sole discretion. The Court has also stated that the Commission has discretionary, but by no means arbitrary, powers to decide in each case whether the friendly settlement procedure is a suitable or appropriate way to resolve the dispute that has been submitted to it.[14] The Court has held that only in exceptional cases may the Commission omit this procedure and it must carefully justify its rejection based on the behavior of the accused State.[15] In the Durand and Ugarte Case, in which the State alleged, as a preliminary objection in the proceedings before the Court, that the Commission had omitted the friendly settlement stage "which it should have suggested as part of the specific case, and not as part of a separate proceeding" as in the Neira Alegría *et al*. Case, the Court repeated that the Commission has discretionary, but by no means arbitrary, powers to promote a friendly solution of the dispute, judging whether such procedure is suitable or appropriate for the protection of human rights. It also pointed out that the Commission had demonstrated, by note of February 14, 1995, that it had suggested a friendly settlement that involved the payment of compensation to the families of Mr. Durand Ugarte and Mr. Ugarte Rivera, but had not received a response from the State.[16] In any case, if it were effectively interested in reaching a friendly settlement, the State itself could have promoted this procedure.

Of course, if the conciliatory procedure is not obligatory for the Commission, neither is it for the parties. In the Loayza Tamayo Case, the Commission emphasized that the claimant had shown no interest in

14. I/A Court H.R., *Velásquez Rodríguez Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, paras. 44-45; *Fairén Garbi and Solís Corrales Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 2, paras. 49-50; *Godínez Cruz Case. Preliminary Objections.* Judgment of June 26, 1987. Series C No. 3, paras. 47-48 and *Caballero Delgado and Santana Case. Preliminary Objections*, *supra* note 4, para. 26.

15. *Caballero Delgado and Santana Case, Preliminary Objections, supra* note 4, paras. 26-28.

16. I/A Court H.R., *Durand and Ugarte Case. Preliminary Objections*. Judgment of May 28, 1999. Series C No. 50, paras. 62.a and 64.

submitting to such a procedure with Peru nor did the government show any interest in reaching a friendly settlement with the claimant.[17] The government asserted that no outside authority could become involved in this case because under its Constitution the legal situation of the claimant was a matter for the judiciary of the country.[18] In the Barrios Altos Case, after the Commission had made itself available to the parties with the view of arriving at a friendly settlement, Peru requested that it discontinue the initiative and declare the case inadmissible for failure to exhaust internal legal remedies.[19] In the Cantos Case, in which the Commission convoked a hearing to make itself available to the parties with the aim of arriving at a friendly solution, after the hearing the State informed that it would not agree to the proposal made in the hearing and the petitioners agreed that it would not be possible to reach a solution of this type.[20] In the Villagrán Morales *et al*. Case, after two invitations by the Commission to achieve a friendly solution, Guatemala stated that this procedure "would not be necessary."[21] In the Ivcher Bronstein Case, responding to the invitation of the Commission to attempt to find a friendly solution, the State claimed that it was not advisable to institute this procedure. When the Commission was deciding whether to refer the case to the Court, the State then requested additional time in order to arrive at an "amicable solution" of the recommendations made in the Commission's report. [22]

Any party may reject this procedure by deeming it inapplicable. In the Constitutional Court Case, in response to the Commission making itself available to the parties in order to reach a friendly settlement, the State responded negatively to such a possibility because it deemed that this procedure was not applicable.[23]

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17. I/A Commission H.R., Case presented to the Inter-American Court against Peru, Case 11.154 (María Elena Loayza Tamayo), para. 66.

18. *Ibid*.

19. I/A Court H.R., *Barrios Altos Case*. Judgment of March 14, 2001. Series C No. 75, para. 16.

20. I/A Court H.R., *Cantos Case. Preliminary Objections*. Judgment of September 7, 2001. Series C No. 85, paras. 7-8.

21. I/A Court H.R., *The "Street Children" Case (Villagrán Morales et al.*) Case. Judgment of November 19,1999. Series C No. 63, paras. 18 and 23.

22. I/A Court H.R.,*Ivcher Bronstein Case. Competence*. Judgment of September 24,1999. Series C No. 54, paras. 9 and 12.

23. I/A Court H.R.,*Constitutional Court Case*. Judgment of January 31, 2001. Series C No. 55, para. 9.

The non-obligatory nature of the conciliatory procedure is also shown by the fact that, at any moment, a party may withdraw from the process. For example, in the Mayagna Community Case, after an informal meeting between the parties and the Commission with the aim of reaching a friendly settlement and after both parties had agreed to try to achieve such a solution, at a second meeting the State rejected a draft "memorandum of understanding," which for all practical purposes ended the negotiations.[24]

## C. ITS APPROPRIATENESS

There is little doubt, in principle, that this procedure is inapplicable if the situation that gave rise to the complaint has been resolved. The Commission, therefore, has declared that a case is not susceptible to a friendly solution if it deals with an act or situation already resolved juridically or factually.[25] On the other hand, the nature of the complaint, that is, the seriousness of the acts and the primordial nature of the rights involved, may also mean that in certain cases the conciliatory procedure is not appropriate.[26] In that respect, Article 41.4 of the Commission's Rules provides that the Commission may terminate its intervention in the friendly settlement procedure if it finds that the matter is not susceptible to be resolved in that manner.

Since the search for a friendly settlement is a question that depends essentially on the will of the parties and in order that it not be a mere delaying tactic, this is not an automatic or obligatory stage for the Commission, which may only employ it when both parties have tacitly or expressly accepted it. The Commission must first take into account the attitude of the State in question with regard to its competence to consider

24. I/A Court H.R.,*The Mayagna (Sumo) Awas Tingni Community Case*. Judgment of August 31, 2001. Series C No.79, paras. 13-14.

25. I/A Commission H.R., Resolution No. 26/88, Case 10.109, Argentina, adopted September 13, 1988, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1987-1988, General Secretariat of the Organization of American States, Washington, D.C., 1988, p. 110, para. 12 of the conclusions.

26. The Commission declared that the Neira Alegría *et al*. Case, alleging the disproportionate use of force to repress a mutiny in the *El Frontón* Penitentiary, which was dynamited, leaving 111 prisoners dead, many of whom could not be identified, was not an appropriate case for a friendly settlement. I/A Commission H.R., Resolution No. 43/90, Case 10.078, Peru, adopted June 7, 1990, para. 2 of the expository part.

the case and the State's willingness to participate.[27] The refusal of the State to furnish information on a case has, for example, been an important factor in not attempting a conciliation.[28] The Commission must also consider the positions of the parties, especially as regards an admission or absolute denial by the State of its responsibility for the acts denounced. Both aspects must be evaluated by the Commission, which then has the necessary information to be able to conclude whether the conciliatory procedure is appropriate in the particular case.[29]

The Court addressed this point in its first three cases, in which the Government of Honduras interposed the preliminary objection that the Commission had not respected the Convention by not promoting a friendly settlement. The Court considered that an interpretation of Article 48.1.f of the Convention, within the context of the Convention, makes it "clear that the Commission should attempt such friendly settlement only when the circumstances of the controversy make that option suitable or necessary, at the Commission's sole discretion."[30] The Commission had argued that it was not possible to use this procedure because the acts were not perfectly defined and because of the government's lack of cooperation and its failure to accept any responsibility for the acts.[31] When a State denies its responsibility for the acts denounced, it is unlikely that a friendly settlement will be accepted. The Commission argued that the friendly settlement procedure was not applicable in a case in which the authorities had informed the victims' next of kin that the victims had not been detained at any time or under any circumstances by military personnel of Frente No. 4, although

27. In the *Neira Alegría et al. Case*, the lack of sufficient cooperation by the State, which took more than a year and nine months to respond in a general way to the complaint and which later pointed out that the matter was before its military courts and that it would be advisable to await the final resolution of that case before the Commission issued a final decision, must have also been a reason why the Commission declared that this case was not appropriate for a friendly settlement.

28. I/A Commission H.R., Report No. 9/94, Cases 11.105, 11.107, 11.110-11.114, 11.118, 11.120, 11.122 and 11.102, Haiti, adopted February 1, 1994, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 2, p. 230, para. 18.

29. *See, e.g.*, Resolution No. 43/90, *supra* note 26, para. 2 of the operative part.

30. *Velásquez Rodríguez Case. Preliminary Objections*; *Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections*, *supra* note 14, paras. 44, 49 and 47, respectively.

31. *Ibid*., paras. 43, 48 and 46, respectively.

it could be inferred that such detention or kidnapping could have been the responsibility of another military unit or dependency.[32]

It should be remembered that, even if the Commission has offered its good offices to reach a friendly solution and has initiated the respective procedure, under Article 41.4 of its Rules the Commission may terminate its participation if it finds that the matter is not susceptible to be resolved by this means or a party does not consent to its application or a party decides not to continue or does not display a willingness to reach a friendly settlement based on respect for human rights. This rule, contained in a different provision of the Rules then in force, was invoked in the case of the Miskito population in Nicaragua in which, in spite of having achieved concrete results in some areas, the procedure bogged down in light of difficulties of agreeing on the representation of the Miskito community and the impossibility of maintaining a quiet dialogue between the parties.[33] In the Baena Ricardo *et al*. Case, in which the Commission had made itself available to the parties in order to attempt a friendly solution, a procedure to which both the State and the petitioners had consented, after almost three years in which three meetings were held to try and reach a solution "the Commission considered that the action for settlement had been exhausted and initiated the legal proceeding."[34]

It has also been argued that, given the nature of the matter in dispute, it may be that the matter is not apt to be resolved by conciliation. On this point, César Sepúlveda has claimed that this type of arrangement "is not apt, for example, when dealing with violations such as unjustified arrest, prolonged detention without being submitted to a judicial trial, or in cases of torture or summary executions or forced disappearances."[35] In numerous cases of detention and subsequent disappearance, or in cases of kidnapping, torture and killing (in which, in one case, one of the victims was a minor

32. I/A Commission H.R., Report No. 37/93, Case 10.563, Peru, adopted October 7, 1993, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 2, p. 306.

33. I/A Commission H.R. REPORT ON THE SITUATION OF THE HUMAN RIGHTS OF A SECTOR OF THE NICARAGUAN POPULATION OF MISKITO ORIGIN. OAS/Ser.L/V/II.62, Doc. 10, rev. 3, of November 29, 1983.

34. I/A Court H.R., *Baena Ricardo et al. Case*. Judgment of February 2, 2001. Series C No. 72, para. 10.

35. *El procedimiento de solución amistosa ante la Comisión Interamericana de Derechos Humanos*, in DERECHOS HUMANOS EN LAS AMERICAS, HOMENAJE A LA MEMORIA DE CARLOS A. DUNSHEE DE ABRANCHES, Inter-American Commission on Human Rights, Washington, D.C., 1984, p. 247.

and another was pregnant), the Commission has held that the friendly settlement procedure was not appropriate.[36] In the case of a massacre of twenty peasants in Colombia, the Commission resolved that "the irrecoverable right to life and the irreversible acquittal despite the evidence, that deprives them forever of the right to justice, cannot, by their very nature, be resolved through a friendly settlement."[37]

The inappropriateness of the conciliatory procedure in the case of forced disappearances, because of their very nature, does not appear to present difficulties. This euphemism has been employed to refer to the arbitrary arrest of a person who is taken to a clandestine detention center to be interrogated and tortured, after which the person is frequently physically eliminated, accompanied by a denial of responsibility by the State authorities as part of a systematic effort to destroy all evidence of the detention, making any type of judicial control practically impossible. Under these circumstances, it is obvious that the only reasonable solution would be the appearance (preferably alive) of the disappeared person. In this respect, the Court has held that "when the forced disappearance of a person at the hands of a State's authorities is reported and that State denies that such acts have taken place, it is very difficult to reach a friendly settlement that will reflect respect for the rights to life, to humane treatment and to personal liberty."[38]

Referring to cases of arbitrary detention with the subsequent forced disappearance of the victim,[39] of an extra-legal execution,[40] of the violation of judicial guarantees by acquitting a soldier whose responsibility in an

36. I/A Commission H.R., Report No. 8/92, Cases 10.227 and 10.333, El Salvador, adopted February 4, 1992, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1991, General Secretariat of the Organization of American States, Washington, D.C., 1992, p. 119, para. 14.

37. I/A Commission H.R., Report No. 2/94, Case 10.912, Colombia, adopted February 1, 1994, in Annual REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 2, p. 150, para. 5.a.

38. *Velásquez Rodríguez Case. Preliminary Objections*; *Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections*, *supra* note 14, paras. 46, 51 and 49, respectively.

39. I/A Commission H.R., Report No. 22/93, Case No. 9.477, Colombia, adopted October 12, 1993, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 2, p. 78, para. 3.a of the considerations.

40. I/A Commission H.R., Report No. 23/93, Case 10.456, Colombia, adopted October 12, 1993, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 2, p. 78, para. 3.a of the considerations.

assassination had been fully demonstrated[41] and of an arbitrary detention and tortures,[42] the Commission has considered that such situations by their nature are not susceptible to be resolved by a friendly settlement. On the other hand, in cases involving illegal detention and mistreatment (without deciding whether it was torture, cruel, inhuman or degrading treatment),[43] summary executions[44] and the violation of the right to life and the obligation to investigate and punish those responsible,[45] the Commission has not rejected the appropriateness of the procedure of conciliation, has promoted the search for a friendly solution or has simply given its approval to an agreement reached by the parties.

In addition to the nature of the rights violated, this rule has been extended to situations in which, given the position of the State regarding the subject matter of the complaint, it is impossible to reach a friendly settlement. For example, it was applied in several cases that impugned the laws of Final Stop and Due Obedience, adopted in Argentina on December 24, 1986 and June 8, 1987, respectively, and their application by the judiciary as a violation of various provisions of the Convention, and that challenged Presidential Decree of Pardon No. 1.002 of October 7, 1989, which ordered that any proceedings against persons indicted for human rights violations who had not benefited from earlier laws be discontinued. According to the Commission, as this was a question of government policy that the State still supported, "a friendly settlement is neither necessary nor appropriate."[46] In the case of a group of petitions

41. I/A Commission H.R., Report No. 1/94, Case 10.473, Colombia, adopted February 1, 1994, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 2, p. 112, para. 5.a of the considerations.

42. I/A Commission H.R., Report No. 7/94, Case 10.911, El Salvador, adopted February 12, 1994, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 2, p. 193, para. 4.a of the considerations.

43. I/A Commission H.R., Report No. 25/94, Case 15.508, Guatemala, adopted September 22, 1994, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1994, General Secretariat of the Organization of American States, Washington, D.C., 1995, p. 53, para. 4.a of the considerations.

44. I/A Commission H.R., HUMAN RIGHTS WITH RESPECT TO COLOMBIA and the reference to the Trujillo Case (No. 11.007), in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1994, *ibid.*, p. 138 *et seq.*

45. The Agreement between the parties in the Eleazar Ramón Mavares Case (Case 11.068), *supra* note 7 and, on this same case, Report No. 8/95, Case 11.068, Venezuela, paras. 4.29-4.32. OAS/Ser.L/V/II.90, doc. 12, of September 12, 1995.

46. I/A Commission H.R., Report No. 28/92, Cases 10.147, 10.181, 10.240, 10.262,10.309 and 10.311, Argentina, adopted October 2, 1992, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1992-1993, General Secretariat of the Organization of American States, Washington, D.C., 1993, p. 41, para. 20.

that objected to Law 15.848 adopted by Uruguay, whose Article 1 provided that "as a consequence of the logic of the events stemming from the agreement between the political parties and the Armed Forces in August 1984 and in order to complete the transition to full constitutional order, any State action to seek punishment of crimes committed prior to March 1, 1985, by military and police personnel for political motives, in the performance of their functions or on orders from commanding officers who served during the *de facto* period, has hereby expired," the Commission observed that this matter referred to a legislative program that the State actively defended and thus the friendly settlement procedure was "neither necessary nor suitable."[47] A controversy on the compatibility of a domestic law with the rights guaranteed in the Convention does not appear to be susceptible to be resolved by means of an agreement between the parties. Unless the parties are willing to abide by a jurisdictional decision on the matter, the only possible solution is the repeal or modification of the law in terms compatible with the Convention.

In cases in which the State in question has challenged the Commission's competence, asserting, for example, that the object of the complaint "refer(s) directly to the exercise of the Mexican people to the right of free self-determination, and that such matters cannot lie within the province of any international authority," the Commission considered that the friendly settlement procedure was not appropriate.[48]

In our opinion, more than the object itself of the controversy, what might be of decisive importance in determining the aptness of the conciliatory procedure is to know whether it is possible to reach an agreement that, given the circumstances, is compatible with respect for the rights recognized in the Convention.

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47. I/A Commission H.R., Report No. 29/92, Cases 10.029, 10.036, 10.145, 10.305 and10.372-10.375, Uruguay, adopted October 2, 1992, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1992-1993. *Ibid*., p. 154, para. 18.

48. I/A Commission H.R., Report No. 8/91, Case 10.180, Mexico, adopted February 22, 1991, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1990-1991, General Secretariat of the Organization of American States, Washington, D.C., 1991, pp. 237 and 247, paras. 3 and 36.

## D. WHEN ITS APPLICATION IS APPROPRIATE

As to the determination of when to resort to conciliation, Article 41 of the Commission's Rules provides that in order to arrive at a friendly settlement of the matter, whether on its own initiative or at the petition of any of the parties, the Commission must place itself at the disposal of the parties "at any stage of the examination of a petition" or case. Additionally, Article 38.4 of the Rules provides that, before deciding on the merits of the petition, the Commission establishes a time period to ascertain whether the parties are interested in initiating the friendly settlement procedure.

In employing this broad power, the Commission has invited the parties to reach a friendly settlement even in cases that it has just begun to process and has rapidly arrived at an agreement in a hearing convoked to inform on the precautionary measures ordered by the Commission.[49] The Commission has also raised the possibility of reaching a friendly settlement after the adoption of its Article 50 Report, as occurred in the Colotenango Case,[50] or the State itself may raise it after the adoption of the Report, as occurred in the Mavares Case.[51] Similarly, in the Constitutional Court Case, although initially the State rejected the possibility of a friendly settlement, after the State had been notified of the Article 50 Report it requested an extension of 60 days to consider the Commission's recommendations and during this period the State and the petitioners held, in the presence and with the knowledge of the Commission, meetings with the aim of reaching a friendly solution, which finally was not arrived at.[52] In Las Palmeras Case, it was also the State that, after having been notified of the Commission's Report, proposed a friendly settlement and stated that it did not share *all* the observations and conclusions of Report No. 10/98, particularly with reference to the exhaustion of internal legal remedies

49. I/A Commission H.R., ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1997, *supra* note 7, pp. 46-47.

50. I/A Commission H.R., Report No. 19/97, Case 11.212, Guatemala, adopted March 13, 1997, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1996, General Secretariat of the Organization of American States, Washington, D.C., 1997, pp. 447-452.

51. Report No. 49/96, *supra* note 7, pp. 844-880, para. 137.

52. I/A Court H.R., *Constitutional Court Case.* Judgment of January 31, 2001. Series C No. 71, paras. 9 and 13.

and the application of the norms of international humanitarian law and it proposed the creation of a committee to move the criminal investigation forward. The State and the petitioners informed the Commission that they had agreed on a deadline of 30 days to begin negotiations leading to a friendly settlement and asked that the time period of Article 51 of the Convention be suspended. A month later, the petitioners informed the Commission that conditions did not exist for a friendly settlement and requested that the proceedings of the case be resumed and that the suspended time period be reinstated.[53]

The Convention clearly grants the Commission the power to determine when its intervention as an organ of conciliation is appropriate. In light of the nature of this institution and taking into account the context of Article 48.1.f of the Convention, it appears that the appropriate moment to attempt a friendly settlement is immediately after having concluded the necessary fact-finding steps. In this sense, although only by analogy, it is important to note that, at the moment of offering its good offices and suggesting a friendly solution the former European Commission on Human Rights indicated to the government of the State in question its provisional opinion on the alleged violation,[54] which is only possible after having examined the evidence. That tentative opinion, which might appear to indicate *prima facie* a violation of the Convention, would certainly encourage the government to try to arrive at a friendly settlement before the Commission formally issued its conclusions.

It is indicative that this provision is placed in the American Convention after the clauses on the examination of the admissibility of the petition or communication and after the reference to the examination of the matter presented, about which the Commission investigates on its own or requests of the State the information deemed relevant. It appears obvious that this procedure may not be employed before the Commission has established its jurisdiction or before it has studied the admissibility of the petition or communication. In a case in which the internal legal remedies had not been exhausted and in which the petitioner proposed

53. I/A Court H.R., *Las Palmeras Case.* Judgment of December 6, 2001. Series C No. 90, paras. 10-12.
54. Francis G. Jacobs, THE EUROPEAN CONVENTION ON HUMAN RIGHTS, Clarendon Press, Oxford, 1975, p. 255.

that proceedings be initiated in order to recognize his innocence and in which he waived any type of economic compensation, in rejecting the admissibility of the petition the Commission ruled that its intervention to find a friendly solution was inappropriate.[55]

This procedure does not appear appropriate before there is a clear idea of the facts and the parties' position. Article 45.2 of the former version of the Commission's Rules provided that the Commission could only offer its good offices after it had sufficiently fixed the positions and claims of the parties, which is in keeping with the idea that this procedure is apt only after the facts have been established or, at least, after the Commission has initiated the fact-finding stage.[56] César Sepúlveda has observed that, in order that it not be premature or ineffective, the friendly solution procedure should only be tried when the positions of the parties are fully known, when the Commission has closely examined the contents and scope of the claim and when the parties have been fully identified.[57] On the other hand, the practice of the Commission has also inclined toward obtaining information from the government before entering into the conciliatory procedure.[58]

Despite the offer of Commission's good offices to attempt to reach a friendly settlement "at any stage of the examination of a petition or case," it appears reasonable to assume that it does not make sense once the Commission has adopted a decision on the case. However, we have already mentioned some cases in which an Article 50 Report has been adopted without it having been an obstacle to attempting a friendly settlement.[59] In the Cantoral Benavides Case the Commission adopted its Report and

55. I/A Commission H.R., Resolution No. 24/88, Case 9.706, Mexico, adopted March 23, 1988, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1987-1988, *supra* note 25, pp. 163-173.

56. *See,* in this same respect, its appropriateness under the European Convention, whose original text, in Article 28, had provided that the former Commission first proceeded to determine the facts and "at the same time, place itself at the disposal of the parties in order to arrive at a friendly settlement of the matter.…"

57. *El procedimiento de solución amistosa ante la Comisión Interamericana de Derechos Humanos*, *supra* note 35, p. 247.

58. I/A Commission H.R., Resolution No. 5/85, Case 7.956, Honduras, adopted March 5, 1985, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1984-1985, General Secretariat of the Organization of American States, Washington, D.C., 1985, p. 104 *et seq*., para. 7.

59. *See* the *Colotenango Case* in I/A Commission H.R., ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1996, *supra* note 50, pp. 447-452 and the *Mavares Case, supra* note 7, pp. 844-880, para. 137.

decided not to notify Peru until after the parties responded to an offer of a friendly settlement that was made the day after the adoption of the Report.[60]

This, of course, does not prevent, either before the Commission has examined the admissibility of the petition or at any later time, the parties from reaching an informal agreement, without the intervention of the Commission, that leads to the petitioner withdrawing his claim if the agreement satisfies his interests. In this event, under Article 35.c of its Rules, if there are no grounds for the petition the Commission may file the case.

On the other hand, it is not absolutely obvious whether the conciliatory procedure may be employed only while a case is pending before the Commission or whether it is also apt after the case has been referred to the Court. The essentially conciliatory nature of this procedure, placed in the Convention as a stage in the Commission's processing of a petition or communication, seems to reject the possibility that it be invoked once the case has been submitted to the Court for a judgment on the merits. Moreover, the expression "at any stage of the examination of a petition," found in Article 45 of the Rules can only refer to the proceedings before the Commission and not to a later stage before the Court.

Nothing, however, precludes the possibility that, after the matter is no longer under the Commission's jurisdiction, the parties reach a friendly settlement and persuade the Commission to withdraw the case from the Court, a situation that is covered by Article 53.2 of the Court's Rules. In fact, the Commission withdrew the Maqueda Case, based on an agreement that met the interests of the parties and that, in the opinion of the Commission, was in accordance with the letter and spirit of the Convention.[61] After consulting the opinion of the Government of Argentina and the petitioners, the Court endorsed the action proposed by the Commission, but reserved the power to reopen and continue processing the case if there was a change of the circumstances that gave rise to the agreement.[62] In El Amparo Case, after admitting the allegations in the petition and after accepting its international responsibility, the State

60. I/A Court H.R., *Cantoral Benavides Case. Preliminary Objections, supra* note 13, para. 7.
61. I/A Court H.R., *Maqueda Case.* Resolution of January 17, 1995. Series C No. 18, para. 16.
62. *Ibid*., paras. 26-27.

requested the Court, before it handed down its judgment, that it remand the case to the Commission to determine in a friendly, non-contentious proceeding the reparations to be paid.[63] Although the cooperative attitude of the State might justify a decision of this nature, it is not obvious that it is within the letter and spirit of the Convention. On the other hand, although the Court agreed that it be the State in question and the Commission that established, by common agreement and within the time frame specified, the reparations and the form and amount of indemnification, it is not evident that the Court had in mind the friendly settlement procedure envisioned in Article 48.1.f of the Convention, either because it was not expressly mentioned in its judgment (which does not imply a stay of the proceedings or a discontinuance of the case by the Commission) or because it reserved the right to review and approve such agreement.[64]

Despite the fact that the State had objected to the Court's jurisdiction and had not appeared in the respective proceedings, a similar situation was presented in the Ivcher Bronstein Case after the new authorities of Peru revoked the resolution by means of which it had purported to withdraw from the Court's contentious jurisdiction. In a note of February 1, 2001, the State indicated that it considered particularly important its policy of reaching out and collaborating with the inter-American human rights system and, with respect to this case, of initiating conversations that could lead to a friendly settlement within the framework of the commitments assumed by the new government expressed in Supreme Resolution No. 254-2000-JUS, which restored to the claimant the ownership and administration of the company that operated *Televisora Frecuencia Latina.*[65]

## E. FORMAL STANDING TO PROMOTE IT

In order that the Commission offer itself to the parties as an organ of friendly settlement of a dispute, it is necessary that the positions and claims of the parties be sufficiently delineated and that, in the opinion of the

63. Note of the Agent of Venezuela, Ildegar Pérez Segnini, of January 11, 1995, addressed to the President of the Court.

64. I/A Court H.R.,*El Amparo Case*. Judgment of January 18, 1995. Series C No. 19, operative paras. 3 and 4.

65. I/A Court H.R., *Ivcher Bronstein Case.* Judgment of February 6, 2001. Series C No. 74, para. 78.

Commission, the matter is, by its nature, susceptible to be resolved in this manner.[66] Obviously, these conditions do not apply with the same rigidity if those who promote the friendly settlement are parties to the controversy. Under those circumstances and if the other party accepts the procedure, the Commission may intercede on its own initiative or at the request of one of the parties to act as the organ that promotes a friendly settlement.

For many years the Commission was not very enthusiastic about encouraging the parties to reach a friendly solution. It frequently excused itself from employing the procedure, asserting that "the parties did not request this procedure of the Commission."[67]

In the Caballero Delgado and Santana Case, the State interposed a preliminary objection regarding the Commission's failure to initiate a friendly settlement procedure, pointing out that it had at no time denied the acts denounced and that, therefore, the assertion contained in the report in the sense that the acts denounced were not "by their very nature" susceptible of being resolved through the friendly settlement procedure was arbitrary.[68] While this was an option that was open to the parties as well as to the Commission, the government answered the argument that it did not request the procedure by asserting that the Convention did not empower the Commission to transfer to the parties its obligation to make itself available to arrive at a friendly solution and that a State should not find itself in the uncomfortable position of having to request a friendly settlement since that could be interpreted as an admission of its responsibility.[69] The Court held that the refusal of the Commission to promote a friendly settlement did not cause irreparable prejudice to the State since, if the State was not in agreement with the decision and had an interest in such a solution, it could propose initiating the procedure without

66. Article 45.2 of the Rules of Procedure of the Commission.

67. Report No. 22/93, *supra* note 39, p. 78, para. 3.a of the considerations. Also, for purposes of illustration, I/A Commission H.R., Report No. 32/93, Case 10.456, Colombia, adopted October 12, 1993 in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 2, p. 96, para. 3.a of the considerations; Report No. 1/94, *supra* note 41, p. 112, para. 5.a of the considerations and I/A Commission H.R., Report No. 24/93, Case No. 10,537, Colombia, adopted October 12, 1993, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 2, p. 137, para. 3.a of the considerations.

68. I/A Court H.R., *Caballero Delgado and Santana Case. Preliminary Objections*, *supra* note 4, paras. 19-20.

69. *Ibid*., para. 21.

it being interpreted as a recognition of responsibility but rather as good faith compliance with the Convention's purposes. According to the Court, a State may not make a preliminary objection that the Commission had not taken the initiative to search for a friendly solution when the State had this same possibility and did not exercise it.[70]

Nothing, of course, prevents the petitioner himself from proposing to the Commission and the State in question that an attempt for a friendly settlement be made.[71] In the Mayagna Community Case, shortly after the date on which the Commission transmitted to the State the pertinent parts of the petition and before the State had responded, the petitioners sent to the Commission a draft "memorandum of understanding" for a friendly solution in the case.[72]

Accepting a friendly settlement allows the petitioner to obtain a prompt and effective satisfaction of his claim, while avoiding the complications of a proceeding that is not known for its brevity and the risk of an adverse decision. On the other hand, while neither the Convention nor the Rules refer to this matter, it is obvious that, by its nature, the conciliatory procedure requires not only the participation of the petitioner but also that of the victim or his family or someone who acts in his name.

## F. ITS PROCEDURE

The Convention does not provide guidelines on how the Commission and the parties should proceed during this stage. While some of the procedural aspects that are essential to resolve the matter have been regulated either by the Commission's Statute or its Rules, it is also true that, unfortunately, these provisions leave important gaps or are not very precise. In particular, there is no clear indication of the Commission's attributes during the procedure or of the time periods to be observed. In any event, although it is undeniable that the Commission may promote a dialogue between the parties and that it may even make specific proposals

70. *Ibid*., paras. 29-30.

71. For example, I/A Commission H.R., Report No. 22/94, Case 11.012, Argentina, Friendly Settlement, adopted September 20, 1994, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1994, *supra* note 43, p. 42, paras. 10-11.

72. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 24, paras. 9 and 11.

leading to a friendly settlement, no provision of the Convention authorizes it to dictate the terms of the settlement.

In accepting to act as an organ of friendly settlement, the Commission may entrust one or more of its members with facilitating negotiations between the parties. In its practice, the Commission appoints, or is requested to appoint, one of its members to coordinate the negotiations between the parties and to contribute to facilitating an eventual conciliation.[73] This implies the holding of numerous meetings between the parties, with or without the representative of the Commission, and also the holding of hearings, either with the full Commission or its representative.[74]

When the parties have shown an interest in finding a friendly solution, the Commission has at times drafted a document in which it proposes the grounds of the agreement and gives the parties 30 days to formalize the terms of an agreement that would resolve the problem. This document, which must be signed by both parties and the Commission,[75] has the advantage of leaving clear, in writing, an agreement in principle and of setting a deadline to conclude the procedure of negotiation in order to avoid that it become a mere delaying tactic.

Obviously, the essentially political nature of the conciliatory procedure requires that the Commission act with discretion, maintaining the confidentiality of the negotiations in order to obtain a prompt and practical solution of the matter.

In the event that the Commission becomes aware, during the procedure, that the situation is, by its very nature, not susceptible to a friendly solution or in the event that one of the parties does not consent to the application of this procedure or does not display a willingness to reach a friendly settlement, the Commission may, at any stage of the procedure, terminate its intervention.

73. See Report No. 22/94, *supra* note 71, p. 42, para. 11.
74. *Ibid*., para. 16.
75. See the documents signed on October 6, 1998 in Cases 11.715 and 11.856 between the Government of Chile and the petitioners, in both cases at the initiative of the Commission.

One of the deficiencies of this mechanism is that there is no maximum time for the negotiations to reach a friendly settlement. However, its Rules authorize the Commission to set a deadline to conclude the procedure, which may be extended at its discretion. When the parties accept this procedure they should obviously do so in good faith and not as a mere delaying tactic. Therefore, when it is obvious that there is no possible agreement and that the procedure is *a priori* doomed to failure, the Commission cannot postpone indefinitely the adoption of a decision on the matter and must look to other ways to settle it. If it does not receive the co-operation of the State during the procedure, it may decide that the matter is not susceptible to a friendly settlement and terminate it. In a case against Ecuador in which the State had indicated a willingness to reach a friendly solution, the Commission required written notification, within ten days, of the specific measures adopted in order for it to consider that the friendly settlement procedure remained open. The government responded two months later that it was attempting a prompt and definitive solution to the matter. For several months, however, it refused to suggest any specific measure and, therefore, the Commission stated that it had "no alternative but to consider the friendly settlement process terminated due to inaction".[76]

Obviously, nothing prevents the parties from negotiating in private and from reaching an agreement that they then submit to the Commission for its approval. In certain cases, however, the Commission has not looked favorably on remaining on the sidelines, compromising the rights of the petitioner. In the Mayagna Community Case, although the case had already been referred to the Court, the Commission requested the Court that it order the State to adopt the necessary measures to ensure that its officials did not pressure the Community to withdraw its complaint, that they did not interfere between the Community and their lawyers and that they cease "to attempt to negotiate with members of the Community without a prior agreement or understanding with the Commission and the Court in that regard."[77]

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76. I/A Commission H.R., Report No. 10/95, Case 10.580, Ecuador, adopted September 12, 1995, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1995, General Secretariat of the Organization of American States, Washington, D.C., 1996, p. 86 *et seq*., para. 7 of the considerations.

77. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 24, para. 48.

The Commission must approve any agreement reached by the parties. The procedure ends with the drafting of a report by the Commission, the nature and characteristics of which will be examined later in this study.

## G. THE TERMS OF THE AGREEMENT

The existence of a conciliatory procedure implies that the State accept what might be on its part an eventual violation of the Convention. It is precisely on this basis that the negotiations take place. But the precise terms of the agreement depend on the circumstances of each case.

In principle and whenever possible, such an agreement should include the re-establishment of the legal situation infringed. For example, in the case of the Peruvian journalist Gustavo Gorriti, who was the Associate Director of *La Prensa* newspaper in Panama and who had been threatened with expulsion from the country on the pretext that Panamanian laws restricted the possibilities of non-citizens working in journalism, the agreement reached included abandoning the deportation proceedings and renewing his work permit so that he could continue as a journalist.[78] The agreement, however, should have included a commitment to investigate the acts denounced, to punish those responsible and indemnify the consequences of the violation, through compensation or in other manner. The Colotenango Case, in which the participants in a peaceful demonstration against the abuses and illegal activities of the Civil Self-Defense Patrols of Guatemala were attacked by the Patrols resulting in one demonstrator being killed and several wounded and in which the judicial procedures initiated because of the incident were systematically blocked, furnishes an appreciation of some of these elements. In this case, before signing the agreement the government had already dissolved the Patrols, recognized their excesses, and demonstrated a willingness to end impunity. The agreement with the petitioners signaled a commitment of the government to take the necessary measures to see justice done, including an investigation into the acts denounced and the arrest of those involved who were still at liberty, assistance to the communities affected and an

78. I/A Commission H.R., ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1997, *supra* note 7, pp. 46-47.

indemnification of 300,000 quetzales to be distributed among the citizens directly affected by the acts denounced.[79]

The friendly settlement reached by the parties in the Guardatti Case was much more elaborate and complex. It included, as its principal aspects, an agreement as to the form to determine indemnification and a mechanism to investigate the facts of the case. To determine the amount of compensation, an Arbitral Court was established, whose members were chosen by consensus from the members of the Advisory Committee of the Magistrates Council on Civil and Commercial Matters of Mendoza Province. Its decision was to be in accord with "current international standards," could be objected to by the parties in the case and was subject to the approval of the Commission. As to the investigation, an *ad hoc* Committee was created, made up of five members appointed by consensus, with the aim of verifying the facts and issuing an opinion suggesting the measures to be adopted.[80] The verdict of the Arbitral Court was guided by the jurisprudence of the Inter-American Court, by the principles of comparative law and by Argentine law and an indemnification of $6,000 US dollars was awarded for consequential damages, $50,000 US dollars were given for loss of income and $80,000 for mental trauma.[81] The *ad hoc* Committee, after examining the circumstances of the detention of Paulo Guardatti and the judicial actions that resulted in the acquittal of the accused persons, held that the Federal Chamber had sufficient proof to try the policemen implicated, indicated the violations of human rights involved in the case and made the following recommendations: a) a national law be adopted that included the different levels of criminal acts and the types of participation involved in the crime of the forced disappearance of persons, b) greater resources be assigned and the judges with this type of cases be relieved from other responsibilities, c) the Code of Conduct for Officials Responsible for Ensuring Compliance with the Law, adopted by the UN General Assembly on December 17, 1979 be promulgated, d) the standards that govern the performance of criminal prosecutors be reformed so as to

79. Report No. 19/97, *supra* note 50, pp. 447-452.

80. I/A Commission H.R., Report No. 31/97, Case 11.217, Paulo C. Guardatti vs. Argentina, adopted October 14, 1997, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1997, *supra* note 7, pp. 232-240, para. 19.

81. *Ibid*., paras. 20-21.

secure their active and effective participation in judicial investigations and e) the investigation be continued until the whereabouts of the victim are ascertained, despite the resolution acquitting the persons responsible for the unlawful deprivation of liberty.[82]

## H. THE NECESSITY OF A SUBSEQUENT APPROVAL

Although the purpose of this procedure is to avoid a decision of a jurisdictional nature, when the parties reach a friendly settlement it is not sufficient that the solution is acceptable solely to them since it must also have the approval of the Commission. Under the Convention, the Commission cannot approve just any type of agreement to which the petitioner and the State might arrive. When the parties reach a friendly settlement, it may only be approved by the Commission if it is based on respect for the human rights recognized in the Convention[83] in a way that satisfies the general interest that the Commission pursues. Under Article 41.5 of the Rules, the friendly settlement must be based on respect for the human rights recognized in the American Convention, the American Declaration and other applicable instruments. However, the Commission's Rules do not contain any precise guidance as to the elements that should be in an agreement in order for it to be acceptable. In fact, notwithstanding its practical value, there is a question as to what point respect for human rights can be compatible with a compromise solution, reached outside a jurisdictional procedure.

In a case presented by the journalist Horacio Verbitsky, before giving its approval to the agreement reached by the parties, the Commission examined its terms to ensure its compatibility with the Convention and observed that it eliminated the legal basis for the undue restriction of a right set forth in the Convention.[84] On the other hand, in the case of a person who had been expelled from his country for having been considered a foreigner, sufficient attention was not given to the general interest because,

82. *Ibid*., paras. 29-32.
83. Article 48.1.f of the Convention.
84. Report No. 22/94, *supra* note 71, p. 42, para. 21.

with the consent of the petitioner the Commission accepted as compatible with respect for human rights the decision of the government to permit the petitioner to enter Honduras in order to prove his Honduran nationality.[85]

The conciliatory procedure implies that the terms of the agreement reached must be compatible with the implicit values of the Convention and, therefore, it is necessary that the agreement go further than a simple restitution of the right infringed or of a monetary satisfaction or indemnification for the affected party. While at this stage of the procedure the Commission has not formally defined whether the acts denounced are a violation of the Convention, the consent of the aggrieved party is not sufficient to put an end to the case if, at the same time, measures that would tend to avoid a repetition of those acts are not adopted or if the agreement reached does not resolve the plight of those who are in a similar situation as the petitioner.

The Commission has, however, not rigorously applied this requirement and simply agrees to the solution proposed by the parties, which in many cases involves only monetary compensation but not reforms to the existing legislation with the aim of avoiding a repetition of similar acts[86] or simply omitting to address expressly the compatibility of the agreement reached with the provisions of the Convention.[87] An exception worthy of mention is the agreement reached in the Verbitsky Case, which resulted in the contempt law (*desacato*) being repealed.[88]

## I. THE CONCLUSION OF THE CONCILIATORY PROCEDURE

Under the terms of Article 49 of the Convention, if the parties have reached a satisfactory arrangement and if it is compatible with respect for human rights, the Commission drafts a report containing a brief statement

85. Resolution No. 5/85, *supra* note 58, p. 110 *et seq*., paras. 1-3 of the considerations and operative para. 4.

86. For example, I/A Commission H.R., Report No. 1/93, Report on the Friendly Settlements in the Cases 10.288, 10.310, 10.436, 10.496, 10.631 and 10.771, Argentina, adopted March 3, 1993, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1992-1993, *supra* note 46, pp. 35-40.

87. *Ibid*.

88. Report No. 22/94, *supra* note 71, p. 42, paras. 9, 14 and 20ii.

of the facts and of the solution reached, which is transmitted to the interested parties and to the OAS Secretary General for publication.[89] Article 41.5 of the Rules of Procedure provides that the report be published by the Commission.

The content of this report is governed by the purpose of the conciliatory procedure, which is to avoid not only a judicial decision but also a decision of the Commission on the allegations. It is timely to recall that, in the opinion of the Court, the Convention contemplates a mechanism of increasing intensity designed to encourage the State to co-operate in the resolution of the case and offers the petitioner the possibility of obtaining an appropriate remedy more quickly and simply.[90] It might be assumed that the absence of a decision that might have concluded that the acts denounced are a violation of the Convention would act as an incentive so that the State in question show a willingness to find a friendly solution. Despite the precise terms of Article 49 of the Convention, the Commission has not always been able to avoid a decision on the facts that served as the basis of the agreement reached by the parties. In the Verbitsky Case, despite having reached a friendly settlement with the Government of Argentina, the Commission did not resist the temptation of indicating that the repeal of the contempt law, in the context of this case, resulted in adapting Argentine law to the Convention since it eliminated a legal basis for the governmental restriction of freedom of expression. The Commission added that when a law is incompatible with the Convention the State is obligated under Article 2 to adopt the legislative measures necessary to give effect to the rights or freedoms guaranteed by the Convention.[91]

The report is transmitted to the OAS Secretary General so that he distribute it, but the Commission may also decide to publish it in its Annual Report to the OAS General Assembly.[92]

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89. Article 45.6 of the Rules of Procedure of the Commission. The text of this provision differs from that of Article 49 of the Convention, which requires that this report be transmitted "to the petitioner and to the States Parties" to the Convention.

90. *Velásquez Rodríguez Case. Preliminary Objections*; *Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections*, *supra* note 14, paras. 60, 60 and 63, respectively.

91. Report No. 22/94, *supra* note 71, p. 42, paras. 21-22

92. *Ibid*., para. 24.

Although neither the Convention nor the Commission's Rules indicate when this report should be drafted, it may be presumed that it should be done within a reasonable period that does not compromise the execution of the agreement reached and that, in any event, does not exceed the period stipulated for the drafting of the Article 50 Report in the event that a friendly settlement is not reached.

Under Article 23.2 of its Statute, if there is no friendly settlement, the Commission drafts, within 180 days, the report required by Article 50 of the Convention.

### *1. COMPULSORY NATURE OF THE AGREEMENT REACHED*

An aspect closely associated with the previous point and that is not sufficiently dealt with by the Convention or by the Commission's Rules concerns compliance with the agreement reached by the parties and approved by the Commission. While no party is obligated to submit itself to the conciliatory procedure and accept a friendly settlement, a commitment freely consented to and accepted, whose terms have been approved by the Commission, is binding.

The fact that this agreement requires the approval of the Commission and that it terminates the procedure also indicate the binding nature of the agreement. A decision by the organs of protection of the system is avoided by this agreement and precisely for this reason it is binding on the parties and its compliance may, and should, be supervised by the Commission. If not, the conciliatory procedure is no more than an escape valve for the States, permitting them to elude the international control established in the Convention.

### *2. SUPERVISION OF COMPLIANCE*

None of the Convention's provisions refers to the effect that a failure to comply with what was agreed upon by the State would have and whether, in such a situation, it should be deemed that the case was not closed. While this procedure would avoid the adoption of an Article 50 Report (which is

necessary in order to refer the case to the Court), there is no provision that, in the case of a failure to comply, would authorize the Commission to reopen the matter, adopt an Article 50 Report and eventually submit the case to the Court. Article 46 of the Rules, however, establishes that, once the report on the friendly settlement is published, the Commission may adopt the follow-up measures that it considers appropriate, such as requesting information from the parties and holding hearings with the aim of verifying compliance of the agreement. Moreover, the Commission informs, in a manner it deems appropriate, on progress in complying with the agreement.

It must be pointed out that the agreement is also compulsory for the petitioners. To determine the indemnification to be paid to the mother of the victim in the Guardatti Case, an Arbitral Court was created. The decision of the Arbitral Court was to be approved by the international organs that had intervened in the case, specifically the Commission, and the parties could object to it in the case of arbitrariness. The mother's lawyers objected to the decision, alleging manifest and clear arbitrariness.[93] After analyzing the decision of the Arbitral Court and the arguments presented by the lawyers, the Commission considered that the deadlines, the stages agreed upon and the mechanisms to define the amount of damages had been strictly complied with and that the criteria utilized by the Arbitral Court as well as the result were acceptable within the framework of the case and the terms of the agreement. Unable to find the decision arbitrary, the Commission, therefore, held that it should not review the manner in which the norms were interpreted, taking into account that both parties voluntarily subjected themselves to arbitration and that they should accept the result, no matter how well-founded their expectation to receive a greater amount.[94]

The Commission should certainly continue to monitor the strict compliance with the terms of the agreement reached by the parties because it has terminated the proceedings and the State may have avoided a possible

93. Report No. 31/97, *supra* note 80, pp. 232-240, paras. 19 and 26-28. The petitioners subsequently sent a communication to the Commission withdrawing their initial objection and requesting that the friendly settlement reached in this case be adopted.

94. *Ibid*., paras. 35-38.

condemnation. Upon approving the agreement, the Commission has sometimes expressly reserved the right to supervise its compliance or, what is more important, has not closed the case and has delayed issuing the report provided for in Article 49 of the Convention until such time as there has been full compliance of the agreement.[95]

It is important to emphasize that, as a general rule, reaching a friendly settlement does not mean the immediate compliance of each and every one of the points that form part of the agreement. Some points involve an obligation of behavior on the part of the State or results that can only be reached as a final product of measures that must be adopted progressively. With respect to those aspects of the agreement that do not call for immediate execution, the oversight of the Commission is fundamentally important. In the Guardatti Case, after becoming aware that the persons named in the *ad hoc* Committee report as being responsible for the human rights violations had not yet been punished and since the State had not yet furnished information on the measures adopted to comply with the recommendations of that Committee and information on the status of the investigations to locate the whereabouts of the victim and since a commitment to pay promptly the agreed upon indemnification was still lacking, the Commission considered it necessary to continue its supervision until the agreement reached by the parties was fully complied with and required the State to send follow-up reports every three months.[96]

This supervision may also be incorporated into the agreement reached by the parties. For example, in the Colotenango Case it was decided that a Verification and Follow-up Commission oversee compliance of each of the provisions agreed upon and that it present a written report to the Commission twice a year.[97]

Regardless of whether the Commission has reserved supervision of compliance of the agreement, it appears to us that a failure to comply by the State must lead to a reopening of the case, allowing the Commission

95. *See*, for example, Report No. 1/93, *supra* note 86, pp. 36-41. Also, Report No. 22/94, *supra* note 71, p. 42, paras. 17.v, 20 and 23.

96. Report No. 31/97, *supra* note 80, pp. 232-240, paras. 41-43 and 45.B.

97. Report No. 19/97, *supra* note 50, pp. 447-452, para. 18.

to continue to process it as if there had not been a friendly settlement. However, since a friendly settlement may be attempted at any stage of the proceedings, there remain some doubts as to the effect that non-compliance would have after the adoption of an Article 50 Report or even after the case has been submitted to the Court and has been the grounds for the withdrawal of the petition. In fact, in the Maqueda Case the Court allowed the Commission to withdraw the case but reserved the right to reopen and continue examination of the case if there were a change in the circumstances that gave rise to the agreement.[98]

98. *Maqueda Case*, *supra* note 61, operative para. 3.

# Chapter X

## THE DECISION OF THE COMMISSION

Although it does not have coercive powers, the Commission is more than an investigatory body, limited to fact-finding and to intervening as a conciliatory body. Within the complex mechanism of increasing intensity established by the Convention to protect human rights, the Commission is called upon to rule on the allegations in a petition or communication that are proved and to make recommendations to the State in question.

After establishing the facts on the basis of the evidence obtained during the proceedings and regardless of whether there has been the conciliatory procedure that the Convention provides for seeking a friendly settlement, the Commission must adopt a decision in the case. The nature, timing and characteristics of this decision will vary, depending on whether the State concerned is a party to the Convention.

### A. THE DECISION WITH REGARD TO NON-STATES PARTIES

For the OAS member States that have not ratified the Convention, the decision that the Commission issues in one single stage does not present practical difficulties. If the Commission finds that there was not a human rights violation, it so states. Its report is then transmitted to the parties, published and included in its Annual Report to the OAS General Assembly. If the Commission finds one or more human rights violations, it prepares a preliminary report with the proposals and recommendations that it deems appropriate and transmits it to the State in question with a deadline to be informed on the measures adopted to comply with its recommendations.

If the State does not adopt the measures recommended by the Commission within the deadline, the Commission may adopt a final report and publish it, either in its Annual Report to the OAS General Assembly or in any other form that it deems appropriate.

In the former version of its Rules, Article 53.2 provided that the final decision was transmitted "to the State concerned and to the petitioner." Moreover, pursuant to Article 54 of those Rules, both the State concerned and the petitioner could request, within 90 days after the adoption of the final resolution, reconsideration of the conclusions or the recommendations contained in the Commission's report by invoking new facts or considerations of law that had not been previously alleged. If it deemed it necessary, the Commission could request the State or the petitioner, as the case may be, to present their observations on the request for reconsideration.[1] With respect to non-States parties to the Convention, the proceedings terminate at this point.

It does not appear necessary to point out the lack of consistency of a system that, for non-ratifying States, has as the only consequence of a human rights violation the formulation of recommendations by the Commission and, if the State does not comply with them within a set period, the possibility that the Commission's final decision is published in its Annual Report to the OAS General Assembly, which is not obligated to adopt any type of measure regarding it.

## B. THE DECISION WITH REGARD TO STATES PARTIES

With respect to States parties to the Convention, this stage of the proceedings, which is governed by Articles 50 and 51 of the Convention, has probably been the source of more speculation and controversy because of the difficulties presented in the interpretation and in the practical application of those articles.

Pursuant to Article 42 of its Rules, the Commission deliberates on the merits of a case and prepares a report in which it examines the arguments, the evidence submitted by the parties and the information obtained during hearings and on-site observations. The Commission may also take into account other information of public knowledge. The deliberations of the Commission are private and all aspects of the

1. Article 54.2 of the previous Rules of Procedure of the Commission.

discussions are confidential. Any question that has to be put to a vote is formulated in precise terms in one of the official languages of the Commission. At the request of any member, the text is translated by the Executive Secretariat into one of the other official languages of the Commission and is distributed prior to the vote. The minutes of the Commission's deliberations are restricted to a mention of the subject of the debate and the decision taken, as well as any separate opinions or statements that have been made for inclusion in the minutes. If the report does not represent, in whole or in part, the unanimous opinion of the members, any member may attach his separate opinion.

### *1. THE CONTENTS OF ARTICLES 50 AND 51*

Article 50 of the Convention provides that, when there has not been a friendly settlement and within the term of 180 days established its Statute,[2] the Commission drafts a report in which it sets forth the facts and its conclusions. If the report does not represent, in whole or in part, the unanimous opinion of its members, any of them may attach their separate opinion to the report. The report also contains the oral or written statements of the parties to the proceedings.[3] This report is transmitted to the States concerned, which may not publish it. In addition to the conclusions in its report, the Commission may make the proposals and recommendations that it deems advisable.

For its part, Article 51 provides that, if within a period of three months from the transmittal of its report to the States concerned the matter has not been settled or referred to the Court, the Commission may by a majority vote issue its opinion and conclusions on the question submitted to its consideration. Pursuant to this provision, the Commission makes the relevant recommendations and prescribes a period for the State to take measures to remedy the situation. After the expiry of this period, the Commission decides by a majority vote whether the State has taken adequate measures and whether to publish its report.

2. Article 23.2 of the Statute of the Commission.
3. In fact, the Convention refers to the *states concerned*, without qualifying them as *parties*.

It appears unnecessary to insist that, due to their ambiguity and lack of precision, these provisions have been severely criticized. Edmundo Vargas Carreño has justifiably referred to Articles 50 and 51 as examples of norms that present serious difficulties in their application and interpretation and he suggests that they be modified because of their obscurity and unsuitability.[4] César Sepúlveda has also written that the language of Articles 50 and 51 is "unfortunate and reading the Articles together leads to different and contradictory interpretations."[5]

Although it seems relatively clear that Articles 50 and 51 refer to two separate reports (not to mention the report of Article 49 of the Convention, about which there is no controversy), the difference between the Article 50 Report, in which the Commission states the facts and its conclusions, and the Article 51 Report, in which the Commission sets forth its opinion and conclusions on the question submitted to its consideration, is not obvious. The facts that gave rise to the petition will be the same in both cases and it is highly unlikely that the Commission will change its legal analysis of these facts from one report to the other. On the other hand, if pursuant to Article 50 the Commission may make "such proposals and recommendations as it sees fit," it is also difficult to envision the difference of this attribute with that of Article 51 that requires that, in order to be adopted, this second report of the Commission contain the "pertinent recommendations" for the State concerned. At least with respect to the contents of these two reports, there appear to be few differences and they may be, fundamentally, the same report.

## *2. THE HISTORICAL BACKGROUND OF ARTICLES 50 AND 51*

To understand these two provisions, it is necessary to look at their history. They were based on Articles 31 and 32 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the absence of a friendly settlement, that treaty required that the then Commission draft a report that included the facts and the Commission's

4. *See* his Foreword to Mónica Pinto, LA DENUNCIA ANTE LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, Editores del Puerto S.R.L., Buenos Aires, 1993, p. 18.

5. César Sepúlveda, *El procedimiento de solución amistosa ante la Comisión Interamericana de Derechos Humanos*, in DERECHOS HUMANOS EN LAS AMÉRICAS: HOMENAJE EN MEMORIA DE CARLOS A. DUNSHEE DE ABRANCHES, Inter-American Commission on Human Rights, Washington, D.C., 1984, p. 247.

opinion on whether there had been a violation of the State's human rights obligations. The report was transmitted to the Committee of Ministers and to the States. Three months after the transmittal of the report to the Committee of Ministers of the Council of Europe and if the Commission had not referred the case to the Court, the Committee of Ministers decided whether there had been a violation of the Convention. This system thus called for two different rulings from two distinct bodies.

On the other hand, the American Convention does not provide for the intervention of a political body like the Committee of Ministers. If the matter is not submitted to the Inter-American Court, the Commission adopts a definitive decision in the case. If the Commission deems it advisable and if the other procedural elements are complied with, the case is published in an Article 51 Report. In any event, the period established between the reports allows for a change in circumstances that the second report would probably take into consideration.

### *3. THE INTERPRETATION OF THE COURT*

Notwithstanding the inconsistent practice of the Commission in this area, the difficulties of interpretation derived from the language of these two provisions were posed in the very first cases that the Court heard[6] and they were not totally resolved. In fact, the ambiguity of the provisions has allowed States to continue to allege, as a preliminary objection before the Court, the irregular application of Articles 50 and 51 by the Commission.[7] Moreover, this issue has also been the object of two advisory opinions of the Court, in which inconsistencies in the practice of the Commission have been highlighted. The first of the advisory opinions refers to the Commission's interpretation of these two Articles read together[8] and the

6. I/A Court H.R., *Velásquez Rodríguez Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 63; *Fairén Garbi and Solís Corrales Case. Preliminary Objections.* Judgment of June 26, 1987. Series C No. 2, para. 63 and *Godínez Cruz Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 3, para. 66.

7. I/A Court H.R., *Caballero Delgado and Santana Case. Preliminary Objections.* Judgment of January 21, 1994. Series C No. 17, paras. 19 and 32 *et seq*.

8. I/A Court H.R., *Certain Attributes of the Inter-American Commission on Human Rights* (Arts. 41, 42, 44, 46, 47, 50 and 51 American Convention on Human Rights). Advisory Opinion OC-13/93 of July 16, 1993 (hereinafter cited as *Certain Attributes*). Series A No. 13.

second to the competence of the Commission, specifically with respect to Article 51.[9]

On the different occasions that this question has been raised, the Court has clarified some of the doubts on the proper interpretation of these norms and the circumstances under which they are applicable.[10]

Until relatively recently, the Commission's decision was issued in what it called a *resolution*. It is only after its 1990-1991 Annual Report that the Commission began to call this decision a *report*, although normally without indicating whether it was the report called for in Article 50 or in Article 51 or if it referred to the report mentioned in Article 49 for cases in which a friendly settlement had been reached. It must be recalled that, in the first cases against Honduras, the Court held that what was important was not literal compliance with the forms but rather that the contents of the report adopted by the Commission were substantially in keeping with the provisions of Article 50 and that the procedural rights of the parties were not affected.[11]

Excluding for the moment the Article 49 report, the adoption of which depends on the parties reaching a friendly settlement, the Court has always been clear that Articles 50 and 51 refer to two separate reports and that, just as the Article 50 Report is dependent on there being no friendly settlement, the Article 51 Report is subject to the condition that the question has not been submitted to the consideration of the Court within three months following notification of the Article 50 Report.[12] However, in a request for an advisory opinion presented by the Governments of Argentina and Uruguay on May 7, 1992, the Court was asked, *inter alia*, to indicate whether it was possible to subsume into a single report the reports mentioned in Articles 50 and 51. The Court was of the opinion that it was a question of two documents that, depending on the interim conduct of the State to which they are addressed, may or may not coincide in their

9. I/A Court H.R., *Reports of the Inter-American Commission on Human Rights* (Art. 51 American Convention on Human Rights). Advisory Opinion OC-15/97 of November 14, 1997. Series A No. 15.

10. *Certain Attributes, supra* note 8, paras. 42-55.

11. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 6, paras. 67, 67 and 70, respectively.

12. *Ibid*., paras. 63, 63 and 66, respectively.

conclusions and recommendations and to which the Convention has given the name *report*.[13] Although the contents of these reports may be similar, they may not be subsumed into a single report because the two norms correspond to two different stages of the proceedings, which are governed separately by Articles 50 and 51.[14]

It must also be observed that the confidential nature of the Article 50 Report contrasts with that of Article 51, which the Commission may publish. This prevents the Commission from omitting the step envisioned in Article 50, which grants the State concerned an additional opportunity to resolve the matter by implementing the Commission's recommendations.

In keeping with its interpretation of Articles 50 and 51, the Court has concluded that the procedure set forth in those provisions establishes three stages: a) the first is governed by Article 50 and, if there has been no friendly settlement, consists in the adoption of a report with proposals and recommendations for the State, which would not be authorized to publish it, b) the second stage is regulated by Article 51 and empowers the Commission, if within three months following the notification of the Article 50 Report the State concerned has not resolved the question, to submit the case to the Court or to continue its examination, in which case it would draft a second and final report with the opinions and conclusions that it considers advisable and c) a third stage that would take place after the expiry of the period that the Commission has given the State to comply with the recommendations in its Article 51 Report and if they have not been implemented the Commission would be at liberty to publish that report.[15]

A reading of Articles 46 to 48 of its Rules indicates that the Commission has interpreted Articles 50 and 51 in a manner that does not correspond to the criteria of the Court. An examination of the Court's holdings and the Commission's practice shows that, for a long time, the Commission understood that Articles 50 and 51 referred to a single report, which explains many of the inconsistencies in its decisions. While the recent practice of the Commission has changed and it now understands

13. *Certain Attributes*, *supra* note 8, para. 53.
14. *Ibid*., para. 55.
15. *Ibid*., paras. 48, 50, 52 and 54.

that they are two separate reports, its Rules still do not reflect the rulings of the Court on the correct meaning and scope of Articles 50 and 51.

### *4. THE CHARACTERISTICS OF THE ARTICLE 50 REPORT*

Pursuant to Article 50 of the Convention, after finishing its investigation of the allegations and if the parties have not reached a friendly settlement, the Commission drafts a report that contains the facts and its conclusions. This report is more complete than that required by Article 49 when the parties have reached a friendly settlement. The Court has held that this is the final stage in the proceedings before the Commission, after which it may refer the case to the Court.[16]

Article 43 of the Commission's Rules governs the content and characteristics of this report. Pursuant to its terms, after deliberation and a vote on the merits of the case, if the Commission finds that there was no violation, it so states in its report, which is transmitted to the parties, published and included in its Annual Report to the OAS General Assembly. If the Commission finds one or more violations, it prepares a preliminary report with the proposals and recommendations that it deems advisable and transmits it to the State concerned. In such a case, it sets a deadline for the State to inform on the measures adopted to comply with the Commission's recommendations. The State is not authorized to publish the report until the Commission adopts a decision in this respect.

Under the terms of Article 43.3 of its Rules, the Commission notifies the petitioner of the adoption of the report and its transmittal to the State. In the case of States parties to the Convention that have accepted the Court's contentious jurisdiction, in notifying the petitioner the Commission gives him the opportunity to present, within one month, his position on submitting the case to the Court. If the petitioner has an interest in the Court hearing the case, he should present: a) the position of the victim or his next of kin,

16. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 6, paras. 61, 61 and 64, respectively.

if distinct from that of the petitioner, b) personal data regarding the victim or his next of kin, c) the grounds for the case to be referred to the Court, d) the documentary, testimonial and expert evidence available and e) the claims for reparations and costs.

Unlike the norms for the parties, which are strictly governed, neither the Convention nor the Rules set a deadline for the adoption of the Article 50 Report. Although it may be presumed that the State concerned should be notified immediately of this report as was done in the Barrios Altos Case when it was transmitted the day following its adoption,[17] there is no express provision governing this matter. There may be different reasons for the report to be retained after adoption before notifying the State. In the Cantoral Benavides Case the Commission adopted its report on March 5, 1996, but decided not to notify Peru until the parties had responded to an offer of friendly settlement that it had made the previous day.[18] Similarly, without any justification, Report No. 83/98, adopted on October 1, 1998 in the case of Miguel Aguilera *et al*. against Venezuela,[19] was not sent to the State until December 7, 1998, which coincidentally was the day after the presidential elections in that country, suggesting dangerously that the timing of the Commission is adjusted to political considerations.

### *a) Its content*

The Article 50 Report contains the oral and written statements that the parties have submitted to the Commission. In addition, if the report does not represent, in whole or in part, the unanimous opinion of the members, any of them may attach his separate opinion to the report.[20]

In transmitting its report and as part of its contents, the Commission formulates the proposals and recommendations that it sees fit, granting

17. I/A Court H.R., *Barrios Altos Case*. Judgment of March 14, 2001. Series C No. 75, para. 17.

18. I/A Court H.R., *Cantoral Benavides Case. Preliminary Objections*. Judgment of September 3, 1998. Series C No. 40, para. 7.

19. Later identified by the Court as the *Del Caracazo Case*.

20. In an interpretation that we do not share, César Sepúlveda has suggested that this report requires a unanimous vote by the members. This conclusion is not in keeping with a literal reading of Article 50 and, moreover, contradicts the obligatory nature of the report, which would be very difficult to adopt if it were necessary to have the vote of all the members of the Commission. Moreover, allowing separate opinions to be appended to the report would not then make sense. *See El procedimiento de solución amistosa ante la Comisión Interamericana de Derechos Humanos, supra* note 5, p. 248.

the State three months to adopt them.[21] According to an interpretation of the Court, this three-month period, which is found not in Article 50 but indirectly in Article 51, is not peremptory and may be extended.[22] Although we share this last conclusion, we believe that the Court seems to have confused the period that the Commission may grant a State to comply with its recommendations, which may be greater or less than three months and which may undoubtedly be extended, with the precise term of three months, counted from the date of transmittal of the report to the States concerned, provided for the Commission or the States concerned to refer the case to the Court. These are two parallel but distinct periods that may have the same duration but that have different functions and a different nature. While the first period is flexible, the second is peremptory and cannot be extended. In more recent cases, in order to adapt the term to comply with the recommendations to that of three months that begins to run simultaneously to refer a case to the Court, the Commission has granted the States a period of less than three months, normally two months and sometimes one month,[23] to comply with its recommendations. Thus, once the period has elapsed there is always time to evaluate the situation and decide whether to refer the case to the Court. On the other hand, while States have requested extensions of the deadline that the Commission has granted to comply with the recommendations, they have not always been used precisely for that purpose. For example, in the Castillo Petruzzi *et al*. Case Peru requested and obtained an extension, which it used to reject the conclusions of the Commission and to assert the legitimacy of its actions.[24]

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21. César Sepúlveda suggests that the Commission may permit complying with its recommendations in stages so that one might be complied with before others, leaving the most difficult to the end and combining their compliance with a new period that may be granted under Article 51.2. *El procedimiento de solución amistosa ante la Comisión Interamericana de Derechos Humanos, ibid*.

22. *See*, in this respect, I/A Court H.R., *Neira Alegría et al. Case. Preliminary Objections*. Judgment of December 11, 1991. Series C No. 13, para. 34; *Cayara Case. Preliminary Objections*. Judgment of February 3, 1993. Series C No. 14, para. 38; *Caballero Delgado and Santana Case. Preliminary Objections, supra* note 7, para. 54 and *Certain Attributes, supra* note 8, para. 51.

23. Given the confidentiality of these reports, its contents, the recommendations of the Commission and the period to comply with them can only be known officially through references that the Court makes to the report, if the case is referred to it. *See, e.g.*, I/A Court H.R., *Castillo Petruzzi et al. Case. Preliminary Objections.* Judgment of September 4, 1998. Series C No. 41, para. 16 and *Cesti Hurtado Case. Preliminary Objections*. Judgment of January 26, 1999. Series C No. 49, para. 7.

24. *Castillo Petruzzi et al. Case. Preliminary Objections, ibid.* paras. 16-17.

When the Commission decides that there has been a violation of the human rights guaranteed by the Convention, it recommends that the State concerned adopt the measures necessary to remedy the situation. These recommendations may refer precisely to the object of the complaint or may be of a general nature, applicable to any situation. The following are examples of recommendations: a) give effect to Articles 1 and 2 of the Convention, ensuring the respect and enjoyment of the rights set forth in the Convention, b) investigate the violations that occurred in the particular case and prosecute and punish those responsible, c) take the necessary measures to avoid the recurrence of similar acts and d) pay a just compensation to the victims or their next of kin.[25] In any event, the central elements of these recommendations must include the need to adopt measures that would avoid the impunity of human rights violations and that would remedy their consequences in an adequate and timely fashion.

If the Commission concludes that there has not been a violation of the Convention, it may be assumed that it will not make any type of recommendation. In the exercise of its functions as an organ of human rights promotion, however, the Commission may deem it advisable to make recommendations even in cases in which the State has not violated the Convention. An example would be the three cases against Jamaica concerning the death penalty in which, although the Commission concluded that there was no violation of the Convention, it recommended that the execution of the condemned persons be stayed and that the death penalty be abolished.[26] In a report in which the Commission declared "formally inadmissible" a petition, it recommended that the Government of Uruguay, "for reasons of moral order and social justice" and since the matter denounced remained open and still pending solution, consider the adoption of legislative or other measures that would revoke Decree 137/85 and its

25. *See, e.g.*, I/A Commission H.R., Report No. 3/90, Case 10.150 (Aloeboetoe *et al*. Case), adopted May 15, 1990; Report No. 4/90, Case 10.274 (Gangaram Panday Case) adopted May 15, 1990; Report No. 43/90, Case 10.078, adopted June 7, 1990 or Report No. 29/91, Cases 10.264, 10.206, 10.276 and 10.446 (Cayara Case), adopted February 20, 1991.

26. I/A Commission H.R., Resolution No. 25/81, Case 3.102, Jamaica, adopted June 25, 1981 and Resolution No. 24/81, Case 3.115, Jamaica, adopted June 25, 1981, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1981-1982, General Secretariat of the Organization of American States, Washington, D.C., 1982, pp. 89-93. *See*, also, Resolution No. 13/84, Case 9.054, Jamaica, adopted October 3, 1984 in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1984-1985, General Secretariat of the Organization of American States, 1985, pp. 111-113.

effects and make it possible "to set the adjustments of pension payments owed for 1985 as a function of the Average Wage Index to all retired and pensioned persons."[27]

***b) Its binding nature***

The Article 50 Report is obligatory in two senses. It is obligatory on the Commission, which cannot omit this step, and it is binding on the State, in that the latter has the duty to comply with the recommendations contained in the report. In this section, we will refer to its obligatory force on the Commission.

This is a mandatory report that, in a certain sense, is merely preliminary, although it may be converted into a final report if the Commission does not adopt an Article 51 Report. The Commission appoints one of its members as rapporteur to present a draft decision that will be considered by the Commission. Although every case presented to the Commission, provided it is not declared inadmissible, should conclude with at least an Article 50 Report, many cases are closed without the adoption of that report.

***c) Its nomenclature***

With respect to the requisites of form or the nomenclature of this report, the Court has been rather flexible. In the first cases against Honduras in which the State interposed a preliminary objection alleging the improper application of Articles 50 and 51, the Court noted that the Commission had adopted two resolutions after a period of not less than a year and a half between one and the other (reaching two and a half years in two of the cases), neither of which, for the effects of Article 50, was formally designated a report.[28] According to the Court, this circumstance "is, nevertheless, irrelevant if the content of the resolution approved by the Commission is substantially in keeping with the terms of Article 50, as in the instant case, and so long as it does not affect the procedural rights of

27. I/A Commission H.R., Report No. 90/90, Case 9.893, Uruguay, adopted October 3, 1990, operative para. 3, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1990-1991, General Secretariat of the Organization of American States, Washington, D.C., 1991, p. 91.

28. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections*, *supra* note 6, paras. 65, 65 and 68, respectively.

the parties (particularly those of the States) to have one last opportunity to resolve the matter before it can be filed with the Court."[29]

The Commission has on occasion indicated that the report that it is issuing is an Article 50 Report,[30] which eliminates any uncertainty and possible confusion with the Article 51 Report. Unfortunately, this is not a systematic practice and depends greatly on the style and greater care taken by the rapporteur who prepared the report. We would note that it would not create any great difficulty and might be of great utility if the Commission would name all of its Article 49 Reports as a *report on friendly settlement*, the Article 50 Reports as a *preliminary report* and reserve the simple title of *report* for Article 51 Reports, assigning, in each category, an independent numbering followed, as the case may be, the number 49, 50 or 51 between parentheses.

### *d) Its confidentiality*

Article 50.2 of the Convention provides that this report be transmitted to the States concerned (but not to the petitioner), which are not authorized to publish it.[31] The Convention, unfortunately, does not define what is meant by *States concerned*, an expression that may be interpreted narrowly, referring only to the States that have intervened in the proceedings before the Commission, or broadly to include other OAS member States that might have some interest in the case as, for example, the State of which the presumed victim is a national, the State that has granted him asylum or the State in which he has his permanent residence and his business.

It is interesting to observe that Article 43 of the Commission's Rules makes a distinction regarding the treatment that should be given to its report, depending on whether a violation of the Convention has been found. If one or more violations have been found, the Commission prepares a

29. *Ibid*., paras. 67, 67 and 70, respectively.

30. *See, e.g.*, I/A Commission H.R., Report No. 75/90, Case 10.163; Report No. 76/90, Case 10.202; Report No. 77/90, Case 10.203; Report No. 78/90, Case 10.4444; Report No. 79/90, Case 10.460; Report No. 80/90, Case 10.463; Report No. 81/90, Case 10.463 and Report No. 82, Case 10.464, all against Peru, para. 11 of the considerations in each case, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1990-1991, *supra* note 27, pp. 364-393.

31. It is timely to emphasize that, while this does not appear to be the purpose, the reference that this provision makes to *states concerned* could lead to the conclusion that it refers only to contentious cases between States.

preliminary report with the proposals and recommendations that it deems pertinent and transmits it to the State in question, which is not authorized to publish it until the Commission adopts a decision in this respect. On the other hand, if it finds no violation in a specific case, it shall so state in its report on the merits, which is transmitted to the parties, is published and included in its Annual Report to the OAS General Assembly.

Although the Article does not expressly state that the Commission should also maintain the report confidential, it is obvious that what is intended to ensure is the confidentiality of this stage of the proceedings in which there is still hope that the State will cooperate to resolve the case in a manner compatible with respect for the human rights guaranteed by the Convention. The Court has emphasized that a proper interpretation of Article 50 implies that the Commission may not publish this preliminary report.[32] It is well to point out that the purpose of Article 50 is to facilitate the cooperation of the State, allowing it to comply with the recommendations of the Commission in a climate of discretion and not convert it into an insurmountable obstacle for the protection of human rights. The confidential nature of this report is not always easy to maintain since, as may be appreciated, many persons have access to it and it may be given to the petitioners, to the press or to the public without taking into account the legal effect that this would have. This has led, on more than one opportunity, to the State manifesting its concern for the dissemination that this report might eventually have.[33]

The Court has observed a dangerous discrepancy between Article 50 of the Convention and a former version of Article 47.6 of the Commission's Rules in effect at the time of the Court's holding. The Court pointed out that, according to the Rules, "the report shall be transmitted to the parties concerned, which shall not be authorized to publish it," which in the opinion of the Court would alter the confidential nature of the report and the obligation not to publish it as the petitioners are parties to the proceedings before the Commission.[34] Responding to

32. *Certain Attributes, supra* note 8, para. 48.
33. *Constitutional Court Case*. Judgment of January 31, 2001. Series C No. 71, para. 11.
34. *Certain Attributes, supra* note 8, para. 49.

the opinion of the Court, the Commission amended its Rules to indicate that the report be sent only "to the State concerned," which is not authorized to publish it. Article 43 of the current Rules, however, provides that the petitioner be informed of the adoption of the report and its transmittal to the State.[35]

It is important to emphasize that, even if the person responsible for the divulgation of the report is a member of the Commission and although this might be grounds for his removal,[36] the violation of confidentiality would not void the proceedings. The purpose of confidentiality is not to conceal a human rights violation but to permit the State, within the time frame prescribed by the Commission, to comply with the Commission's recommendations and to remedy the legal situation violated. Not publishing the report would mean that the Commission's conclusion that the State had violated rights set forth in the Convention would not be disseminated and that conclusion could not be used to characterize the behavior of the State. This is acceptable if it is the price to be paid for the State to comply with the Commission's recommendations. Otherwise, the only sensible response is that the Article 51 Report be adopted and made public or that the case be referred to the Court.

***e) Its reconsideration***

While it is not expressly provided, the State concerned may request, as has been done on various occasions, reconsideration of this report because of new evidence that would refute the Commission's conclusions.[37]

Although the Court has observed that the Convention does not provide for a situation in which the State concerned may request reconsideration of the Article 50 Report, it has held that, within certain timely and reasonable limits, it may admit a request for reconsideration based on a willingness to resolve the case being examined by the

35. I/A Court H.R., *Cantos Case. Preliminary Objections*. Judgment of September 7, 2001. Series C No. 85, para. 9.C.

36. Article 8 of the Statute of the Commission.

37. I/A Commission H.R., Resolution 1/85 (bis), Case 9.265, Suriname, adopted October 1, 1985, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1984-1985, *supra* note 26, para. 118 *et seq*. and Case of Juan Humberto Sánchez. Judgment of June 7, 2003. Series C No. 99, para. 8.

Commission provided that it may be said to meet the general aim, under the Convention, of the Commission's proceedings.[38]

At one time, the Commission understood that the period to request reconsideration of the preliminary report was that provided for in Article 51.1 of the Convention. In a case against Nicaragua, the Commission observed that such a request had been presented beyond the period prescribed in Article 51.1. Considering that the government had not presented any new evidence that refuted the allegations and that it had not adopted adequate measures to resolve the situation, the Commission found that there was no new proof that merited changing the original report.[39]

While not an explicit request for reconsideration, it is not infrequent that a State responds to the Commission's report by making *observations,*[40] which may obviously reopen the debate,[41] or that it informs the Commission of the impossibility of implementing its recommendations. As an example, in Report 18/94 the Commission recommended that Peru take the necessary steps to overturn the decision of the Supreme Military Court that had confirmed a ruling of the War Chamber that convicted the petitioners. The government answered that acceding to the request would constitute an inadmissible interference on the part of the Executive Branch in the affairs of the judiciary, which would be incompatible with the independence and autonomy that the Constitution vested in the latter and that, therefore, it was not possible to implement the report's recommendation.[42] In its final report, the Commission observed that, being a special court subordinated to the Ministry of Defense, it would not be an "inadmissible interference on the part of the Executive Branch in the affairs of the Judiciary," especially when there were other cases in which, bending to

38. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 6, paras. 69, 69 and 72, respectively.

39. *See, e.g.*, I/A Commission H.R., Report No. 12/94, Case 10.770, Nicaragua, adopted February 1, 1994, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, General Secretariat of the Organization of American States, Washington, D.C., 1994, p. 300 *et seq*., paras. 16, 19 and 20.

40. *See, e.g.*, I/A Commission H.R., Report No. 28/94, Case 10.026, Panama, adopted September 30, 1994, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1994, General Secretariat of the Organization of American States, Washington, D.C., 1995, p. 66, para. 31.

41. *Ibid*., para. 32.

42. I/A Commission H.R., Report No. 27/94, Case 11.084, Peru, adopted November 30, 1994, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1994, *supra* note 40, p. 124.

pressures including those of the President of the Republic, a convicted person had been absolved after there was a final decision of the Supreme Military Court.[43]

### *f) The legal nature of the recommendations*

A final element that must be considered with respect to the Article 50 Report concerns the legal nature of its recommendations. The name *recommendations* would appear to indicate that they are not binding on the States. An interpretation of Article 33 of the Convention, which lists the competent organs to deal with matters related to the fulfillment of the commitments made by the States parties to the Convention and that heads Part II of the Convention entitled "Means of Protection," suggests that, regardless of the name, recommendations are the result of the exercise of the Commission's functions as an organ of protection of human rights. The interpretation of Article 41.f of the Convention, which enables the Commission to act on petitions and other communications "pursuant to its authority" under the provisions of Articles 44 to 51 of the Convention, also leads to this conclusion.

Notwithstanding the above, States have frequently understood that these recommendations are not binding. In the Baena Ricardo *et al.* Case, Panama did not comply with the recommendations of Report 26/99 since it did not consider them compulsory and rejected the report alleging "legal reasons (of domestic law that impede it) from executing the recommendations of the honorable Inter-American Commission on Human Rights." The Commission was, thus, led to request that the Court declare that the State had violated its duty to comply in good faith with its recommendations, pursuant to Articles 33 and 50.2 of the Convention.[44] In its judgment, the Court reiterated its jurisprudence in the sense that Article 50 refers to the preparation of a report by the Commission that is transmitted to the State confidentially in order that the State comply with a series of recommendations and resolve the situation. If within three months following the sending of the report to the State, the matter has not

43. *Ibid*., p. 125.
44. I/A Court H.R., *Baena Ricardo et al. Case*. Judgment of February 2, 2001. Series C No. 72, paras. 12 and 185.

been settled and the Commission considers that the State has not complied, the Commission has two options: refer the case to the Court or issue an Article 51 Report which, by vote of a majority of its members, contains its opinion and conclusions on the question submitted to it. As in the case of an Article 50 Report, an Article 51 Report sets a deadline within which the State must take the pertinent measures to comply with the recommendations and remedy the situation. The Court has pointed out that the word *recommendations* used by the Convention should be interpreted according to its ordinary meaning in accordance with the general rule of interpretation found in Article 31.1 of the Vienna Convention on the Law of Treaties and, therefore, does not have the character of an obligatory judicial decision for which the failure to comply would generate State responsibility. The Court also considered that, in accordance with the principle of good faith embodied in that same article of the Vienna Convention, if a State signs and ratifies an international treaty, especially one dealing with human rights such as the American Convention, it has the obligation to make every effort to apply the recommendations of an organ of protection such as the Commission, which is, indeed, one of the principle organs of the OAS and whose function is to "promote the observation and defense of human rights" in the hemisphere. The Court also recalled that Article 33 of the American Convention provides that the Commission is a competent organ, together with the Court, "with respect to matters relating to the fulfillment of the commitments made by the States Parties," which means that by ratifying the Convention the States parties have committed themselves to apply the recommendations that the Commission adopts in its reports. In any event, the Court held that, once the jurisdictional stage was initiated, it was for the Court to determine whether the State had violated substantive precepts of the Convention and, if so, to establish the consequences of those violations. On the other hand, the Court did not believe that it had the power to determine liabilities arising from the procedural conduct of the State during the proceedings before the Commission that constitute, precisely, the necessary steps to refer the case to the Court.[45]

The Article 50 Report, which is obligatory, obviously implies that the State must adopt the pertinent measures to comply with the

45. *Ibid*., paras. 189 and 191-193.

Commission's recommendations. The same report may provide that the State inform the Commission on the measures taken to comply with the recommendations. Article 50 does not provide that the State has to respond to the Commission's report, but it frequently does. For example, in the Mayagna Community Case, in which the State had been granted 60 days "to transmit information on the measures that it had adopted to comply with the recommendations," the State not only responded to the report but the Commission itself pointed out that, although such response was presented after the time limit had expired, "it would examine it in order to add it to the record of the case."[46]

### *5. THE PURPOSE AND NATURE OF THE THREE-MONTH PERIOD*

Pursuant to Article 51, from the moment that the Article 50 Report has been transmitted to the State in question, a three-month period begins to run that suspends any other measure that might be adopted by the Commission. Establishing the purpose of this period may facilitate the interpretation of the provisions under discussion and clarify some of their ambiguities.

In our opinion, the three-month period of Article 51 has the double function of granting to the State the opportunity to comply with the recommendations of the Commission in its report or, if not, to give it one last opportunity to reach a friendly settlement with the petitioner in terms compatible with the Convention. The Court has observed that the proceedings before the Commission contain a mechanism of increasing intensity with the aim of encouraging the State to fulfill its obligation to cooperate in the resolution of the case, offering it the opportunity of resolving the matter before it is brought to the Court and giving the petitioner the possibility of obtaining an appropriate remedy more quickly and simply.[47] The expiry of the deadline does not prevent the State from

46. I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community Case. Preliminary Objections*. Judgment of February 1, 2000. Series C No. 79, paras. 22-23.

47. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 6, paras. 60, 60 and 63, respectively.

later complying with the recommendations. It is interesting to observe that when the Court was about to deliver its judgment in the Ivcher Bronstein Case, on February 1, 2001 the State presented a submission containing the "Supreme Resolution" by which it accepted the recommendations of the Commission's report dated December 9, 1998. This submission was sent to the Commission so that it might make its observations with regard thereto.[48]

This provision also prescribes a deadline to refer the case to the Court. According to the Court, "because this period starts to run on the date of the transmittal to the parties of the report referred to in Article 50, this offers the Government *one last opportunity* to resolve the case before the Commission and before the matter can be submitted to a judicial decision."[49] The Court has, however, held that this three-month period should not be interpreted to govern the actions of the Court in the exercise of its own jurisdiction, since Article 51 only refers to the period for the presentation of the case and has no direct relation to the Court's actions regarding a determination of its jurisdiction.[50]

As we have already expressed, a literal reading of the Convention would make this a maximum period that has specific consequences if the matter has not been settled or referred to the Court. This is basically a period in which the Commission may decide to submit the case to the Court, but this does not prevent the Commission in its report from calling upon the State to adopt measures immediately[51] or in a period of less than three months[52] or that it be required to inform on the result of the

48. I/A Court H.R., *Ivcher Bronstein Case.* Judgment of February 6, 2001. Series C No. 74, paras. 50-51.

49. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 6, paras. 62, 62 and 65, respectively. (Emphasis added.) The Court refers incorrectly to a report that is transmitted *to the parties*, while Article 50 provides that it is to be transmitted only to "the states concerned."

50. I/A Court H.R., *Constantine et al. Case. Preliminary Objections*. Judgment of September 1, 2001. Series C No. 82, para. 40 and *Benjamin et al. Case. Preliminary Objections*. Judgment of September 1, 2001. Series C No. 81, para. 40.

51. *See, e.g.*, Report No. 20/94 of the Commission in the Loayza Tamayo Case, adopted September 26, 1994, operative para. 2 of which recommends that Peru, given the analysis of the facts and the law by the Commission, immediately release María Elena Loayza Tamayo. Cited in I/A Court H.R., *Loayza Tamayo Case. Preliminary Objections.* Judgment of January 31, 1996. Series C No. 25, para. 18.

52. *See, e.g.*, the Report of the Commission in the Paniagua Morales *et al*. Case, stemming from Case 10.154, adopted September 23, 1994, operative paragraph 5 of which grants the State 60 days to implement the recommendations contained in the Report. Cited in I/A Court H.R., *The "Panel Blanca" Case (Paniagua*

recommendations in a period of less than three months.[53] The Commission may also choose not to set a deadline for compliance of its recommendations and submit the case to the Court almost immediately.[54] This period does not prevent the Commission, after the three months have elapsed and the case has still not been referred to the Court, from overseeing compliance of its recommendations, in accordance with the terms of Articles 41 of the Convention and 18 of its Statute. This is a matter that also falls under Article 46 of the Commission's Rules, which will be analyzed.

The Court has interpreted the period established in Article 51 differently, by allowing under certain circumstances its extension, thus permitting the Commission to submit a case after this period. This practice suggests that, although the Convention does not provide for a situation in which the State concerned requests reconsideration of the Article 50 Report, under some circumstances this period may be suspended. In the first three cases against Honduras, the Court observed that before three months had elapsed since the initial resolutions, which the Court held were substantially the same as Article 50 Reports, the government requested that the Commission reconsider those resolutions. Although the Commission decided to continue its examination of the cases and requested additional information from the government after the period had elapsed (a year and a half and up to two and a half years from the time the initial resolutions were adopted), it decided to confirm those resolutions and submit the cases

*Morales et al.). Preliminary Objections*. Judgment of January 25, 1996. Series C No. 23, para. 20. *See*, also, the Report of the Commission in the Castillo Páez Case, stemming from Case 10.733, adopted October 13, 1994, operative paragraph 3 of which recommends to Peru that, given the Commission's analysis, in a period of no more than 45 days it carry out a new investigation on the allegations, determine the whereabouts of the victim and identify and punish those responsible for the disappearance of Ernesto Castillo Páez. Cited in I/A Court H.R., *Castillo Páez Case. Preliminary Objections.* Judgment of January 30, 1996. Series C No. 24, para. 20.

53. *See, e.g.*, Report 19/94 of the Commission in the Castillo Páez Case, adopted on September 26, 1994, that grants the State 60 days to report on the results of its recommendations. Cited in *Castillo Páez Case. Preliminary Objections, supra* note 52, para. 20. Also, Report 20/94, *supra* note 51, which requests the State to inform the Commission within 30 days on the measures that it has taken in the case in accordance with the recommendations. *Loayza Tamayo Case. Preliminary Objections, supra* note 51, para. 18.

54. The Hilaire Case was referred to the Court before a month had elapsed since the notification of the final report. I/A Court H.R., *Hilaire Case. Preliminary Objections*. Judgment of September 1, 2001. Series C No. 80, paras. 10 and 16.

to the Court.[55] The Court observed that the extension of the periods within which a matter should be referred to the Court did not prejudice the procedural position of the State when the State itself requested the extension, the extension was to its benefit and did not lessen its procedural rights.[56] The Court held that, within certain timely and reasonable limits, a request for reconsideration based on a willingness to resolve a case being examined by the Commission may be compatible with the purposes of the Convention. It did not escape the attention of the Court that requests for reconsideration had a repercussion on the procedural deadlines and that they might negatively affect the right of the claimant to obtain, within the established periods, the international protection offered by the Convention.[57] In later cases, the Commission has accepted the agreement of the parties to suspend the running of the period of Article 51.1 and the Court has implicitly backed this interpretation of the Convention.[58]

While reconsideration of a report may, in effect, require suspending the period for referring a case to the Court, the request of a State for an extension of the period to comply with the Commission's recommendations poses different problems since, as has been stated, the periods are independent of each other. In the first case, what is at play is both the content of the report and the date from which action might be taken on it. In the second case, there is no doubt as to the content and the date of the report. In any event, an extension of the period to comply with the Commission's recommendations does not signify, *per se*, an extension of the period that the Convention grants to the Commission to submit the case to the Court. In the Ivcher Bronstein Case, together with a request for an extension in order to reach an *amicable solution* of the Commission's recommendations, the State informed that it waived its right to count the days of the extension toward the time period of Article 51.1. In agreeing to the request, the Commission extended a like period to present the case

55. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 6, paras. 68, 68 and 71, respectively.

56. *Ibid*., paras. 70, 70 and 73, respectively.

57. *Ibid*., paras. 69, 69 and 72, respectively.

58. *See, e.g.*, I/A Court H.R., *Las Palmeras Case*. Judgment of December 6, 2001. Series C No. 90, para. 11.

to the Court.[59] In the Constitutional Court Case, Peru requested an extension of the period to comply with the Commission's recommendations in order to be able to study them, to which the Commission agreed, suspending the application of the Article 51.1 periods. The State later requested another extension, which was also granted.[60]

To date, neither the Commission nor the Court has provided arguments that explain the legal grounds that authorize an extension of a precise period established by the Convention. While such a practice is not in keeping with the letter of the Convention, we must agree that it is in accordance with its spirit since it gives a State an additional opportunity to comply with the Commission's recommendations, while not preventing, if applicable, the filing of the application to the Court.

### *6. THE NATURE OF THE ARTICLE 51 REPORT*

Pursuant to Article 51, if within three months from the date of the transmittal of the Commission's report to the States concerned, the matter has not been settled or submitted to the Court by the Commission or the State concerned, the Commission may issue, by a majority vote of its members, its opinion and conclusions on the question submitted to its consideration. The preparation of this report is, therefore, subject to three very precise conditions: a) that the matter has not been resolved during this three-month period, b) that the case has not been referred to the Court within that period and c) that there exists the will and quorum necessary to adopt it.

In the first three cases against Honduras, the Court underscored that it is the drafting of this second report that is subject to not having filed the application to the Court and not the introduction of the case that is subject to whether the Article 51 Report has been prepared or published. If, even after having submitted the case to the Court, the Commission were to

59. I/A Court H.R., *Ivcher Bronstein Case. Competence*. Judgment of September 24, 1999. Series C No. 54, paras. 12-13.

60. I/A Court H.R., *Constitutional Court Case. Competence.* Judgment of September 24, 1999. Series C No. 55, para. 16.

prepare or publish the Article 51 Report, it may be thought to have improperly applied the provisions of the Convention, a circumstance that would affect the juridical value of this second report, but would not invalidate its filing to the Court.[61]

The Article 51 Report is the final ruling on the merits of the controversy and should contain the recommendations that the Commission deems pertinent. The Commission's current Rules suggest a clearer perception of the differences that exist between the preliminary report of Article 50, which is confidential, and the final Article 51 Report, which does not have to be so. Under Article 45.2 of the Rules, the final report is transmitted to the parties, which may present within a deadline prescribed by the Commission information on compliance with its recommendations.

Finally, it is important to reiterate that the Article 51 Report, unlike the Article 50 Report, is not obligatory and, therefore, the Commission may decide to omit it, either because it does not have a majority required for its adoption or because it deems it unnecessary.

### *a) The contents of the Article 51 Report*

As has been suggested, this report represents a duplication of efforts since its opinion and conclusions should not differ from the facts and conclusions of the Article 50 Report.[62] Nor should there be a great difference in the scope of the recommendations, which may, of course, vary due to a change in circumstances or a partial compliance of the recommendations of the initial report. While in an Article 50 Report the Commission may formulate the proposals and recommendations that it deems appropriate, should it decide to adopt this second report the Commission must formulate the pertinent recommendations and set a deadline for the State to adopt the respective measures. In some cases this second report only informs that the State has not complied with the recommendations of the initial report, that it has not made observations to the report, that it has not responded to the Commission's communications

61. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 6, paras. 76, 75 and 78, respectively.

62. *See*, in this respect, the opinion of César Sepúlveda, *El procedimiento de solución amistosa ante la Comisión Interamericana de Derechos Humanos, supra* note 5, p. 248.

or that there is no new evidence that would require a modification of the report, and orders its publication.[63] In the context of Article 51.2, the Commission's opinions and conclusions as well as the setting of a deadline for compliance of the recommendations are only apt in the event that the case has not been submitted to the Court, in which case the supposed violation of such provision would not be argued before the Court.[64]

The Commission's recommendations obviously depend on each particular case. Among the recommendations that the Commission may adopt, in addition to re-establishing the legal situation violated, guaranteeing the exercise of the rights violated, adapting the domestic legislation to the obligations contracted under the Convention, adopting the legislative or other measures that are indispensable to assure the exercise of human rights or paying a compensation to the victims of the violations, it has insisted on the necessity of judicial action directed to combating impunity and to punishing those responsible for grave violations of human rights. For example, the Commission recommended that the Government of Colombia open an impartial and thorough investigation into the allegations, taking into account the conclusions of the Attorney General and the Special Prosecutor for Human Rights that coincided, to avoid censurable acts that strike at the very heart of the legal system and to order the review of the serious but unproven charges against the officers whose case was dismissed "taking into consideration the principle whereby *res judicata* does not exist when there has been serious judicial error."[65] The Commission has also recommended the adoption of the measures necessary to protect witnesses who at the risk of their lives had bravely cooperated in clarifying the allegations.[66] It has also insisted on the recommendations contained in its Article 50 Report with the aim of preventing such grave acts from being repeated.[67] Among its recommendations, the Commission

63. *See, e.g*., I/A Commission H.R., Report No. 5/91, preliminary reports on several cases against Guatemala, adopted February 15, 1991, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1990-1991, *supra* note 27, p. 114.

64. I/A Court H.R., *Castillo Petruzzi et al. Case*. Judgment of May 30, 1999. Series C No. 52, para. 212.

65. I/A Commission H.R., Report No. 1/92, Case 10.235, Colombia, adopted February 6, 1992, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1991, General Secretariat of the Organization of American States, Washington, D.C., 1992, p. 72, operative para. 3.

66. *Ibid*., p. 43.

67. *See, e.g.*, I/A Commission H.R., Report No. 9/94, Cases 11.105, 11.107, 10.110-10.114, 10.118, 10.120, 10.122 and 10.102, Haiti, adopted February 1, 1994, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 39, p. 226.

has invited the State in question to ratify a human rights treaty, such as the Inter-American Convention to Prevent and Punish Torture,[68] and to accept, for a specific case, the contentious jurisdiction of the Inter-American Court.[69]

If this report is adopted, the Commission must establish a new deadline for the State to adopt the recommendations and to take the measures necessary to remedy the situation. This period is additional to that of the aforementioned three months and its extension must be compatible with the nature of the new recommendations.

***b) Publication of the report***

Under Article 45.3 of its Rules, the Commission evaluates compliance with its recommendations on the basis of the available information and decides, by a majority vote, on the publication of the final report. The Commission also decides on whether to include it in its Annual Report to the OAS General Assembly or its publication by any other appropriate means.

The vote to publish the report, however, does not terminate the case. In principle, under the terms of the Convention the Commission cannot decide immediately whether the State has taken adequate measures and whether to publish the report on the pretext that new recommendations have not been made nor a period prescribed for their implementation. In the opinion of the Court, the Convention establishes two stages to decide on the publication of the Article 51 Report. In the first stage, if the matter has not been settled or submitted to the Court, the Convention gives the Commission discretion to issue its opinion and conclusions and make the pertinent recommendations, prescribing a period for their implementation. In the second stage, if the Commission decides to exercise this discretion, the Convention requires that at the end of the period the Commission decide whether the State has taken adequate measures and whether to publish its report, containing its opinion and conclusions and its recommendations.[70]

68. *See, e.g.*, I/A Commission H.R., Report No. 5/94, Case 10.574, El Salvador, adopted February 1, 1994, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, *supra* note 39, p. 180, para. 6 of the conclusions.

69. *Ibid*., para. 5 of the conclusions.

70. *Reports of the Inter-American Commission on Human Rights*, *supra* note 9, para. 46.

With respect to the publication of the Article 51 Report, the practice of the Commission is not free of irregularities. The Commission has decided to publish numerous reports, obviously Article 50 Reports that are confidential, or at least it is not clear that the report being published is in fact an Article 51 Report. For example, in the case of Héctor Gerónimo López Aurelli[71] the Commission recommended that the government pay compensation and immediately ordered publication of its report. This decision raises doubts as to whether the report is an Article 50 Report (and is obligatory) or an Article 51 Report that, after the expiry of the term to comply with the recommendations, is the only one that may be published. Notwithstanding a prior resolution of the Commission (No. 22/88 of March 23, 1988), it is clear that the report refers to the admissibility of the petition and the Commission's decision to place itself at the disposal of the parties to arrive at a friendly settlement, but there is no possibility, no matter what title it is given, that such a resolution could be an Article 50 Report.[72] More irregularly, in a case in which the Commission decided that the petition was inadmissible, as the report manifestly dealt with a resolution on admissibility and was not an Article 51 Report, the Commission "communicate(d) this report to the Government of Uruguay and to the petitioners, and dispose(d) its publication in the Annual Report of the Commission to the General Assembly of the Organization."[73]

On the other hand, what can be understood from Article 51.2 and 51.3 is that, at this stage, the Commission has the duty to make recommendations and must set a deadline for the State to adopt the necessary measures, so that only after this period has elapsed may the Commission publish its report. In several of its initial reports, those adopted under Article 50, the Commission has indicated that, if within 90 days the government had not implemented its recommendations, it would include it in its Annual Report to the OAS General Assembly.[74]

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71. I/A Commission H.R., Report No. 74/90, Case 9.850, Argentina, adopted October 4, 1990, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1990-1991, *supra* note 27, paras. 41-76.

72. *Ibid*.

73. Report No. 90/90, *supra* note 27, pp. 41-46.

74. *See, e.g.*, I/A Commission H.R., Report No. 54/90, Case 9.933; Report No. 55/90 Case 9.935; Report No. 56/90 Case 9.936; Report No. 57/90 Case 9.946; Report No. 58/90 Case 9.948; Report No. 59/90 Case 9.955; Report No. 60/90 Case 9.956 and Report No. 61/90 Case 9.960, all against Guatemala in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1990-1991, *supra* note 27, pp. 130-155.

In any event, the decision to publish the Commission's report is one that may not be taken arbitrarily and must take into account what is most advisable to achieve the purposes of the Convention. Among the considerations that the Commission has borne in mind in publishing its reports is that the State has not reported on the measures adopted to resolve the situation denounced[75] or that it has simply not implemented its recommendations.[76]

### *c) Revision of the report*

An initial reading of Article 51 leads to the presumption that with this second report the case is definitively closed. But the history of the Martorell Case and Advisory Opinion OC-15 suggests something different. In the Martorell Case of September 14, 1995, the Commission adopted, pursuant to Article 50, Report No. 20/95 and transmitted it to Chile, which responded on February 8, 1996. On March 19, 1996, the Commission forwarded a second report to Chile (No. 11/96) indicating that this report had received its final approval and its publication had been ordered.[77] This latter was, obviously, an Article 51 Report that theoretically would have closed the case. However, on April 2, 1996 the Commission informed the State that, in view of information that it had received from the petitioners regarding new facts, it had decided to postpone publication of Report 11/96. On May 3, 1996 the Commission adopted a new report that was sent to the State informing it that it was a copy of the previous report with the modifications that had been adopted by the Commission.[78] According to the Government of Chile, Articles 50 and 51 of the Convention make no provision for the revision or amendment of a final report that has already been adopted by the Commission, nor could this be inferred from their texts and that such an action was a serious infringement of the legal certainty that the system requires.[79] The Government of Guatemala has argued that

75. *See, e.g.,* I/A Commission H.R., Report No. 3/92, Case 10.003, El Salvador, adopted February 4, 1992, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1991, *supra* note 65, p. 85, operative para. 5.

76. *See, e.g.,* I/A Commission H.R., Report No. 1/94, Case 10.473, Colombia, adopted February 1, 1994, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1994, *supra* note 40, p. 116, para. 4 of the conclusions.

77. *Reports of the Inter-American Commission on Human Rights, supra* note 9, para. 2.a.

78. *Ibid*., para. 2. b and c.

79. *Ibid*., para. 3.

once the Commission has adopted the Article 50 and 51 Reports, it has no legal power to issue a third report that changes the Article 51 Report, especially when the second report has been sent to the State as a final report and, therefore, the new report was null and void.[80]

Under its interpretation of Article 51.2 and 51.3 and according to the doctrine of the Court in its Advisory Opinion OC-13/93, the Commission contended that, in limited and justified circumstances, it is permissible to introduce changes to an Article 51 Report before publishing it.[81] The request for the advisory opinion, however, referred to the competence of the Commission to change the *substance* of the Article 51 Report, which it called *final*.[82]

As to the final nature of the Article 51 Report, in referring to the Article 50 and 51 Reports the Court expressed that the former is a preliminary report and the latter final.[83] The Court has, however, subsequently held that, in that context, the words *preliminary* and *final* are purely descriptive and do not establish legal categories of the reports, which are not envisaged in the Convention.[84]

In the second place, with respect to amending the report, the Court has held that, while the Convention does not contemplate the possibility that the Commission modify the second report (Article 51), neither does it forbid it.[85] The Court has accepted that the Commission may change the report under exceptional circumstances, such as: a) partial or full compliance with its recommendations and conclusions, b) the existence in the report of material errors on the facts of the case and c) the discovery of facts that were not known at the time of issuing the report and that could have a decisive effect on the content of the report. This implies that the debate may not be re-opened on the original facts or on questions of

80. *Ibid*., para. 10.
81. *Ibid*., para. 17.c.
82. *Ibid*., para. 1.a.
83. *Certain Attributes, supra* note 8, para. 53.
84. *Reports of the Inter-American Commission on Human Rights, supra* note 9, paras. 44-45. That the term *Final Report* "is described incidentally as a purely descriptive term that establishes no juridical category," was criticized by Judge Pacheco in paragraph 7 of his dissenting opinion.
85. *Ibid*., para. 51.

law.[86] Citing its judgment in the Cayara Case, the Court recalled that, referring to the period in which to submit a case to the Court, it had emphasized the fair balance that must exist in the proceedings of the inter-American human rights system and that similar considerations would be applicable with respect to the period when it is no longer possible for the Commission or the State concerned to refer the case to the Court. At that stage, the Commission, as the only body under the Convention entitled to do so, continues with the case. In these circumstances, the Commission's actions must respond to the following criteria: a) the general principle that its acts must be fair and impartial with respect to the parties, b) the mandate of Article 41 of the Convention, by which the Commission has the principal function to promote respect for the observance and defense of human rights, and c) its powers under Article 41.b that permit it "to make recommendations to the governments of the member States, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic laws and their constitutional provisions as well as appropriate measures to further the observance of those rights."[87]

In the aforementioned circumstances, modification of the Commission's report may be requested only by the petitioners or by the State and this request may only be made prior to publication of the report within a reasonable period from the date of its notification. Once this request is received, in accordance with the principle of procedural equality, the parties are granted an opportunity to discuss the facts or errors that gave rise to the request.[88]

In commenting on modifications to the Article 51 Report, the Court has observed that, in contentious matters, it has agreed in exceptional cases to hear requests for the revision of final rulings that terminate the

86. *Ibid*., para. 54. Judge Pacheco dissented from this judgment because he considered that "it would be extremely difficult in the future for a State or a petitioner whose allegations have not been fully or partially examined by the Commission –aware as they will be that the final report may be altered in strict and exceptional circumstances- not to seek its amendment, adducing, for example, real or fictitious events that permit amendment of the final report. Likewise, once a report has been successfully amended, there is nothing to prevent the new report from being amended as well if the grounds sustained by the Court are invoked" Para. 35 of the dissenting opinion.

87. *Ibid*., para. 47.

88. *Ibid*., para. 55.

proceedings in order to avoid the decision perpetuating a situation of obvious injustice due to the discovery of a fact that, if it had been known at the time of the judgment, would have altered the result or would demonstrate the existence of a substantial error in the judgment. This recourse exists for judgments of tribunals and, in the opinion of the Court, there is even a greater reason to allow revision of the decisions of organs, such as the Inter-American Commission, in the understanding that a modification may only be made for exceptional reasons.[89] In any case, none of the aforementioned circumstances in which the second report may be amended implies that the Commission may issue a third report, which is not provided for in the Convention.[90]

### *d) Notification of the report*

Under Article 45.2 of the Rules, the final report is transmitted to the parties, which may present within a period set by the Commission information on compliance of its recommendations. The parties to the proceedings are perfectly defined and include the petitioner and the State in question, but not the victim if he is not the petitioner.

Within that deadline, the State must make the observations that it deems pertinent and adopt the recommendations indicated in the report. This period may, however, be extended. In a case against Costa Rica, the State informed that the adoption of the Commission's recommendations regarding judicial guarantees required an intricate coordination for which a Special Commission of judges and specialized public officials had been formed, which was preparing a draft law to present to the Legislative Assembly. It thus requested an extension of six months, which was granted by the Commission.[91]

In a still politically convulsed region with very fragile democracies, while it is evident that one of the parties to which the report should be sent

89. *Ibid*., paras. 56-57. *See* the request for review of the judgment in the Genie Lacayo Case and the Resolution of September 13, 1997, para. 10.

90. *Ibid*., para. 58.

91. I/A Commission H.R., Report No.24/92, Cases 9.328, 9.329, 9.742, 9.884, 10.131, 10.193, 10.230, 10.429 and 10.469, Costa Rica, Review of the criminal sentence, adopted October 2, 1992, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1992-1993, General Secretariat of the Organization of American States, Washington, D.C., 1993, p. 74, para. 10.

is the State in question, there is occasionally a problem as to who represents the State. According to a norm of customary international law, the State is represented in its foreign relations by the Head of State, the Head of Government or the Minister of Foreign Relations. In the event that there is more than one government in a State, according to the principle of effectivity it has traditionally been understood that the representation of the State resides in the government that has effective control of the territory and the population. However, especially after the adoption of the Inter-American Democratic Charter on September 11, 2001, the principle of effectivity has been replaced by that of legitimate democracy. After the fall of the President of Haiti, Jean-Bertrand Aristide in 1992, in several cases against Haiti the Commission forwarded the preliminary report to the legitimate government of Haiti, which was in exile and obviously could not comply with the recommendations nor did it present its observations to the confidential report. In its final report, the Commission distinguished between the responsibility of the legitimate government of Haiti and the responsibility of those who were in power, who had not guaranteed the free and full exercise of human rights pursuant to Article 1 of the Convention.[92] The final report was transmitted to the effective government of Haiti.

### *e) Reconsideration of the report*

The current Rules do not contemplate a request for reconsideration of the report adopted by the Commission. For States that are not parties to the Convention, Article 54 of the previous Rules provided that the State in question or the petitioner, before the expiry of 90 days and by invoking new facts or questions of law that had not previously been presented, could request reconsideration of the conclusions and recommendations of the Commission's report. The Commission could then decide whether to maintain or modify its decision and set a new date for compliance if applicable. According to that provision, which is no longer in force, the Commission could, if it deemed it necessary, ask the State in question or the petitioner for their observations to the request for reconsideration. According to that version of Article 54.3, the procedure of reconsideration could only be used one time.

92. Report No. 9/94, *supra* note 67, pp. 224-238.

Given the unheard of facility with which the Commission periodically amends its Rules, it is not improbable that, in the near future, the figure of reconsideration will be reintroduced. It could be considered an inherent right of the parties to proceedings of this nature, particularly considering the existence of facts previously unknown by a party, which could not be reported to the Commission before it adopted its decision.

On more than one opportunity the State in question has requested reconsideration of a report of the Commission. For example, on July 2, 1991, invoking Article 54 of the Rules then in force, the Government of Colombia requested reconsideration of Report No. 11/91 issued in Case 10.235, with respect to the background information, facts, evidence, conclusions and recommendations of the Commission. The petitioner objected that, with this request for reconsideration, the State wanted to reopen a debate on the evidence. The Commission observed that the government, other than making certain comments on the facts contained in Report 11/91, did not offer new information that would refute the allegations and, thus, it ratified its decision[93] without referring to the fact that the request for reconsideration under Article 54 was only applicable to States that were not parties to the Convention, as it had done in previous cases.[94]

A petitioner has on infrequent occasions requested reconsideration of the final report. In the case of Report No. 27/92 against Mexico, the petitioner presented his observations, but the Commission in a footnote considered that they did not merit reconsideration.[95]

### *7. LEGAL EFFECT OF THE DECISION*

Some governments, which have been characterized by their repressive policies and lack of respect for human rights, have recently

93. Report No. 1/92, *supra* note 65, p. 27 *et seq*.

94. *See, e.g.*, I/A Commission H.R., Report No.15/95, Case 11.010, Colombia, adopted September 13, 1995, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1995, General Secretariat of the Organization of American States, Washington, D.C., 1996, p. 76, para. 7 of the conclusions.

95. I/A Commission H.R., Report No. 27/92, Case 10.957, Mexico, adopted September 28, 1992, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1992-1993, *supra* note 91, p. 104, footnote.

refused to comply with the Commission's recommendations, invoking, *inter alia*, the argument of national sovereignty. On this subject, Helio Bicudo has pointed out that, "from the moment in which a State assumes obligations under international treaties that it has signed or ratified, that State abdicates its sovereignty in the name of international coexistence and is, therefore, obligated to comply in good faith with the terms of those treaties."[96] The notion of absolute sovereignty, appropriate for absolute monarchies, was replaced a long time ago by the principle of the sovereign equality of States, understood in terms their political independence from other States[97] but not as an expression of the absence of international standards or of anarchy. The argument of sovereignty also ignores the fact that, since the middle of the last century respect for human rights forms part of the hard nucleus of *ius cogens*, understood as that collection of imperative norms of international law that apply to all and that States must follow and accept. Human rights, therefore, concern the international community collectively and leave no room for national sovereignty. International law means that a State does not act in a sovereign manner. In signing and ratifying a treaty such as the American Convention, a State does not abdicate its sovereignty but acts in exercise of it. It is by means of a treaty freely consented to and accepted that the States parties to the Convention subject themselves to the organs of human rights protection and their procedures established by the Convention. It must also be remembered that, pursuant to the terms of Article 3.b of the OAS Charter, "international order consists essentially of respect for the … sovereignty, and independence of States, and the faithful fulfillment of obligations derived from the treaties and other sources of international law." Sovereignty is thus not an autonomous and independent concept, but goes hand in hand with the duty to comply faithfully –and in good faith– with the obligations arising from treaties.

Although Article 33 of the Convention includes the Commission as an organ with competence to deal with matters relating to the fulfillment of the commitments made by the States parties to the Convention, it must

96. Helio Bicudo, *Cumplimiento de las sentencias de la Corte Interamericana de Derechos Humanos y de las recomendaciones de la Comisión Interamericana de Derechos Humanos*, in EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS EN EL UMBRAL DEL SIGLO XXI, Inter-American Court of Human Rights, San José, Costa Rica, 2001, p. 230.

97. *See, e.g.*, Article 2.1 of the United Nations Charter.

be observed that the Commission's powers are limited to the formulation of proposals and recommendations (Article 50) and of opinions and conclusions (Article 51), which does not appear to make them binding. The language used by the Commission itself is not conclusive, in that many of its decisions or reports include expressions such as *recommend*, *invite* or *request*, while others are more categorical and state that the government of the State in question "must fulfill its obligation to correct the domestic law of its country so that it will effectively guarantee the exercise of the political right … (that) the Nuevo Leon Election Law does not fully and effectively protect the exercise of political rights and does not provide for simple, swift and effective recourse to independent and impartial tribunals. Hence, it must be adjusted to conform to the requirements under the Convention. Under Articles 2 and 28.2 of the Convention, the Government of Mexico must immediately adopt measures to see that the law is corrected."[98] In any event, the object and purpose of the Convention and the duty of the States parties to comply in good faith with the commitments acquired must be borne in mind without ignoring their duty to cooperate with the organs that have been charged with overseeing that human rights are respected and ensured. The States have not always shown the proper willingness to comply with the recommendations contained in the Commission's reports. In some cases, in the absence of any norm of the Convention authorizing it, a State has *rejected* the report,[99] not recognizing the competence that, under Article 33 of the Convention, the States themselves have conferred on the Commission. In other cases, the State has responded to the report,[100] ignoring that the only proper response is that the State indicate the manner in which it has complied with the Commission's recommendations or, if not in agreement with the recommendations, by referring the case to the Court so that the latter decides.

In its final submissions in the Caballero Delgado and Santana Case, the Commission implicitly argued that its decisions were binding, by

98. I/A Commission H.R., Report No. 8/91, Case 10.180, Mexico, adopted February 22, 1991, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1990-1991, *supra* note 27, p. 250 *et seq.*, paras. 52-53.

99. For example, the attitude of Peru in the Cesti Hurtado Case, as described by the Court in the *Cesti Hurtado Case. Preliminary Objections*, *supra* note 22, para. 8.

100. *See, e.g.*, *Hilaire Case. Preliminary Objections*, *supra* note 54, para. 11.

requesting that the Court, on the basis of the principle of *pacta sunt servanda*, declare that Colombia had violated Article 51.2 of the Convention by deliberately failing to comply with the Commission's recommendations.[101] After recalling that there is no authority for an Article 51 Report when the case has been submitted to the Court, as occurred in this case, the Court held that the word *recommendations* used by the Convention should be interpreted in conformity with its ordinary meaning in accordance with the general rule of interpretation found in Article 31.1 of the Vienna Convention on the Law of Treaties and that, in not giving this term a special meaning, a recommendation does not have the character of an obligatory judicial decision for which the failure to comply would generate State responsibility. Therefore, according to the Court, the State would not incur international responsibility for not complying with a recommendation that is not obligatory.[102]

The Commission's report is certainly not a judgment, but the purpose of the recommendations is, precisely, that the State comply with the obligations that it contracted under the Convention. In keeping with the spirit of the Convention, it cannot be assumed that such recommendations are completely without legal effect. The Court has held that the purpose of the Convention is to obtain compliance by the States with their obligations, especially their legal obligation "to cooperate in the investigation and resolution of the violations of which they may be accused."[103] It is also timely to recall that Article 31.1 of the Vienna Convention on the Law of Treaties provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Without doubting the good faith of the Court, its interpretation in the Caballero Delgado and Santana Case appears not to have paid sufficient attention to the object and purpose of the treaty or to have duly taken into consideration the context of the provisions of Articles 50 and

101. I/A Court H.R., *Caballero Delgado and Santana Case.* Judgment of December 8, 1995. Series C No. 22, para. 23.

102. *Ibid*., para. 67. *See*, also, I/A Court H.R., *Genie Lacayo Case.* Judgment of January 29, 1997. Series C No. 30, para. 93.

103. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 6, paras. 59, 60 and 63, respectively.

51 of the Convention in relation to Article 1.1 of that treaty. Moreover, Article 47.d of the Convention, which establishes that a petition that is substantially the same as one previously examined by the Commission be declared inadmissible in the sense of having been resolved by the Commission in the terms referred to in the analysis of the conditions of admissibility of a petition, may also be used to argue that the decision of the Commission is binding.

The Court's holding in the Caballero Delgado and Santana Case not only weakens the juridical nature of the Commission's recommendations, which cannot be separated from its other decisions, but also represents a step backwards in the interpretation of the Convention. The Court itself understood this in its judgment in the Loayza Tamayo Case when it changed its criterion and held that "in accordance with the principle of good faith, embodied in … Article 33.1 of the Vienna Convention, if a State signs and ratifies an international treaty, especially one concerning human rights, such as the American Convention, it has the obligation to make every effort to comply with the recommendations of a protection organ, such as the Inter-American Commission, which is, indeed, one of the principal organs of the Organization of American States, whose function is 'to promote the observance and defense of human rights' in the hemisphere (OAS Charter, Articles 52 and 111)."[104] The Court also recalled that Article 33 of the Convention provides that the Commission, together with the Court, is an organ with "competence with respect to matters relating to the fulfillment of the commitments made by the States Parties," so that, in ratifying the Convention, the States have agreed to comply with the recommendations that the Commission adopts in its reports.[105] In later cases, the Commission has requested that the Court declare, *inter alia*, pursuant to Article 2 of the Convention and the principle of *pacta sunt servanda* recognized in the jurisprudence of the Court that the State in question has violated Article 50.3 of the Convention in not complying with its recommendations.[106]

The binding nature of the recommendations contained in the Commission's report is implicit in Article 46 of its Rules, which provides

104. I/A Court H.R., *Loayza Tamayo Case*. Judgment of September 17, 1997. Series C No. 33, para. 80.
105. *Ibid*., para. 81.
106. *Cantos Case*, *supra* note 35, para. 11.2.

that, once the report on a friendly settlement or on the merits in which it has made recommendations is published, the Commission may take the follow-up measures that it deems appropriate, such as requesting information from the parties and holding hearings with the aim of verifying compliance of the friendly settlement agreement and its recommendations. In addition, the Commission reports on progress in the compliance of the agreements and recommendations, as it deems appropriate.

In the event that the State does not adopt the measures recommended by the Commission, the only sanction that the Commission may apply is the publication of its report, which would supposedly affect the State's international prestige. Of course, if such prestige is minimal or non-existent, the State has nothing to fear and, obviously, such a sanction would not be effective at all.

The instrument that the Commission does have to require compliance with its decisions is its power to refer the case to the Court, although this is an option that, being subject to a deadline, is not always available.

Should the State not comply with its commitments with the Commission in regard to, for example, the guarantee of a right infringed or the observance of judicial guarantees, keeping in mind that it is a new infraction of the Convention and pursuant to the provisions of Article 26.2 of the Commission's Rules, the Commission could re-open the case.

## *8. FOLLOW-UP OF THE RECOMMENDATIONS OF THE COMMISSION*

Since full compliance of the Commission's decisions is an indispensable element to ensure that human rights are fully effective in the hemisphere, it must be emphasized that a case is not closed with the adoption of the final report or with its publication. Under Article 46 of its Rules, once the report on the merits, which includes recommendations, is published, the Commission may adopt the follow-up measures that it deems advisable, such as requesting information from the parties and holding hearings in order to verify compliance of its recommendations. The Commission may also inform, in the manner it deems appropriate, on the progress made in complying with the recommendations. This Rule is based

on Articles 41.b-d and f and 3 of the Convention and Article 18.b-d of its Statute. Article 51.3 of the Convention establishes that, when the period prescribed by the Commission for the State to comply with its recommendations has elapsed, the Commission decides, by a majority vote, whether the State has taken adequate measures and whether to publish its report.

The Commission's final report may also be used to follow up on the degree of State compliance with the recommendations that it made in its preliminary report. An example would be the report adopted in the case of Ruth del Rosario Garcés Valladares, in which the Commission welcomed the signs that the State was in the process of complying with the recommendation regarding compensation, but that the information presented as of the date of the final report did not indicate that it had effectively complied with the recommendations issued in Report No. 52/98.[107] Moreover, in the operative part of its final report, the Commission usually requests that a State inform it on the measures that it has adopted to comply with the recommendations.[108] Until now, these requests for information have not been objected to by the States.

The OAS General Assembly has not been able to ignore the importance of the follow-up of the Commission's recommendations. At its XXXIII Session, the General Assembly urged the member States to follow up on the Commission's recommendations and that the States continue to take appropriate action in connection with its Annual Report in the context of the OAS Permanent Council and the General Assembly.[109] In its resolution on Strengthening of Human Rights Systems Pursuant to the Plan of Action of the Third Summit of the Americas, the General

107. I/A Commission H.R., Report No. 64/99, Case 11.778, Ruth del Rosario Garcés Valladares, Ecuador, adopted April 13, 1999, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1998, General Secretariat of the Organization of American States, Washington, D.C., 1999, vol. 1, p. 509, para. 113.

108. *See, e.g.*, I/A Commission H.R., Report No. 5/92, Case 10.151, El Salvador, adopted February 4, 1992, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1991, General Secretariat of the Organization of American States, Washington, D.C., 1992, p. 98, operative para. 4; Report No. 25/91, Cases 10.111-10.112, Guatemala, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1991, *ibid*., p. 168, operative para. 3; Report No.26/91, Case 10.113, Guatemala, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1991, *ibid*., p. 170, operative para. 4 and Report No. 27/91, Case 10.120, Guatemala, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1991, *ibid*., p. 172, operative para. 4.

109. Resolution AG/RES. 1917 (I/A COURT H.R.III-0/03), operative points 3.b and 3.c.

Assembly also reaffirmed the commitment of the OAS to continue to take concrete measures to comply with the mandates of the Summit, including the follow-up of the recommendations of the Inter-American Commission, and instructed the Permanent Council to convoke the Committee on Juridical and Political Affairs to consider means of promoting the follow-up of the Commission's recommendations by the OAS member States.[110]

Among the recent follow-up reports is the case of Carmelo Soria Espinoza, where the Commission had adopted preliminary report No. 79/99, in which it made several recommendations to Chile. After receiving the observations to that report, on October 18, 1999 the Commission adopted its definitive report (No. 133/99) and transmitted it to the State, giving it one month to report on compliance with the recommendations. On January 21, 2003, the Commission received a commitment signed by the State for the partial compliance of the recommendations, which had been accepted by the petitioners. The Commission took note of the commitment assumed by Chile and accepted by the petitioners, welcomed the willingness manifested by the government to comply with its recommendations, urged the State to take the necessary measures to comply with the pending recommendations, agreed to continue to oversee compliance of the agreement arrived at by the parties and of its recommendations and decided to make public its follow-up report and include it in its Annual Report to the General Assembly. It should be observed that, in spite of the agreement reached between the State and the petitioner, the Commission insisted on full compliance of its recommendations.[111]

## *9. LENGTH OF THE PROCEEDINGS BEFORE THE COMMISSION*

Despite the Commission's role as an organ of supervision of the obligations assumed by the States and the purposes of the Convention, proceedings before the Commission, from the presentation of the petition until the issuance of the final report or a decision to submit the case to the

110. Resolution AG/RES. 1925 (I/A COURT H.R.III-0/03), operative points 2.b and 4.d.

111. I/A Commission H.R., Report No. 19/03, Petition 11.725, Agreement of Compliance, Carmelo Soria Espinoza, Chile, adopted March 6, 2003.

Court, may involve an extended period of time, which limits the effectiveness of the protection of human rights. Sometimes such a simple step as notification of the petition to the State in question may take months. For example, the claim in the Mayagna Community Case was presented on October 2, 1995, but its pertinent parts were not forwarded to the State until four months later, on February 5, 1996.[112]

It must be remembered that the Commission's Rules prescribe periods for the petitioners and the State in question, but the Commission does not hold itself to precise periods. This is not in keeping with Article 8.1 of the Convention, which provides that everyone has the right to be heard "within a reasonable time." While it is the State that assumes the correlative obligations, the organs of protection of the system should abide by the rights that the Convention recognizes for all persons and that the organs have the obligation to protect. If not, it would be a system that requires something of States that its own bodies are not capable of guaranteeing.

A few cases are processed with relative ease. For example, the Cesti Hurtado Case was denounced before the Commission on March 7, 1997 and the application was filed with the Court on January 9, 1998, only ten months later, and the Hilaire Case was initiated with a complaint received on October 9, 1997 and was referred to the Court on May 25, 1999, a year and a half later. The Constitutional Court Case, from the time that the petition was presented to the Commission until the case was submitted to the Court, took one year and eleven months. In the Villagrán Morales *et al*. Case, the complaint was presented on September 15, 1994 and some stages were concluded promptly, such as notifying the State five days later and immediately holding a hearing during the Commission's session, held September 19-30, in which Guatemala presented its response to the complaint.[113] Unfortunately, this is not generally the case. In the Baena Ricardo *et al*. Case the complaint was presented to the Commission on February 22, 1994 and forwarded to the State almost four months later on July 6[114] and the response of the State was not sent to the petitioner until a

112. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 46, paras. 6 and 9.

113. I/A Court H.R., *The "Street Children" Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, paras. 5-6.

114. *Baena Ricardo et al. Case*, *supra* note 44, para. 6.

month and a half after receipt,[115] which means that the proceedings before the Commission in that case took four years.

It must be remembered that, on occasion, it is the petitioners themselves who delay the proceedings, with repeated submissions in which they offer additional information or present new arguments on the same facts, each one of which is sent to the State for its response, which can generate a never-ending exchange between the parties.[116]

115. *Ibid*., para. 8.

116. *The "Street Children" Case (Villagrán Morales et al.), supra* note 113, paras. 7-17, 21, 25-26 and 28.

## Chapter XI

## THE ADOPTION OF PROVISIONAL MEASURES

The American Convention takes into account that it may sometimes be necessary to avoid irreparable damage to persons, thus requiring that the system's organs take timely, rapid and effective action to prevent such damage and to ensure the full exercise of human rights. The Convention's ordinary procedure is not the most appropriate means to achieve this purpose. Article 63 of the Convention, therefore, provides that, whether or not a case has been referred to it, the Court may intervene and adopt provisional measures. For its part, Article 25 of the Court's Rules states that in cases of extreme gravity and urgency and when necessary to avoid irreparable damage to persons, the Court may adopt the provisional measures that it deems pertinent. The purpose of provisional measures is to avoid the prejudicial effect of delaying a final ruling, anticipating a result and causing the Court's judgment to be ineffective.

As this type of measure in domestic law is an action taken during proceedings that have already been initiated, it is important to underscore the Court's very broad jurisdiction to order provisional measures, even in cases that have not yet been submitted to its consideration and that might never be,[1] which is an aspect that makes it particularly innovative. Consideration of provisional measures takes place at the margin of the principal proceedings before the Court and are incidental to proceedings before the Commission.

Since provisional measures may be requested under the Convention even with respect to matters that are not yet before the Court, we have treated them separately from the principal proceedings of cases that are referred to the Court regarding the violation of rights set forth in the Convention.

1. This has been, for example, the situation in the Chunimá, Colotenango, Bustíos-Rojas, Chipoco, Peruvian Prisons and Reggiardo-Tolosa Cases in which, although the Commission considered the cases to be of *extreme gravity*, it never referred them to the Court.

## A. THE LIMITS OF THE COURT'S JURISDICTION TO ADOPT PROVISIONAL MEASURES

In cases already before it, the Convention authorizes the Court, in cases of extreme gravity and urgency and when necessary to avoid irreparable damage to persons, to order the provisional measures that it deems pertinent. The Court may adopt these measures at the request of a party or on its own motion. At the Commission's request, the Court may also adopt these measures in matters that have not been filed with it but that are before the Commission, even though there has not been a ruling on admissibility, and meet the same requisites of extreme gravity and urgency as well as the necessity to avoid irreparable damage to persons.[2] Pursuant to Article 74 of the Commission's Rules, when the Commission is not in session, such a request may be made by its Chairman or, in his absence, by one of the Vice Chairmen, in order of precedence.

It is also possible that such a request is the result of a combination of both hypotheses. In a request for provisional measures to protect the life and physical integrity of members of the Vásquez family, the Commission indicated that the provisional measures should ordered with respect to the Paniagua Morales *et al*. Case that was before the Court and the Vásquez *et al*. Case that was being examined by the Commission,[3] without this particular circumstance preventing or impeding the exercise of the Court's jurisdiction.

2. *See* Article 63.2 of the Convention. This is an area in which the European Convention on Human Rights is not as advanced as the inter-American system since it does not explicitly provide for the adoption of preliminary or exceptional measures on behalf of those who allege that their human rights have been violated. This matter was, however, covered by Article 36 of the Rules of the former European Commission of Human Rights and may also be concluded from Article 25 (now Article 34) of the European Convention, the last phrase of which states that the States parties "undertake not to hinder in any way the effective exercise" of the right to individual petition, and Article 46 (now Article 32), which grants the tribunal jurisdiction for all matters concerning the interpretation and application of that treaty.

3. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights. Paniagua Morales et al.* and *Vásquez et al. Cases (No. 11.448).* Order of the President of February 10, 1998, para. 2 of the expository part.

### *1. THE COURT'S JURISDICTION WITH RESPECT TO CASES UNDER ITS CONSIDERATION*

The Court's jurisdiction to adopt provisional measures in cases that are before it does not present great difficulties. Such requests, of course, may be made when the case is submitted. What is not so evident, however, is the determination of when a case is no longer before the Court, at which time it would no longer have jurisdiction to order such measures.

In the Caballero Delgado and Santana Case, the Court ordered the Government of Colombia to adopt the necessary measures to protect the life and physical integrity of several persons and to maintain the measures in force as long as the circumstances that gave rise to them persisted.[4] When it lifted the measures, the Court observed that the case had terminated with its judgments on the merits and on reparations, but it emphasized that it maintained jurisdiction in order to monitor compliance of the latter judgment.[5] It is not easy to conclude from this decision whether, for the effect of requesting provisional measures, the case is under consideration until the judgment on the merits or on reparations or while the Court continues to have jurisdiction to monitor compliance of the judgment. In our opinion, even if the case is before the Court only to supervise compliance, this is one of the hypotheses under Article 63.2 of the Convention and, therefore, the Commission may request the adoption of provisional measures. In the aforementioned case, invoking its powers under Article 63.2, the Court reinstituted the provisional measures that it had previously lifted[6] and, thus, implicitly acknowledged that this was a case that it had under consideration.

On the other hand, while the adoption of provisional measures may have resulted from a request of the Commission regarding a matter

4. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Colombia. Caballero Delgado and Santana Case*. Order of December 7, 1994, operative paras. 1 and 2.

5. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Colombia. Caballero Delgado and Santana Case*. Order of January 31, 1997, para. 2 of the considerations.

6. I/A Court H.R.,*Provisional Measures adopted by the Inter-American Court of Human Rights in the matter of the Republic of Colombia. Caballero Delgado and Santana Case.* Order of April 16, 1997.

that it was examining, a new request for those measures or for extending those already ordered may be presented once the case is referred to the Court or together with the filing of the application to the Court.[7] It is also possible that, if there is a sufficient connection between them, the Commission may request provisional measures simultaneously for a case before the Court and for another case before the Commission[8] or it may request an extension of provisional measures already ordered in a case to persons in another case that is at a different stage in the proceedings. As an example, in the Hilaire Case, before filing the application the Commission requested that the measures in the James *et al*. Case, which the President of the Court had ordered on May 27, 1998 and the Court had ratified on June 14 of the same year, be extended to include Mr. Hilaire. The Commission asserted that the circumstances of Mr. Hilaire were similar to those of the inmates covered by the previous measures and that Mr. Hilaire was exposed to irreparable damage, as he was about to be executed.[9]

### *2. THE COURT'S JURISDICTION WITH RESPECT TO MATTERS PENDING BEFORE THE COMMISSION*

With respect to provisional measures requested by the Commission in matters that have not been submitted to the Court, a former judge of the Court has stated that the Commission may only use this attribute in cases that it is considering and only when the cases have been formally and expressly accepted, that is, when they have been declared admissible.[10] This point of view is not shared by the author since it ignores that the purpose of these measures is to protect the life and physical integrity of persons in cases of extreme gravity and urgency and, therefore, it would not be wise to await a decision on the admissibility of a petition. Moreover,

7. *See*, in this respect, I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Peru. Cesti Hurtado Case*. Order of January 21, 1998, paras. 4 and 5 of the expository part and para. 5 of the considerations.

8. *See, e.g*., I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Guatemala. Paniagua Morales et al.* and *Vásquez et al. Cases (No. 11.448*). Order of June 19, 1998, para. 4 of the considerations.

9. I/A Court H.R., *Hilaire Case. Preliminary Exceptions*. Judgment September 1, 2001. Series C No.80, para. 13.

10. *See* Héctor Gros Espiell, ESTUDIOS SOBRE DERECHOS HUMANOS, Inter-American Institute of Human Rights/Editorial Civitas, S.A., Madrid, 1988, p. 170.

this position is not in accord with the object and purpose of the treaty, the relevance of which has been emphasized by the Court.

In matters that are before the Commission, Judge Fix-Zamudio has asserted that provisional measures must be thought of as the application of the Court's special, and not ordinary, attributes, precisely because they may deal with matters that are not before it.[11] The exceptional nature of this institution, which is subject to very precise conditions, must not be employed in a way that would make it absolutely inapplicable or so that it would not serve the purpose for which it was established. As a prompt recourse to protect rights enshrined in the Convention and to avoid irreparable harm to persons, the importance of this type of measure is obvious. Thus, the suggestion of Judge Fix-Zamudio to establish some general rules to avoid a proliferation of requests for these measures with respect to matters that have not been submitted to the Court[12] seems to be absolutely contrary to the purposes of the Convention, which expressly provides for the possibility of requesting the Court to adopt provisional measures in any case of extreme gravity and urgency and whenever necessary to avoid irreparable damage to persons. If it would accept his position, the Court would be abdicating the delicate functions that have been conferred on it.

A matter must be pending before the Commission in order that it request provisional measures, but once a case has been referred to the Court, it falls under the Court's jurisdiction and remains so, regardless of the course of the proceedings before the Commission, which might even include the termination of the matter. Although the Commission had adopted an Article 51 Report with respect to one of the claimants in the James *et al*. Case, this circumstance did not prevent the Court from adopting

11. Communication dated November 30,1992 of Judge Fix-Zamudio, as President of the Court, addressed to the Secretary of the Court regarding the requests for provisional measures in the Chipoco and Peruvian Prisons Cases, p. 1, point 1.

12. *Ibid*., p. 4, point III(c). *See*, also, I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Peru, Peruvian Prisons Case*. Order of the President of December 14, 1992, para. 4 of the considerations and the Order of the same date in the *Chipoco Case*, para. 4 of the considerations. It is obvious that by *precautionary measures* the President referred to the provisional measures that may be applied by the Court and not the precautionary measures that may be applied by the Commission.

its order of May 25, 1999 but did allow Judge Cançado Trindade to formulate, in a concurring opinion, valid considerations on the issue and on the Court's jurisdiction to define the limits of its competence. He contended that, once the Court has jurisdiction, it is intangible and cannot be affected by the subsequent actions of the parties.[13] For his part, Judge de Roux Rengifo believes that it is necessary to make a full and balanced interpretation of the provisions of Chapters VI, VII and VIII of the Convention that define the structure of the inter-American human rights system and govern the functions of its organs, which must work in tandem to achieve the system's goals. According to Judge de Roux Rengifo, by not prolonging the effect of the provisional measures, the Court would be disregarding the combined scope of Articles 50, 51 and 63.2 of the Convention and, taking this into account, the Court can hardly deny the protection of provisional measures to persons whose rights have been protected by express recommendations of the Commission from the moment that those recommendations became final. Reading Articles 50, 51 and 63.2 of the Convention together, it would be appropriate to prolong the measures for a reasonable period in order to allow the State to make every effort to apply the Commission's recommendations before irreparable damage occurs.[14] It is interesting to observe that this request for provisional measures, which initially referred to five persons, was later submitted to the Court as the Constantine *et al*. Case, although it did not include three of the persons for whom provisional measures had been previously requested. The Court subsequently ordered the joinder of the cases into the Hilaire, Constantine and Benjamin *et al*. Case.[15]

In order for the Court to hear a request for provisional measures, it is necessary that all the requisites for its jurisdiction have been met. In the James *et al.* Case, the Court amplified the provisional measures to include two persons whose complaints had been received in the Commission the day before the effective date of the denunciation of the Convention by

13. I/A Court H.R., *Provisional Measures ordered by the Inter-American Court of Human Rights in the matter of the Republic of Trinidad and Tobago, James et al. Case*. Order of May 25, 1999, especially paras. 3, 5 and 7 of the concurring opinion.

14. *Ibid*.

15. I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al*. Judgment of June 21, 2002. Series C No. 94.

Trinidad and Tobago. This request was presented to the Court on June 18, 1999, when the denunciation was not yet in force. The Court understandably indicated that the denunciation of the treaty did not release the State from its obligations with respect to possible violations of the Convention that had occurred prior to the effective date of the denunciation.[16]

## B. THE DIFFERENCE WITH PRECAUTIONARY MEASURES

In analyzing the provisional measures that the Court may adopt, we must bear in mind what has already been stated with respect to the precautionary measures that the Commission may adopt under Article 25 of its Rules. Of course, there is no, nor does there have to be, irreconcilable conflict between the Commission's measures and those that are within the Court's competence. If the precautionary measures ordered by the Commission are complied with in a timely and effective manner, recourse to the Court would not be necessary. Failure to comply with precautionary measures is one more element that the Court must take into account when it rules on the request for provisional measures.

Although they pursue the same end, precautionary and preliminary measures differ in various aspects of special relevance. First, from a formal point of view, while precautionary measures are within the Commission's competence, provisional measures are adopted by the Court on its own motion, at the request of the Commission or, in cases before it, at the request of a party.

In the second place, provisional measures are expressly provided for in the Convention but precautionary measures, while derived from the Commission's Statute, are only provided for in its Rules.

As a third difference is that, while the Commission may adopt precautionary measures with respect to any OAS member State, whether

16. I/A Court H.R., *Request for the amplification of the Provisional Measures requested by the Inter-American Court of Human Rights in the matter of the Republic of Trinidad and Tobago, James et al. Case*. Order of June 19, 1999, para. 3 of the expository part and para. 3 of the considerations.

or not it has ratified the Convention, the Court may only adopt provisional measures with respect to States parties to the Convention.

In the fourth place, there is a difference with respect to the organ's jurisdiction *ratione materiae* to adopt them. While the Court may order provisional measures in cases that are being heard by it and, exceptionally, at the Commission's request in matters that have not yet been filed, it appears that the Commission, on the basis of its powers under the Statute, may request the adoption of precautionary measures whenever it deems it necessary in order to carry out its functions. In fact, in the first cases against Honduras, when two witnesses were killed the Commission, invoking Article 29 of its then Rules, requested that the government conduct a complete investigation of those acts and protect the other witnesses in those cases. At the same time, it requested the Court, pursuant to Article 63.2 of the Convention, to adopt provisional measures.[17]

When it is a matter that has not been referred to the Court, precautionary measures, since they do not involve the intervention of another organ, may result in a prompter effect than provisional measures.

With respect to the operative circumstances that allow recourse to this type of measure, provisional measures may only be applied in cases of extreme gravity and urgency and when necessary to avoid irreparable damage to persons. In contrast, pursuant to Article 41.b of the Convention the Commission may take any action that it deems necessary in order to carry out its functions and, therefore, may order precautionary measures in a much wider range of situations.

Given their different normative sources, what is most important is the binding nature of the two measures, which influences their degree of effectiveness. It is well to recall the language employed for each measure since, while the Commission may *request* the authorities of a State to adopt precautionary measures to avoid the occurrence of irreparable damage to persons, pursuant to Article 63.2 of the Convention the Court *shall adopt* the provisional measures that in cases of extreme gravity and urgency are necessary to avoid irreparable damage to persons. That difference in

17. I/A Court H.R., ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1987-1988, General Secretariat of the Organization of American States, Washington, D.C., 1988, p. 23.

language leads to the conclusion that, while precautionary measures are a mere recommendation of the Commission,[18] provisional measures are binding on the State. However, as will be seen later, we believe both to be binding.

In any event, when precautionary measures are not duly complied with, provisional measures are available, as the Commission's Chairman stated in the Peruvian Prisons Case when he pointed out that if the requested measures were not adopted within ten days the Commission would consider presenting the pertinent request to the Court, as it eventually did.[19] In the Blake Case, in justifying its request for provisional measures the Commission recalled that, in order to preserve the life, freedom and physical integrity of a witness to a criminal act, it had requested that the Government of Guatemala adopt precautionary measures, but the government did not respond.[20]

The Court itself occasionally appears to have agreed with the idea of initially using precautionary measures and only if they are not sufficient resorting to the Court.[21] The Court has also held that the fact that the precautionary measures ordered by the Commission have not produced the required protection is a special circumstance that makes it necessary to adopt urgent measures –or provisional measures– to avoid irreparable damage to persons.[22]

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18. Article 41.b of the Convention, which is the basis for the adoption of precautionary measures by the Commission.

19. *See* para. 14 of the request for precautionary measures presented by the Chairman of the Commission to the Government of Peru on August 18, 1992. *See*, also, the brief of November 25, 1992 to the Court by the Executive Secretariat of the Commission, requesting provisional measures with respect to Cases No. 11.015 and 11.048, pp. 2-3.

20. *See* the account of the facts in I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Guatemala, Blake Case*. Order of the President of August 16, 1995, para. 3.b of the expository part.

21. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Guatemala, Vogt Case*. Order of the President of April 12, 1996, para. 5 of the considerations and the Order of the Court of June 27, 1996 confirming the Order of the President. *See*, also, I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Colombia, Clemente Teherán et al. Case*. Order of June 19, 1998, para. 6 of the considerations.

22. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Guatemala, Serech and Saquic Case*. Order of the President of April 24, 1996, para. 6 of the considerations and the Order of the Court of June 28, 1996 confirming the Order of the President.

In the Giraldo Cardona Case, the Commission requested that the Court order provisional measures in favor of the widow and children of José Giraldo Cardona as well as of other persons whose lives had been threatened, after the precautionary measures ordered by the Commission were not effective, as proved by the assassination of Mr. Giraldo Cardona.[23] In the Alvarez *et al.* Case, the Commission turned to the Court because the precautionary measures it had adopted had not been effective, having culminated in harassment and an attack on the Medellín office of the Association of the Families of Detained-Disappeared Persons of Colombia.[24] In any event, it is always possible that the Commission would prefer to go directly to the Court, so that it adopt provisional measures.

## C. JUSTIFICATION OF THE JURISDICTION TO APPLY PROVISIONAL MEASURES

Determining the cases in which the Court may adopt provisional measures is a matter of great theoretical and practical importance. Until recently, no State had objected to the Court's competence to order this type of interlocutory measure, but it must be borne in mind that in every case the State had previously accepted the Court's contentious jurisdiction. Nonetheless, in the James *et al*. Case Trinidad and Tobago became the first State to object obliquely to this type of measure when it pointed out that the Commission was only empowered to make recommendations and not to "overturn judgments of the domestic courts," that the international organs had the duty to create the necessary machinery to allow a State "to comply with its own domestic laws" and that the reservation that it had made recognized the Court's jurisdiction "only to such extent that recognition is consistent with the relevant sections of the Constitution of … Trinidad and Tobago." The Court, in rejecting these arguments, observed that the States parties to the Convention must comply with its provisions

23. *See* the letter dated October 18, 1996 of the Executive Secretary of the Commission to the President of the Court, in ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1996, General Secretariat of the Organization of American States, Washington, D.C., 1997, p. 256.

24. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Colombia, Alvarez et al. Case*. Order of November 11, 1997, para. 4 of the expository part.

in good faith, including those norms that allow the development of proceedings before the system's two organs that ensure the Convention's purposes are achieved. The Court indicated that the States must not take any action that might frustrate the *restitutio in integrum* of the rights of the alleged victims and that the function of the Convention's supervisory organs is to ensure that its provisions are observed and adequately applied by the States and not to ensure that the States comply with their own domestic laws.[25] Two days later, the State informed the Court that it would not consult with the Court or the Commission any further in these matters.[26]

The Commission may, of course, only request the application of provisional measures with respect to States parties to the Convention. It is not so clear whether the State must have previously accepted the Court's contentious jurisdiction. In the inter-American system, provisional measures may be applied not only as part of the judicial proceedings already underway in the Court, but also as the result of the Commission's request in a matter that has not yet been submitted to the Court. In the second place, it must be borne in mind that provisional measures are not part of the Court's contentious jurisdiction but rather fall under its competence as an organ of human rights protection. The Court has repeatedly stated that, in the international law of human rights, the purpose of provisional measures, in addition to their essentially preventive nature, is to provide effective protection to fundamental rights in that they seek to prevent irreparable damage to persons.[27]

Provisional measures are an institution that has been taken from domestic law, where the jurisdictional problems found on the international plane do not exist. Nevertheless, their appropriateness in the framework of a treaty designed for the protection of human rights is more than obvious. A State may undoubtedly object to a request for provisional measures,

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25. I/A Court H.R.,*Provisional Measures adopted by the Inter-American Court of Human Rights in the matter of the Republic of Trinidad and Tobago, James et al. Case*. Order of August 29, 1998, para. 5 of the expository part and para. 7 of the considerations.

26. I/A Court H.R., ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1998, General Secretariat of the Organization of American States, Washington, D.C., 1999, pp. 33-35.

27. *See, e.g.,* I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Colombia, Peace Community of San José de Apartadó Case.* Order of November 24, 2000, para. 12 of the considerations.

either because the Court lacks jurisdiction to hear the case or because it lacks competence regarding specific matters with respect to that State.[28]

Taslim O. Elias has divided the theories on the jurisdiction of an international tribunal to adopt provisional measures into three categories: a) that which holds that, before granting provisional measures, the Court must, as a preliminary question, be absolutely sure of its jurisdiction to hear the case,[29] b) that which asserts that the Court has an *inherent jurisdiction*, derived from its mere existence as a judicial organ created with the consent of the States, which authorizes it to adopt the measures that it deems indispensable to ensure that the exercise of its jurisdiction on the merits is not frustrated[30] and c) the thesis according to which, in the absence of a clear indication to the contrary, the Court may assume, *prima facie*, that it has jurisdiction to hear a request for provisional measures or that its lack of jurisdiction is not manifest, postponing until a later stage the question of its jurisdiction.[31] Thomas Buergenthal seems to favor the latter position, contending that provisional measures may only be granted after the Court has established, even preliminarily, that the parties have accepted and are subject to its jurisdiction.[32] In contrast, Rafael Nieto categorically states that the Court lacks jurisdiction to adopt provisional measures with respect to States that have not made the declaration that recognizes its contentious jurisdiction.[33] This also appears to be the opinion of the Court, as reflected in the James, Briggs, Noel, Garcia and Bethel Case, in which it based its jurisdiction on Article 62.3 of the Convention

28. For example, if the State, upon ratifying or adhering to the Convention, has made a valid reservation that, with respect to that State, limits the scope *ratione materiae* of the application of the Convention.

29. *See* the dissenting opinions of Judges Morozov and Ruda in International Court of Justice, *Aegean Sea Continental Shelf Case, Interim Protection*, Order of September 11, 1976, I.C.J. Reports, pp. 21 and 22-23, respectively.

30. International Court of Justice, *Nuclear Test case, Australia v. France*, I.C.J. Reports 1974, p. 259 *et seq*. In the opinion of Taslim O. Elias, however, this theory requires that the petition for provisional measures be based on a treaty in force between the parties. *See* The International Court of Justice and some Contemporary Problems, Martinus Nijhoff Publishers, The Hague, Boston, London, 1983, p. 21.

31. International Court of Justice, *Anglo Iranian Oil Company case (jurisdiction)*, Judgment of July 22, 1952, I.C.J. Reports 1952, p. 93 and *Fisheries Jurisdiction case (United Kingdom v. Iceland), Jurisdiction of the Court*, Judgment, I.C.J. Reports 1973, p. 3.

32. Thomas Buergenthal, *The Inter-American Court of Human Rights*, in THE AMERICAN JOURNAL OF INTERNATIONAL LAW, vol. 76, No. 2, 1982, p. 241.

33. *See* Rafael Nieto Navia, *Las medidas provisionales en la Corte Interamericana de Derechos Humanos: Teoría y praxis*, in LA CORTE Y EL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS, edited and presented by Rafael Nieto Navia, Inter-American Court of Human Rights, San José, Costa Rica, 1994, p. 385.

that authorizes the Court to hear any case relating to the interpretation and application of the Convention provided that the State has recognized or recognizes such jurisdiction. The Court, therefore, asserted that it was competent to hear that case because it referred to the application of Article 63.2 of the Convention.[34]

In the Anglo-Iranian Oil Co. Case and notwithstanding that the Government of Iran had objected to its jurisdiction, the International Court of Justice did not hesitate to order provisional measures since it considered that the measures did not prejudge in any way the issue of the Court's jurisdiction to hear the merits of the controversy.[35] In their dissenting opinion, Judges Winiarski and Badawi Pasha rejected the idea that the Court had jurisdiction to order provisional measures if it lacked jurisdiction to hear the merits of the case and expressed their difficulty to accept the idea that if, *prima facie*, the Court's complete lack of jurisdiction was not evident and there was an even a remote possibility that it might have jurisdiction, it could order provisional measures. In their opinion, such a focus would be based on a presumption in favor of the Court's jurisdiction, which would not be compatible with the principles of international law. In their opinion, if there were sound arguments in favor of the Court's jurisdiction that would make it reasonably probable, the tribunal could order provisional measures of protection. However, if there were serious doubts or sound arguments against the Court's jurisdiction, the measures should not be granted.[36] Of course, in the case of a human rights tribunal, such as the Inter-American Court, in the light of the purposes of the Convention, in a case pending before it in which preliminary objections have been raised, if there has not yet been a decision on its competence and its absolute lack of jurisdiction is not obvious, it would be incomprehensible that the Court refuse to adopt provisional measures.

Going even further than the aforementioned position, in the Aegean Sea Continental Shelf Case, the International Court of Justice suggested

34. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Trinidad and Tobago, James, Briggs, Noel, García and Bethel Case*. Order of June 14, 1998, para. 1 of the considerations.

35. International Court of Justice, *Anglo Iranian Oil Company case, request for the indication of interim measures of protection (United Kingdom / Iran),* order of July 5, 1951, I.C.J. Reports 1951, p. 93 *et seq*.

36. *Ibid*., p. 97.

that its jurisdiction to hear the merits of a matter was not relevant in considering a petition for provisional measures, implying that its authority to adopt such measures under Article 41 of its Statute gave it sufficient grounds for its jurisdiction.[37] This conclusion, however, was not shared in the separate opinions of Judges Lachs,[38] Ruda,[39] Mosler,[40] Tarazi,[41] nor that of the *ad hoc* judge Stassinopoulos.[42] Since the Inter-American Court is one of the organs competent to hear matters related to the fulfillment of the commitments made by the States parties to the American Convention and that among those commitments is that of respecting and ensuring the rights embodied in the Convention, this thesis cannot be rejected out of hand. It must also be kept in mind that, in adopting provisional measures, the Court does not act in exercise of its contentious jurisdiction, but as a body charged with the protection of human rights even in cases that have not yet been referred to it and that might never be. After all, provisional measures do not prejudge the merits of the controversy.

The practice of both the Commission and the Court appears to favor the position that the latter only has jurisdiction to order provisional measures in the event that it is competent to hear the case for which such measures were requested, that is, only if the State has made a declaration pursuant to Article 62.1 of the Convention accepting its contentious jurisdiction.[43] In the Commission's request for the application of provisional measures in the Bustios-Rojas Case, it was noted that Peru had accepted the Court's compulsory jurisdiction.[44] In the Commission's resolution that requested provisional measures in the Chunimá Case, it also cited as grounds for its petition, *inter alia*, the fact that Guatemala had ratified the Convention and had accepted the Court's contentious jurisdiction.[45] In the order of

37. *Aegean Sea Continental Shelf Case, Interim Protection*, Order of September 11, 1976, *supra* note 29, p. 14.

38. *Ibid*., p. 20.

39. *Ibid*., p. 24.

40. *Ibid*., p. 25.

41. *Ibid*., pp. 31-32.

42. *Ibid*., pp. 39-40.

43. This position is supported by Article 62(3) of the Convention, which grants the Court jurisdiction to hear any case relating to the interpretation and application of the provisions of the Convention that is submitted to it "provided that the States Parties to the case recognize or have recognized such jurisdiction."

44. I/A Commission H.R., Resolution 2/90, Case 10.348, Peru, adopted May 16, 1990, para. 13.

45. I/A Commission H.R., *Request for provisional measures, Case 10.674*, adopted June 1991, para. 7 of the considerations.

the President of the Court regarding that request, he was careful to point out that Guatemala had accepted the compulsory jurisdiction under Article 62 of the Convention.[46] While the Court's decision in this case does not mention the fact that the State had accepted its jurisdiction, it must be observed that the government did not object to the Court's jurisdiction to adopt provisional measures and that in any event the decision ratified the order of the President.[47] In contrast and without necessarily signifying a change of criterion, in the Reggiardo Tolosa Case the order of the Court did not note that Argentina had accepted its jurisdiction.[48]

In the first cases against Honduras, the impression is given that the Court would have inclined for the theory of its inherent jurisdiction to order provisional measures. On that occasion, after citing Articles 63.2, 33 and 62.3 of the Convention, its order takes into account the Court's nature as a judicial organ and the powers that are derived therefrom.[49] In this same decision[50] and in several more recent orders, a paragraph has been included that appears to suggest that the Court's jurisdiction to order provisional measures cannot be disassociated from the general commitments undertaken by a State when it ratifies the Convention. In its order in the Alemán Lacayo Case, the Court called upon "the Government of … Nicaragua to adopt, forthwith, such measures as are necessary to protect the life and personal integrity of Dr. Arnoldo Alemán Lacayo and to avoid irreparable damage to him, in strict compliance with its legal obligation under Article 1.1 of the Convention to respect and guarantee human rights."[51] It is not evident from that text that Nicaragua was

46. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Guatemala, Chunimá Case*. Order of the President of July 15, 1991, para. 2 of the considerations.

47. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Guatemala, Chunimá Case.* Order of August 1, 1991.

48. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Argentina, Reggiardo Tolosa Case.* Order of January 19, 1994. However, para. 1 of the considerations of the Order of the President of November 19, 1993 noted that Argentina had accepted the Court's jurisdiction.

49. I/A Court H.R., *Velásquez Rodríguez, Fairén Garbi and Solís Corrales* and *Godínez Cruz Cases*. Order of January 15, 1988, para. 1 of the considerations.

50. *Ibid*., operative para. 1.

51. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Nicaragua, Alemán Lacayo Case.* Order of February 2, 1996, operative para. 1. *See*, also, operative para. 1 of the Order of the President of April 12, 1996 in the Vogt Case, *supra* note 21, which was ratified in I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human*

obligated to take the measures requested because it had previously accepted the Court's jurisdiction and the Court so held or simply because the State undertook the commitment to respect and guarantee human rights (that is precisely what the measures ordered by the Court imply) or because the Court's jurisdiction to adopt provisional measures so that a State fulfills its obligation to respect and guarantee the full exercise of human rights is derived from Article 1.1 of the Convention.

Grounds for these measures may also be found in the specific nature of the obligations assumed by the States parties to the Convention. While expressly taking note that Guatemala had accepted the Court's jurisdiction in its decision in the Colotenango Case, after recalling that pursuant to Article 1 of the Convention the States have the duty to respect and ensure the rights enshrined in the Convention, the Court emphasized that Guatemala was "under the obligation to adopt all necessary measures to protect the life and integrity of those persons whose rights might be threatened."[52] In a much firmer and more vigorous way, in the Carpio Nicolle Case the Court held that Guatemala was obligated "in every case" to preserve the life and integrity of those persons whose rights might be threatened.[53] This interpretation, however, conflicts with a literal reading of Article 63.2 of the Convention, which confers on the Court jurisdiction to adopt provisional measures "in the matters it has under consideration" or in those that have not yet been submitted to it in which the Commission has requested its intervention. In our opinion, the reference to matters that have not yet been submitted to it implies that in any event the Court must be competent to hear them. The Court has gone further, pointing out that "the basis of the rule in Article 63.2 of the Convention is the presumption that a request by the Commission for provisional measures is

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*Rights in the matter of the Republic of Guatemala, Vogt Case*. Order of the Court of June 27, 1996, para. 3 of the considerations and operative para. 1. *See*, also, operative para. 1 of the Order of the President of April 24, 1996 in the Serach and Saquic Case, *supra* note 22, which was ratified in I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Guatemala, Serach and Saquic Case*. Order of June 28, 1996, operative para. 1.

52. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Guatemala, Colotenango Case*. Order of June 22, 1994, para. 4 of the considerations.

53. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Guatemala, Carpio Nicolle Case*. Order of September 19, 1995, para. 3 of the considerations.

grounded on the understanding that when it has completed the processing of the case before it, that case be submitted to the jurisdiction of the Court."[54]

The State objected to the Court's jurisdiction to adopt provisional measures in the case of Anthony Briggs. According to Trinidad and Tobago, on November 25, 1998 the Commission had concluded consideration of the case of Mr. Briggs and had forwarded its Article 50 Report to the State. Therefore, the period of three months during which it could submit the matter to the Court had expired on February 25, 1999. In addition, on March 3, 1999 the Commission had adopted its Article 51 Report and that report had been published "on or about May 3, 1999." According to the State, after the Commission published its Article 51 Report there was no matter pending before the Commission or any matter pending before the Court, nor was there any matter that could be referred to the Court. The State, therefore, argued that after that decision of the Commission the Court could not adopt provisional measures in the case of Mr. Briggs and that the Court did not have jurisdiction to adopt the measures and they were, therefore, null and void.[55] The Court did not refer to this objection and it did not note that the initial request for provisional measures was made on May 22, 1998 when the case was still pending before the Commission. The Court also appears to have embraced the theory of its inherent jurisdiction to order provisional measures. The Court simply pointed out that, pursuant to its orders of June 14 and August 29, 1998 and May 25, 1999, Trinidad and Tobago had the duty to preserve the life and physical integrity of Mr. Briggs, for whom provisional measures had been ordered. Moreover, the Court observed that the States parties to the Convention should fully comply in good faith with all the provisions of the Convention, including those relating to the operation of its two supervisory organs and that, in view of the Convention's fundamental objective of guaranteeing the effective protection of human rights (citing to that effect Articles 1.1,

54. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Guatemala, Colotenango Case.* Order of February 1, 1996, para. 4 of the considerations.

55. I/A Court H.R., *Provisional Measures ordered by the Inter-American Court of Human Rights in the matter of the Republic of Trinidad and Tobago, James et al. Case*. Order of August 16, 2000, para. 13 of the expository part.

2, 51 and 63.2), States must refrain from taking actions that might frustrate the *restitutio in integrum* of the rights of the alleged victims.[56]

In the James *et al*. Case the Court took up the problem of the effect of a State's denunciation of the Convention on its jurisdiction to adopt provisional measures. In this case, it is important to observe that, pursuant to the terms of Article 78.1 of the Convention, since one year had elapsed from the notification of the denunciation to the OAS Secretary General the denunciation was already in force and, therefore, Trinidad and Tobago was no longer a State party to the Convention. The Court, however, considered that, under Article 78.2 of the Convention, the denunciation by the State did not release it from its obligations for possible violations of the Convention that occurred prior to the effective date of the denunciation.[57] Although Trinidad and Tobago had notified the denunciation on May 26, 1998, to become effective one year later, it is interesting to observe that, on June 18, 1999 the Commission requested that the provisional measures ordered by the Court in the James *et al.* Case be broadened to include Marvin Parris and Francis Mansingh, who had recently been condemned to death and whose petitions had been received by the Commission on May 25, 1999 and were therefore pending on that date. In his order of urgent measures, the President of the Court observed that the Commission's request referred to acts that took place prior to the date on which the denunciation took effect and, therefore, it was relevant to call upon Trinidad and Tobago to adopt the urgent measures that were necessary to preserve the life of those persons in order that the Court might study the request.[58] This order was ratified by the Court, which urged the State to take all the measures necessary to preserve the lives and personal integrity of Mr. Parris and Mr. Mansingh in order not to impede the processing of their cases in the inter-American system while their situation of extreme gravity and urgency persisted.[59]

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56. I/A Court H.R., *Provisional Measures ordered by the Inter-American Court of Human Rights in the matter of the Republic of Trinidad and Tobago, James et al. Case*. Order of November 24, 2000, para. 7 and para. 11 of the considerations.

57. *Ibid*., para. 6 of the considerations.

58. *James et al. Case.* Order of June 19, 1999, *supra* note 16, para. 3 of the expository part and paras. 7 and 8 of the considerations.

59. I/A Court H.R., *Provisional Measures ordered by the Inter-American Court of Human Rights in the matter of the Republic of Trinidad and Tobago, James et al. Case*. Order of September 25, 1999, operative paras. 1-2.

In cases before the Court, notwithstanding a preliminary objection regarding precisely its jurisdiction, the Court has favorably decided a request for provisional measures. With regard to the provisional measures requested by the Commission before filing the respective applications in the Hilaire Case[60] and Constantine *et al.* Case[61] (subsequently joined with the Benjamin *et al*. Case[62] to become the Hilaire, Constantine and Benjamin *et al*. Case), notwithstanding the preliminary objections presented by the State, the Court continued to issue orders on provisional measures, at least until December 2, 2003.

## D. THEIR PURPOSE

Unlike what occurs in general international law where the measures are designed basically to maintain the *statu quo ante* or in civil law where they are issued to preserve the rights of the parties to the controversy, in the international law of human rights the purpose of these measures (provisional, precautionary or conservatory) is to preserve an individual's fundamental rights, making the legal system of the Convention pre-eminent thus ensuring the exercise of the Court's jurisdictional function and avoiding irremediable situations that would make compliance of a final judgment illusory. Preliminary measures are designed to avoid irreparable damage, prior to what might be resolved in the final judgment, and they introduce revolutionary elements into classical international law and make the administration of justice a task that definitively transcends State borders. Their importance for the protection of individual rights cannot be ignored.

The purpose of provisional measures in the area of human rights cannot be that of classical international law, which is to preserve the *statu quo ante* or to stabilize a situation that is part of the conflict, or its objective in domestic law to guarantee the effectiveness of the results of the process. Here its function is to grant a temporary remedy under certain circumstances

60. The application was filed on May 25, 1999 and the preliminary objections were presented on August 16, 1999.

61. The application was filed on February 22, 2000 and the preliminary objections were presented on June 14, 2000.

62. The application was filed on October 8, 2000 and the preliminary objections were presented on December 9, 2000.

to whoever alleges to be a victim of a violation of certain human rights. The Court has held that, in the international law of human rights, the purpose of provisional measures goes beyond its function in domestic law since, in addition to their essentially preventive nature, they effectively protect fundamental rights in that they seek to prevent irreparable damage to persons.[63] Moreover, the Court has held that the language of Article 63.2 of the Convention "indicates that we are dealing here with an extraordinary instrument, one which becomes necessary in exceptional circumstances."[64] Their adoption, however, cannot be seen as a provisional ruling or a prejudgment on the merits of a petition presented to the Commission or a case referred to the Court.

With respect to provisional measures requested by the Commission in cases that have not been referred to the Court, it is evident that the Court's intervention is restricted to the adoption of such measures and that, while the proceedings before the Commission are not concluded and the case not yet submitted either by the Commission or the State concerned (or by another State with an interest in the case), the Court lacks jurisdiction to hear the matter and to decide on the merits of the controversy.

On the other hand, in matters already under its consideration provisional measures may be ordered by the Court on its own motion or at the request of a party at any stage of the proceedings, even before a decision on its own jurisdiction if it has been objected to by the State concerned.

To date, the Court has ordered provisional measures both in cases that it is already hearing and, at the Commission's request, on matters that have not yet been submitted to it.

The Court ordered provisional measures for the first time in the first three cases referred to it because of the threats that some witnesses had received and at the express request of the Commission that asked for the application of the measures. After learning of the death of two witnesses, on January 15, 1988 the Court ordered the Government of Honduras to adopt without delay the measures that were necessary to prevent further infringements to the fundamental rights of those who had already appeared

63. *See, e.g., Peace Community of San José de Apartadó Case.* Order of November 24, 2000, *supra* note 27, para. 12 of the considerations.

64. *Chunimá Case.* Order of August 1, 1991, *supra* note 47, para. 6.b.

or who had been summoned to appear before the Court in these cases.[65] The Court subsequently received another request from the Commission that it take the pertinent measures to protect the integrity and security of those persons who had appeared or would appear in the future before the Court. As complementary provisional measures, the Commission asked the Court, *inter alia*, to request the government to inform it within a reasonable period of the specific measures that it had adopted to protect the physical integrity of the witnesses as well as of those persons in any way involved in the proceedings, such as the leaders of human rights organizations.[66] After receiving the parties in a public hearing, the Court unanimously decided to request that the government inform it within two weeks on a) the measures that it had adopted or planned to adopt to protect the physical integrity and to avoid irreparable damage to persons involved in the proceedings, b) the judicial investigations that were underway, or that would be undertaken, on the threats to those persons and c) the investigations of the killings, including the respective forensic reports and the actions that were proposed to be taken within the judicial system of Honduras to punish those responsible. To refute the versions and campaigns that presented as disloyal to the country those Hondurans who had appeared before the Court, which were exposing them to public disgrace and physical or moral aggressions, the Court requested the government to adopt specific measures to make it clear that the appearance of an individual before the Commission or the Court was the right of every person, recognized by Honduras as a party to the Convention.[67]

## E. THE NECESSARY CONDITIONS IN ORDER TO BE APPROPRIATE

It may be concluded from Article 63.2 that, in order to be appropriate, provisional measures must fulfill the substantive requisites found in that

65. I/A Court H.R., *Velásquez Rodríguez Case*. Judgment of July 29, 1988. Series C No. 4, paras. 39-41; *Godínez Cruz Case.* Judgment of January 20, 1989. Series C No. 5, paras. 41-43 and *Fairén Garbi and Solís Corrales Case*. Judgment of March 15, 1989. Series C No. 6, paras. 62-64.

66. *Ibid*., paras. 42-43, 44-45 and 65-66, respectively.

67. *Ibid*., paras. 45, 47 and 68, respectively.

article as well as the formal requirements that may be derived from that provision or from the practice of the Court.

### *1. THE FORMAL REQUISITES*

The Court has held that it is necessary to individualize the persons who are at risk of suffering irreparable damage and, therefore, it has denied ordering provisional measures for unnamed persons.[68] It has, however, granted provisional measures to persons who, although they are not individualized, may be identified by objective elements. In the Digna Ochoa y Plácido *et al*. Case, the Court requested that the State adopt without delay all necessary measures to ensure that the persons who worked at or visited the offices of the Miguel Agustín Pro Juárez Human Rights Center might carry out their work or business without danger to their lives or personal integrity.[69] In the Peace Community of San José de Apartadó Case, the Commission requested provisional measures for the inhabitants of that Community with the idea of protecting their lives and personal integrity. The Commission reported to the Court that it had been informed of the murder of 47 members of the Community within a period of nine months and pointed out a series of other physical aggressions and threats against Community members as well as incidents in which their houses were burned, their goods destroyed and their animals killed.[70] In his order of urgent measures, the President of the Court recalled that on other occasions the Court had considered it necessary to individualize the persons who were at risk of suffering irreparable damage in order to grant them protective measures. He pointed out, however, that "the protective measures adopted by the State in compliance with the decisions issued by

68. *See, e.g*., I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Colombia, Peace Community of San José de Apartadó Case.* Order of the President of October 9, 2000, para. 7 of the considerations and I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Dominican Republic, Haitians and Dominicans of Haitian Origin in the Dominican Republic*. Order of August 18, 2000, para. 8 of the considerations.

69. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the United States of Mexico, Digna Ochoa y Plácido et al. Case*. Order of November 17, 1999, operative para. 2.

70. *Peace Community of San José de Apartadó Case*. Order of October 9, 2000, *supra* note 68, paras. 1 and 2 of the expository part.

the Court or its President are expected to benefit other persons of the same community that may be in the same situation of vulnerability and risk."[71] In the hearing before the Court, the Commission argued that the requested measures had the purpose of protecting the lives and personal integrity of the members of the Peace Community of San José de Apartadó, located in the region of Urabá, Antioquia, one of the epicenters of the internal armed conflict that was taking place in Colombia and that the Community was made up of approximately 1,200 civilians and, since its founding in 1997, it had been constantly harassed by paramilitary violence and stigmatization, in spite of its efforts to isolate itself from the armed conflict. According to the Commission, the Peace Community was governed by the principles of neutrality with respect to the armed actors, did not participate directly or indirectly in the war, did not bear arms and did not offer or manipulate information in favor of any of the armed actors. The Community was governed by a local council, comprised of eight peasants, elected democratically for a period of three years. The Commission indicated that its efforts to identify the members of the Community in order to present the request for provisional measures enabled it to compose a list of 189 persons, which was not exhaustive since the vast majority of the Community members feared stigmatization and the resulting violence and, therefore, did not give their names. The Commission, however, presented a series of elements that enabled the identification of the Community members collectively. One of these elements was geographical, since it was located in a determined place, the Municipality of Apartadó, made up of 32 surrounding trails. In the second place, the Community had a series of norms, including bylaws and a system of representation. In addition, its members had an identity document. According to the Commission, after three years of precautionary measures ordered by the Commission, the State had not questioned or alleged that it had any problem to identify the persons who were to be protected. The Commission was convinced that the State understood the collective dimension of the problem, knew which persons it had to protect, understood the geographical limits and the element of belonging to the Community as well as its mechanisms of functioning and, therefore, it requested ratification of the urgent measures

71. *Ibid*., para. 7 of the considerations.

issued by the President and their extension to all persons who might find themselves in the same situation of vulnerability and risk.[72] The Court took note that many members of the Peace Community did not wish to be identified for fear of reprisals and indicated that, while on other opportunities it had considered it necessary to individualize the persons who were in danger of suffering irreparable damage in order to grant them protective measures, this case had special characteristics that made it different from previous cases and, therefore, it decided to order protective measures with respect to the persons already named in the urgent measures previously ordered by the President of the Court and to "expand them so that they cover all of the members of the aforementioned Community."[73] In their separate opinion, Judges Abreu Burelli and García Ramírez observed that the justifiable interest in preserving rights determined that the Convention requires only certain objective conditions for the adoption of provisional measures: a situation of extreme gravity and urgency, which has to do with "the characteristics of the fear affectation and its imminence." There are no other requirements that could delay or prevent the issuance of such measures and, therefore, place at greater risk the human rights that are sought to be protected. According to Judges Abreu Burelli and García Ramírez, it is true that in most cases it is possible to identify, individually, the potential victims of the violations that are sought to be prevented. There are, however, other assumptions that make this precise individualization difficult, at least for the time being.[74] In their opinion,

> In some way, that situation corresponds with the one presented under the concept of diffuse interests: a plurality of individuals share a determined interest that is juridically relevant and that requires public protection, although none of the subjects may be considered as holder of a subjective right about the rendering or the measure that is sought or the legal framework that is relied upon, or that said entitlement may not be attributed in a way excluding the other subjects that are in the same situation. Under these circumstances, any of them may

72. *Peace Community of San José de Apartadó Case*. Order of November 24, 2000, *supra* note 27, para. 9.a, c, i-k and n.

73. *Ibid*., paras. 6 and 7 of the considerations and operative para. 3.

74. Ibid. *See* paras. 2-3 of his concurring opinion.

> appear before the corresponding organ and request the adoption of provisions or decisions that preserve the common interest. In such case, an *actio popularis* or a class action would work, in keeping with the characteristics reviewed in this matter in the specific proposed circumstances.[75]

According to Judges Abreu Burelli and García Ramírez, this decision clearly sets a standard of protection that reasonably extends the subjective scope of provisional measures and serves, with increasing intensity, the preventive purpose of this type of measure so that it might reach a plurality of persons who were not previously individualized but who are potential victims of acts of authority or of persons associated with it. Belonging to the group of potential victims for whom the provisional measures are intended is, therefore, not the result of a precise knowledge of each individual, that is, knowing his name, but under objective criteria that would enable the individualization of the beneficiaries when the measures are implemented. It would cover the danger encountered by the Community members and not only some individuals, as generally occurs. The potential victims might, however, decide not to provide their names for a request for provisional measures given the real risk to which this identification might expose them or, even more, to the risk of the irreparable harm that the measures seek to avoid.[76]

Although the Convention does not mention it as a condition precedent, it has been suggested that, with respect to the situations of extreme urgency in matters being considered by the Commission, pursuant to Article 29 of its Rules it may request precautionary measures and should, as a preliminary matter, do so before seeking the Court's intervention.[77] According to Fix-Zamudio, "the decisions of the Inter-American Court in this matter may only be ordered in extraordinary cases in which the measures requested directly by the Commission are ineffective or are not adequate and a situation of extreme gravity and urgency persists."[78] The Commission seems to have embraced this position. In its request of

75. *Ibid*., para. 4.
76. *Ibid*., paras. 6 and 8.
77. *See* the communication of Judge Fix-Zamudio, *supra* note 11, p. 2, points I and II(a).
78. *Ibid*., p. 2, point I.

November 25, 1992 for provisional measures in the Peruvian Prisons Case, which was based, *inter alia*, on the fact that it had already ordered precautionary measures, the Commission indicated that if they were not adopted within a period of ten days "the request for provisional measures might be presented to the Inter-American Court."[79] In our opinion, without prejudice to the Commission's attributes, that requirement not only is not found in the Convention but it does not appear to be compatible with the spirit of that instrument that, in this aspect, seeks to prevent irreparable damage and specifically grants this competence to the Court. This is not the same as the Court, in deciding on a request for provisional measures, taking into consideration that the Commission had previously ordered precautionary measures that were not implemented by the State,[80] were not effective[81] or did not produce the desired effects.[82] In the James, Briggs, Noel, Garcia and Bethel Case, the President of the Court observed that the State's failure to respond to the requests for the adoption of precautionary measures was a special circumstance that had given rise to the presentation of the request for provisional measures to the Court.[83]

### *2. THE OBJECTIVE CONDITIONS*

The application of this type of measure by the Court is obviously not discretional and requires the presence of three very precise conditions that are expressly set forth in the Convention: the gravity of the threat, the

79. *See* in addition to the text of the request for provisional measures presented by the Commission in, I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Peru, Peruvian Prisons Case*. Order of January 27, 1993, para. 2 of the expository part. From a semantic point of view, it should be remembered that the Convention refers to this institution as *provisional measures* and that the Commission's Rules have introduced among its attributes the possibility of requesting *precautionary measures,* which are not the same as the measures that correspond to the Court.

80. *See, e.g., Haitians and Dominicans of Haitian Origin in the Dominican Republic*. Order of August 18, 2000, *supra* note 68, para. 2.b.

81. *See, e.g., Digna Ochoa y Plácido et al. Case*. Order of November 17, 1999, *supra* note 69, para. 6 of the considerations.

82. *See, e.g*., I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Colombia, Giraldo Cardona Case*. Order of the President of October 28, 1996, para. 6 of the considerations.

83. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Trinidad and Tobago, James, Briggs, Noel, García and Bethel Case* Order of the President of May 27, 1998, para. 3 of the considerations.

urgency of the measure requested and the need to avoid irreparable damage to persons. Given the nature and the purpose of provisional measures, the practice of the Court does not require conclusive proof of these circumstances, but it is necessary that the situation be characterized, *prima facie*, as one of extreme gravity and urgency.[84]

Although it is obvious that these three elements are intimately linked and that the urgency of the case and the necessity to avoid irreparable damage to persons are a necessary consequence of the gravity of the situation, we shall now examine them separately.

***a) The extreme gravity of the threat***

In the first place, the application of these exceptional measures may only be justified in cases where there is sufficient proof to show that their eventual beneficiaries are exposed to a grave danger, which cannot be dealt with by the regular guarantees of the State. In other words, the gravity of an anticipated danger is not enough; it is necessary that there be a true danger. The gravity of the threat must be the consequence of a real and not a merely hypothetical danger. In the first cases against Honduras, after establishing that a witness summoned to testify before the Court had been killed and another who had already testified had met the same fate, in addressing the death threats received by other witnesses in the same cases, the Court held that under these circumstances the persons who had already appeared before the Court or had been summoned to appear ran a "real danger" that merited the adoption of special measures to guarantee their lives, their personal integrity and even their assets.[85]

To the extent that, in the first cases against Honduras, what was at stake was the very lives of individuals, to qualify this situation as one of extreme gravity did not present any difficulties because the extreme gravity of the threat has to do not only with the certainty and imminence of the damage that is feared, but very especially with the fundamental nature of the rights threatened, going to the very core of the person. This requirement, therefore, cannot be understood without taking into account the purpose

84. *Colotenango Case*, Order of June 22, 1994, *supra* note 52, para. 5 of the considerations.
85. *Velásquez Rodríguez, Fairén Garbi and Solís Corrales* and *Godínez Cruz Cases.* Order of January 15, 1988, *supra* note 49, para. 5 of the considerations.

of provisional measures, which is to avoid irreparable damage to persons. While a threat to life or physical integrity is undoubtedly a matter of extreme gravity, a threat to the freedom of association or the right to free movement within the territory of a State, in the context of Article 63.2 of the Convention does not appear to merit this same qualification.

In the Bustíos-Rojas Case, the Commission based its request for provisional measures on the murder of Hugo Bustíos and the attack on Eduardo Rojas, both journalists, in a zone controlled by the military, on the subsequent threats made to witnesses of these acts, one of whom –although he had requested official protection– was later killed, on the lack of cooperation of the military authorities in identifying those responsible and on the level of violence existing in the area of Ayacucho, where there had been numerous killings of persons who had given testimony on human rights violations by the military. According to the Commission, this was a *prima facie* situation of real, grave and urgent risk to the lives and personal integrity of the victims as well as the witnesses in the case. In the light of this information, the Commission believed that the normal guarantees in force for the population in these zones of emergency in Peru were not sufficient to ensure the lives and physical integrity of persons and, therefore, it requested provisional measures of protection.[86] The James, Briggs, Noel, García and Bethel Case, concerning five persons condemned to death whose executions were imminent, in which the Commission contended that "in each case the petitioner has argued a *prima facie* case alleging that the State had contravened one or more articles of the American Convention which had prejudiced the accused," appropriately illustrates this point. From the information provided by the Commission, the Court concluded that there was a situation of "extreme gravity and urgency."[87]

In the Chunimá Case, in view of the seriousness and gravity of the death threats to the beneficiaries of the request, the kidnapping and murder of other persons who had belonged to the same group –which was attributed to the civilian patrols that operated with the acquiescence of the State

86. Resolution 2/90, *supra* note 44.

87. *James, Briggs, Noel, García and Bethel Case*, Order of June 14, 1998, *supra* note 34, para. 1 of the expository part and paras. 4 and 9 of the considerations.

organs– and the failure of the police to execute arrest warrants issued by judges against members of those patrols, the Commission concluded that these facts provided by the petitioners presented, *prima facie*, a serious case of imminent and irreparable risk to the lives and physical integrity of the members of human rights organizations and their families.[88]

Establishing the extreme gravity of the threat was also not difficult in the Alemán Lacayo Case, where a presidential candidate in Nicaragua, who was subsequently elected, was the object of an attack on his life during the electoral campaign. According to the Court, the publicity in the national and international media, the death of one of his bodyguards and the injuries suffered by members of his entourage gave the acts denounced a high degree of notoriety and credibility and, therefore, it was considered a case of "extreme gravity and urgency."[89]

The extreme gravity of the situation was different in the Reggiardo Tolosa Case, which concerned two children whose parents had disappeared during the military dictatorship in Argentina. The children were born during the illegal detention of their mother and were immediately taken by a former official of the Federal Police and his wife and registered as their children. When they were eleven years of age they became aware that the persons with whom they lived were not their real parents and they began judicial proceedings that allowed them to prove their true identity and initiated criminal proceedings against those responsible for their concealment and the falsification of their birth certificates. Despite the precautionary measures adopted by the Commission, the Association of the Grandmothers of the Plaza de Mayo reported that the minors remained in the hands of the persons who had been prosecuted for crimes against them and requested that the Commission ask the Court to adopt provisional measures with the purpose of placing the children in a foster home and providing them with psychological treatment.[90] In this case, the President of the Court

88. I/A Commission H.R., *Request for Provisional Measures, Case No. 10.674* (Chunimá), June 1991, para. 1 of the considerations. Also, *Request for Provisional Measures, Case 11.212* (Colotenango), Guatemala, June 17, 1994, para. 23 of the considerations.

89. *Alemán Lacayo Case*. Order of February 2, 1996, *supra* note 51, paras. 3 and 4 of the considerations.

90. According to the Commission, the gravity of the situation denounced was the result of the unjustified prolongation that aggravated the psychological condition of the children, which was exacerbated as a consequence of the repression of their identity while they were not returned to their legitimate family or transferred to a substitute home under temporary guardianship. Moreover, the Commission considered that

considered that what was at stake was the mental integrity of the two children, a situation that, in his opinion, was sufficiently grave and urgent for the appropriateness of the measures requested.[91] It is interesting to observe that the order did not characterize the acts as being of "extreme gravity," as required by Article 63.2. It is not obvious whether such condition is a given, deduced from the nature itself of the acts, or whether a less strict interpretation of the Convention –that it is enough for the acts to be simply grave– has been accepted.

In the Constitutional Court Case, Delia Revoredo alleged that, after her removal as a magistrate of that tribunal and as a result of her activities as President of the Board of Deans of the Bar Associations of Peru where she denounced the interference of the Executive Branch in the functions of other State organs, she was informed that her husband would be tried and that he would be arrested. They, therefore, went into exile. As a result of statements of the President of Peru, which referred negatively to the honor of the couple, they decided to give up their exile and return to Peru. According to Mrs. Revoredo, the government used family or business problems to impose, through judges or prosecutors, arbitrary judicial sanctions that threatened "the honor and freedom of the persons involved." Taking into account these circumstances, the President of the Court called upon the State, as an urgent measure that was later ratified by the Court, to adopt whatever measures were necessary to ensure the physical, mental and moral integrity of Delia Revoredo.[92] When the Court was subsequently requested to maintain the provisional measures due to the fact that there were judicial proceedings pending in Peru against the claimant, it stated that such proceedings were not related to the provisional measures that had been adopted and that, in any event, in view of the changes in Peru,

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the delay of justice was not justified because since September 1989, through genetic blood tests, the minors had been identified as belonging to the Reggiardo Tolosa family but they remained in the hands of persons who were being prosecuted for illegal acts against them. *See*, I/A Commission H.R., *Request for Provisional Measures, Case 10.959*, October 1993, paras. 11-12.

91. *Reggiardo Tolosa Case*. Order of the President of November 19, 1993, *supra* note 48, para. 4 of the considerations.

92. I/A Court H.R., *Constitutional Court Case*. Judgment of January 31, 2001. Series C No. 71, paras. 32-33 and 35.

they were not circumstances of extreme gravity and urgency that warranted maintaining the provisional measures.[93]

***b) The urgency of the measure requested***

In the second place, a request for provisional measures must be based on the urgency of the situation, which arises from the imminent threat of irreparable damage that would make any delay dangerous (*periculum in mora*). The nature of an emergency of this type makes it impossible to await a final judgment on the matter and requires immediate action to avoid irreparable damage so that, at the moment of deciding, the Court does not find itself with a *fait accompli*. This circumstance is illustrated by the James, Briggs, Noel, García and Bethel Case, concerning five persons condemned to death, whose executions were already scheduled, in which the Court concluded that the information provided by the Commission demonstrated there was a situation of extreme gravity and it was, therefore, necessary to adopt without delay the necessary measures to preserve the lives and personal integrity of the presumed victims.[94]

It appears unnecessary to point out that the required urgency of the measure is the result of the very nature of the situation that gave rise to it. In the Blake Case where one of the witnesses had received death threats for having informed officials of the US Embassy in Guatemala on the manner in which Mr. Blake was killed as well on the members of the patrol who participated in the kidnapping and killing and that after his testimony before the Commission the witness was subjected to repeated telephone calls that threatened him and his family with death, a risk that had increased after the prosecutor in the case before the courts of Guatemala had cited him to appear, the President of the Court was of the opinion that the affirmations and proof offered by the Commission merited the credibility necessary to classify, *prima facie*, the situation as one of extreme urgency that justified issuing urgent measures in order to avoid irreparable damage to those persons in whose favor they were requested.[95]

93. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Peru, Constitutional Court Case*. Order of March 14, 2001, para. 4 of the considerations.

94. *James, Briggs, Noel, García and Bethel Case*. Order of June 14, 1998, *supra* note 34, para. 1 of the expository part and paras. 4 and 9 of the considerations.

95. *Blake Case*. Order of the President of August 16, 1995, *supra* note 20, para. 3.a-c of the expository part and para. 4 of the considerations.

In the Chipoco Case, concerning a human rights activist who was in the United States and who had participated before the Commission in the Neira Alegría *et al.* and Cayara Cases, both against Peru, and against whom the Government of Peru had filed criminal charges before the 43rd Special Prosecutor of Lima for alleged "activities in support of subversion in the United States," the Commission requested provisional measures since he could be charged under the recent anti-terrorist legislation, which could lead to a loss of his nationality and a prison term of more than twenty years with a grave risk to his life and personal integrity. The President of the Court did not agree to the provisional measures requested by the Commission, a decision that was subsequently ratified by the Court, because he considered that the danger that Mr. Chipoco faced in being prosecuted under the anti-terrorist laws of Peru, which allowed a trial *in absentia*, did not constitute a case of extreme gravity and urgency since Mr. Chipoco was in the United State and had not been detained and, therefore, there was no possibility of an imminent danger that such violations would be produced. Moreover, the Commission itself was unsure since it asked the Court that it request the government, as a provisional measure, to confirm the truth of the allegations.[96]

On the other hand, as has been indicated, the urgency of the situation is a necessary consequence of its extreme gravity and of the necessity to avoid irreparable damage to persons. In the Colotenango Case, the Commission alleged that the threats and violations denounced in this case against human rights and the social peace in a region of Guatemala that continued and increased daily, making this situation one of "extreme gravity and urgency" that required provisional measures to avoid greater irreparable damage to the life, freedom and personal integrity of numerous inhabitants of that zone and to establish the guarantees of the State pursuant to the Convention.[97] This connection may also be seen in the Alemán Lacayo Case, in which the attack denounced by the Commission, which was notorious and appeared in the national and international media, the gravity of which was reflected in the death of one of the bodyguards and the injuries

96. *See* Point II(b) of the communication dated November 30, 1992 of the President of the Court to the Secretary of the Court, before issuing his order on the requested provisional measures. The order does not contain the same arguments that are found in the letter. *Supra* note 11.

97. *Request for Provisional Measures, Case 11.212, supra* note 88, para. 31.

suffered by other persons accompanying the presidential candidate of Nicaragua, allowed the Court to conclude that this was a case of extreme gravity and urgency that made it necessary to avoid irreparable damage to Mr. Alemán Lacayo.[98]

The urgency of the situation obviously means that the measures that the Court may order must be adopted immediately or without undue delay by the State to which the measures are directed.[99]

***c) The need to avoid irreparable damage to persons***

Even when there is no doubt as to the extreme gravity and urgency of the situation, the measures that are requested must be precisely directed to avoid irreparable damage to persons and must be supported by proof that shows the necessity of such measures. In the Colotenango Case, the Court found that some of the measures requested by the Commission were not directed at avoiding irreparable damage to persons or that, in any event, there was no proof to that effect.[100] In contrast, in the Reggiardo Tolosa Case, the President of the Court considered that what was at stake was the mental integrity of two children and that, therefore, provisional measures were necessary to prevent them from suffering irreparable damage due to the situation alleged in the request.[101] In its submission in the Mayagna Community Case, the Commission, while requesting that the Court order that the State "abstain from granting or considering the granting of any concessions to exploit natural resources on the lands used and occupied by Awas Tingni until the issue of the land tenure affecting the Community has been resolved," was very careful not to ask for the adoption of provisional measures because of the absence of irreparable damage.[102]

***i. The type of damage that is sought to be prevented***. In principle, the purpose of provisional measures implies that they are not appropriate when the exercise of certain rights enshrined in the Convention are

98. *Alemán Lacayo Case*. Order of February 2, 1996, *supra* note 51, paras. 3 and 4 of the considerations.
99. *Colotenango Case*. Order of June 22, 1994, *supra* note 52, operative para. 1.
100. *Ibid*., para. 6 of the considerations.
101. *Reggiardo Tolosa Case*. Order of November 19, 1993, *supra* note 91, para. 4 of the considerations.
102. I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community Case*. Judgment of August 31, 2001. Series C No. 79, para. 3.

threatened. Irreparable damage to persons may only be the result of a violation of the rights to life, physical integrity, personal freedom and probably the judicial guarantees that have a direct bearing on the enjoyment of those rights. According to Judge Cançado Trindade, taking into account the indivisibility of all human rights, "there is, juridically or epistemologically, no impediment at all for such measures, which so far have been applied by the Inter-American Court in relation to the fundamental rights of life and to personal integrity (Articles 4 and 5 of the American Convention on Human Rights), to be applied in relation to other rights protected by the American Convention. All those rights being interrelated, it is perfectly possible, in my way understanding, to order provisional measures of protection of each of them, whenever are met the two requisites of the 'extreme gravity and urgency' and of the prevention of 'irreparable damage to persons,' set forth in Article 63(2) of the Convention."[103]

While any human rights violation implies damage to persons, the application of provisional measures appears to be inappropriate when the right threatened cannot be infringed irreparably before the Court is able to decide on the merits, as, for example, the case of censorship that restricts the exercise of freedom of expression or of another measure that might be remedied *a posteriori*. It must be borne in mind that the purpose of this area of law is to protect the full exercise of human rights and only tangentially to remedy or indemnify the consequences of their violation. In the Cesti Hurtado Case, in which the Commission had requested that the assets of Mr. Cesti be released and some provisional measures be broadened, the Court considered that, to determine whether this petition met the requirements of Article 63.2 of the Convention, it needed additional elements to those that it had available at the time and thus only ordered that the State continue the provisional measures necessary to ensure the physical integrity of Mr. Cesti.[104] Similarly, in *La Nación* Newspaper

103. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Dominican Republic, Haitians and Dominicans of Haitian Origin in the Dominican Republic*. Order of August 18, 2000, para. 14 of the concurring opinion.

104. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Peru, Cesti Hurtado Case*. Order of January 21, 1998, para. 5(b) of the expository part and para. 7 of the considerations and I/A Court H.R., *Cesti Hurtado Case. Preliminary Objections*. Judgment of January 26, 1999. Series C No. 49, para. 12.

Case, the Commission requested provisional measures to protect the freedom of expression of a journalist and the legal representative of the newspaper. The State argued, *inter alia*, that accepting such a request would legitimate the use of an extraordinary remedy to annul the execution of a sentence in which the life or physical integrity of a person was not at stake and that the possibility of causing irreparable damage to persons was not evident because, if a violation of the rights protected by the Convention were to be found, Article 63 of the Convention authorized the Court to order that the consequences of the situation that constituted the violation be remedied and that fair compensation be paid to the injured party. According to the Commission's brief, however, the Convention essentially establishes a system of protection of human rights and not one of compensating the violation of such rights. Moreover, the gravity and irreparability of the situation refer to the rights of persons recognized under the Convention with respect to which the States parties have undertaken an obligation to respect and ensure. After holding a public hearing to receive evidence and the arguments of the parties, the Court considered that it needed more information regarding the irreparability of the damage that Mauricio Herrera might suffer if his name were included in the Judicial Register of Delinquents of Costa Rica and that, therefore, the State should report on the possibilities offered by its domestic legislation to prevent or to remedy the damage. In the meantime, the Court requested the State to refrain from executing any action that might affect the *statu quo* of the matter until it had presented the requested report and the Court could discuss and decide the matter.[105]

Of course, in the case of someone who has already suffered an attack against his life and requires the adoption of appropriate measures so that the attack is not repeated or to avoid irreparable damage, the presence of this requisite is obvious and does not pose difficulties.[106] This is also true where one or more persons have been threatened with death, especially when other persons who were in the same circumstances have been

105. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Costa Rica, "La Nación" Newspaper Case*. Order of May 23, 2001, paras. 3-4 of the expository part, paras. 5-6 and 8 of the considerations and operative para. 2.

106. *Alemán Lacayo Case*. Order of February 2, 1996, *supra* note 51, para. 4 of the considerations.

killed,[107] or where a person is held incommunicado, without seeing the light of day and enclosed in a very small cell during 23 $^1/_2$ hours a day, placing at risk her physical, psychological and moral integrity.[108] Although a threat to property does not seem to justify the adoption of provisional measures since it does not appear to lead to the "irreparable damage to persons" referred to in Article 63.2 of the Convention, in the first case of provisional measures that the Court heard, it ordered the adoption of special measures to guarantee, *inter alia*, the assets of the persons affected.[109] Understandably, it does not appear that this has been repeated in later cases.

In the Haitians and Dominicans of Haitian Origin in the Dominican Republic Case concerning a Dominican citizen who, upon being arbitrarily deported, was separated from his child, the Court extended the application of provisional measures to protect not only the rights to life and personal integrity but also the special protection of the children in a family and the rights of movement and residence.[110]

The fact that the Convention provides for the application of this institution when it is necessary to avoid irreparable damage to persons emphasizes once more its exceptional nature. This was evident in the James *et al.* Case in which the Commission requested that the Court adopt provisional measures to preserve the life and physical integrity of inmates who were awaiting execution in Trinidad and Tobago. As is to be supposed, this request was based on the fact that the execution of these persons, before the Commission had the opportunity to rule on their petitions, would

107. I/A Court H.R., *Velásquez Rodríguez, Fairén Garbi and Solís Corrales* and *Godínez Cruz Cases*. Order of January 19, 1988, operative para. 1. Also *Chunimá Case*. Order of August 1, 1991, *supra* note 47, operative para. 1, in relation with the Order of the President of July 15, 1991.

108. I/A Court H.R., *Provisional Measures Requested by the Inter-American Commission on Human Rights in the matter of Peru, Loayza Tamayo Case*. Order of July 2, 1996, paras. 8-9 of the considerations and operative para. 2.

109. *Velásquez Rodríguez, Fairén Garbi and Solís Corrales* and *Godínez Cruz Cases*. Order of January 19, 1988, *supra* note 107, para. 5 of the considerations. *See*, also, the letter of the President of the Court, dated November 6, 1987, to the Government of Honduras urging that it adopt the necessary measures to ensure the life and *assets* of the witnesses in those cases.

110. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Dominican Republic, Haitians and Dominicans of Haitian Origin in the Dominican Republic*. Order of November 12, 2000, paras. 5 of the considerations and operative paras. 1-3.

cause irreparable damage and would make ineffective any decision that the Commission might adopt in their cases.[111]

***ii. The persons they are designed to protect***. The adoption of this type of measure is only justified if the normal guarantees that the State must offer its inhabitants are not sufficient in the specific case and it is necessary to take special pains since the beneficiaries of the provisional measures carry out tasks that expose them to particularly grave risks.[112] In no case are provisional measures a substitute for the obligation that every State has to respect and ensure human rights pursuant to Article 1 of the Convention.

On the other hand, in the context of Article 63.2 of the Convention it should be understood that the persons whose protection is being sought are involved in cases pending before the Court or in matters that have not yet been submitted to it that are under consideration by the Commission. From the beginning, the Court has protected, through provisional measures, persons who have appeared as witnesses before it.[113] The Court has obviously understood that, when the person who claims that he fears for his personal integrity is a petitioner in a case before the Court, the adoption of provisional measures is even more justified.[114]

## F. THE APPLICABLE PROCEDURE

In principle, a request for provisional measures is incidental to the principal proceedings and, pursuant to Article 25 of the Court's Rules, the measures may be ordered at any stage of the proceedings, either by the Court on its own motion or at the request of a party. In the first cases against Honduras, without referring to the Commission's request, the Court pointed out that it had knowledge that a person who was summoned to appear before the Court had been killed, that another witness who had

111. *Case of Hilaire, Constantine and Benjamin et al., supra* note 15, para. 26.

112. *See, e.g., Request for Provisional Measures, Case 11,212* (Colotenango), *supra* note 88, paras. 24-26.

113. *Velásquez Rodríguez, Fairén Garbi and Solís Corrales* and *Godínez Cruz Cases.* Order of January 19, 1988, *supra* note 107.

114. *See, e.g.*, I/A Court H.R., *Constitutional Court Case.* Order of the President of April 7, 2000, para. 8 of the considerations.

already testified had met the same fate and that "according to reports received by the Court, some of the witnesses who had testified in those cases had been subjected to death threats for having given their testimony."[115] The Court also stated that it had jurisdiction to adopt provisional measures on its own motion.[116]

While, initially, the parties to proceedings before the Court were only the Commission and the State concerned, reforms to the Court's Rules have changed this radically by gradually conferring on the individual the status of party and granting him a more active participation in the proceedings. The first modification to the Rules recognized the victim or his family as a party at the reparations stage, by providing that his representatives or next of kin could present their arguments and proof autonomously. In the Caballero Delgado and Santana Case, the representatives requested that the Court review its decision of January 31, 1997, by which it had lifted the provisional measures in the case, and to maintain them while the case remained open.[117] While the re-establishment of such measures was also requested by the Commission and by the State concerned, the Court not only did not object to the *locus standi* of the victims' representatives to request provisional measures but even expressly considered their petition.[118] In any event, Article 2.23 of the current Rules considers the victim or the alleged victim to be a party to a case and is complemented by Articles 23 and 25.3 of the Rules, which permit the victim's active participation in the proceedings before the Court and even allows him to request provisional measures.

It is well to note that in matters not yet submitted to its consideration, the Court may act, in principle, only at the Commission's request on the petitions that have been presented to the latter, even if there has not been a ruling on their admissibility. In any event, once the Court has adopted provisional measures, they may only be modified or lifted by the Court, since the Commission lacks competence to annul or suspend them.

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115. *Velásquez Rodríguez, Fairén Garbi and Solís Corrales* and *Godínez Cruz Cases.* Order of January 19, 1988, *supra* note 107, paras. 1-3 of the expository part.

116. *Ibid*., para. 4 of the considerations.

117. *Caballero Delgado and Santana Case*. Order of April 16, 1997, *supra* note 6, para. 4 of the expository part.

118. *Ibid*., especially para. 1 of the considerations.

### *1. ACTIVE STANDING TO REQUEST PROVISIONAL PROVISIONS*

In a matter that has not yet been referred to it, the Court may only act at the Commission's request. Pursuant to Article 74.2 of the Commission's Rules, when it is not in session, the request may be made by its Chairman or, in his absence, one of the Vice Chairmen in order of precedence. In matters before it, however, the Court may adopt the measures that it deems pertinent on its own initiative or at the request of one of the parties.

Prior to the entry into force of the Court's current Rules when the victim was not considered to be a party to the proceedings before the Court and his representatives were limited to presenting their own arguments at the stage of reparations, only the Commission or a State could request the Court to adopt provisional measures. However, in the Constitutional Court Case, under those Rules, one of the alleged victims in the case, Delia Revoredo, went directly to the Court requesting that it adopt provisional measures on behalf of her and her husband. Since the Court can act on its own motion, the President of the Court promptly called upon the State to adopt whatever measures that were necessary to ensure the physical, psychological and moral integrity of Mrs. Revoredo so that the provisional measures that the Court might order in her case would have the relevant effect. This order was ratified by the Court, requesting the State to investigate the acts and inform it every two months on the measures taken.[119] It is interesting to observe that the order of urgent measures did not include the husband of Mrs. Revoredo, as had been requested.

Although it is not very probable that a third person not at all involved in the proceedings requests the provisional measures, it remains a possibility. After the judgment on reparations in the Loayza Tamayo Case, Professor Michelangela Scalabrino submitted a request to the Court for provisional measures for María Elena Loayza Tamayo, which was later confirmed by Carolina Loayza Tamayo, the victim's lawyer. As the Court was not in session, its President considered that the information provided by Prof. Scalabrino revealed, *prima facie*, a threat to the integrity of María

119. *Constitutional Court Case*, *supra* note 92, paras. 32 and 34-35.

Elena Loayza Tamayo and, since the Court had retained jurisdiction of the case for the effects of supervising compliance of its judgments, he decided to call upon the State to adopt without delay whatever measures were necessary to ensure effectively the return of Mrs. Loayza Tamayo to her country as well as her physical, psychological and moral integrity so that whatever provisional measures the Court might order would have the relevant effect.[120] On February 3, 2001, this decision was ratified by the Court.

Based on its authority to order provisional measures on its own motion, in the Ivcher Bronstein Case, given the tenor of the statements of the witnesses and the expert during the public hearing, the Court considered that the testimony as well as the Commission's final submissions allowed it to establish, *prima facie*, the existence of threats to the rights of personal integrity and judicial guarantees of Mr. Ivcher Bronstein, members of his family, officials of his companies and other persons related to the acts. The Court, therefore, called upon the State to adopt without delay the necessary measures to protect the rights to the physical and moral integrity and the judicial guarantees of the beneficiaries.[121]

Under the current Rules of the Court, Article 2.23 considers the victim or alleged victim to be a party to a case before the Court and Article 23.1 provides that, after the application is filed, the alleged victim, his next of kin or duly accredited representatives may present their pleadings, motions and evidence autonomously throughout the proceedings. It may, therefore, be presumed that the victim or his representatives may directly request provisional measures. Moreover, according to a reform in effect since January 1, 2004, pursuant to Article 25.3 of the Court's Rules in the contentious cases that are already before the Court the victims or the alleged victims, their next of kin or their duly accredited representatives may present directly to the Court a request for provisional measures.

120. I/A Court H.R., *Loayza Tamayo Case*. Order of the President of December 13, 2000, para. 1 of the expository part and paras. 7,12 and 14 of the considerations.

121. I/A Court H.R., *Provisional Measures in the matter of the State of Peru, Ivcher Bronstein Case*. Order of November 21, 2000, para. 2 of the expository part and operative paras. 1-2.

## *2. THE PRESENTATION AND PROCESSING OF THE REQUEST*

A request for provisional measures may be presented to the President of the Court, to any of its judges or to the Secretary of the Court by any means of communication. In any event, whoever receives the request must immediately inform the President. Given its nature, the Court must respond to this request immediately, but a request does not in any way suspend the examination of the merits. However, since these measures may be requested when the Court is not in session, the Rules provide for the possibility that, before provisional measures as such are adopted, the President of the Court may order urgent measures. While the Rules do not state so expressly, it is evident that a request for provisional measures has priority over any other matter.

In practice, once the Court's provisional measures or the President's urgent measures are adopted, the State is asked for a first report on the actions taken, which should be presented within a short period depending on the circumstances of each case. In the Hilaire Case, since the information supplied in the Commission's request stated that Mr. Hilaire would be executed on July 14, 1998, the President, after requesting the adoption of all measures necessary to preserve his life, asked the State to report to the Court on the same day as the order (July 13, 1998) on the actions taken in compliance with the order.[122] Pursuant to Article 25.6 of the Rules, the beneficiaries of provisional or urgent measures may present directly to the Court their observations to the State's report. The Commission should also present information regarding the State's report and on the observations on the measures of the beneficiaries or that of their representatives.

### *a) The adoption of urgent measures*

Originally, pursuant to Article 24.4 of a former version of the Rules, if the Court was not in session, the President was to convoke it without delay to decide on a request for provisional measures. This norm was eliminated by a reform of the Court's Rules on January 25, 1993 and it,

122. I/A Court H.R., *Request for amplification of the Provisional Measures adopted by the Inter-American Court of Human Rights in the matter of the Republic of Trinidad and Tobago, James et al. Case*. Order of the President of July 13, 1998, operative para. 12.

with small variations, corresponds to Article 25.5 of the current Rules,[123] maintaining the power of the President in consultation with the Permanent Commission and, if possible, with the other judges to call upon the government concerned to adopt urgent measures in order to ensure that any provisional measures that the Court might order in its next session are effective. The intervention of the President is explained by the urgent nature of the situations that justifies requesting the Court to adopt provisional measures. Therefore, when the Court is not in session, the President may issue urgent measures.

A clear example of the necessity of an expeditious proceeding is the case of Darrin Roger Thomas, who was condemned to death in Trinidad and Tobago and who on June 26, 1998 was notified that he was to be executed at 6 o'clock on the morning of June 30. The Court was informed of this situation on June 29, 1998 with a request that the provisional measures ordered in the James *et al*. Case be extended to include Mr. Thomas, whose case was before the Commission. That same day, since the Commission had not yet had the chance to examine the facts of the case and that the situation described was, *prima facie*, of extreme gravity and urgency that could cause irreparable damage to persons, the President of the Court decided that it was appropriate to call upon the State to adopt whatever measures were necessary to preserve the life of Mr. Thomas so that the Court might examine the relevance of amplifying its provisional measures and to request that the State report to the Court that same day on the measures adopted in compliance of its order.[124] This also occurred in the cases of Haniff Hilaire[125] and Denny Baptiste.[126]

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123. Rules of Procedure, adopted November 25, 2003 at the ninth and tenth meetings of the LXI Regular Session, held November 20 to December 4.

124. I/A Court H.R., *Request for amplification of the Provisional Measures adopted by the Inter-American Court of Human Rights in the matter of the Republic of Trinidad and Tobago, James et al. Case*. Order of the President of June 29, 1998, paras. 2 and 4 of the expository part, paras. 3 and 7 of the considerations and operative paras. 1-2.

125. *James et al. Case*. Order of the President of July 13, 1998, *supra* note 122, paras. 2 and 4 of the expository part, paras. 3 and 7 of the considerations and operative paras. 1-2.

126. I/A Court H.R., *Broadening of the Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Trinidad and Tobago, James,Briggs, Noel, Garcia and Bethel Case.* Order of the President of July 22, 1998, para. 5 of the expository part, paras. 3 and 7 of the considerations and operative paras. 1-2.

The urgent measures that the President of the Court may issue have the purpose of facilitating the processing and affording a timely remedy when the Court is not in session. The provision authorizing urgent measures points up the difference between urgent and provisional measures. The Court itself has distinguished between provisional measures, which only the Court may order, and the urgent measures that the President may issue so that any provisional measures that the Court may eventually adopt have the desired effect and that the Court is not presented with a *fait accompli*.[127] In considering a request for provisional measures in the James, Briggs, Noel, García and Bethel Case, the President of the Court observed that the implementation of the death penalty would necessarily affect consideration of the Commission's request for provisional measures by rendering moot any order that the Court might formulate in favor of the petitioners. In his opinion, this consideration did not imply a judgment on the merits of the request but simply acknowledged the possibility of a judgment, which led to the conclusion that the ideal measure "to guarantee the integrity of the system" was a stay of execution. In issuing urgent measures, the President of the Court was only ensuring that the Court could carry out its mandate under the Convention.[128] Moreover, timely compliance of the urgent measures may make it unnecessary for the Court to adopt provisional measures, as happened in the Reggiardo Tolosa Case.[129]

On the other hand, taking into account the dynamics of the situation and the possibility of new information, the Court has sometimes pointed out that the President of the Court may order the relevant additional measures.[130] In the Giraldo Cardona Case, on September 3, 1999 the Commission informed the Court that the previous night one of the beneficiaries of provisional measures had received a telephone call from the Commandant of Police of Meta informing her that they had intercepted a telephone call in which orders were given to kill her. That same day, upon instructions of the President, the Secretariat requested that the State

127. *Chunimá Case*. Order of August 1, 1991, *supra* note 47, para. 5.
128. *James, Briggs, Noel, García and Bethel Case*. Order of May 27, 1998, *supra* note 83, paras. 6 and 7 of the considerations.
129. *Reggiardo Tolosa Case.* Order of January 19, 1994, *supra* note 48, operative para. 1.
130. *Carpio Nicolle Case*. Order of September 19, 1995, *supra* note 53, operative para. 5.

take the special measures of protection necessary to guarantee the life and personal integrity of Mrs. Islena Rey.[131]

***b) The scope of the adversary proceedings***

In view of the nature and purpose of provisional measures, based precisely on the urgency of the situation and the danger of a delay, an adversary proceeding is not absolutely necessary. In order to apply these measures, what the doctrine has labeled the appearance of good law or *fumus boni juris* together with the ultimate object of the Convention –to avoid human rights violations– fully justify this type of proceedings.[132] This was partially accepted by the Government of Guatemala in the Chunimá Case, when it agreed that the urgent measures of the President of the Court could be issued without a hearing of the parties.[133] Taking into account that urgent measures are provided for in its Rules when the Court is not in session, thus delegating part of its attributes to its President, there is no reason to deny to its President what the Court can do. In one of the most recent decisions, however, there has been an effort to distinguish the content or the type of provisional measure. In the Suárez Rosario Case, the President of the Court distinguished between provisional measures and anticipatory or restitutory measures, suggesting that while the former may be issued without hearing the parties, for the latter two a hearing is indispensable.[134]

In any event, as an element of an adversary proceeding the State will be requested to transmit to the Court its points of view on the provisional measures requested by the Commission, even if a public hearing has not been convoked.[135]

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131. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Colombia, Giraldo Cardona Case*. Order of September 30, 1999, paras. 2-3 of the expository part.

132. Along these same lines, it must be emphasized that, with regard to the composition of the Court, to date it has not followed the erroneous practice of inviting the State to appoint an *ad hoc* judge to rule on provisional measures.

133. Note of the Government of Guatemala dated July 24, 1991 and addressed to the President of the Court, cited in *Chunimá Case.* Order of August 1, 1991, *supra* note 47, para. 3 of the expository part.

134. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Ecuador, Suárez Rosero Case*. Order of June 28, 1996, paras. 1 of the expository part and paras. 7, 12 and 14 of the considerations.

135. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights, Bámaca Velásquez Case*. Order of the President of June 30, 1998, operative para. 2.

### *c) The holding of a public hearing*

Under Article 25.7 of its Rules, the Court or its President, if the Court is not in session, may convoke the parties to a public hearing on provisional measures. In practice, after issuing urgent measures, the President usually convokes the Court and the parties to a public hearing to examine the request for provisional measures.[136] After adopting the measures, the Court may hold a public hearing to learn how the State had complied and to receive the arguments of the parties before deciding on whether to continue or broaden the provisional measures already ordered.[137] The purpose of a hearing is not simply to enable the Court to decide on the requested measures and eventually on the President's order of urgent measures, but also to continue receiving the parties points of view on the merits and the appropriateness of the measures. Taking into account these factors, in the Chunimá Case the Government of Guatemala requested postponement of the public hearing for at least 30 days in order to "conduct a thorough investigation, obtain reports, hear from the inhabitants and carry out related efforts."[138] A postponement to issue provisional measures, which are by their very nature urgent, does not seem compatible with the nature of the institution and obviously was not accepted by the Court.[139] In the Bustíos-Rojas Case, the Court rejected the request of the State to postpone the hearing due to the urgent nature of provisional measures and the agenda of the session of the Court (according to which a hearing could not be held until the following year) and decided at the hearing that the request for provisional measures and not the merits of the case would be dealt with.[140]

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136. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Guatemala, Chunimá Case.* Order of the President of July 15, 1991, operative paras. 2 and 3. Also, I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Peru, Cesti Hurtado Case*. Order of the President of July 29, 1997, operative para. 3.

137. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Guatemala, Colotenango Case*. Order of December 1, 1994, para. 6. *See*, also, I/A Court H.R., *Provisional Measures adopted by the Inter-American Court of Human Rights in the matter of the Republic of Colombia, Giraldo Cardona Case*. Order of April 16, 1997, paras. 1 and 3 of the expository part.

138. *Chunimá Case.* Order of the President of July 15, 1991, *supra* note 136, operative para. 3.

139. *Ibid*., operative part.

140. *See* the note of the Secretariat of the Court, of July 26, 1990, REF. CHD-S/302, addressed to the Chargé d'Affaires a.i. of the Embassy of Peru in Costa Rica.

In the Giraldo Cardona Case, in view of the difficulties between the State and the beneficiaries of the provisional measures and the contradictions in the reports of the government and the Commission regarding the nature of the provisional measures and the effects that they might produce and considering that the parties had requested a hearing to discuss their implementation, the Court agreed and convoked the parties to a public hearing to examine the matter.[141]

A State has refused to participate in the public hearing on the provisional measures. In the James *et al.* Case the Government of Trinidad and Tobago informed the Court, in a note of August 11, 1998, that it would decline the invitation to appear at the public hearing convened by the Court to examine the Commission's request for provisional measures. In response, the President of the Court informed the Prime Minister of Trinidad and Tobago that the failure of a State party to appear at a public hearing to which it had been duly convoked was without precedent in the history of the Court and that the Court was seriously concerned for the implications of that decision.[142] Despite the urging of the President, the State did not appear at the public hearing, which the Court considered a failure of its international obligations under the Convention.[143]

### *d) Modification or revocation of the measures*

After provisional measures are in effect, the government may request that they be lifted and the Commission may ask that they be extended. As an example, in the first cases against Honduras, on January 18, 1988 the Commission requested the adoption of specific measures, complementary to those already decided by the Court on January 15, a petition that was granted by the Court.[144]

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141. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Colombia, Giraldo Cardona Case*. Order of February 5, 1997, paras. 3, 5-7 of the expository part, para. 7 of the considerations and operative para. 5.

142. Note of the President of the Court to the Prime Minister of Trinidad and Tobago of August 19, 1998, in ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1998, *supra* note 26, pp. 279-280.

143. *James et al. Case*. Order of the President of August 29, 1998, *supra* note 25, para. 13 of the considerations.

144. *Velásquez Rodríguez, Fairén Garbi and Solís Corrales* and *Godínez Cruz Cases.* Order of January 19, 1988, *supra* note 107, operative part.

A change of circumstances or new facts that would indicate a worsening of the original situation may lead the Commission to ask that the provisional measures be broadened, either with regard to the nature of the protection or to the persons for whom protection is requested. The Commission's brief in the first cases against Honduras asking the Court to adopt specific measures, complementary to those already ordered,[145] and the request in the Blake Case that the protective measures on behalf of persons while at home be extended to them when they were not at home[146] belong to the first category. A second category would include the Carpio Nicolle Case, where, after requesting the provisional measures and after the President had issued urgent measures, the Commission asked that those measures be broadened to extend their protection to another person. According to the President, the Commission's request presented new acts that affected a person who had not been included in the list of persons protected by the urgent measures and, therefore, the measures were amplified to include that person and the State was also ordered to investigate and punish those responsible for the acts denounced.[147] In the cases against Trinidad and Tobago, at the request of the Commission, the Court ordered on several occasions that the provisional measures adopted in the James *et al*. Case be extended to other persons whose execution was also imminent and who, therefore, were exposed to irreparable damage.[148]

In the Ivcher Bronstein Case, after the judgment on the merits and the changes that occurred in Peru, notwithstanding the fact that the Commission had requested that the provisional measures be maintained, the Court recalled their exceptional nature and pointed out that they are ordered for purposes of protection and that they must be maintained while the basic requirements set forth in Article 63 of the Convention persist. The changes that occurred in Peru, the willingness of the State to comply

145. *Ibid*.

146. *Blake Case.* Order of August 16, 1995, *supra* note 20, considerations and operative para. 2.

147. I/A Court H.R., *Expansion of Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Guatemala, Carpio Nicolle Case*. Order of the President of July 26, 1995, para. 3 of the expository part, paras. 2-3 of the considerations and operative para.1.

148. I/A Court H.R., *Constantine et al. Case. Preliminary Exceptions.* Judgment of September 1, 2001. Series C No. 82, paras. 12-16; *Benjamin et al. Case. Preliminary Exceptions*. Judgment of September 1, 2001. Series C No. 81, paras. 9-12 and *Hilaire Case. Preliminary Exceptions*, *supra* note 9, paras. 13-14.

with the recommendations found in the Commission's Report No. 94/98, the developments in the case, in particular, the return of the victim's family, the canceling of the arrest warrants, his reinstatement as stockholder and Chairman of the Board of the *Compañía Latinoamericana de Radiodifusión*, which operates Channel 2 of Peruvian television, as well as other relevant information provided by the parties, allowed the Court to conclude that there were no longer reasons of "extreme gravity and urgency" and the probability of irreparable damage required by Article 63.2, which had led to the adoption of provisional measures. The Court, therefore, decided to lift them.[149] In the Constitutional Court Case, after its judgment on the merits of January 31, 2001 and in spite of the express request to the contrary of the Commission, the changes that had occurred in Peru and the developments in the case, particularly the reincorporation of Mrs. Revoredo as a magistrate of that tribunal, led the Court to conclude that the circumstances of "extreme gravity and urgency" and the probability of irreparable damage required by Article 63.2 of the Convention that had motivated the Court to order provisional measures no longer existed. The Court, therefore, decided to lift the measures.[150]

It is important to underscore that the provisional measures may also be modified due to a request that they be partially lifted or that they be lifted with respect to some persons and left in force with regard to others.[151]

On the other hand, just as any of the parties may request before a judgment on the merits that the provisional measures be modified or revoked if there has been a change in the circumstances that were grounds for adopting them, the Court's refusal to order provisional measures does not mean that, on the basis of new facts, provisional measures could not be renewed.

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149. I/A Court H.R., *Provisional Measures ordered by the Court in the Ivcher Bronstein Case*. Order of March 14, 2001, paras. 3-4 of the expository part, paras. 3-4 of the considerations and operative para. 1.

150. *Constitutional Court Case.* Order of March 14, 2001, *supra* note 93, paras. 3-4 of the considerations and operative para. 1.

151. I/A Court H.R., *Provisional Measures adopted by the Inter-American Court of Human Rights in the matter of the Republic of Guatemala, Carpio Nicolle Case*. Order of June 19, 1998, para. 4 of the expository part, para. 3 of the considerations, operative paras. 1-2 and I/A Court H.R., *Provisional Measures adopted by the Inter-American Court of Human Rights in the matter of Colombia, Giraldo Cardona Case*. Order of June 19, 1988, paras. 2-4 of the considerations and operative paras. 1-3.

### *e) The available appeals*

The Court's decisions on provisional measures are not subject to appeal. Even a request for interpretation is not available since, under Article 59.1 of the Court's Rules, it is only appropriate with respect to judgments on the merits or on reparations and, therefore, the Rules do not include the possibility of an interpretation of interlocutory resolutions.

In the Caballero Delgado and Santana Case, after the judgment on reparations, the Court adopted an order in which it decided to lift the provisional measures. Since the witnesses who had testified in the case were harassed, followed and received intimidating telephone calls after the judgment on reparations was made public, the victims' representatives requested that the Court *review* and *reconsider* the order by which it had decided to lift the measures. The Court, however, considered that this request did not impugn the prior order but rather, in the light of the new events, was an additional request to protect the lives and personal integrity of the persons affected by such acts and it, therefore, adopted new provisional measures on their behalf.[152]

## *3. THE PROOF OF THEIR APPROPRIATENESS*

The fact that provisional measures are exceptional and they have to meet certain requisites means that the existence of these requisites must be proved. Bearing in mind that the decision to order provisional measures does not involve a decision on the merits, the evidence that is offered at this stage must be directed solely at demonstrating the gravity and urgency of the situation and the probability of irreparable damage to persons.[153]

It is obviously not necessary to have conclusive proof, but enough to have "the appearance of good law." It is, of course, necessary to prove that it is a case of extreme gravity and urgency that might cause irreparable damage to persons. In the Chunimá Case, the Court found that, as it was a matter that had not yet been submitted to it, the Court lacked information

152. *Caballero Delgado and Santana Case*. Order of April 16, 1997, *supra* note 6, para. 4 of the expository part, paras. 1-2 of the considerations and operative para. 1.

153. *"La Nación" Newspaper Case.* Order of May 23, 2001, *supra* note 105, operative para. 2.

on the facts and circumstances of the case that the Commission surely possessed and that, therefore, it should make the request so that the Court would have the evidence necessary to make a decision.[154] In this same case, in response to a note of the Executive Secretariat of the Commission protesting that the provisional measures were becoming ineffective, that the parties had not been convoked to a hearing and asking that the measures be re-established, the President of the Court, in addition to pointing out that the facts in the note were presented extemporaneously, observed that it did not contain any evidence to support the statements, but that the government had provided evidence.[155]

Emphasizing the need for evidence that would enable it to make a decision, in the Chipoco Case the Court rejected the request for provisional measures because the Commission had not "submitted information to the Court sufficient to support the adoption of such measures, which requires the Commission to have gathered preliminary evidence to support a presumption of the truth of the allegations and of a situation whose grave seriousness and urgency could cause irreparable harm to persons."[156] In the Peruvian Prisons Case, with respect to one of the measures requested by the Commission regarding the lack of medical assistance and mistreatment of the inmates, the President of the Court observed that the Commission had not offered evidence on the truth of the allegations.[157] In contrast, because the acts that gave rise to the petition for provisional measures had been disseminated by the national and international media, in the Alemán Lacayo Case the Court held that the acts were notorious and credible and that it did not require any further proof.[158] In the Giraldo Cardona Case, the Court stated that "the violent past and the new violent acts and aggression against the members of the Meta Civic Committee for Human Rights, occurring since 1992, constitute a situation of imminent and grave danger for the members of said Committee."[159]

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154. *Chunimá Case.* Order of August 1, 1991, *supra* note 47, para. 7 of the considerations.

155. *Chunimá Case*, note of the President of January 14, 1992 addressed to the Executive Secretariat of the Commission, para. 3.

156. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Peru, Chipoco Case*. Decision of January 27, 1993, para. 2 of the considerations.

157. *Peruvian Prisons Case.* Order of the President of December 14, 1992, *supra* note 79, para. 6 of the considerations.

158. *Alemán Lacayo Case.* Order of February 2, 1996, *supra* note 51, para. 3 of the considerations.

159. *Giraldo Cardona Case.* Order of October 28, 1996, *supra* note 82, para. 5 of the considerations.

Since it is necessary to demonstrate the necessity and urgency of the measures, the Court's jurisprudence has also emphasized the exceptional nature of the cases for which provisional measures may be requested in matters that have not yet been referred to the Court. The Court has not required that the truth of the allegations be fully proved but only that the Commission offer a reasonable basis to presume them to be certain and not simply transcribe the information provided by the petitioners.[160] What the Court requires is that, depending on the circumstances of the case, the information presented by the Commission provides, *prima facie*, grounds to conclude that the situation is of extreme gravity and urgency making it imperative to order the State to adopt the measures[161] or that such information affords a basis for the Court to conclude that there is a situation of extreme gravity and that it is imperative to order the State to adopt without delay provisional measures to preserve the lives and physical integrity of the alleged victims.[162] In any event, when it is a matter before the Commission, the request should indicate that the complaint refers to acts that, if proved, would tend to establish a violation of the human rights enshrined in the Convention. Moreover, the Court should be persuaded that, if the State did the opposite of what is sought to be achieved through the provisional measures, it would be creating an irremediable situation that is incompatible with the purposes of the Convention.[163]

To require the Commission to present evidence other than that which it receives from the petitioners to show a situation of extreme gravity and urgency is certainly inadequate because it raises an insurmountable barrier to the utilization of this procedure. It is well to recall that the Court itself has held that, in proceedings on human rights violations, the defense of the State cannot rest on the impossibility of the complainant to furnish evidence that, in many cases, cannot be obtained without the cooperation of the State.

Fortunately, in its more recent jurisprudence, the evidentiary requirements of the Court do not follow its initial holdings. In cases already

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160. *Velásquez Rodríguez Case* and *Godínez Cruz Case*, *supra* note 65, paras. 135 and 141, respectively.

161. *See, e.g.,* I/A Court H.R., *Provisional Measures ordered by the Inter-American Court of Human Rights in the matter of the Republic of Trinidad and Tobago, James et al. Case*. Order of May 27, 1999, para. 8 of the considerations.

162. *See, e.g., James et al. Case.* Order of September 25, 1999, *supra* note 59, para. 9 of the considerations.

163. *See, e.g., ibid.*, para. 11 of the considerations.

before it, the Court's practice has been more flexible with regard to the evidence necessary to adopt provisional measures. In the Caballero Delgado and Santana Case, in which the Commission contended that the witnesses in the case had been constantly threatened with reprisals if they were to testify before the Court, as in effect they did, and that they feared for their lives and physical integrity, the Court stated that, under these circumstances, since the request came from the Commission it accorded "credibility to these statements and finds that they endow the situation *prima facie* with the characteristics of extreme gravity and urgency that justify adoption by the Court of whatever provisional measures it deems necessary to avoid irreparable damage to the persons on whose behalf they have been requested."[164] This criterion was repeated in the Carpio Nicolle Case, which was not before it and for which, therefore, it only had the information that had been presented by the Commission.[165]

It must be noted that it is only necessary to prove that it is a case of extreme gravity and urgency in which it is necessary to avoid irreparable damage to persons. It is, therefore, not necessary to prove that the threat of irreparable damage comes precisely from the State. In the first three cases against Honduras because of the threats against witnesses in those cases, although the President of the Court had informed the government that it did not at the time have sufficient evidence as to who was responsible for the threats, the Court, nonetheless, requested the Government to take the necessary measures to ensure the security and lives of those persons.[166]

Similarly, in the Clemente Teherán *et al*. Case, in which the State argued that provisional measures were not appropriate since the acts arose from a criminal situation resulting from the intervention of various private individuals and groups and that it had practical difficulties in effectively protecting the reserve of the Zenú indigenous community since it covered an area of approximately 20,000 hectares of marsh, forest and jungle, the Court pointed out that it is the responsibility of the State to adopt security measures for all of its citizens, a commitment for which special pains

164. *Caballero Delgado and Santana Case*. Order of December 7, 1994, *supra* note 4, para. 3 of the considerations.

165. *Carpio Nicolle Case*. Order of the President of July 26, 1995, *supra* note 147, para. 4 of the considerations, ratified by the Order of the Court of August 16, 1995.

166. Note of the President of the Court of November 6, 1987, *supra* note 109, para. 2.

must be taken when it concerns persons who are involved in proceedings before the organs of the inter-American human rights system, designed to determine whether or not there has been a violation of the human rights embodied in the Convention.[167]

The existence of a generalized practice, in addition to a threat, may be evidence or may contribute to its credibility. In the Haitians and Dominicans of Haitian Origin in the Dominican Republic Case, the Court indicated that it was not proved that the Dominican Republic had a State policy of massive deportations and expulsions in violation of the express norms of the Convention. The Court, however, indicated that the testimony enabled it to establish a *prima facie* presumption that certain individuals were the object of abuses.[168]

In establishing the elements that make up an appropriate situation for the application of provisional measures, the Court has taken into account indications and presumptions. In the Chunimá Case, after observing that the government had recognized the existence of an internal armed conflict for the past thirty years and the acts of violence that occurred in the zone, the Court stated that, although this generic recognition did not imply accepting as true the allegations, it did allow the presumption of the existence of a situation in which irreparable damage to persons might be produced.[169] In the Loayza Tamayo Case, given the failure of the government to report on the measures that it had taken to safeguard the victim's physical, psychological and moral integrity, the Court presumed that her prison situation placed her physical, psychological and moral health in grave danger, as the Commission had argued.[170] The *prima facie* standard of appreciation of a case and the application of presumptions given the necessity to protect persons has led the Court to order provisional measures on diverse occasions.[171]

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167. *Clemente Teherán et al. Case.* Order of June 19, 1998, *supra* note 21, para. 5 of the expository part and para. 7 of the considerations.

168. *Haitians and Dominicans of Haitian Origin in the Dominican Republic.* Order of August 18, 2000, *supra* note 68, paras. 5 and 9 of the considerations.

169. *Chunimá Case.* Order of August 1, 1991, *supra* note 47, para. 6.a of the considerations.

170. I/A Court H.R., *Provisional Measures in the matter of Peru, Loayza Tamayo Case*. Order of September 13, 1996.

171. *See, e.g., Constitutional Court Case.* Order of the President of April 7, 2000, *supra* note 114, para. 7 of the considerations.

The Court has not been indifferent to its responsibility as an organ of human rights protection. Thus, this element has also been considered as having a direct effect on the evidence required. In the Blake Case, after establishing that the case was before it, the Court expressed the view that it was its duty "to avoid irreparable harm to persons, which is understood to include the complete security of witnesses and their relatives and determining whether the measures adopted by the Government have been sufficient."[172] Similarly, in deciding on an extension of the provisional measures decreed in the Colotenango Case, and although the case was not before it, the Court held that "although the various steps taken by the Government towards fulfillment of the directives contained in the orders on provisional measures have led to a noteworthy decrease in the number of acts of intimidation by members of the civil patrols, the Court neverthless, in view of its protective responsability, deems it appropriate to maintain the provisional measures in force until such times that there is certainty that no irreparable damage will be done to the lives and physical integrity of the 13 persons under protection."[173]

### *4. SUPERVISION OF THEIR COMPLIANCE*

The commitment undertaken by the States under the Convention implies complying in good faith with the obligations that they have contracted. In order for the inter-American human rights system to be effective, suitable mechanisms of supervision and control are essential. In the system designed by the Convention, the competent organ to monitor compliance of the provisional measures ordered by the Court is the Court itself. This, however, does not prevent the Court from entrusting the Commission with the verification of the compliance of the measures adopted, as occurred in the Bustíos-Rojas Case.[174]

172. *Blake Case.* Order of September 22, 1995, *supra* note 20, para. 5 of the considerations.

173. *Colotenango Case.* Order of February 1, 1996, *supra* note 54, para. 8 of the considerations. The reference to *preliminary objections* should be understood to refer to *provisional measures.*

174. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Peru, Bustíos-Rojas Case*. Order of January 17, 1991, operative para. 3.

The Court normally requests a State to inform it within a short period of time, which is determined in each case, on the specific measures that it has adopted to comply with its order,[175] although occasionally it has requested that the information be presented on the same day or within five days. In its recent practice, the Court has required the presentation of the first report within fifteen days and then periodic reports every two months. The Court has given special attention to compliance with this measure, by noting that the State has presented promptly and periodically the reports[176] or by indicating that the State has not complied with its obligation of reporting periodically on the measures that it has taken to safeguard effectively the physical, psychological and moral integrity of the person affected.[177] Pursuant to its Rules, the Court transmits this information to the Commission so that, within an established period, it forward its observations on the manner in which the provisional measures have been implemented[178] or that it forward its observations on the information provided by the government,[179] which transforms this supervisory mechanism into a type of adversary proceedings. Moreover, the Court may request the Commission to furnish information urgently and independently of the information that it might have requested of the State on the current situation of the beneficiaries of the provisional measures.[180]

In the Bámaca Velásquez Case, after analyzing the reports of Guatemala and the Commission's observations to those reports objecting to the manner in which the State was complying with the measures adopted by the Court, the President of the Court found that there were discrepancies between the parties on the measures adopted by the State and that there were gaps in the documentation furnished by both parties with regard to

175. *See, e.g., Colotenango Case.* Order of June 22, 1994, *supra* note 52, operative para. 4.

176. *See, e.g.*, I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Guatemala, Colotenango Case*. Order of September 10, 1996, para. 2 of the considerations.

177. *See, e.g., Loayza Tamayo Case.* Order of September 13, 1996, *supra* note 170, para. 3 of the considerations.

178. *See, e.g.,* I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Guatemala, Colotenango Case*. Order of May 18, 1995, operative para. 4.

179. *Alemán Lacayo Case.* Order of February 2, 1996, *supra note 51*, operative para. 3.

180. *Haitians and Dominicans of Haitian Origin in the Dominican Republic.* Order of February 2, 1996, *supra* note 103, operative para. 2.

the requested information and, therefore, he convened a public hearing so that the parties could inform on the acts and on the circumstances that would justify continuation of the measures.[181]

There have also been cases of open rebellion, in which the State has refused to inform the Court on the fate of the measures ordered by it. In the James *et al.* Case, in spite of the multiple occasions in which the Court requested that the State furnish information on the provisional measures, Trinidad and Tobago did not present the information that was requested on the alleged victims.[182] Similarly, in several Venezuelan cases in which the State furnished information only one time and in an untimely and inappropriate way, the Court pointed out that "the obligation to report to the Court is not fulfilled merely by making a formal presentation of a document to the Court, but is a dual obligation, which, for its effective compliance, requires the formal presentation of a document within the established time limit with specific, updated, true and detailed information on the issues related to this obligation."[183] According to the Court, compliance by the State of this obligation is essential in order to evaluate the case.[184] In the Constitutional Court Case, the Court observed that the State had not presented the urgent report that had been requested by the President of the Court on the measures adopted to ensure effectively the physical, psychological and moral integrity of Delia Revoredo and on her situation and that the failure to comply by the State was especially grave given the juridical nature of the provisional measures, which sought the prevention of irreparable damage to persons in a situation of extreme gravity and urgency.[185]

181. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights, Bámaca Velásquez Case*. Order of the President of February 16, 2001, paras. 3-4 of the expository part, 4-5 of the considerations and the operative part.

182. *Case of Hilaire, Constantine and Benjamin et al., supra* note 15, para. 32.

183. I/A Court H.R., *Provisional Measures in the matter of the Bolivarian Republic of Venezuela, Marta Colomina and Lilana Velásquez Case*. Order of December 2, 2003, para. 14 of the considerations.

184. *Ibid*., para. 15 of the considerations.

185. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Peru, Constitutional Court Case*. Order of August 14, 2000, paras. 11-12 of the considerations.

The Court has observed that the beneficiaries of its provisional measures must also cooperate with the State so that the State may adopt more effectively the relevant security measures.[186]

The Court includes in its Annual Report to the OAS General Assembly an account of the provisional measures that it has ordered during the period covered by the Report and, when such measures have not been duly implemented, it may make the recommendations that it deems pertinent.

## G. THE TYPE OF APPROPRIATE MEASURES

Pursuant to Article 63.2 of the Convention, the Court may adopt "such provisional measures as it deems pertinent," which grants it a broad margin of discretion to select the measures that it considers appropriate. In view of the variety of situations in which they may be appropriate, as well as the absence of limitations as to the types that may be adopted, it is not possible to offer an exhaustive list of the provisional measures that the Court may adopt. The only limitations that the Court should take into account are those related to the purpose of those measures and their temporary nature. The Court, thus, has at its disposal an immense range of possibilities in this area.

It is interesting to observe, however, that in its early days the Court showed very little imagination as to the type of measures that it adopted. Even now it often limits itself to requesting, without giving details, that the State adopt without delay whatever actions are necessary to protect the rights of the beneficiaries of the measures and that it be informed on the actions effectively taken. While this focus, in which it does not indicate the precise actions that the State must take, is not altogether unacceptable and has the advantage of specifying the result that is required while allowing the State to determine the means to achieve it, it is not always advisable and, therefore, it should not be ruled out that the Court indicate specific measures of protection. In the Bustíos-Rojas Case, while taking note of

186. I/A Court H.R., *Provisional Measures adopted by the Inter-American Court of Human Rights in the matter of the Republic of Colombia, Alvarez et al. Case*. Order of August 29, 1998, paras. 7-8 of the expository part and 6 of the considerations.

the measures adopted by the government at the request of the President of the Court, the Court specifically required the Government of Peru to set up civilian liaison authorities in Lima, Ayacucho and Huanta to receive the urgent communications of the persons under protection.[187] In the Alemán Lacayo Case, after indicating that Nicaragua should adopt the necessary measures to preserve the life and personal integrity of Mr. Alemán Lacayo and avoid irreparable harm to him, the Court requested that the attempt on his life when he was a presidential candidate be investigated and that those responsible be punished[188] and in the Colotenango Case the government was required, in addition to the measures already taken, to establish control and vigilance mechanisms on the civilian patrols that were active in Colotenango.[189] In the Blake Case, the Court confirmed the measures issued by its President that the government adopt whatever measures as were necessary so that the beneficiaries might continue to live in their places of residence and that they be ensured that they would not be followed or threatened by State agents or by persons acting with the acquiescence of the State[190] In contrast, in the Cesti Hurtado Case although the Commission had requested that the Court order the State, as a provisional measure, to comply with the writ of habeas corpus handed down in favor of Mr. Cesti Hurtado, the President only requested that the State adopt without delay "such measures as may be necessary" to ensure the physical and moral integrity of Mr. Cesti, an order that was ratified without modification by the Court.[191]

In deciding on a request for provisional measures in the Giraldo Cardona Case, the Court also emphasized the importance of ensuring that the beneficiaries might continue to live in their habitual places of residence or to return to their homes and assuring them that they would not be persecuted or threatened by State agents or by individuals.[192] In the Peace Community of San José de Apartadó Case, considering that the situation

187. *Bustíos-Rojas Case.* Order of January 17, 1991, *supra* note 174, operative para. 2.

188. *Alemán Lacayo Case.* Order of February 2, 1996, *supra* note 51, operative para. 2.

189. *Colotenango Case.* Order of February 1, 1996, *supra* note 54, operative para. 8.

190. *Blake Case.* Order of September 22, 1995, *supra* note 172, operative para. 1 in relation to operative para. 2 of the Order of the President of August 16, 1995.

191. *Cesti Hurtado Case, Preliminary Objections, supra* note 104, paras. 10-11.

192. *Giraldo Cardona Case.* Order of February 5, 1997, *supra* note 141, para. 5 of the considerations.

had forced the members of the Community to move to other regions of the country, the Court held that it was necessary that the State ensure that the beneficiaries of the measures might continue to live in their habitual places of residence and that it grant the necessary conditions so that the members of that Community who had been forced to move could return to their homes.[193]

In other cases the Court has placed special emphasis on the investigation and punishment of criminal acts as a measure of protection that, if not fully complied with, would simply ensure the impunity of the crime and constitute a violation of the duty to ensure human rights undertaken by the States. In the Serech and Saquic Case, the Court considered that the criminal investigations conducted by the State had been neither adequate nor effective and, therefore, it called upon the Government of Guatemala "as a vital aspect of its protective duty to take effective measures to investigate the acts denounced, guarantee the full independence of the judges, and, where appropriate, punish those responsible."[194] According to the Court, the State has the obligation to investigate every situation in which the human rights protected by the Convention may have been violated and that such obligation, as well as that of preventing and punishing, must be assumed by the State as a legal duty and not as a mere formality.[195] In the Carpio Nicolle Case, the President accepted the Commission's argument that the facts showed "the existence of a deliberate attempt to obstruct the judicial process,"[196] underscoring the importance that the Court attributes to the investigation and punishment of criminal acts as part of the obligation of ensuring human rights that the States have undertaken. Similarly, in the Giraldo Cardona Case the Court required the State to include in its next report on compliance of the provisional measures, as an essential element of the duty of protection, information on the progress of the investigation of those

193. *Peace Community of San José de Apartadó Case*. Order of November 24, 2000, *supra* note 27, para. 8 of the considerations.

194. *Serech and Saquic Case*. Order of April 24, 1996, *supra* note 22, para. 5 of the considerations.

195. *Ibid*., para. 6 of the considerations.

196. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Guatemala, Carpio Nicolle Case*. Order of the President of June 4, 1995, para. 5 of the considerations.

responsible for the acts that gave rise to the measures and their punishment.[197] In these circumstances, it is easily understandable that, in the Colotenango Case, the Court called upon the State to use the means at its disposal, obviously all of them, to comply with the arrest warrants for thirteen members of the civilian patrol, accused of the criminal acts denounced in this case.[198]

The provisional measures that are required by the Court must be compatible with the nature and purpose of this institution and, therefore, it does not enjoy absolute discretion to determine the type of measure that is appropriate. Of course, both the measures that the Court orders and their form cannot prejudge the merits of the controversy nor be converted into a prior judgment of the State.[199] With regard to cases not yet before it, the Court has repeatedly emphasized that its consideration does not concern the merits of the cases but the procedural obligations of the State as a party to the Convention.[200] In the Constitutional Court Case, which was before the Court, with respect to judicial proceedings not directly associated with the acts mentioned in the request for provisional measures, the President indicated that, if they had been submitted to the Court, it could not decide because to do so would be a prejudgment on the merits.[201] In the Cesti Hurtado Case, the Court ratified the decision of the President that rejected the Commission's request to order the State to comply with a writ of habeas corpus without prejudice to the investigations before the competent judicial body being continued, because it considered that there was a direct tie between the Commission's request that Mr. Cesti be released and the question of the merits of the case that was under consideration by the Commission, which would prejudge a case not yet submitted to the Court.[202] In the James, Briggs, Noel, Garcia and Bethel Case, in which

197. I/A Court H.R., *Provisional Measures adopted by the Inter-American Court of Human Rights in the matter of the Republic of Colombia, Giraldo Cardona Case.* Order of November 27, 1998, operative para. 4.

198. *Colotenango Case.* Order of December 1, 1994, *supra* note 137, operative para. 2.

199. *See*, in this respect, the Resolution of the Permanent Court of International Justice in *German Interests in Polish Upper Silesia and the Factory at Chorzow, order (interim protection),* November 21, 1927, serie A No. 12, pp. 9-11.

200. *James, Briggs, Noel, García and Bethel Case.* Order of June 14, 1998, *supra* note 34, para. 5 of the considerations.

201. *Constitutional Court Case.* Order of the President of April 7, 2000, *supra* note 114, para. 12 of the considerations.

202. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Peru, Cesti Hurtado Case.* Order of September 11, 1997, paras. 4-5 of the considerations.

the Commission requested that the Court require Trinidad and Tobago to take the necessary measures to ensure that five persons condemned to death were not executed while it was examining their cases, the Court noted that this request did not refer to the merits of the cases but rather to the procedural obligations of the State as a party to the Convention and that the execution of the complainants would cause an irremediable situation in which the State had not recognized the authority of the Commission, thus seriously affecting the very essence of the inter-American system.[203]

In the Peruvian Prisons Case, the order of the President expressed the view that some of the measures requested could not be properly considered as provisional or precautionary in the terms of Article 63.2 of the Convention since they referred to the authorization of the government to permit the Commission to conduct an on-site investigation of prison facilities in Peru, a situation that is governed by Articles 48.2 of the Convention and 44.2 of the Rules of the Commission then in force, precepts that required the prior consent of the government, which could not be supplied by an order of the President of the Court.[204] In the Chipoco Case, Judge Fix-Zamudio held that the request of the Commission to call upon the Government of Peru to confirm as soon as possible the truth of the acts denounced was clearly unacceptable as a provisional measure[205] because its function is obviously not to establish the facts. In other cases, the Court has simply not ruled on some of the measures requested by the Commission and has not referred to their relevance. For example, in the Alemán Lacayo Case, the Court did not refer to the part of the Commission's petition that requested that the Government of Nicaragua give Mr. Alemán Lacayo "an armored car, so that he might travel throughout the national territory without fear of being pursued or attacked by groups of armed irregulars."[206]

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203. *James, Briggs, Noel, García and Bethel Case.* Order of June 14, 1998, *supra* note 34, expository part and paras. 4-5 and 8 of the considerations.

204. *Peruvian Prisons Case.* Order of the President of December 14, 1992, *supra* note 12, para. 5 of the considerations.

205. Communication dated November 30,1992 of Judge Fix-Zamudio, *supra* note 11, p. 3. Although the language of the Convention refers to *provisional measures*, the note of Judge Fix-Zamudio refers to *precautionary measures*, which is the term used in the Rules of Procedure of the Commission for the measures that it may request directly of the State.

206. *Alemán Lacayo Case.* Order of February 2, 1996, *supra* note 51, para. 2 of the expository part and operative para. 1.

In our opinion, provisional measures may be used to suspend the execution of domestic laws or regulations, the application of which would cause irreparable harm to persons in violation of the rights set forth in the Convention. That was the grounds for the provisional measures in the Loayza Tamayo Case that ordered Peru to modify the prison conditions of Mrs. Loayza Tamayo (held incommunicado, without sunlight, enclosed in a very small cell for 23 hours each day) in order to conform her situation to the requirements of Article 5 of the Convention.[207] The measures may also be applied in cases in which it is necessary to suspend an order of expulsion or extradition, when there are good reasons to fear that with those orders a person may be physically eliminated, exposed to torture or cruel, inhuman or degrading treatment, or when it is a question of remedying the arbitrary deprivation of freedom. Although the Court did not arrive at the point of deciding the issue due to the withdrawal of the matter by the Commission after Ecuador had ordered the release of the person affected in the Suárez Rosero Case, since the alleged victim had been held in preventive detention for a longer period than he would have served if he had been prosecuted and found guilty, the Commission requested of the Court the provisional measures necessary for the victim be immediately released pending continuation of the proceedings.[208]

Another aspect to be remembered is that the views of the beneficiary of the measures must be taken into account regarding their implementation. In the Giraldo Cardona Case, some beneficiaries asserted that the measures ordered by the government placed them in a more dangerous situation because they consisted of installing in their homes and offices armed men belonging to the security apparatus of the State, who were strongly suspected of having participated in the persecution of members of the Meta Civic Committee for Human Rights. The Commission observed that the government could not protect the threatened persons with members of institutions from whence came the threats and that the government had pressured the beneficiaries into accepting the services of armed bodyguards or to signing a document renouncing the protection of the State. The Commission considered that such pressure was unacceptable and that the

207. *Loayza Tamayo Case.* Order of September 13, 1996, *supra* note 170, operative para. 1.
208. *Suárez Rosero Case.* Order of June 28, 1996, *supra* note 134, paras. 3-4 of the expository part.

State had the duty to find more effective security measures, always keeping in mind the needs of the beneficiaries. It also pointed out that the type of protection that could be offered by the Office of Victim Protection was not the only solution, given that such protection consisted in removing the persons at risk from their places of work and residences.[209] In view of these considerations and the report of the State, among the measures adopted by the Court was that of requiring the State to continue to allow the participation of the petitioners in the planning and implementation of the provisional measures.[210] In a subsequent order, since some of the beneficiaries had rejected the protection of the State because it had not given them the option of selecting the method of protection that did not involve the participation of individuals who were under suspicion, the Court indicated that a dialogue was necessary in order to reach an agreement and decided that the State must communicate with the beneficiaries in order to offer them due, serious, definitive and reliable protection.[211]

It is interesting to observe that under the Rules of the International Court of Justice, while requiring that the request for provisional measures indicate the type of measures requested, the ICJ may adopt measures that, in whole or in part, are different from those requested.[212] Although the Rules of the Inter-American Court do not contain a similar provision, it is evident that the Court, which may order provisional measures on its own motion, may also adopt measures that are in whole or in part different from those requested.

## H. THEIR TEMPORARY NATURE

By their very nature, provisional measures should not be prolonged any longer than the circumstances that gave rise to them. It should also be remembered that the Court's jurisdiction extends only to the adoption of

209. *Giraldo Cardona Case.* Order of February 5, 1997, *supra* note 141, paras. 3 and 5 of the expository part.

210. *Giraldo Cardona Case*. Order of September 30, 1999, *supra* note 131, operative para. 4.

211. *Giraldo Cardona Case.* Order of November 27, 1998, *supra* note 197, para. 4 of the considerations and operative para. 3.

212. Articles 73(2) and 75(2) of the Rules of Procedure of the International Court of Justice, of April 14, 1978, with the amendments introduced by the Court on December 5, 2000.

provisional measures to avoid irreparable damage to persons and is not a provisional decision in favor of the complainant nor does it prejudge the merits of the controversy. The adoption, therefore, of a final decision in the case, whether by the Commission or by the Court, would have an effect on their force.

### *1. THE PERIOD SET FOR THE MEASURES AND ITS EXTENSION*

Provisional measures are ordered for a brief period of time, which in some cases the Court has set at six months, at the end of which the Court evaluates the situation of the beneficiaries and decides whether to continue them.[213] The Court has not always indicated the precise length of the provisional measures. For example, in the Alemán Lacayo Case, the Court simply requested the government to inform monthly on the provisional measures that it had adopted.[214] By not establishing their length, the Court maintains a constant vigilance to ascertain whether the circumstances that gave rise to them still persist.[215] If not, the measures are revoked or lifted, as were those that were adopted on behalf of Arnoldo Alemán Lacayo when he assumed office as President of Nicaragua on January 10, 1997.

This requisite does not have a mathematical and precise length after which the measures become necessarily inappropriate. In the Colotenango Case, the Government of Guatemala requested that the Court annul the provisional measures that it had ordered, which had been in force for nineteen months and whose temporary nature, in the opinion of the government, made it necessary to annul them because prolonging them would distort their inherent nature.[216] However, notwithstanding the actions taken by the government to comply with the order on preliminary exceptions and although the acts of intimidation by the civilian patrols had notably decreased, the Court deemed it appropriate in its duty of

213. *See, e.g., Alvarez et al. Case.* Order of November 11, 1997, *supra* note 24, operative para. 2.
214. *See, e.g., Alemán Lacayo Case.* Order of February 2, 1996, *supra* note 51, operative para. 3.
215. *See, e.g., Giraldo Cardona Case,* Order of February 5, 1997, *supra* note 141, operative paras. 2-4.
216. *Colotenango Case.* Order of February 1, 1996, *supra* note 54, para. 4 of the expository part.

protection that the measures should remain in force until it was certain that irreparable damage would not occur to the lives and physical integrity of the protected persons.[217] In the same sense, in deciding to extend the provisional measures ordered in the Carpio Nicolle Case the Court pointed out that "in light of the representations made by the Inter-American Commission on Human Rights on alleged acts of intimidation and threats directed towards certain of the persons for whose benefit the provisional measures were ordered, the Court continues to be concerned in regard to the prevention of irreparable damage arising from the violation of the human rights recognized in the American Convention."[218]

While it is normal that a State oppose a request for provisional measures or their extension, in the Colotenango Case the State requested that the measures be extended for whatever period the Court considered advisable.[219] This request was later repeated to "provide a framework of security and tranquility" for the friendly settlement procedure that was taking place between the parties.[220] In the Caballero Delgado Case, after the provisional measures ordered by the Court had been lifted, the Government of Colombia presented a brief in which it agreed with a request of the victims' representatives and asked that, while the situation of risk continued, the provisional measures be maintained.[221] In the Giraldo Cardona Case during a public hearing the State announced that it would not oppose the continuation of the provisional measures for six months so that it could comply fully with the Court's order.[222] The Court, therefore, concluded from the statements of the Commission and the State that there were still circumstances of extreme gravity and urgency that required that the provisional measures adopted by the Court be maintained.[223]

217. *Ibid*., para. 8 of the considerations.

218. I/A Court H.R., *Provisional Measures Requested by the Inter-American Commission on Human Rights in the matter of Guatemala, Carpio Nicolle Case*. Order of February 1, 1996, para. 3 of the considerations.

219. *Colotenango Case.* Order of December 1, 1994, *supra* note 137, para. 6 of the expository part.

220. *Colotenango Case.* Order of September 10, 1996, *supra* note 176, para. 6 of the expository part.

221. *Caballero Delgado and Santana Case*. Order of April 16, 1997, *supra* note 6, para. 5 of the expository part.

222. I/A Court H.R., *Provisional Measures Requested by the Inter-American Commission on Human Rights in the matter of Colombia, Giraldo Cardona Case*. Order of April 16, 1997, para. 3 of the expository part.

223. *Ibid*., only paragraph of the considerations.

### *2. THE JUSTIFICATION FOR THEIR EXTENSION*

Regardless of the fact that at the moment of their adoption the Court may have indicated a time period for their duration, provisional measures must be justified at all times by the strict necessity to avoid irreparable damage to persons. These measures, therefore, may be extended while the circumstances that gave rise to them persist[224] or they may be lifted because they are no longer necessary or because there is no evidence to justify their continuation. In the Chunimá Case, the Court on August 1, 1991 ratified the order of the previous July 15 issued by its President and resolved "to extend its effect until December 3 of the same year." While the order of the President did not refer to a term for the measures, it did indicate that, since it was a case that had not yet been submitted to its jurisdiction, the Court lacked information on the facts and circumstances of the case that the Commission surely possessed and that it should provide with the respective request so that the Court might have the evidence to be able to make the appropriate decision. In response to a communication of November 28 of the Vice Minister of Foreign Affairs of Guatemala, on December 3, 1991 the President of the Court thanked the government for its diligence in complying with the order on provisional measures, the effect of which ended that day upon the expiration of the established term. A copy of this communication was forwarded to the Commission on December 6, in reaction to which its Executive Secretariat, on December 16, requested that a public hearing be convened to enable the Commission and the government to present their arguments before the Court and that the provisional measures be immediately reinstituted until the hearing. The President, after consulting the other judges, answered on January 14, 1992 by repeating that the resolution on provisional measures had terminated on December 3, 1991 and the Commission had not requested and justified in a timely fashion their extension. The President also recalled that the Commission, pursuant to the order of August 1, 1991, had the opportunity between August 1 and December 3, 1991 to inform the Court of the facts contained in its submission of December to which it did not attach any evidence that justified its position, as had the government in its note of November 1991.

224. *Colotenango Case.* Order of December 1, 1994, *supra* note 137, para. 5 of the considerations.

In contrast, in the Colotenango Case, the Court agreed that the government had adopted actions tending to comply with its orders but considered that the government had not presented credible information that demonstrated that the circumstances of extreme gravity and urgency had ceased, especially with regard to compliance with arrest warrants issued against 13 civilian patrol members accused of the criminal acts that were the grounds for the request for provisional measures. The Court, therefore, observed that, while the government had shown a willingness to adopt the measures, they had not been implemented fully.[225] Moreover, in view of the fact that the information sent by the Commission and by the government was contradictory on several points, specifically with regard to the arrested patrol members and that there was information revealing continuing acts of intimidation and threats against several of the persons for whom the provisional measures were adopted, the Court decided to extend the provisional measures ordered on June 22, 1994, and extended by its order of December 1, 1994, until February 1, 1996.[226]

The Court must also take into account the opinion of the beneficiary of the provisional measures as to their justification. In the Giraldo Cardona Case, one of the beneficiaries of the measures stated that he did not need the services of a bodyguard because he had not received threats nor did he work in the area of human rights. The Court, therefore, decided to lift and terminate the provisional measures ordered on his behalf.[227] The decisive factor, however, is the objective existence of a situation of extreme gravity and urgency that makes it necessary to avoid irreparable damage to persons and not the opinion of the beneficiary of the measures. In the same Giraldo Cardona Case, in which one of the beneficiaries had stated that she did not require protective measures since she was in Bogotá, the Court resolved that the State must maintain the measures with the purpose of making them effective when she returned to Meta.[228]

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225. *Colotenango Case.* Order of May 18, 1995, *supra* note 178, para. 2 of the considerations.

226. *Ibid*., paras. 3-4 of the considerations and operative para. 1.

227. I/A Court H.R., *Provisional Measures adopted by the Inter-American Court of Human Rights in the matter of Colombia, Giraldo Cardona Case.* Order of June 19, 1998, para. 2 of the considerations and operative para. 1.

228. *Ibid*., para. 3 of the considerations and operative para. 2.

### *3. THE ADOPTION OF A FINAL JUDGMENT*

Except for the general obligation to respect and to ensure human rights, the provisional nature of these measures, in addition to suggesting that they are for short periods of time, means that they must be suspended if, in deciding on the preliminary objections or on its own motion, the Court concludes that it lacks jurisdiction to hear the case. The measures are also suspended when a final judgment is delivered, either because it rejects the position of the complainant or because, in accepting it, the measures initially adopted as provisional acquire a definitive character. The provisional measures must of course be lifted whenever the purpose for which they were adopted has been achieved. It should be remembered that in the Hilaire, Constantine and Benjamin *et al*. Case, in granting several extensions of the measures to include other persons in the same situation as those who had already obtained provisional measures, the Court held that their object was, *inter alia*, "not to impede the processing of their cases before the inter-American system."[229]

When the Commission requests provisional measures on matters that are under its consideration, those measures cannot be extended after the Commission has filed the case. The fact, however, that the parties have reached a friendly settlement, in which they have directly or indirectly asked the Commission to monitor its compliance, does not mean that the case has been completely closed or that the provisional measures ordered by the Court must be lifted. In the Colotenango Case, although the parties had agreed to a friendly settlement duly ratified by the Commission,[230] at the Commission's request the Court considered that the situation of extreme gravity and urgency that gave rise to the provisional measures persisted and decided to maintain them while those circumstances continued.[231] In the Loayza Tamayo Case, however, in view of the Court's judgment that ordered the release of Mrs. Loayza Tamayo and the information provided

229. I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al., supra* note 15, para. 30.

230. I/A Commission H.R., Report No. 19/97, Case 11.212, Friendly Settlement, Guatemala, adopted March 13, 1997, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1996, *supra* note 142, pp. 447-452.

231. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Guatemala, Colotenango Case*. Order of April 16, 1997, considerations and operative para. 2.

by the State indicating that she had been freed, the Court held that the grounds that gave rise to the provisional measures no longer existed and ordered that they be lifted and terminated.[232]

Although it might be assumed that provisional measures, *ipso facto*, lose their effect when a final judgment is handed down in a case, the Court has not considered it so. In the Caballero Delgado and Santana Case, in which it had delivered a judgment on the merits on December 8, 1995 and one on reparations on January 29, 1997, it was not until January 31, 1997 that the Court decided to lift the provisional measures that it had previously ordered. A possible interpretation of that order would be that the measures were maintained since the Court still had jurisdiction to monitor compliance of the latter judgment and that they were lifted only because they had already "fulfilled the purpose for which they were ordered."[233] In fact, the measures were later reinstituted.[234]

### *4. WITHDRAWAL OF PROVISIONAL MEASURES*

Notwithstanding the gravity and urgency of the situation that gave rise to the request for provisional measures, it cannot be ruled out that, as a result of a fundamental change of circumstances, the Commission may withdraw its petition, either because the grounds that gave rise to them no longer exist or because new facts no longer make them necessary. This was precisely the situation presented in the Serech and Saquic Case, in which the Court, having adopted provisional measures at the request of the Commission, was informed by the latter that it considered that the measures could be lifted, a position with which the petitioners were in agreement, with the understanding that there would be a new request if the situation once again became grave and provisional measures were necessary. It was under those circumstances that the Court decided to lift

232. I/A Court H.R., *Provisional Measures adopted by the Inter-American Court of Human Rights in the matter of the Republic of Peru, Loayza Tamayo Case*. Order of November 11, 1997, para. 6 of the expository part, the considerations and operative para. 1.

233. *Caballero Delgado and Santana Case*. Order of January 31, 1997, *supra* note 5, paras. 1-2 of the considerations and the operative part.

234. *Caballero Delgado and Santana Case.* Order of April 16, 1997, *supra* note 6.

the measures.[235] In the Vogt Case, the Commission requested the *withdrawal* of the provisional measures ordered by the Court since the petitioners themselves had informed it that, owing to the effective and timely intervention of the Court, the threats against Padre Vogt had lessened considerably and that he was carrying out his normal pastoral duties.[236] In the Paniagua Morales *et al*. and Vásquez *et al*. Cases, the Commission informed the Court that it considered that the measures adopted by the Court could be lifted since the petitioners had indicated that the security situation of the beneficiaries had improved and that they thought that it was appropriate that the measures be lifted. The Court, therefore, considered that the situation of extreme gravity and urgency that gave rise to the adoption of the provisional measures no longer existed and proceeded to terminate them.[237]

A similar situation was presented in the Suárez Rosero Case, in which the Commission had requested as a provisional measure the release of the victim, without prejudice to the proceedings being continued, because he had been detained for a period longer than if he had been prosecuted and found guilty. Since he was freed by the Ecuadorian authorities before the Court could decide on the request, the Commission informed the Court that the security of Mr. Suárez Rosero and his family appeared to be no longer at risk and that, therefore, it withdrew the request for provisional measures but not the principal proceedings of the case before the Court, reserving the right to bring a new request in the event that the circumstances changed. Therefore, since the grounds that led the President of the Court to issue urgent measures no longer existed and in view of the withdrawal of the Commission, the Court lifted the urgent measures.[238]

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235. I/A Court H.R., *Provisional Measures adopted by the Inter-American Court of Human Rights in the matter of the Republic of Guatemala, Serech and Saquic Case*. Order of September 19, 1997, paras. 4-6 of the expository part and operative para. 1.

236. I/A Court H.R., *Provisional Measures adopted by the Inter-American Court of Human Rights in the matter of the Republic of Guatemala, Vogt Case*. Order of November 11, 1997, para. 4 of the expository part.

237. I/A Court H.R., *Provisional Measures adopted by the Inter-American Court of Human Rights in the matter of Guatemala. Paniagua Morales et al. and Vásquez et al. Cases (No. 11.448),* Order of November 27, 1998, para. 4 of the expository part, para. 2 of the considerations and operative para. 1.

238. *Suárez Rosero Case.* Order of the President of June 28, 1996, *supra* note 134, paras. 6-7 of the expository part, paras. 2-3 of the considerations and the operative part.

## I. THE JURIDICAL NATURE OF PROVISIONAL MEASURES

In our opinion, there is no doubt that provisional measures are binding since they are a necessary consequence of the judicial proceedings that order them. As they have been provided for by a treaty freely consented to and accepted by the States, they must be obeyed by virtue of the norm of *pacta sunt servanda,* which obligates the States to comply in good faith with the provisions of treaties to which they are parties. Compliance of provisional measures is, therefore, not only the result of practical considerations –avoiding adverse publicity– but also the consequence of a State's legal duty to comply with its international commitments.

Article 63.2 of the Convention refers to the provisional measures that the Court *shall adopt*, which suggest that they are binding. The judicial nature of the organ that adopts them, together with the object and purpose of the Convention, also suggest that they are compulsory. This conclusion is in accord with Article 25.1 of the Court's Rules, which provides that it may "order such provisional measures as it deems pertinent." For its part, Article 25.5 provides that the President of the Court shall "call upon the government concerned to adopt such urgent measures as may be necessary to ensure the effectiveness of the provisional measures" that the Court may subsequently order. Article 25.8 of the Rules also emphasizes the compulsory nature of these measures by providing that the Court include in its Annual Report to the OAS General Assembly an account of the provisional measures that it has "ordered" and that "have not been duly implemented." What is decisive, however, is the text of Article 68.1 of the Convention, which provides that the States parties "undertake to comply with the judgment of the Court in any case to which they are parties." The judgment referred to in that provision obviously covers any decision of the Court in cases under its consideration.

The Court has also related Article 63.2 to Article 1.1 of the Convention, concluding that the State must adopt the measures that are necessary to preserve the life and integrity of those persons whose rights might be threatened[239] or has simply underscored the State's obligation to

239. *Carpio Nicolle Case*. Order of September 19, 1995, *supra* note 53, paras. 1-3 of the considerations.

prevent human rights violations and to investigate the facts that gave rise to any request for provisional measures in order to identify those responsible and apply the pertinent sanctions to prevent a repetition of such acts.[240] In addition, if the provisional measures were not obligatory, the subsequent judgment of the Court could lack practical effect, which is certainly not the purpose of the Convention.

In its jurisprudence on provisional measures, the Court has held that a State must comply with all parts of the Court's orders and report periodically on the measures taken to protect the human rights of those persons protected by the provisional measures.[241]

Nonetheless, in an act without precedent in the history of the inter-American system, in the James *et al.* Case, by note of September 1, 1998, Trinidad and Tobago became the first State to object to the compulsory nature of these measures, pointing out that the Court had no jurisdiction to adopt a measure that might frustrate the application of a legally imposed death penalty. According to the State, the Commission is empowered only to make recommendations and not to "overturn judgments from the State's domestic courts," that international organs had the duty to create the necessary machinery to enable a State "to comply with its own domestic laws" and that according to a reservation made by the State it had recognized the Court's jurisdiction "only to such extent that recognition is consistent with the relevant sections of the Constitution of … Trinidad and Tobago." These arguments were rejected by the Court, which observed that the States parties to the Convention should comply with its provisions in good faith, including those norms that allow the development of the procedures before the organs of the Convention and that ensure that its purposes are achieved. According to the Court, States must not take any action that would frustrate the *restitutio in integrum* of the rights of the alleged victims, since the function of the supervisory organs of the Convention is to ensure that the provisions of the Convention are observed and applied adequately by the States and not to ensure that the States comply

240. *Alemán Lacayo Case.* Order of February 2, 1996, *supra* note 51, para. 6 of the considerations.

241. *See, e.g., Marta Colomina and Lilana Velásquez Case.* Order of December 2, 2003, *supra* note 185, para. 15 of the considerations.

with their own domestic laws.[242] With respect to the reservation, on September 1, 1998 the State informed the Court that it would not consult with the Court or the Commission any further in these matters.[243] In spite of the fact that pursuant to Article 65 of the Convention the Court informed the OAS General Assembly of the State's refusal to comply with its decision and notwithstanding the two communications sent to the Chairman of the OAS Permanent Council and a third one to the OAS Secretary General requesting that this question be considered by the General Assembly in order that it might adopt specific measures and urge the State to comply with its international commitments, the OAS took no action on the matter.

Notwithstanding the binding nature of the provisional measures that the Court may order, the language of its orders has not always been sufficiently categorical, sometimes *requesting* or *urging* and on other occasions limiting itself to *calling upon* the State to *adopt* the necessary measures. For example, in the Peruvian Prisons Case, the order of the President stated, very timidly, that it was not appropriate to *ask* that the Government of Peru take the urgent measures.[244] However, as of the order of February 1, 1996 in the Colotenango Case, which extended the provisional measures,[245] the phrase *So ordered* has been added to these orders immediately after the signatures of the judges who participated in its adoption, which emphasizes the obligation of States to comply with them.

It is also necessary to determine whether the urgent measures that the President of the Court issues have the same binding effect as the provisional measures adopted by the Court, a question that, in our opinion, must be answered in the affirmative. It must be recalled that the procedure for the adoption of urgent measures requires that the President consult the Permanent Commission of the Court and, if possible, the other judges.[246] It should also be underscored that the purpose of these measures is to

242. *James et al. Case*, Order of August 29, 1998, *supra* note 25, para. 5 of the expository part and paras. 7 and 10 of the considerations.

243. I/A Court H.R., ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1998, *supra* note 26, pp. 33-35.

244. *Peruvian Prisons Case.* Order of December 14, 1992, *supra* note 12, operative para. 1.

245. *Colotenango Case.* Order of February 1, 1996, *supra* note 218, operative para. 2.

246. Article 24.4 of the Rules of Procedure of the Court.

avoid that, when it adopts a judgment, the Court is faced with a *fait accompli* and to permit that the provisional measures that the Court might adopt have an *effet utile*. This, therefore, means that the urgent measures are also binding. With this type of institution, when the President issues an order of urgent measures because the Court is not in session, he is acting in the name of the Court in a matter that by its nature cannot wait. The distinction suggested by the President in the Suárez Rosero Case, that the President is empowered only to issue urgent measures, which probably correspond to conservatory measures, while measures of a restitutory or anticipatory nature can only be ordered by the Court, does not change the above conclusion as to the binding nature of each of them.

## J. THEIR EFFICACY

As a general rule, faithful to their international commitments and respect for human rights, States have strictly complied with the provisional measures decreed by the Court. The type of measures ordered has, however, not always effectively protected the beneficiaries.

In the James *et al*. Case, notwithstanding the fact that the Court had ordered the adoption of provisional measures necessary to preserve the lives and physical integrity of a group of inmates on death row in Trinidad and Tobago, the State executed Joey Ramiah, one of the persons protected by the measures.[247] In spite of having been duly notified by the Court, the State indicated that it had not received any order related to the adoption of measures of protection in favor of Joey Ramiah.[248] In this case, the Court had ordered that the State adopt provisional measures in order not to frustrate the processing of the case before the inter-American system, specifically before the Commission, a decision that was repeated by the Court and by its President in subsequent orders.[249] The Court, therefore, considered that the execution of Mr. Ramiah was an arbitrary deprivation of the right to life, a situation that was aggravated because the victim was

247. *Case of Hilaire, Constantine and Benjamin et al., supra* note 15, paras. 33, 84.r and 191.
248. *Ibid*., para. 197.
249. *Ibid*., para. 196.

protected by a provisional measure ordered by the Court, in which it expressly indicated that the execution should be stayed until the case was resolved by the organs of the inter-American system.[250]

250. *Ibid*., paras. 198-200.

## Chapter XII

## THE CONTENTIOUS JURISDICTION OF THE COURT

After the Commission transmits its preliminary report to the State concerned, the procedural stages that follow depend on whether the State has accepted the Court's compulsory jurisdiction and, if so, whether the Commission or the State refers the matter to the Court, which is a political decision that is not obligatory and is subject to a deadline that commences to run after the State has been notified of the Article 50 Report.

We begin this Chapter by noting that, while individuals have always been able to present to the Commission petitions alleging a violation of the Convention, in the early days of the system the complainant was not authorized to act in his own name and independently before the Court. The Court may only hear a case at the request of the Commission or a State concerned. There have, however, been significant advances in this area. In a former version of the Court's Rules, if the case had been referred to the Court and the State held responsible, the victim's next of kin or his representatives could present their own arguments and evidence autonomously at the reparations stage. Article 23.2 of the current Rules considers the victim or alleged victim to be a party to the case. Article 23 also provides that, after the application is admitted, "the alleged victims, their next of kin or their duly accredited representatives may submit their pleadings, motions and evidence, autonomously, throughout the proceedings." In contrast, Protocol No. 11 of the European Convention has eliminated the Commission and gives individuals direct access to the Court, permitting them to participate at all stages of the procedure.[1]

When a State has been brought before the Court, one of the central aspects to be defined is the nature of the proceedings to determine responsibilities with regard to the allegations. Before analyzing these proceedings, it is important to observe that the Court has emphasized that

1. Article 34 of the European Convention on Human Rights, as amended.

the international protection of human rights is not to be confused with criminal justice, since a State does not appear before it as a defendant in a criminal trial, and that the purpose of the international law of human rights is not to sanction the individuals responsible for the violations but to protect the victims and indemnify the damages that have been caused by the State responsible for such actions.[2] It is not a civil law proceeding nor is it comparable to other international proceedings.

The proceedings before the Court are not expressly spelled out in the Convention,[3] but are sufficiently detailed in its Statute and Rules. These proceedings have innovative and peculiar characteristics that flow from the purposes of the Convention and they thus differ from those of other international bodies, such as those that resolve interstate conflicts in which the procedural impulse depends entirely on the parties and which do not necessarily involve a public interest.

The Court has repeatedly held that international proceedings, in validating an act, are not bound by the requirements and formalities of a State's domestic law.[4] In the Loayza Tamayo Case, in which the State made the point that the victim had not signed the agreement on reparations and that her power of attorney lacked juridical value because it did not meet the requirements of Peruvian law, the Court, after recalling that the validity of the acts and instruments in proceedings before it are not governed by a State's internal laws, observed that its practice with regard to representation has always been guided by those principles and that this flexibility has been applied equally to States, the Commission and, at the reparations stage, to the victims or their next of kin.[5] This latitude in

2. I/A Court H.R., *Velásquez Rodríguez Case.* Judgment of July 29, 1988. Series C No. 4, para. 134; *Godínez Cruz Case*. Judgment of January 20, 1989. Series C No. 5, para. 140 and *Fairén Garbi and Solís Corrales Case*. Judgment of March 15, 1989. Series C No. 6, para. 136.

3. Articles 66 to 69 of the Convention, which are entitled "Procedure," refer to the Court's judgments but not to the procedural steps necessary to arrive at the judgments.

4. I/A Court H.R., *Gangaram Panday Case. Preliminary Objections*. Judgment of December 4, 1981. Series C No. 12, para. 18; *Cayara Case. Preliminary Objections*. Judgment of February 3, 1993. Series C No. 14, para. 42; *Caballero Delgado and Santana Case. Preliminary Objections*. Judgment of January 21, 1994. Series C No. 17, para. 44 and *Loayza Tamayo Case. Preliminary Objections*. Judgment of January 31, 1996. Series C No. 25, para. 97.

5. I/A Court H.R., *Loayza Tamayo Case. Reparations* (Art. 63.1 American Convention on Human Rights). Judgment of November 27, 1998. Series C No. 41, paras. 94, 96 and 98. Also, *Castillo Páez Case. Reparations* (Art. 63.1 American Convention on Human Rights). Judgment of November 27, 1998. Series C No. 43, paras. 63 and 65.

accepting instruments of representation has, however, certain limitations that are dictated by the purpose that the representation is intended to serve. Such instruments, in order for the Court to consider them valid and fully effective, must a) unequivocally identify the person granting the power of attorney and reflect that person's free will, b) clearly identify the representative and c) state the precise purpose of the representation.[6] It is also important to emphasize that even though the power of attorney might not have been correctly granted, if the victim has ratified everything that his representative has done before the Court, the latter has held that it cannot ignore the will of the victim for whom the reparations procedure is conceived and has accepted the validity of the actions objected to by the State.[7]

The victim's non-appearance in the proceedings before the Court is another element to be considered. In the Blake Case, the Court considered proved the responsibility of the State in the disappearances and deaths of Nicholas Blake and Griffith Davis but, as the Commission did not include the latter in its submissions, the Court concluded that it could only decide on the facts with respect to Mr. Blake.[8] It must, however, be observed that, while Article 62.3 of the Convention provides that the Court has jurisdiction to hear all *cases* concerning the interpretation and application of the provisions of the Convention that are submitted to it, the Court has interpreted that a *case* is comprised of the person or persons on whose behalf it was submitted and not the act denounced, which is what the Court must analyze in determining its legal consequences with respect to the persons involved.[9] In the reparations stage of the Loayza Tamayo Case, however, after the victim had been clearly identified in the judgment on the merits, the Court stated that, although the direct participation of "the injured party" at the reparations stage is important for the Court, the injured parties non-appearance does not relieve either the Commission or the Court of its duty as organs of the inter-American human rights system to ensure

6. *Ibid*., paras. 99 and 66, respectively.
7. *Loayza Tamayo Case, supra* note 5, para. 100.
8. I/A Court H.R., *Blake Case*. Judgment of January 24, 1998. Series C No. 36, paras. 52 and 85.
9. In examining the facts and then submitting them to the Court, the Commission may err not only in its appreciation of the provisions of the Convention that might have been violated, but also in the determination of the persons who might have been victims of the violations.

that those rights are effectively protected, which includes matters relating to the duty to make reparations.[10] The Court has, therefore, deemed it appropriate to order reparations for the victims' next of kin who have not appeared during the Court's proceedings, pointing out that, in the absence of their claims or arguments, it must decide on the basis of the available evidence.[11] Although the Court has mainly referred to the non-appearance of the victims' next of kin, it appears to us that the same arguments are valid for the case in which it is the victim himself who does not appear. This conclusion may be drawn from the reference to "the injured party" in Article 63 of the Convention, which obviously includes the victim. It must be remembered that this is a system of the collective guarantee of human rights in which States have undertaken objective obligations.

## A. THE DETERMINATION OF THE CASES APPROPRIATE FOR EXAMINATION

After the Commission has adopted its report and transmitted it to the State in question, the States parties and the Commission, which are the only ones that may do so,[12] must decide within three months whether to refer the matter to the Court.[13] In the opinion of the Court, this time limit is preclusive, except in special circumstances.[14] With respect to the possible exceptions that may suspend that period, the Court has held that in the course of the proceedings "a number of circumstances could develop that would interrupt it or even require the drafting of a new report or the resumption of the period from the beginning. In each case it will be necessary to conduct an analysis to determine whether or not the time limit has expired and what circumstances, if any, could reasonably have interrupted the period."[15]

10. *Loayza Tamayo Case*, *supra* note 5, para. 103.
11. *Ibid*. para. 104.
12. Article 61.1 of the Convention.
13. Article 51 of the Convention. In fact, together with the adoption of the Article 50 Report, the Commission may decide to refer the case to the Court unless the State concerned adopts its recommendations and resolves the matter within three months. *See*, in this respect, I/A Commission H.R., Resolution 43/90, of June 7, 1990, operative para. 7.
14. I/A Court H.R., *Certain Attributes of the Inter-American Commission on Human Rights* (Arts. 41, 42, 46, 47, 50 and 51 of the American Convention on Human Rights). Advisory Opinion OC-13/93 of July 16,1993 (hereinafter cited as *Certain Attributes*). Series A No. 13, para. 51.
15. *Cayara Case*, *supra* note 4, para. 39.

With respect to which States may refer a case to the Court, the Convention is not sufficiently clear because, while Article 61 mentions "the States Parties" without indicating whether they are the States that have been *parties* to the proceedings before the Commission or whether they are the States parties to the Convention, Article 51 refers to "the interested States," without it being evident which States might be interested in referring a case to the Court. In any event, it surely includes the State against which a complaint has been made, even though it is not very realistic to expect it to refer a case.[16] In State communications, it also appears clear that the defendant State is an *interested State* and that it could refer the case to the Court. In contrast, it is not evident whether a State party that has some nexus, such as nationality, with the victim of the alleged violation and that in this respect could be an interested State. In the African system, the African Charter on Human and Peoples' Rights expressly provides that the State parties that may present a case to the Court are: a) the State that has lodged a complaint to the Commission, b) the State against which the complaint has been lodged at the Commission and c) the State whose citizen is a victim of a human rights violation.[17]

A close reading of Article 61.1, in conjunction with other provisions, leads to the conclusion that the only States that may refer a case to the Court are those that have participated in the proceedings before the Commission. This interpretation is confirmed by Article 61.2 of the Convention, which provides that in order for the Court to hear a case it is necessary that the procedures set forth in Articles 48 to 50 of the Convention have been exhausted, and Article 50.2 of the Convention, which provides that the Commission's report is transmitted only to the "interested States," a report that, for its confidentiality, may only be given to the States parties to the case.

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16. Except for the so-called *In the Matter of Viviana Gallardo et al*. submitted by the Government of Costa Rica on July 13, 1981 in order that the Court investigate a possible violation of human rights occurring in its territory. The Court decided not to admit the matter but to send it to the Commission in order that the procedures established in Articles 48 to 50 of the Convention were observed. I/A Court H.R., *In the Matter of Viviana Gallardo et al.* Series A No. G 101/81. To date (February 2004) all of the contentious cases filed with the Court have been by the Commission.

17. Article 5.1.b-d of the Protocol to the African Charter of Human and Peoples' Rights regarding the establishment of an African Court of Human and Peoples' Rights (1998).

In view of the nature and purpose of the proceedings before the Court, it is not very probable, much less realistic, that the defendant State would refer a case to the Court. To date, no State has submitted a case to the Court[18] and, therefore, the Commission is, or rather should be, the principal actor in proceedings before the Court. Although the Convention entered into force on July 18, 1978, it was not until April 24, 1986 that the Commission filed the first applications with the Court and only 63 cases had been lodged as of February 2004. The Commission has alleged budgetary reasons to explain this reluctance to file more applications. In any event, the fact that more than half of these cases have been submitted since 1996 suggests a healthy change of attitude.

Given the paucity of practice in this area, it is difficult to determine the criteria that the Commission employs to decide which cases should be referred to the Court. In any event, that decision has been affected by a lack of human and financial resources, which appears to have resulted in giving priority to the cases in which enough evidence has been gathered or is available to allow the presentation of a sufficiently solid case. In the second place, the failure of a State to implement the Commission's recommendations has been another important element in that decision. In adopting its report on the Gangaram Panday Case, as well as in the Aloeboetoe *et al*. and the Paniagua Morales *et al*. Cases, the Commission stated that, if its recommendations were not implemented within 90 days (except for the Paniagua Morales *et al.* Case, in which 60 days were given), it would submit the case to the Court. Similarly, although in the Caballero Delgado and Santana Case such indication was not included in the Commission's report, it may be assumed that the Commission's decision to file the application was related to the State's failure to implement the recommendations. This element is more evident in the Castillo Petruzzi *et al.* Case, in which, before the period given to the State to implement the recommendations formulated in the Article 50 Report had elapsed, the Commission referred the case to the Court, subject to the eventual implementation of the recommendations by Peru.[19]

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18. *In the Matter of Viviana Gallardo et al*., *supra* note 16, which the Court declared inadmissible on November 13, 1981 and cannot be considered, properly speaking, a contentious case.

19. I/A Court H.R., *Castillo Petruzzi Case. Preliminary Objections*. Judgment of September 4, 1998. Series C No. 41, paras. 87-88.

In addition to the aforementioned criteria, the common element in most of the cases lodged with the Court in its early days was that they involved a violation of the right to life.[20] Beginning with the Genie Lacayo Case in 1994 and continuing with the Maqueda, Loayza Tamayo and Suárez Rosero Cases, the Commission has abandoned that very conservative attitude and has submitted matters in which the application mainly refers to a violation of judicial guarantees, which has broadened beyond the narrow boundaries of the right to life the nature of the cases that justify the intervention of the Court. This tendency has been reinforced in the cases that have recently been sent to the Court and that refer, *inter alia*, to violations of the right to property,[21] the protection of honor and dignity,[22] the protection of the family,[23] the principle of legality and the non-retroactivity of criminal laws,[24] the right of assembly,[25] freedom of association,[26] of thought[27] and of expression.[28]

While the Convention grants the Commission discretion as to whether to refer a case to the Court,[29] this attribute may not be exercised arbitrarily in violation of the purposes of the Convention, thus preventing the Court's intervention and the possibility that the individual obtain a judicial decision on his petition.[30] The Commission's decision should

20. This was the central element in the Velásquez Rodríguez, Fairén Garbi and Solís Corrales, Godínez Cruz, Aloeboetoe *et al*., Gangaram Panday, Neira Alegría *et al*., Cayara, Caballero Delgado and Santana and El Amparo Cases.

21. I/A Court H.R., *Cesti Hurtado Case. Preliminary Objections*. Judgment of January 26, 1999. Series C No. 49, para. 13; *The Mayagna (Sumo) Awas Tingni Case. Preliminary Objections*. Judgment of February 1, 2000. Series C No. 66, para. 25 and the case filed on March 9, 1999 against Argentina, *Cantos Case. Preliminary Objections.* Judgment of September 7, 2001. Series C No. 85, para. 11.

22. *Cesti Hurtado Case*, *supra* note 21, para. 13.

23. *Ibid*.

24. I/A Court H.R., *Baena Ricardo et al. Case*. Judgment of February 2, 2001. Series C No. 72, para. 1.

25. *Ibid*.

26. *Ibid*.

27. I/A Court H.R., "*The Last Temptation of Christ" Case (Olmedo Bustos et al.).* Judgment of February 5, 2001. Series C No. 73, para. 1.

28. *Ibid*.

29. *See*, in this respect, Article 51 of the Convention, which suggests that the Commission has a certain margin of discretion in deciding whether or not to refer a case to the Court.

30. *See*, in this respect, the arguments of Edgar Macías, petitioner in I/A Commission H.R., Case No. 9.102 against Nicaragua, although they do not correspond to the legal norms contained in the Convention and do not reflect the actual state of the law in this area, as *lege ferenda*, are especially interesting. ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1985-1986, General Secretariat of the Organization of American States, Washington, D.C. 1986, pp. 75-86.

take into account the purposes of the Convention and, therefore, what would be most favorable for the protection of human rights. The Court itself has suggested several criteria to guide the Commission in deciding whether a case should be referred to it. In its advisory opinion on the compulsory licensing of journalists, the Court held that

> Although the Convention does not specify under what circumstances a case should be referred to the Court by the Commission, it is implicit in the functions that the Convention assigns to the Commission and to the Court that certain cases should be referred by the former to the Court, provided they have not been the subject of a friendly settlement, notwithstanding the fact that there is no legal obligation to do so. The Schmidt case clearly falls into this category. The controversial legal issues it raised had not been previously considered by the Court; the domestic proceedings in Costa Rica produced conflicting judicial decisions; the Commission itself was not able to arrive at a unanimous decision on the relevant legal issues; and its subject is a matter of special importance to the hemisphere because several states have adopted laws similar to that of Costa Rica.[31]

According to these criteria, the Commission should refer to the Court not only those grave cases in which it considers that there has been a violation of the Convention, but also those cases in which it believes that there has not been a violation but because of their complexity or transcendence should be resolved by the Court. The Court has underscored that neither Article 50 nor Article 51 of the Convention requires that the Commission conclude that there has been a violation of the Convention in order to refer a case to the Court.[32] In this aspect, the Commission's function is to collaborate with the Court and to filter the cases that should be heard by the Court, gathering the relevant evidence and defining the legal arguments of the parties. The Commission should not impede the exercise of the Court's jurisdictional function under the Convention nor

31. I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13,1985. Series A No. 5, para. 25.

32. *Ibid*.

deny the alleged victim the opportunity to obtain reparations under Article 63.1 of the Convention, which may only be ordered by the Court. In this respect, it has been pointed out that, although Article 51 of the Convention authorizes the Commission to decide whether to file an application with the Court or to continue to examine the matter, that decision "is not discretionary, but must be based upon the alternative that would be most favorable for the protection of the rights established in the Convention." [33] While this conclusion does not exactly reflect the intention expressed in the relevant passages, in the first cases against Honduras the Court implied that, once the procedure set forth in Articles 48 to 50 of the Convention has been completed and does not lead to a satisfactory result respecting the human rights recognized in the Convention, as part of the mechanism of increasing intensity established in the Convention resort to the jurisdictional body should operate automatically,[34] which would certainly deprive once and for all the discretionary nature of the Commission's decision.

The Court has stated that, when it is a question of a request for provisional measures in matters that are not before it and the situation of extreme gravity and urgency continues for a prolonged period, the Commission should analyze the possibility of referring the case to the Court, since the latter lacks sufficient direct information on the facts and the circumstances that would enable it to reach the most appropriate decision.[35]

Finally, the importance of taking into account the petitioner's interest in a final decision by the Court in his case is obvious. If the Commission has not been able to resolve the matter based on respect for human rights and in the manner most favorable for the protection of human rights,[36] it cannot use its discretion to refuse to refer the case to the Court, depriving

33. *Certain Attributes, supra* note 14, para. 50.

34. *Velásquez Rodríguez Case. Preliminary Objections.* Judgment of June 26, 1987. Series C No. 1; *Fairén Garbi and Solís Corrales Case. Preliminary Objections.* Judgment of June 26, 1987. Series C No. 2 and *Godínez Cruz Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 3, paras. 58-60, 58-60 and 61-63, respectively.

35. I/A Court H.R., Order of February 1, 1996. *Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of Guatemala, Colotenango Case,* para. 5 of the considerations and operative para. 5.

36. *Certain Attributes, supra* note 14, para. 50.

the individual of a means of protection established by the Convention and ignoring that the object and purpose of the treaty is, precisely, to give the maximum protection to human rights. In a complete about-face, Article 43.3 of its current Rules requires the Commission to notify the petitioner that a report on the merits has been adopted and transmitted to the defendant State. It also provides that, in the case of States parties to the Convention that have accepted the Court's contentious jurisdiction, in notifying the petitioner the Commission must give him one month to present his position on whether the case should be referred to the Court. If the petitioner is in favor of the application being filed, he should indicate: a) the position of the victim or his next of kin, if he is not the petitioner, b) personal information regarding the victim or his next of kin, c) the grounds for the case to be submitted to the Court, d) the documentary, testimonial and expert evidence available and e) the claims concerning reparations and costs.

Taking into consideration the aforementioned criteria, Article 44 of the Rules provides that, if the State has accepted the Court's jurisdiction pursuant to Article 62 of the Convention and the Commission considers that the State has not complied with the recommendations of its Article 50 Report, it shall refer the case to the Court unless there is a reasoned decision of the absolute majority of its members to the contrary. To that effect, the Commission shall weigh essentially the following elements: a) the position of the petitioner, b) the nature and gravity of the violation, c) the need for developing or clarifying the jurisprudence of the system, d) the possible effect of the decision on the legal systems of the member States and e) the quality of the available evidence.

If the Commission refers a case to the Court, Article 71 of the Commission's Rules instructs the Executive Secretary to notify immediately that decision to the petitioner and the victim, forwarding to the former all of the elements necessary for the preparation and presentation of the case.

## B. ESTABLISHMENT OF THE COURT'S JURISDICTION

In order to hear a case the Court must verify, even without a preliminary objection by the State, that it has jurisdiction with regard to: a) the parties that intervene in the proceedings, b) the subject matter of the controversy and c) the time that has elapsed since notification to the State in question of the Commission's report. It is, however, important to emphasize that the Court is competent to decide on its own jurisdiction. This is an inherent power of all international tribunals that is firmly established in international law.

Although the Convention does not contain an express norm regarding the Court's jurisdiction to decide its own competence in cases where it has been objected to,[37] there is a widely-recognized general principal of international law that obligates a tribunal to establish whether it has jurisdiction to hear the matters that are submitted to it, even without an express objection of any of the parties. A decision of the Court, whether affirming its jurisdiction in the particular case or admitting that it lacks jurisdiction, is binding on the parties. This did not prevent the State in the Neira Alegría *et al.* Case from insisting on the Court's lack of jurisdiction, from requesting an interpretation of the ruling on preliminary objections and from presenting a request of review, which it later withdrew.[38] In the Cantos Case, the Court pointed out that "in accordance with the rule of the *compétence de la compétence/Kompetenz-Kompetenz*, established in both the jurisprudence of this Court and in standard, on-going arbitral and juridical practice, this Court is competent to hear the instant case."[39] Moreover, the Court has held that this rule has been incorporated into Article 62.3 of the Convention, which provides that the Court has

37. In contrast, Article 36.6 of the Statute of the International Court of Justice provides that, in case of a dispute as to whether the Court has jurisdiction, the Court decides.

38. I/A Court H.R., *Neira Alegrîa et al. Case*. Judgment of January 19, 1995. Series C No. 20, para. 21.

39. *Cantos Case*, *supra* note 21, para. 21. In a footnote the Court cites its own jurisprudence as well as the jurisprudence of other international tribunals that agree with it.

jurisdiction to hear all cases referred to it concerning the interpretation and application of the provisions of the Convention, provided that the States parties to the case recognize or have recognized its jurisdiction, whether by special declaration or by special agreement. It is also based on Article 62.1 of the Convention since, according to the Court, the instrument of acceptance of the optional clause of its compulsory jurisdiction is an admission by the State that deposits it of the Court's right to resolve any controversy relating to its jurisdiction.[40] In the opinion of the Court, it has this power, which is inherent, because of the need for legal certainty.[41]

This principle was important in the Ivcher Bronstein and Constitutional Court Cases. In those cases, which were filed with the Court on March 31 and July 2, 1999, respectively, by note of July 16, 1999 the OAS General Secretariat informed the Court that on July 9, 1999 Peru had deposited an instrument by which it withdrew its recognition of the optional clause relating to the Court's contentious jurisdiction. According to the note of the Minister of Foreign Affairs of Peru, the withdrawal was effective immediately and applied "to all cases in which Peru has not answered the application filed with the Court."[42] In the Court's opinion, it "must settle the question of Peru's purported withdrawal of its declaration recognizing the contentious jurisdiction of the Court and of its legal effects. The Inter-American Court, as with any court or tribunal, has the inherent authority to determine the scope of its own competence."[43] The Court held that it cannot abdicate this prerogative, which is a duty under the Convention and which requires it to exercise its functions in accordance with Article 62.3 of the Convention.[44] These two decisions contain a serious examination of the validity of the withdrawal of the

40. I/A Court H.R., *Ivcher Bronstein Case. Competence*. Judgment of September 24, 1999. Series C No. 54, para. 34 and *Constitutional Court Case. Competence.* Judgment of September 24, 1999. Series C No. 55, para. 33.

41. I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al*. Judgment of June 21, 2002. Series C No. 94, para. 19.

42. *Ivcher Bronstein Case. Competence* and *Constitutional Court Case. Competence*, *supra* note 40, paras. 28-29 and 27-28, respectively.

43. *Ibid*., paras. 32 and 31, respectively.

44. *Ibid*., paras.33 and 32, respectively. In several notes, Peru objected to the Court's judgments regarding its competence by arguing, *inter alia*, that they were not provided for procedurally by any of the human rights instruments in force in the inter-American system. *Ibid.* paras. 33 and 22.1, respectively.

acceptance of the Court's contentious jurisdiction, but do not emphasize that the two cases were submitted to the Court when there was no doubt about its jurisdiction with respect to the State in question and that, therefore, irrespective of the effect of the decision to withdraw from its contentious jurisdiction with respect to future cases, the Court was competent to hear those cases.

The Court's jurisdiction may be restricted by the terms of the instrument of its acceptance. The Court has, however, held that its jurisdiction cannot be contingent on events extraneous to its own acts since a State's acceptance of the optional clause regarding binding jurisdiction implies an admission of the Court's right to resolve any controversy relating to its competence. According to the Court, an objection or any other action by the State for the purpose of affecting the Court's jurisdiction has no consequence whatsoever, since the Court retains jurisdiction to determine its own competence (*compétence de la compétence*), as it is the master of its jurisdiction.[45] In the Hilaire Case, with respect to the reservation by which Trinidad and Tobago had accepted its jurisdiction, the Court again ratified the principle that it has competence to determine its own competence.[46] In that case, Judge Salgado Pesantes observed that the State did not make the reservation with respect to the substantive clauses of the Convention, but rather attempted to do so with respect to the optional clause recognizing the Court's contentious jurisdiction. In his opinion, it is not possible for a State to disregard the provisions of Article 62.2 and impose conditions on its acceptance of the Court's jurisdiction, since it does not have a margin of discretion other than expressing its will to accept or not the jurisdiction. A State may not establish conditions that limit the operation of the jurisdictional organ, charged with applying and interpreting the Convention.[47] According to Judge Cançado Trindade, the modalities of acceptance by a State party of the Court's contentious jurisdiction are expressly stipulated in Article 62. In his opinion, the formulation of the

45. *Ibid*., paras. 34 and 33, respectively.

46. I/A Court H.R., *Hilaire Case. Preliminary Objections*. Judgment of September 1, 2001. Series C No. 80, paras. 78-79.

47. *Hilaire Case. Preliminary Objections*, *ibid*.; I/A Court H.R., *Constantine et al. Case. Preliminary Objection.* Judgment of September 1, 2001. Series C No. 82 and *Benjamin et al. Case. Preliminary Objections.* Judgment of September 1, 2001. Series C No. 81, paras. 4, 6 and 7 of his opinion.

optional clause of the Court's compulsory jurisdiction in that article is not simply illustrative but very precise. No State is obligated to accept the Court's contentious jurisdiction, but a reservation to the optional clause would simply amount to the non-acceptance of such a clause, which may be done under the Convention. If a State party decides to accept the clause, it must do so in the terms expressly stipulated in that provision. According to Article 62.2, the acceptance by a State party of the Court's contentious jurisdiction may be done in four ways: a) unconditionally, b) on the condition of reciprocity, c) for a specified period and d) for specific cases. They are the only modalities of acceptance of the Court's contentious jurisdiction envisaged and authorized by Article 62.2, which does not authorize the State parties to interpose any other conditions or restrictions (*numerus clausus*).[48]

### *1. JURISDICTION RATIONE PERSONAE*

With respect to the nature of who may intervene in the procedure before the Court, the Court must examine the capacity of both the complainant and the defendant to appear as such before the Court.

#### *a) The defendant State*

The Court's jurisdiction does not operate, *ipso iure*, and a State is not considered to have accepted its jurisdiction simply because it has ratified the Convention.

Pursuant to Article 62 of the Convention, a State may, upon ratifying or adhering to the Convention or at any later time, declare expressly that it recognizes as binding in law and without any special agreement the Court's jurisdiction for all cases relating to the interpretation and application of the Convention. As the Court has well observed, Article 62 employs the verb *may* to signify that the recognition of this jurisdiction is optional.[49]

In principle, the declaration is an anticipated acceptance of the Court's jurisdiction, without knowing who will be the eventual complainants and without knowing what will be the subject matter of the case. According to

48. *Ibid*., paras. 22-23 of his opinion.
49. *Cantos Case*, *supra* note 21, para. 34.

Article 62.2, this declaration may be made unconditionally, on the condition of reciprocity, for a specified period or for specific cases. It may also be formulated for an indefinite period and must be presented to the OAS Secretary General, who transmits a copy to the other OAS member States and to the Secretary of the Court. The Court has pointed out that "it is necessary to distinguish between 'reservations to the Convention' and 'acceptance of the jurisdiction' of the Court. The latter is a unilateral act of each State, governed by the terms of the American Convention as a whole and, therefore, not subject to reservations. Although some doctrine refers to 'reservations' to the acceptance of the jurisdiction of an international court, in reality, this refers to the limitations in the acceptance of the jurisdiction and not, technically, to reservations to a multilateral treaty."[50] It is a question of the conditions under which a State accepts the Court's jurisdiction, the purpose of which is entirely distinct than that for reservations, which seek to modify the effects of the treaty with respect to the State making the reservation. The Court, however, ended up confusing both institutions and ignoring that States may ratify the Convention with reservations by emphasizing that the Convention creates obligations for the States and that "these obligations are the same for all the States parties, in other words, they bind in the same way and with the same strength both the State party that has accepted the obligatory jurisdiction of the Court and the State party that has not done so."[51] In fact, a State's obligations under the Convention depend on what the State has effectively accepted in its instrument of ratification and, therefore, the strength of its tie to the treaty will depend on having ratified purely and simply the treaty or having done so subject to certain reservations. The acceptance of the Court's jurisdiction is governed, with respect to each State, by the obligations that the State has effectively accepted upon ratifying the Convention.

The declaration made by Chile in which it "on accepting the competence of the Inter-American Commission and Inter-American Court of Human Rights declares that these organs, in applying Article 21(2) of the Convention, shall refrain from judgments concerning the concept of

50. *Ibid*. The citation to the jurisprudence in the text has been omitted.
51. *Ibid*.

public use or social interest cited in cases involving the expropriation of an individual's property" may be seen as a true reservation in spite of what it was called and its placement. Some declarations of acceptance of the Court, however, contain conditions that do not exactly correspond to the reservations that States make upon ratifying the Convention but rather to the conditions under which they accept the Court's jurisdiction. Upon ratifying the Convention, Mexico made a reservation referring to the political rights of religious ministers, but on accepting the jurisdiction of the Court it excepted the cases derived from the application of Article 33 of the Mexican Constitution relating to the political rights of foreigners and to the possibility that they might be expelled from Mexico without a trial for the mere fact that their stay in the country could be considered inconvenient. This circumstance is a curious condition to the exercise of the Court's jurisdiction that was not extended to the Commission's jurisdiction.

On the other hand, the meaning and scope of some declarations of acceptance of the Court's jurisdiction place doubts on their seriousness and pertinence. In ratifying the Convention, Trinidad and Tobago recognized the compulsory jurisdiction of the Court "only to such extent that recognition is consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago; and provided that any judgment of the Court does not infringe, create or abolish any existing rights or duties of any private citizen." Such condition served as grounds for not complying with decisions of the Court and, on May 26, 1998, Trinidad and Tobago notified the OAS Secretary General of its denunciation of the Convention. Similarly, the Government of Bolivia, upon depositing its instrument of recognition of the Court's jurisdiction, attached an interpretative declaration stating that "the norms of unconditionality and indeterminacy shall apply with strict observance to the Constitution of Bolivia, especially with respect to the principles of reciprocity, non-retroactivity and judicial autonomy."

It is important to observe that acceptance of the Court's jurisdiction also places a time limit with respect to the cases that the Court may hear. That is, the Court may only hear cases on acts that occurred after the date that the State has accepted the Court's jurisdiction. In this sense, the final

clause in Argentina's recognition of the Court's compulsory jurisdiction upon ratifying the Convention (September 5, 1984), noting that the obligations undertaken "would only take effect with regard to acts that occurred after the ratification of said instrument" (which is also repeated in other instruments accepting the Court's jurisdiction), may be thought to be unnecessary. In any case, based on this declaration, in the Cantos Case the State interposed a preliminary objection that the Court was only competent with respect to acts occurring after September 5, 1984.[52] The Court held that the acts occurred before the entry into force of the Convention for that State were not subject to its jurisdiction.[53] While the Commission argued that some of the acts of which the State was accused were ongoing illegal acts, the Court did not find it necessary to examine that legal theory since it was sufficient to verify that if any of the acts imputed to the State were of this nature, it would not be "a fact that had occurred after September 5, 1984," the only category of acts with respect to which Argentina had accepted the Court's jurisdiction.[54]

While most of the declarations accepting the Court's jurisdiction are limited to noting this matter (Chile, Costa Rica, Dominican Republic, Haiti, Honduras, Panama, Peru, Suriname and Venezuela) or to pointing out that such recognition is for an indeterminate period (Brazil and Ecuador) or indefinite (Bolivia, Colombia, El Salvador, Guatemala, Nicaragua, Paraguay and Uruguay), the declaration of Mexico indicates that the acceptance of the Court's jurisdiction continues in effect until one year after the date on which the country notifies that it has denounced it. Similarly, Ecuador reserved the right to withdraw its recognition of this jurisdiction "whenever it may deem it advisable to do so." In the declarations of Colombia and El Salvador those States also reserved the right to terminate the Court's jurisdiction "should it deem this advisable" and at "whatever moment it considers opportune."

In the Ivcher Bronstein and Constitutional Court Cases, in which the State concerned had announced the withdrawal of its recognition of the Court's jurisdiction with immediate effect and applying to all the cases in which Peru had not answered the application, the Court did not accept

52. *Ibid*., paras. 21 and 32.
53. *Ibid*., para. 38.
54. *Ibid*., para. 39.

that, under the terms of the Convention, a State has full liberty to withdraw its acceptance of the Court's jurisdiction. According to the Court, the acceptance of its contentious jurisdiction is "an ironclad clause to which there can be no limitations except those expressly provided for in Article 62.1 of the Convention." Given the fundamental importance of that clause for the operation of the Convention's protective system, the Court cannot be at the mercy of limitations that have not been provided for but that are invoked by States for domestic reasons. Such a clause is essential to the efficacy of the mechanism of international protection and must be interpreted and applied in such a way that the guarantee it establishes is truly practical and effective, given the special nature of human rights treaties and their collective enforcement.[55] According to the Court, there is no provision in the Convention that expressly authorizes a State party to withdraw its declaration of acceptance of the Court's compulsory jurisdiction nor does the instrument of acceptance by Peru of the Court's jurisdiction envisage such a possibility. The Court's interpretation of the Convention "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context of them and in light of its object and purpose" is that a State party to the Convention may only release itself of its obligations under the treaty by observing the terms of that treaty. According to the Court, in the circumstances of these two cases, the only way that a State may disengage itself from the Court's contentious jurisdiction under the Convention is to denounce the treaty as a whole. In that event, the denunciation would only have effect under Article 78 of the Convention with an advance notice of one year.[56] The Court has held that, in interpreting the Convention in accordance with its object and purpose, it must act in such a way as to preserve the integrity of the mechanism provided for in Article 62.1 of the Convention since that mechanism may not be subordinated to restrictions suddenly adopted by a State to the terms of its acceptance of the Court's contentious jurisdiction, as this would not only adversely affect the effectiveness of such mechanism but would also

55. *Ivcher Bronstein Case. Competence* and *Constitutional Court Case. Competence*, *supra* note 40, paras. 35 and 36, respectively.

56. *Ibid*., paras. 39-40 and 38-39, respectively. In spite of the language of Article 78 of the Convention, it must be observed that the doctrine considers that a *denunciation* has an application in the case of bilateral treaties, while with respect to multilateral treaties, as is the case of the American Convention, the proper term is *withdrawal*.

obstruct its future development. Moreover, Article 29.a of the Convention establishes that no provision of the Convention may be interpreted as "permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in (the) Convention or restrict them to a greater extent than is provided for herein." Any interpretation of the Convention permitting a State party to withdraw its recognition of the Court's compulsory jurisdiction would mean the suppression of the exercise of the rights or freedoms recognized by the Convention, would be contrary to its object and purpose as a human rights treaty and would deprive all the beneficiaries of the Convention of the additional guarantee of protection of those rights through the action of the jurisdictional body.[57]

In rejecting the possibility that a State may withdraw the recognition of its binding jurisdiction, the Court has placed special emphasis on the nature of the Convention as a treaty of collective guarantee of human rights. In this respect, the Court has held that

> the optional clause recognizing the contentious jurisdiction of the Inter-American Court is of particular importance to the operation of the system of protection embodied in the American Convention. When a State consents to that clause, it binds itself to the whole of the Convention and is fully committed to guaranteeing the international protection of human rights that the Convention embodies. A State Party may only release itself from the Court's jurisdiction by renouncing the treaty as a whole. The instrument whereby it recognizes the Court's jurisdiction must, therefore, be weighed in light of the object and purpose of the Convention as a human rights treaty.[58]

Citing the decision of the International Court of Justice in the Nuclear Tests Case,[59] the Inter-American Court has held that even when the international obligation in question has been undertaken by means of a unilateral declaration, it is binding and the State must follow a course of

57. *Ibid*., paras. 35 and 41 and 34 and 40, respectively.
58. *Ibid*., paras. 46 and 45, respectively.
59. International Court of Justice, *Nuclear Tests case (Australia v. France)*, judgment of 20 December 1974, p. 268 and *Nuclear Tests case (New Zealand v. France)*, judgment of 20 December 1974, ICJ Reports (1974), p. 473, para. 49.

conduct consistent with its declaration. The Court emphasized that, in spite of its optional nature, a declaration of acceptance of the contentious jurisdiction of an international tribunal, once done, does not authorize the State to later change its content and scope. Again citing the International Court of Justice in the Case concerning Military and Paramilitary Activities in and against Nicaragua,[60] the Court has observed that the right of immediate termination of declarations with an indefinite duration is far from established and it appears from the requirement of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable period for the withdrawal or denunciation of a treaty that does not contain any provision regarding the duration of its validity. Therefore, in the judgment of the Court, in order that the acceptance of the optional clause be terminated unilaterally, the relevant rules of international law of treaties must be applied, which clearly preclude such termination or release with immediate effect.[61]

The Court has warned that, in view of the special nature and object and purpose of the Convention, an analogy should not be made between the permissive State practice developed under Article 36.2 of the Statute of the International Court of Justice and acceptance of the optional clause of the binding jurisdiction of the Inter-American Court. In its opinion, resolving human rights cases (conferred on tribunals such as the Inter-American and European Courts of Human Rights) cannot be compared to the peaceful settlement of international controversies in purely inter-State controversies (conferred on a tribunal such as the International Court of Justice). Since it a question of fundamentally distinct contexts, States cannot expect to have, in the first of such contexts, the same discretion that they have traditionally had with respect to the second. According to the Court, there is no way to compare a unilateral juridical act done in the context of purely inter-State relations (such as recognition, promise, protest or denunciation), which are "independently consummated," with a unilateral juridical act done within the framework of treaty law, such as

60. International Court of Justice, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility,* judgment of November 26, 1984, ICJ Reports 1984, p. 420, para. 63.

61. *Ivcher Bronstein Case. Competence* and *Constitutional Court Case. Competence*, *supra* note 40, paras. 52-53 and 51-52, respectively.

the acceptance of an optional clause of the binding jurisdiction of an international tribunal. According to the Court, that acceptance is determined and shaped by the treaty itself, especially through fulfillment of its object and purpose.[62]

In accordance with the reasoning of the Court, a State that accepts the Court's binding jurisdiction under Article 62.1 becomes bound by the Convention as a whole. In its opinion, the goal of preserving the integrity of obligations under the Convention arises from Article 44.1 of the Vienna Convention on the Law of Treaties and is based precisely on the principle that the denunciation (or withdrawal of recognition of a treaty's mechanism) may only be done in relation to the treaty as a whole, unless the treaty so provides or the parties agree otherwise. According to the Court, the American Convention is clear in providing for its denunciation but not for the denunciation or release from its parts or clauses, since the latter would affect the integrity of the whole. Applying the criteria of Article 56.1 of the Vienna Convention, it does not appear to have been the intention of the parties to permit this type of denunciation or release, nor can this be inferred from the nature of the American Convention as a human rights treaty. However, if such a release were possible, a hypothesis that the Court rejects, it could not in any way have an immediate effect. The Court recalled that Article 56.2 of the Vienna Convention stipulates that a party must give at least twelve months notice of its intention to denounce or withdraw from a treaty.[63]

The States parties to a controversy may also have recognized or recognize the Court's jurisdiction through a special agreement,[64] if one or both of them have not previously consented to the exercise of that jurisdiction. This alternative permits the Commission, if the State has not accepted the Court's jurisdiction, to invite it to do so in a particular case. In fact, the Commission did so to the Government of Panama in the case of Hugo Spadafora,[65] to the Government of El Salvador in the cases of

62. *Ibid*., paras. 47-49 and 46-48, respectively.
63. *Ibid*., paras. 50-52 and 49-51, respectively.
64. Article 62.3 of the Convention.
65. I/A Commission H.R., Resolution No. 25/87, Case 9.726, Panama, adopted September 23, 1987, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1987-1988, General Secretariat of the Organization of American States, Washington, D.C., 1988, p. 234, operative para. 6.

Manuel Antonio Alfaro Carmona,[66] Wilfredo Navarro Vivas[67] and José Walter Chávez Palacios[68] and to the Government of Nicaragua in the cases of Edgar Macías[69] and Genie Lacayo,[70] a recommendation that was only accepted in the last case and that coincided with the declaration of general acceptance of the Court's jurisdiction.

***b. The actors***

With respect to who may request a decision of the Court, pursuant to Article 61.1 of the Convention only the States parties and the Commission have the right to refer a case to the Court. Employing the word complainant is, therefore, not appropriate in this context since it could be a State that has been denounced to the Commission.

The formal standing of the Commission offers no difficulties. Since its intervention presents special characteristics, it is well to underscore that, in its role before the Court as the complainant, the Commission does not exactly act as the agent of the victim or the petitioner but exercises a right that converts it into a type of *Ministerio Público* of the inter-American system.[71]

It remains to be defined whether Article 61.1 refers to the States parties to the Convention, the States that are parties to the proceedings before the Commission or the States parties to the Convention that have accepted the Court's jurisdiction and have also accepted the Commission's competence to process communications that other States present against them for the violation of obligations undertaken in the Convention. While

66. I/A Commission H.R., Report No. 1/91, Case 9.999, El Salvador, adopted February 11, 1991, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1990-1991, General Secretariat of the Organization of American States, Washington, D.C., 1991, p. 188, operative para. 2.

67. I/A Commission H.R., Report No. 2/91, Case 10.000, El Salvador, adopted February 13, 1991, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1990-1991, *ibid*., p. 98, operative para. 2.

68. I/A Commission H.R., Report No. 3/91, Case 10.001, El Salvador, adopted February 13, 1991, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1990-1991, *ibid*., p. 103, operative para. 2.

69. I/A Commission H.R., Resolution No. 29/86, Case 9.102, Nicaragua, adopted April 16, 1986, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1985-1986, *supra* note 30, p. 101, operative para. 3.

70. I/A Commission H.R., Report No. 2/93, Case 10.792, Nicaragua, adopted March 10, 1993, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1987-1988, *supra* note 65, p. 245, para. 7 of the recommendations.

71. *In the Matter of Viviana Gallardo et al.*, *supra* note 16, para. 22.

each State party to the Convention has a legitimate interest in the Convention being respected, in light of the importance that Article 45 gives to reciprocal relations among the States it appears to us that Article 61 must be interpreted similarly. If not, it would be absurd that a State that had not accepted either the Court's jurisdiction or the Commission's competence to process State communications could not denounce a State before the Commission but could do so, at a later stage, before the Court. When a case is submitted to the Court by a State, therefore, the Court could not hear it if both States have not accepted the Court's jurisdiction.[72]

There is also no doubt about the formal standing of the defendant State. Whether or not the Commission rules that a violation of the Convention has taken place, the defendant State may also have an interest in that the matter before the Commission be the object of a definitive judgment of the Court and, under the Convention, it has standing to submit the case to it. It is, however, not very realistic to think that a State, much less the State denounced, would submit a case to the Court. This makes the Commission the principal actor before the Court.

In a matter that mixes the *ratione materiae* and *ratione personae* jurisdictions, the Court has significantly restricted the Commission's right to refer a case to the Court. In a recent ruling, the Court has held that "a law that enters into force does not necessarily affect the legal sphere of specific individuals" and that it may require subsequent normative measures, compliance with additional conditions or simply its implementation by State officials before it can affect that sphere. In those circumstances, the Court considers that if the law is not self-executing and has not yet been applied in a specific case, the Commission may not submit a case against the State on the grounds of the mere promulgation of the law.[73] According to the Court, a non-self-executing law simply

72. On the other hand, Gerardo Trejos believes that the Court should hear a case submitted by a State that has not accepted its jurisdiction against a State that has done so, as long as the latter has not accepted the Court's jurisdiction under the condition of reciprocity. Rubén Hernández and Gerardo Trejos, LA TUTELA DE LOS DERECHOS HUMANOS, Ed. Juricentro, S.A., San José, Costa Rica, 1977, p. 101. In the same sense, Félix Laviña, SISTEMAS INTERNACIONALES DE PROTECCIÓN DE LOS DERECHOS HUMANOS, Depalma, Buenos Aires, 1987, p. 121.

73. I/A Court H.R., *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (Arts. 1 and 2 American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994, Series A No. 14, paras. 41-42.

empowers the authorities to adopt measures under it and is not, *per se*, a violation of human rights, suggesting that, to avoid the occurrence of such violation, the Convention provides for the mechanism of provisional measures.[74] The Court attempted to justify this reasoning by invoking Article 61.2 of the Convention, which requires that in order for the Court hear a case it is essential that the procedures set forth in Articles 48 to 50 of the Convention be completed, procedures that first require that the Commission receive a petition that contains a complaint or denunciation of a concrete violation of human rights with respect to specific individuals.[75] In support of this argument, the aforementioned judgment incorrectly cites the jurisprudence of the European Court of Human Rights beginning with the Klass *et al.* (Judgment of September 6, 1978, Series A No. 28), Marckx (Judgment of June 13, 1979, Series A No. 31) and Adolf (Judgment of March 26, 1982, Series A No. 49) Cases, which refer to the interpretation of the word "victim" employed in Article 25 of the European Convention.[76]

The Court's reasoning appears to us to be incorrect. In the first place, Article 25 of the European Convention required that the author of a petition to the Commission had to be the victim of a violation of a human right enshrined in that treaty, an aspect that differs radically from the American Convention, Article 44 of which permits any person or group of persons (without them having been or pretending to be victims of a violation) to present to the Commission petitions "containing denunciations or complaints of violation of this Convention by a State Party." Under the American Convention, a violation of the rights that it guarantees may be produced either *de facto*, by a concrete violation of those rights with respect to a specific person, or *de jure*, through the adoption of laws that are incompatible with the Convention and thus violate the obligation to ensure human rights that a State has assumed with respect to all persons subject to its jurisdiction without it being necessary to identify a specific victim. In the second place, with respect to complying with the procedures set forth in Articles 48 to 50 of the Convention, the Court has held that not all of them, for example the friendly settlement procedure, are absolutely

74. *Ibid*., paras. 42 and 44.
75. *Ibid*., para. 45.
76. *Ibid*., para. 47.

indispensable.[77] Finally, with regard to the exhaustion of domestic remedies, it appears evident that in a *de jure* violation of the Convention, that is, one arising from the adoption of a domestic law incompatible with the obligations under the Convention, there would be no internal remedies to exhaust.

### *c) The position of the individual before the Court*

From a formal point of view, the only parties to the proceedings before the Court are the Commission and the States that participate either as complainants or defendants. While there is a broad consensus as to whether the individual is a party to the proceedings, Judge Piza Escalante has argued that the only formal party, in a substantive sense, is "the victim or his assignees who possess the rights in question and are the beneficiaries of the provisions contained in the judgment, in keeping with Article 63.1 of the Convention, which specifically provides that 'fair compensation be paid to the injured party.'"[78] In fact, in view of the traditional criteria of classical international law, which until the end of the Second World War denied international standing to the individual, the mere circumstance of conferring the possibility of presenting a complaint to the Commission was difficult for the States to accept and was revolutionary when the Convention was adopted.[79] At the same time, it is possible that, in the near future, the position of the individual before the Court will be improved, as it has been thanks to the modifications of its Rules. Unlike what occurred with the reforms introduced by Protocol No. 11 of the European Convention,[80] in the inter-American system, although the individual may set in motion the Convention's machinery by denouncing a human rights violation to the Commission, the Convention does not permit him to refer a case to the Court. At least on one occasion, this circumstance has been

77. *Velásquez Rodríguez Case. Preliminary Objections*; *Fairén Garbi and Solís. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 34, paras. 44, 49 and 47, respectively.

78. *Velásquez Rodríguez Case, supra* note 2, dissenting opinion of Judge Piza Escalante, para. 3. According to which the Commission is only a *party* in the procedural sense, as the prosecutor, but never in the substantial or material sense, as a beneficiary of a judgment.

79. In fact, this institution was introduced in 1950 by the European Convention on Human Rights. The American Convention has only copied it, with some changes that have already been analyzed.

80. In effect, in the European system Protocol No. 11 of the European Convention on Human Rights, signed May 11, 1994 and in force since November 1, 1998, gives the individual direct access to the Court.

strongly criticized in a petition to the Commission,[81] leading the Commission to invite the State in question to accept the Court's jurisdiction for that particular case, a suggestion that was not taken by the State.

In the opinion of Judge Cançado Trinidade, "without the *locus standi in judicio* of both parties, any system of protection is irremediably mitigated, as it is not reasonable to conceive of rights without the procedural capacity to vindicate them directly."[82] He also contends that "in our regional system of protection, the spectre of the persistent denial of the procedural capacity of the individual petitioner before the Inter-American Court, a true *capitis diminutio*, arose from dogmatic considerations, belonging to another historical era, which tended to avoid his direct access to the international judicial organ. Such considerations, in my view, in our time lack support or meaning, even more so when referring to an international tribunal of *human rights*."[83] He proposes, *de lege ferenda*, to overcome gradually the paternalistic and anachronistic idea of the total intermediation of the Commission between the individual and the Court, according to clear and precise criteria and rules, previously and carefully defined.[84]

In any event, the Court's Rules authorize an individual to intervene in its proceedings. Article 22.2 of the former Rules of the Court requested the Commission to inform the Court whether the original petitioner or the victim's representatives or his next of kin were among those comprising its delegation. The Court could thus authorize their participation in the debates at the proposal of the Commission, which made it possible for the original complainant, his next of kin or his representatives to offer conclusions or proposals other than those of the Commission. At the annual Court-Commission meeting, held on October 12, 1998, in compliance with a resolution of the OAS General Assembly that ordered the organs of the system to coordinate their functions,[85] it was decided to give pre-eminence to the role of the victim in the inter-American system, principally before

81. *See* the arguments of the petitioner, Edgar Macías, in Case 9.102 against Nicaragua, *supra* note 30, pp. 76-85.

82. *See* his opinion in the *Castillo Páez Case. Preliminary Objections*, *supra* note 19, para. 14 and also in the *Loayza Tamayo Case. Preliminary Objections*, *supra* note 4, para. 14.

83. *Ibid*., para. 16 of both judgments.

84. *Ibid*., para. 17 of both judgments.

85. Resolution AG/RES. 1041 (XX-/90) and Resolution AG/RES. 1330 (I/A COURT H.R.V-/95).

the Court, and that the Court study the possibility of amending its Rules so that the complainants might present autonomous written submissions at all stages of the proceedings before the Court and not only at the reparations stage.[86] Article 2.23 of the current Rules provides that the expression "parties to the case" refers to the victim or the alleged victim, the State and, only procedurally, the Commission. In addition, Article 23 indicates that, after the complaint has been admitted, the alleged victim, his next of kin or his duly accredited representatives may present their pleadings, motions and evidence, autonomously, throughout the proceedings.

### *2. Jurisdiction ratione materiae*

In general terms, with respect to the jurisdiction *ratione materiae*, the Court has competence to hear any case that is referred to it concerning the interpretation and application of the provisions of the Convention.[87] Although the effect of the international law of human rights has been precisely to exclude everything related to human rights from the ambit of the domestic jurisdiction, in the Castillo Petruzzi *et al*. Case the State argued that the case referred to aspects inherent to State sovereignty that could not be renounced without affecting public order and that, therefore, although it did not expressly so indicate, are excluded from the scope of the jurisdiction *ratione materiae* of the Court. In the opinion of Peru, a sovereign republic has the right to promulgate the necessary laws to repress crimes committed in its territory and that the decision of any of its courts was final and could not be modified or rendered ineffective by any foreign or international authority.[88] The Court categorically rejected this argument, recalling that in the exercise of its sovereignty, Peru had ratified the Convention and that, as a consequence, had accepted the obligations embodied therein with respect to persons subject to its jurisdiction.[89] According to the Court, on becoming a State party, Peru accepted the jurisdiction of the organs of the inter-American human rights system and,

86. ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1998, General Secretariat, Organization of American States, Washington, D.C., 1999, p. 37 *et seq*.

87. Article 62.3 of the Convention.

88. *Castillo Petruzzi Case. Preliminary Objections*, *supra* note 19, para. 100(a).

89. *Ibid*., para. 101.

therefore, was obligated, in the exercise of its sovereignty, to participate in proceedings before the Commission and the Court and to ensure the obligations that are derived from the general application of the Convention.[90]

In the hearings convoked by the Court in the first cases against Honduras, the Commission argued that the Court had a limited jurisdiction that prevented it from reviewing all aspects relating to compliance of the requisites of admissibility of a petition addressed to the Commission or the applicable procedural norms of the different stages that must be completed in processing a case. The Court, in rejecting this position, recalled that, under the Convention and in the exercise of its contentious jurisdiction, it was competent to decide "all matters relating to the interpretation and application of (the) Convention," being these the attributes that, with respect to the Court, are accepted by the States that submit themselves to its jurisdiction. The broad terms in which the Convention is drafted show that the Court exercises "full jurisdiction over all of the issues relevant to the case." Therefore, the Court held itself competent to determine whether there has been a violation of any of the rights or freedoms recognized in the Convention and to adopt the appropriate measures and it is also competent to judge the procedural rules that justify its hearing a case and to verify compliance with all procedural norms involved in the "interpretation or application of (the) Convention." In the exercise of these attributes, the Court is not bound by what the Commission may have previously decided, but may freely decide in accordance with its own appreciation of the facts and the law.[91]

The dispute on the Court's competence to decide on the exhaustion of domestic remedies, regardless of whether this matter had been examined by the Commission, was again posed in the Gangaram Panday Case by *ad hoc* judge Cançado Trinidade. He stated that the division of functions under the Convention grants the Commission competence to decide on the admissibility of petitions that are presented to it, which is a final decision

90. *Ibid*., para. 102.

91. *Velásquez Rodríguez Case. Preliminary Objections*; *Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections*, *supra* note 34, paras. 28-29, 33-34 and 31-32, respectively.

that cannot be appealed, and the Court has the competence to decide whether there has been a violation of the Convention.[92] In our opinion, since the Convention charges the Court with the interpretation of its provisions, in the cases that are referred to it the Court may review any decision of the Commission without being bound by what has been decided by the Commission. In view of the terms of Article 61.2 of the Convention by which the Court may only hear cases when the procedures set forth in Articles 48 to 50 of the Convention have been completed, the Court is only prevented from ruling on those decisions where, whether for a failure to exhaust domestic remedies or for any other circumstance, a petition is declared inadmissible. According to Buergenthal, the Court may even review a decision of the Commission that declares inadmissible certain allegations in the petition, especially if the Court finds that some of the elements judged inadmissible by the Commission are closely related to the parts declared admissible and sent to the Court.[93]

Notwithstanding the clear language of Article 62.3 of the Convention, which grants the Court jurisdiction to hear all matters relating to the interpretation and application of the provisions of the Convention, the Court initially interpreted its jurisdiction *ratione materiae* in a way that limited the possibilities offered by the inter-American human rights system. Notwithstanding the States parties' obligation to ensure human rights pursuant to Article 1 of the Convention, in its early years the Court ruled that it was not competent to decide on what it called "the abstract compatibility" between a domestic law and the Convention, which it held pertained to its advisory and not its contentious jurisdiction.[94] That conclusion does not take into account the fact that the States parties undertake to ensure the full and free exercise of the rights enshrined in the Convention and diminishes the importance of *de jure* violations that a State may incur by adopting domestic laws incompatible with the

92. *Gangaram Panday Case, supra* note 4, separate opinion of *ad hoc* judge Cançado Trinidade, para. 6.

93. Thomas Buergenthal, *Judicial Fact-Finding: Inter-American Human Rights Court*, in FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS, ELEVENTH SOKOL COLLOQUIUM, edited by Richard B. Lillich, Transnational Publishers, Inc. Ardsley-on-Hudson, New York, 1992, p. 263 *et seq*.

94. I/A Court H.R., *Genie Lacayo Case. Preliminary Objections*. Judgment of January 27, 1995. Series C No. 30, para. 49 of the considerations.

Convention. This position, if it had prevailed, would have impeded access to an international remedy that would prevent the application of those norms, absurdly obliging the Court to await their materialization in a *de facto* violation of the Convention when a remedy might be too late, as in the case of a summary execution ordered by special courts. That unfortunate decision of the Court was corrected in the Loayza Tamayo Case, in which two decree-laws were declared incompatible with the Convention.[95] Moreover, in the Suárez Rosero Case, the Court recalled that the States parties cannot promulgate measures that violate the rights or freedoms recognized in the Convention and, with respect to an exception contained in Article 114 bis of the Ecuadorian Criminal Code referring to the right of detainees to be released when the conditions indicated in the provision exist, held that this exception deprived some of the inmates of a fundamental right on the basis of the crime of which they had been accused and that, therefore, intrinsically harmed everyone in that category of inmates. According to the Court, "this law violates *per se* Article 2 of the American Convention, whether or not it was enforced" in a concrete case.[96] More recently, the Court has insisted on the incompatibility of two decree-laws with the Convention and has held that the State has the duty to comply with its obligations under Article 2 of the Convention, which stipulates that the States undertake to adopt the legislative and other means that are necessary to give effect to the rights or freedoms embodied in the Convention.[97]

Although the Convention does not contain an express norm in this sense, it is obvious that the jurisdiction *ratione materiae* of the Court is limited not only by the nature of the facts but also by when they take place. Except when a State makes an express declaration accepting the Court's jurisdiction to hear a specific case, it could be argued that the Court is only competent to judge acts occurring after the date on which the State has accepted such jurisdiction. In fact, the problem is posed only if the acceptance of the Court's jurisdiction contains a reservation regarding that jurisdiction that is subsequent to the ratification of the Convention by that State. In the absence of an express reservation, even though the State

95. I/A Court H.R., *Loayza Tamayo Case*. Judgment of September 17, 1997. Series C No. 33, para. 68.
96. I/A Court H.R., *Suárez Rosero Case.* Judgment of November 12, 1997. Series C No. 35, para. 98.
97. *Loayza Tamayo Case. Reparations*, *supra* note 5, para. 164.

might have previously accepted the obligations imposed upon it by the Convention, it could be argued that the Court's jurisdiction extends only to those controversies that refer to acts that arise after the acceptance of its jurisdiction.

This aspect of the Court's jurisdiction was posed in the Genie Lacayo Case in which the victim was killed by military forces on October 28, 1990 and the acceptance of the Court's jurisdiction by Nicaragua took place on February 12, 1991 "subject to the reservation that this recognition of competence applies only to cases arising solely out of events subsequent to, and out of acts which began to be committed after, the date of deposit of this declaration with the Secretary General of the Organization of American States."[98] The government later made a special declaration accepting the Court's jurisdiction in that case, only and exclusively in the terms contained in the case presented by the Commission under the heading entitled "Purpose of the Application,"[99] in which no reference is made to the violation of the right to life. Without deciding on the effect of the existence of these two acts of acceptance of its jurisdiction, the Court held that it had competence to hear the case since the application referred to the violation of judicial protection and guarantees and equal protection, which occurred after the date on which Nicaragua deposited its general declaration accepting the Court's jurisdiction. In filing the application, the Commission did not refer to the violation of the right to life or personal integrity and thus the Court held that since it was not part of the application it could not be examined so as not to risk the adoption of an *ultra petita* decision.[100]

It is obvious that, before establishing its jurisdiction *ratione materiae*, the Court must define the exact nature of the matter that has been submitted to its consideration. In its judgment in the Cayara Case, the Court referred tangentially to this topic, holding that it had jurisdiction to decide on the preliminary objections presented by the State even though one of them was called "lack of jurisdiction of the Court," since this referred

98. *Genie Lacayo Case. Preliminary Objections, supra* note 94, para. 21.

99. *Ibid*.

100. *Ibid.*, paras. 22-26. While we share the criteria of the Court, we have to agree that, under Article 63 of the Convention, it is for the Court to qualify juridically the facts and decide whether there has been a violation of the Convention. The possibility of *ultra petita* is only posed because *the act of depriving the victim of his life* was not submitted to the Court and, therefore, the Court lacked jurisdiction to hear that aspect and decide whether there was a violation.

to the inadmissibility of the application but did not question the Court's power to rule on the exceptions interposed by the State.[101] In holding that the application was submitted out of time, the Court did not analyze the objection of "lack of jurisdiction of the Court," which is certainly different than one concerning the inadmissibility of the application.

Another aspect related to the jurisdiction *ratione materiae* refers to the victim of the violation. In the Cantos Case, Argentina argued that the alleged victim was not a person since, for the effects of the Convention, person is "every human being" and, therefore, the Convention did not apply to legal entities. It thus asserted that the companies of José María Cantos, which had different forms, were not protected by Article 1.2 of the Convention.[102] This argument was rejected by the Court in the passage indicated below.

In analyzing Article 21 of the Convention, which deals with private property, the Court observed that, according to the interpretation suggested by Argentina, which the Commission appeared to share, if a landowner acquires a harvesting machine to work his fields and the government confiscates it, Article 21 would protect him. But, if in place of the landowner, it was two poor farmers who formed a company to buy the same harvester and it was confiscated they could not invoke the Convention because the machine in question would be the property of a company. If the farmers, instead of forming a company, bought the harvester in a partnership, the Convention would protect them because, according to the principle that goes back to Roman law, a partnership does not constitute a legal entity.[103] After citing the judgment of the International Court of Justice in the Barcelona Traction Case,[104] in which the ICJ distinguished between the rights of the shareholders of a company and the rights of the company itself (pointing out that the domestic laws granted the shareholders certain direct rights, such as receiving dividends, attending and voting in

101. *Cayara Case*, *supra* note 4, para. 33.
102. *Cantos Case*, *supra* note 21, para. 22.
103. *Ibid*., para. 25.
104. International Court of Justice, *Barcelona Traction, Light and Power Company, Limited*, Judgment, ICJ Reports 1970, p. 36, para. 47.

the general meetings and receiving part of the assets of the company when liquidated), the Inter-American Court held that

> Argentina asserts that legal entities are not included in the American Convention and, therefore, its provisions are not applicable to them, since they do not have human rights. However, the Court observes that, in general, the rights and obligations attributed to companies become rights and obligations for the individuals who comprise them or who act in their name or representation.[105]

As the Court has pointed out on other occasions,[106] a different interpretation would be incompatible with the Vienna Convention on the Law of Treaties since it would lead to unreasonable results "because it implies removing from an important group of human rights the protection of the Convention."[107] In the opinion of the Court, "although the figure of legal entities has not been expressly recognized by the American Convention, as it is in Protocol No. 1 to the European Convention on Human Rights, this does not mean that, in specific circumstances, an individual may not resort to the inter-American system for the protection of human rights to enforce his fundamental rights, even when they are encompassed in a legal figure or fiction created by the same system of law."[108] The Court held that a distinction must be made in order to decide which situations may be analyzed under the American Convention. In the Ivcher Bronstein Case, which concerned the possible violation of the rights of persons as shareholders,[109] the Court referred to this by citing the European Court of Human Rights in a case in which there were three petitioners (the Pine Valley Company, the Healy Holdings Company, which

105. *Cantos Case*, *supra* note 21, para. 27.

106. *Constantine et al. Case*, *supra* note 47, para. 75; *Benjamin et al. Case*, *supra* note 47, para. 76; *Hilaire Case*, *supra* note 47, para. 84; I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of Legal Due Process*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No.16, paras. 58, 114 and 128; *Enforceability of the Right to Reply or Correction* (Arts. 14.1, 1.1 and 2 American Convention on Human Rights). Advisory Opinion OC-7/84 of January 19, 1984. Series A No. 7, para. 21 and *Restrictions on the Death Penalty* (Arts. 4.2 and 4.4 American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 48.

107. *Cantos Case*, *supra* note 21, para.28.

108. *Ibid*., para. 29.

109. I/A Court H.R.,*Ivcher Bronstein Case.* Judgment of February 6, 2001. Series C No. 74, paras. 123, 125, 138 and 156.

owned of Pine Valley, and Mr. Healy) and in which it held that the legal entities were only vehicles through which Mr. Healy, as a natural person, carried out a determined economic activity. In any case, the European Court rejected the argument of the State (similar to that of Argentina) and held that it was artificial to make distinctions among the petitioners in order to consider them victims of a violation of a right embodied in the European Convention.[110]

The Court may also extend its jurisdiction *ratione materiae* to the application of treaties other than the American Convention, such as the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) in the restricted terms of Article 19.6 of the Protocol; the Inter-American Convention to Prevent and Punish Torture, under the provisions of the last paragraph of its Article 8; the Inter-American Convention on Forced Disappearance of Persons, under its Article XIII, and the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) with the limitations indicated in its Articles 11 and 12, and not excluding its jurisdiction with respect to other human rights treaties. In the Baena Ricardo *et al.* Case, at the public hearing and in its final arguments, the Commission asserted a violation of the Protocol of San Salvador based on the application of Law 25 by the State affecting the exercise of freedom of association (one of whose expressions is the right to strike), which is guaranteed by Article 8 of the Protocol that had been signed, but not ratified, by Panama when the acts that gave rise to the complaint occurred. According to the Commission, by signing the Protocol the State undertook to refrain from committing acts that were not in accord with the object and purpose of the treaty and was, therefore, liable for the violation committed by its agents after the Protocol was signed with respect to the trade union rights of the dismissed workers.[111] The Court held that since, when the acts occurred, Panama had not yet ratified the Protocol it could not be accused of violations of the Protocol.[112] The Court, however,

110. *Cantos Case*, *supra* note 21, para. 29. The citation is to European Court of Human Rights, *Pine Valley Development Ltd and Others*, Judgment of 29 November 1991, Series A no. 222.

111. *Baena Ricardo et al. Case*, *supra* note 24, para. 95.

112. *Ibid*., para. 99.

has admitted that it has jurisdiction to apply human rights treaties other than the American Convention, but has clarified that, while it has broad powers to hear violations of human rights, they must refer to rights protected by the Convention, except for cases in which another international instrument ratified by the State grants it jurisdiction to hear the violations of human rights protected by this other instrument.[113] For example, in the Bámaca Velásquez,[114] Cantoral Benavides,[115] Villagrán Morales *et al.*,[116] and Paniagua Morales *et al*.[117] cases, the Court applied, in addition to the American Convention, the Inter-American Conventions to Prevent and Punish Torture and on Forced Disappearance of Persons.

### *3. JURISDICTION RATIONE TEMPORIS*

The Court's jurisdiction *ratione temporis* depends on when the State accepts its jurisdiction, whether by means of a special declaration or by special agreement, and while the acceptance remains in force.

In the Ivcher Bronstein and Constitutional Court Cases, the Court held that the declaration of acceptance of its jurisdiction, once made, cannot be withdrawn. In the opinion of the Court, the only way to withdraw its competence would be to denounce the Convention. That was precisely what Trinidad and Tobago did, after having ratified the Convention on May 28, 1991, when it denounced it on May 26, 1998. Pursuant to Article 78 of the Convention, the denunciation took effect one year later. In spite of the fact that the acts in the Hilaire, Constantine *et al*. and Benjamin *et al*. Cases had occurred before the date that the denunciation took effect, the State interposed a preliminary objection that questioned the Court's jurisdiction to hear those cases based on a restriction in its instrument of

113. I/A Court H.R., *Las Palmeras Case. Preliminary Objections*. Judgment of February 4, 2000. Series C No. 67, para. 34.

114. I/A Court H.R., *Bámaca Velásquez Case*. Judgment of November 25, 2000. Series C No. 70, paras. 126, 157 and 158.

115. I/A Court H.R., *Cantoral Benavides Case*. Judgment of August 18, 2000. Series C No. 69, paras. 98, 100 and 101.

116. I/A Court H.R., *The "Street Children" Case (Villagrán Morales et al.)*. Judgment of November 19, 1999. Series C No. 63, paras. 247-252.

117. I/A Court H.R., *The "White Van" Case (Paniagua Morales et al.)*. Judgment of March 8, 1998. Series C No. 37, paras. 133-136.

acceptance that it qualified as a "reservation," which the Court rejected in its totality.[118] Notwithstanding that decision, the State refused to recognize the Court's jurisdiction to continue hearing these cases and announced that it would decline the invitation to participate in the public hearings convoked by the Court, since it understood that, in the absence of a special agreement by it recognizing the Court's jurisdiction for those particular cases, the Court did not have jurisdiction.[119] The State did not mention whether this objection was based on the reasons previously presented in its arguments on the preliminary objections or on the denunciation of the Convention. In any event, the Court indicated that it did not share the reasoning of the State not to appear and not to participate in the proceedings, noted that the acts in the case occurred prior to the date on which the denunciation took effect and repeated that, as any international organ with jurisdictional functions, it had the inherent power to determine its own jurisdiction.[120] It is interesting to observe that this case is the result of the joinder of the Hilaire, Constantine *et al*. and Benjamin *et al*. Cases and that the applications with respect to the latter two cases were filed by the Commission after the denunciation of the Convention had taken effect.[121] The organs of the Convention, however, retain their jurisdiction to continue to hear the matters that, as of that date, are under consideration. In fact, the State did not object to this circumstance.

118. *Hilaire Case. Preliminary Objections*; *Constantine et al. Case. Preliminary Objection* and *Benjamin et al. Case. Preliminary Objections. supra* note 47, paras. 43, 42 and 42, respectively.

119. *See* the note of Trinidad and Tobago of February 8, 2000 in the *Case of Hilaire, Constantine and Benjamin et al*., *supra* note 41, para. 16.

120. *Ibid*., paras. 17, 19 and 20.

121. The application was filed on February 22, 2000 in the *Constantine et al. Case, supra* note 47 and on October 5, 2000 in the *Benjamin et al. Case, supra* note 47.

## Chapter XIII

## PRELIMINARY OBJECTIONS

As in proceedings before domestic courts, under the terms of the Convention a State may, as a first line of defense, present preliminary objections, either objecting to the Court's jurisdiction or to the admissibility of the complaint.

It is the Court that rules on preliminary objections because it is the Court that, pursuant to Article 62.1 of the Convention, has jurisdiction on all cases relating to the interpretation and application of the Convention and because, according to a firmly established principle of international law, each international tribunal is competent to decide its own competence. This principle was broadly developed by the Court in the Constitutional Court and Ivcher Bronstein Cases, in which Peru purported not to recognize the Court's competence by unilaterally withdrawing with immediate effect its acceptance of the Court's jurisdiction and at the same time it returned the respective applications to the Secretariat of the Court with the claim that the Court was no longer competent to hear those cases.[1] Although those objections were not interposed as preliminary objections, since they questioned its jurisdiction to hear the cases, the Court delivered a judgment on competence in each case that provided a detailed examination of the State's arguments.[2] When one year after those judgments, the State again in the Barrios Altos Case asserted the purported withdrawal of the declarations recognizing the Court's competence and returned the application, the Court simply sent a note signed by all of the judges to the OAS Secretary General, informing him of this fact and indicating that such a decision was inadmissible because the withdrawal had been rejected by the judgments on competence in the Ivcher Bronstein and Constitutional Court Cases and that Peru's attitude was a clear failure to comply with

1. I/A Court H.R., *Ivcher Bronstein Case. Competence*. Judgment of September 24, 1999. Series C No. 54, paras. 23 and 28-29 and *Constitutional Court Case. Competence*. Judgment of September 24, 1999. Series C No. 55, paras. 23 and 27-28.
2. *Ibid*., para. 25 *et seq.* in both judgments.

Article 68.1 of the Convention and a violation of the basic principle of *pacta sunt servanda*.[3] In any event, on January 23, 2001 Peru sent the Court a Legislative Resolution that repealed the prior Legislative Resolution. The new Resolution authorized the Executive Branch to execute all actions necessary to annul the results that might have arisen from the former Resolution, "fully reestablishing the contentious jurisdiction" of the Court."[4]

## A. THE NATURE AND CHARACTERISTICS OF THE PRELIMINARY OBJECTIONS

Preliminary objections cannot be exaggerated or interpreted out of the context for which they were established in order to be an insurmountable obstacle to the defense of an individual's rights vis-à-vis the State. Since preliminary objections are not a defense on the merits and the object and purpose of the Convention is the international protection of human rights, the Court has emphasized that in international jurisdiction the failure to observe certain formalities is not always relevant, since what is essential is that the conditions necessary for the preservation of the parties' procedural rights are not diminished or unbalanced and that the objectives of the different procedures are met.[5] Citing the Permanent Court of International Justice and the International Court of Justice, the Inter-American Court has observed that in international jurisdiction matters of form cannot be given the same importance as they might have under domestic law.[6] The Court must, therefore, interpret preliminary objections restrictively, bearing in mind the object and purpose of the Convention and limit itself to a determination of whether the essential procedural guidelines in the Convention have been respected and whether in processing

3. I/A Court H.R., *Barrios Altos Case*. Judgment of March 14, 2001. Series C No. 75, paras. 25-27.
4. *Ibid*., paras. 28-29.
5. I/A Court H.R., *Velásquez Rodríguez Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 33; *Fairén Garbi and Solís Corrales Case. Preliminary Objections.* Judgment of June 26, 1987, Series C No. 2, para. 38 and *Godínez Cruz Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 3, para. 36.
6. *Ibid*. The reference is to Permanent Court of International Justice, *Mavrommatis Palestine Concessions*, judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 34 and to International Court of Justice, *Aegean Sea Continental Shelf*, judgment, I.C.J. Reports 1978, para. 42.

the case the State's right of defense has been prejudiced or whether the procedure followed is flawed and consideration of the merits would have to be rejected *in limine*.[7]

### *1. THEIR EFFECT ON THE PROCEEDINGS*

By its very nature, this stage must be resolved as a preliminary question (*in limine litis*) before examining the merits of the matter raised in the application. Pursuant to Article 37.3 of the current Rules of the Court, the filing of preliminary objections does not suspend the proceedings on the merits nor the time periods or terms. A former version of the Rules indicated that the proceedings on the merits were not suspended unless the Court expressly so decided. The logical conclusion to be drawn of the elimination of this reference is that the proceedings on the merits are not suspended in any case. On the other hand, in controversies submitted to the International Court of Justice, the presentation of a preliminary objection suspends the proceedings on the merits.[8]

In the Cayara Case, although the Government of Peru requested that the proceedings on the merits be suspended until the preliminary objections were resolved, the President of the Court through the Secretariat informed the government that such proceedings could only be suspended if the full Court so decided and that, meanwhile, the periods would continue to run normally.[9] In other cases in which the State in question has requested that the proceedings on the merits be suspended until the objections were resolved, the Court has declared the requests out of order because they did not respond to an *exceptional situation* and the States did not present arguments to justify it.[10] An *exceptional situation* could be an application

7. *Velásquez Rodríguez Case. Preliminary Objections*; *Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections*, *supra* note 5, paras. 34, 39 and 37, respectively.

8. Article 79.5 of the Rules of the International Court of Justice, of April 14, 1978, as amended by the Court on December 5, 2000.

9. I/A Court H.R., *Cayara Case. Preliminary Objections*. Judgment of February 3, 1993. Series C No. 14, para. 7.

10. I/A Court H.R., *The "Panel Blanca" Case (Paniagua Morales et al.). Preliminary Objections*. Judgment of January 25, 1996. Series C No. 23, para. 8; *Castillo Páez Case. Preliminary Objections.* Judgment of January 30, 1996. Series C No. 24, para. 7; *Loayza Tamayo Case. Preliminary Objections*. Judgment of January 31, 1996. Series C No. 25, para. 8 and *Hilaire Case. Preliminary Objections*. Judgment of September 1, 2001. Series C No. 80, paras. 19 and 21.2.

filed against a State that had not accepted the Court's jurisdiction with a request in the application that the State accept it for this particular case. In such case, if the State has filed a preliminary objection that the Court lacks jurisdiction, it would hardly request that the proceedings on the merits be suspended.

In the Hilaire Case, the State in presenting a preliminary objection requested that the question of the merits be suspended until the Court had issued a decision on the preliminary objection. The Court rejected this request.[11]

A State has also tried to avoid a well-established principle in this area. Instead of requesting the suspension of the proceedings, it requested that the period to answer the application be extended until the preliminary objections were resolved,[12] which obviously would have the same effect. It is not surprising that the Court also declared this request out of order.[13]

The Court has been very careful to ensure that, due to the principle of procedural economy, suspension of the processing of the merits of the case does not mean that the question of the merits is decided before the preliminary objections are resolved. It simply means that the non-suspension of the proceedings on the merits does not affect the distinct and separate nature of the preliminary objections stage. It also implies the non-interruption of the deadlines and the carrying out of procedural actions, such as answering the application and the indispensable steps in presenting evidence.[14]

Along these lines, it should also be emphasized that the filing of preliminary objections does not prevent the Commission or the State in question from requesting the adoption of provisional measures or the Court from adopting them pursuant to Article 63.2 of the Convention. After all,

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11. Order of October 1, 1999, in I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al*. Judgment of June 21, 2002. Series C No. 94, para. 37, footnote 26.

12. I/A Court H.R., *The "Street Children" Case (Villagrán Morales et al.). Preliminary Objections*. Judgment of September 11, 1997. Series C No. 32, para. 6.

13. *Ibid*., para. 7.

14. *The "Panel Blanca" Case (Paniagua Morales et al.). Preliminary Objections*; *Castillo Páez Case. Preliminary Objections and Loayza Tamayo Case. Preliminary Objections*, *supra* note 10, para. 2 of the considerations in each case..

the Court is one of the organs of protection of human rights under the system established by the Convention and, as has been mentioned, it is not certain whether its competence to adopt provisional measures under Article 63.2 in "cases of extreme gravity and urgency" depends on the acceptance of the Court's jurisdiction referred to Article 62 of the Convention.

### *2. THEIR PURPOSE*

While preliminary objections do not paralyze the proceedings on the merits and are processed separately, their purpose is to raise the issue, prior to a decision on the merits of the controversy, that the Court does not have jurisdiction, that the application is inadmissible because the action has been extinguished or that it is out of order due to a failure to observe a prior step or the lack of an essential requisite.

Unlike an interlocutory decision on the domestic plane, preliminary objections on the international plane are not merely procedural but may put a definitive end to the controversy, thus becoming substantive. The International Court of Justice has held that, although a jurisdictional decision does not resolve the merits of the controversy, it is a decision of a substantive character inasmuch as it may put an end to the matter if the tribunal declares itself incompetent to hear it. Therefore, a decision that might have that effect is scarcely less important than a decision on the merits.[15] Under the inter-American system for the protection of human rights, the clearest example is the judgment in the Cayara Case, in which the Court refrained from examining the merits of the complaint due to the "manifest violations of the procedural norms established by the Convention itself,"[16] even though, according to the Court, the application contained serious charges of human rights violations and that justice cannot be sacrificed for the sake of mere formalities.[17]

It must be borne in mind that a State may present as a preliminary objection what in reality is a defense on the merits, such as the contention

15. International Court of Justice, *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan),* Judgment of 18 August 1972, I.C.J. Reports 1972, p. 46, para. 18.a.
16. *Cayara Case. Preliminary Objections, supra* note 9, para. 63.
17. *Ibid*., paras. 40 and 42.

that the Court lacks jurisdiction because there had not been a violation of the Convention. In those situations, what distinguishes true preliminary objections from a defense on the merits that is presented as a preliminary objection is the prior nature of the former because, notwithstanding the juridical qualification that they may have been given by the State in question, occasionally some objections go to the merits of the controversy and may not be strictly preliminary. For example, in the Villagrán Morales *et al*. Case, the Government of Guatemala maintained, *inter alia*, that the judgments of its courts were only subject to review by its Supreme Court of Justice, which excluded the possibility of a "fourth instance."[18] The Inter-American Court held that the application did not seek to review the decision of the Guatemalan courts but rather to decide whether the State had violated several precepts of the Convention and that, therefore, the argument of the State was not a preliminary objection but was related to the merits of the case.[19]

In cases in which it is not clear whether it is a preliminary objection or a defense on the merits, it is obvious that the competent body to decide on the nature of those objections is the Court itself and not the State in question. According to an old principle of law, incorporated into Article 36.6 of the Statute of the International Court of Justice, international tribunals have competence to decide on their own competence. In the Cayara Case, in which the Government of Peru had interposed as a preliminary objection its lack of jurisdiction,[20] the Court, after noting that Peru was a party to the Convention and that it had accepted the Court's jurisdiction, observed that the arguments of the State, which did not indicate the grounds for the preliminary objection, did not question the Court's authority to rule on the preliminary questions presented by the government that, in the Court's opinion, referred only to the inadmissibility of the application filed by the Commission.[21]

18. *The "Street Children" Case (Villagrán Morales et al.). Preliminary Objections, supra* note 12, para. 15.
19. *Ibid*., paras. 17-19.
20. *Cayara Case. Preliminary Objections, supra* note 9, para. 6.
21. *Ibid*., para. 33.

### *3. THEIR CLASSIFICATION*

Since there is not a definitive list of preliminary objections, States have been very imaginative in proposing a broad variety of them and have even repeated in different language objections that have already been raised. Before ruling on them, the Court has sometimes classified the objections into specific procedural categories. By way of example and not the longest list of preliminary objections filed by a State, in the Durand and Ugarte Case, Peru presented the following preliminary objections: 1) failure to exhaust local remedies, 2) case already decided by the Commission, 3) *res judicata*, 4) extemporaneous filing, 5) lack of jurisdiction of the Court, 6) procedural error, lack of competence and lack of standing (proceedings conducted before the Commission invalid for reasons of omissions and irregularities) and 7) lack of standing of the Commission. Taking into account their nature and similarities, the Court decided to analyze those preliminary objections under the following procedural principles: a) exhaustion of local remedies (objection 1), b) matter decided, *res judicata* and lack of jurisdiction of the Court (objections 2, 3 and 5), c) extemporaneous filing of the petition (objection 4) and d) procedural error, lack of competence to take action and lack of standing of the Commission (objections 6 and 7).[22] Inversely, in cases against Trinidad and Tobago in which the State interposed what was supposedly a preliminary objection based on three arguments, the Court examined the State's arguments under two different aspects: the admissibility of the application (either the extemporaneous presentation of the application or the extemporaneous "acceptance of the jurisdiction of the Court") and the lack of jurisdiction of the Court.[23]

To the extent that, given the nature and characteristics of international jurisdiction, the preliminary objections do not correspond exactly to categories in domestic law, it is not possible to use the same criteria of

22. I/A Court H.R., *Durand and Ugarte Case. Preliminary Objections*. Judgment of May 28, 1999. Series C No. 50, paras. 15 and 29.

23. *Hilaire Case. Preliminary Objections*, *supra* note 10, para. 29 *et seq*.; I/A Court H.R., *Constantine et al. Case. Preliminary Objections*. Judgment of September 1, 2001. Series C No. 82, para. 29 *et seq*. and *Benjamin et al. Case. Preliminary Objections*. Judgment of September 1, 2001. Series C No. 81, para. 29 *et seq*.

classification used by the latter. In principle, the objections may be classified by considering: a) the definitive or temporary effect that is sought, b) whether it concerns the application as a whole or only part of it and c) its purpose, whether it objects to the jurisdiction of the Court or to the admissibility of the application. In practical terms, what is more important than distinguishing between the types of objections is to know whether the objections are preliminary or not,[24] as this may prevent the examination of the merits of the controversy.

***a) According to their effect***

Most of the objections that have been interposed to date are of a peremptory nature and, therefore, have the purpose of definitively terminating the proceedings. Some objections, however, may have a merely delaying effect and, being accepted, do not preclude the possibility that the same matter may again be presented to the Court. Among those with a peremptory nature is, for example, the objection of *res judicata*, understanding by that the existence of a previous decision by the same tribunal or another body of international proceeding for settlement that would prevent a new examination of a matter that has already been decided. On the other hand, the objection of the failure to exhaust domestic remedies, if accepted, does not prevent it from being presented to the Court once the pending remedies have been exhausted.

***b) According to their scope with respect to the application***

Preliminary objections usually have the purpose of opposing the application as a whole. It is also possible that the objection refers only to a part of the application and that, therefore, if accepted, only terminates the proceedings with respect to that part and the examination of the rest of the application would continue. For example, in the Blake Case the Court declared "partially founded" the objection interposed by the State on whether the State's acceptance of the Court's jurisdiction was made exclusively for cases occurring after the date of deposit of that declaration and that, therefore, the Court was not competent to rule on the responsibility

24. *See,* in this respect, the dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock in International Court of Justice, *Nuclear Tests Case (Australia v. France),* Judgment of 20 December 1974, I.C.J. Reports 1974, p. 363.

of Guatemala with respect to the detention and death of Nicholas Blake. It decided, however, to continue hearing the case with respect to the effects and acts occurring after the date on which Guatemala recognized the competence of the Court.[25] In the Castillo Petruzzi *et al*. Case, the State objected that one of the violations of the Convention alleged by the Commission was not included in the Commission's Article 50 Report. To the extent that the State was not informed of this part of the application and thus could not refute it before the Commission, it could not use its right at that stage. The Court accepted this objection with the effect that it was not part of the proceedings on the merits.[26]

***c) According to their purpose***

A final classification is composed of the elements to which a State may object. In general terms, preliminary objections may refer either to the lack of the Court's competence to hear the case for any reason or the inadmissibility of the application. It is not always easy to distinguish between objections to the Court's jurisdiction and those that question the admissibility of the application. One very frequent objection, the failure to exhaust domestic remedies, may be seen as a condition precedent to the jurisdiction of the organs of the Convention or simply as a requisite of the admissibility of the application.[27] In the Cantoral Benavides Case, an objection interposed by Peru regarding the failure to demand that the State conform its anti-terrorist legislation to the Convention referred to both elements. On the one hand, it objected to the Court's jurisdiction by pointing out that this was a domestic matter within the exclusive competence of the Peruvian authorities and, on the other hand, it suggested that, since it had not been raised before the Commission or included in the Article 50 Report, there was no "prior demand" that could be refuted by the State, making it inadmissible.[28] It is interesting to observe that the

25. I/A Court H.R., *Blake Case. Preliminary Objections.* Judgment of July 2, 1996. Series C No. 27, para. 22 of the expository part and operative paras. 1-2.

26. I/A Court H.R., *Castillo Petruzzi et al. Case. Preliminary Objections*. Judgment of September 4, 1998. Series C No. 41, paras. 65-66, 68-69 and 105.2 and .3.

27. I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Case. Preliminary Objections*. Judgment of February 1, 2000. Series C No. 66, para. 32.

28. I/A Court H.R., *Cantoral Benavides Case. Preliminary Objections.* Judgment of September 3, 1998. Series C No. 40, paras. 42 and 44.

Court dealt with this issue as proposed by Peru, as if it were only one objection and not as if it concerned two entirely different questions.

***i. The lack of jurisdiction of the Court.*** We have already referred to the components of a material, personal and temporal nature that determine the Court's jurisdiction: the subject of the application (jurisdiction *ratione materiae*), the parties that intervene in the proceedings, referring to both the *locus standi* of the complainant and the defendant (jurisdiction *ratione personae*) and when the acts denounced occurred in relation to when the Convention entered into force for the State in question (jurisdiction *ratione temporis*). The absence of any of these elements obviously means that the Court cannot hear a case that is submitted to its consideration and would mean the acceptance of an objection of a lack of jurisdiction of the Court.

Since the Convention itself requires that special declaration be made expressly accepting the Court's jurisdiction, it is difficult for a State that has made the declaration to argue the lack of competence of the Court, unless one of the aforementioned elements is invoked. This has not prevented States, very frequently and sometimes with a complete lack of seriousness, from objecting to the Court's competence. For example, in the Villagrán Morales *et al*. Case, Guatemala contended that an intervention of the Inter-American Court in a case already decided by its courts infringed the principle of State sovereignty and independence, enshrined in the OAS Charter.[29] Similarly, in the Castillo Petruzzi *et al.* Case, the State classified one of the objections "sovereignty and jurisdiction" and asserted that: a) there were inherent aspects to sovereignty that cannot be renounced without affecting public order, b) Peru was a sovereign Republic with full rights to enact the necessary laws to repress crimes committed in its territory, c) the sovereign decision of the legal organs of Peru could not be modified, much less rendered ineffective, by any national, foreign or international authority and d) the criminal offenses committed by nationals and foreigners in Peru should be punished by the competent courts of that country whose decisions are final.[30] In the Cantoral Benavides Case, Peru argued that the question

29. *The "Street Children" Case (Villagrán Morales et al.). Preliminary Objections*, *supra* note 12, para. 15.c.

30. *Castillo Petruzzi et al. Case. Preliminary Objections*, *supra* note 26, paras. 99 and 100.a.

of the compatibility of the anti-terrorist legislation with the Convention was "a domestic affair within the exclusive competence of the Peruvian authorities and that in no way can it be dealt with in a judicial proceeding such as the present one," an argument that was rejected by the Court, which pointed out that it could examine in the context of a concrete case, the substance and legal effect of a domestic law from the viewpoint of the international norms of human rights protection to determine the compatibility of the law with those norms.[31] In the Cesti Hurtado Case, Peru again put forward the argument of State sovereignty, supported by arguments on the power to administer justice as an exclusive function of the State, on the intervention in internal affairs of the State in violation of the OAS Charter and that an institution composed of persons who were not Peruvians could not question Peru's legal order.[32] The Court rejected this latter objection pointing out that the argument was not compatible with the obligations undertaken by the State in ratifying the Convention and recalled what it had already expressed in its judgment on preliminary objections in the Castillo Petruzzi *et al.* Case, where it held, *inter alia*, that Peru had accepted the jurisdiction of the organs of the inter-American human rights system and therefore obligated itself, also in the exercise of its sovereignty, to participate in the proceedings before the Commission and the Court and to assume the obligations that derive from them and from the general application of the Convention.[33]

In the cases against Trinidad and Tobago, this objection was raised more plausibly, by arguing that a *reservation* contained in its declaration of acceptance of the Court's jurisdiction made it operative "only to such extent that recognition is consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago; and provided that a judgment of the Court does not infringe, create or abolish any existing rights or duties of any private citizen."[34] The Court observed that such

31. *Cantoral Benavides Case. Preliminary Objections, supra* note 28, paras. 42 and 45.

32. I/A Court H.R., *Cesti Hurtado Case. Preliminary Objections*. Judgment of January 26, 1999. Series C No. 56, para. 35.

33. *Ibid*., paras. 37 and 43-44.

34. *Hilaire Case. Preliminary Objections, supra* note 10; *Constantine et al. Case. Preliminary Objections, supra* note 23 and *Benjamin et al. Case. Preliminary Objections, supra* note 23, paras. 43, 42 and 42, respectively.

declaration did not fall within the terms of Article 62.2 of the Convention and had a general scope that completely subordinated the application of the Convention to the internal legislation as decided by its courts, which would make it manifestly incompatible with the object and purpose of the Convention. According to the Court, Article 29(a) of the Convention establishes that no provision of the Convention may be interpreted as "permitting any State Party, group or person to suppress the enjoyment or exercise of the rights and freedoms recognized in (the) Convention or to restrict them to a greater extent than is provided for herein." It would, thus, make no sense to suppose that a State had purported, at that same moment, to restrict the Court from exercising its functions under the Convention. On the contrary, the mere acceptance by the State leads to the overwhelming presumption that it will subject itself to the Court's compulsory jurisdiction. If not, it would allow the State to decide, in each specific case, the extent of its acceptance of the Court's jurisdiction to the detriment of that compulsory function and would give the State discretion to decide which matters the Court could hear, which would make the exercise of its contentious jurisdiction completely ineffective.[35] According to the Court, to accept that declaration in the terms proposed by the State would lead to a situation in which the Court would have as its first point of reference the Constitution of the State and only collaterally the American Convention, a situation that would fragment the international legal order for the protection of human rights and would render illusory the object and purpose of the Convention. The Court, therefore, concluded that Trinidad and Tobago could not avail itself of the limitations found in its instrument of acceptance of the optional clause of the Court's compulsory jurisdiction, by virtue of the terms of Article 62 of the Convention, because this limitation was incompatible with the object and purpose of the Convention.[36]

Probably in view of the interchangeable nature that, in international law, is frequently attributed to the concepts of jurisdiction (understood as the power to declare the law) and competence (understood as the power to hear a determined matter), in the Genie Lacayo Case the Government of

35. *Ibid*., paras. 88, 90 and 92; 79, 81 and 83 and 79, 81 and 83, respectively.
36. *Ibid*., paras. 93 and 98, 84 and 89 and 84 and 89, respectively.

Nicaragua argued, as a preliminary objection, the lack of jurisdiction of the Court. The allegation of Nicaragua was based, *inter alia*, on the fact that its acceptance of the Court's competence was dated February 12, 1991 for acts occurring after that date. In addition, although Nicaragua subsequently accepted the Court's competence to hear this case, it did so in the precise terms of the application filed by the Commission, excluding the examination of acts that occurred prior to that date.[37] This objection was rejected by the Court since the alleged acts had occurred after the date on which Nicaragua made its general declaration accepting the Court's jurisdiction.[38] As has been pointed out, this same objection was lodged successfully in the Blake Case where the Court declared itself not competent to rule on the responsibility of Guatemala with respect to the detention and death of Nicholas Blake because it occurred before the acceptance of the Court's jurisdiction by the State.[39]

The effect of *res judicata* of domestic decisions has also been employed to object to a lack of competence. In the Cesti Hurtado Case, the State asserted that the Commission in filing the application purported to undermine the institution of *res judicata* by requesting that the proceedings before a military court be declared null and void.[40] According to the State, Mr. Cesti's imprisonment derived from a final judgment of the highest court of the military justice, had the authority of *res judicata* and, therefore, was "set and irreversible,"[41] suggesting that the Court did not have competence to admit and hear the application filed by the Commission. In its observations, the Commission noted that judicial decisions may be grounds for the international responsibility of the State and, therefore, the object of an international judicial proceeding.[42] The Court recalled that in international jurisdiction the parties and the matter in the controversy are, by definition, different than those in the domestic jurisdiction and that the fundamental aspect of the controversy before the

37. I/A Court H.R., *Genie Lacayo Case. Preliminary Objections.* Judgment of January 27, 1995. Series C No. 21, para. 21.

38. *Ibid*., paras. 23-26.

39. *Blake Case. Preliminary Objections, supra* note 25, para. 22 of the expository part and operative paras. 1-2.

40. *Cesti Hurtado Case. Preliminary Objections, supra* note 32, para. 35.a.

41. *Ibid*., para. 41.b.

42. *Ibid*., para. 36.d.

Court was not whether the alleged victim violated domestic laws, but whether Peru violated the international obligations that it undertook when it became a State party to the Convention.[43]

*Res judicata* at the international level, or the effect of judgments of international tribunals, has also been used to substantiate the Court's lack of competence. In the Durand and Ugarte Case, the State asserted that the Court because of its judgment in the Neira Alegría *et al.* Case, in which it had found Peru guilty for the same acts, lacked competence to hear the case. The Court rejected this argument, indicating that its judgment in one case does not prejudge others when they concern different persons, even though the facts may be the same. According to the Court, the Durand and Ugarte Case involved acts considered in the Neira Alegría *et al.* Case, but referred to violations of different persons since the case dealt with Mr. Durand Ugarte and Mr. Ugarte Rivera, who were not among the persons included in the Neira Alegría *et al*. Case.[44] However, in addition to the contention that this was a question of *res judicata*, Peru argued the lack of competence of the Court since there was a prior judgment on the same acts that gave rise to this case and that, therefore, the Court lacked objectivity and the ability to judge the case as a separate case, since it would feel compelled to follow its previous decision. The Court rejected this preliminary objection, for the reasons already expressed.[45]

To the extent that an objection filed by a State refers to the lack of standing to present the application, the *locus standi* of the complainant plays a role particularly worthy of mention and of examining among the preliminary objections for lack of jurisdiction. Pursuant to Article 61 of the Convention, only States parties and the Commission may refer a case to the Court and, as a corollary, the Court is only competent to hear the cases that are presented by those bodies. From the terms of Article 51 of the Convention in the sense that the matter may be referred to the Court "by the Commission" or "by the State concerned," it may be concluded that not any State party to the Convention may submit a case to the Court. In the case of an application filed by a State party, the absence of an interest

43. *Ibid*., para. 47.
44. *Durand and Ugarte Case. Preliminary Objections*, *supra* note 22, paras. 46 and 48.
45. *Ibid*., paras. 51 and 53-54.

on the part of the latter, although not manifest, could impede the Court from exercising its jurisdiction. On this point, we refer to what we already expressed when we examined the Court's competence with respect to the parties that intervene in the proceedings and in particular with respect to the party initiating the proceedings. In the Durand and Ugarte Case, the State filed as a preliminary objection the "lack of standing of the Commission" since it could not issue a report on a matter in which it had already acted as a party before the Court (referring to the acts in the Neira Alegría *et al*. Case that were the same acts denounced in this case) nor could it decide on a case already resolved by the Court (referring to its judgment in the Neira Alegría *et al*. Case), the Court limited itself to rejecting this objection on the basis of the arguments presented in that case, in which it rejected the objections of a case already decided by the Commission, *res judicata* and lack of competence.[46]

***ii. The inadmissibility of the application.*** A State may also oppose the admissibility of an application by alleging the existence of formal defects, the prescription of the action, the absence or omission of a procedural element or essential requisite that would prevent the initiation of proceedings, such as the omission of prior steps by the Commission, the violation of the guarantees which the State should have in proceedings before the Commission, the lack of competence of the Commission or the existence of some other defect that prevents its consideration by the Court. In practice, most of the preliminary objections filed by States concern the admissibility of the application, particularly the processing by the Commission.

As there is not a definitive list of circumstances that would allow opposition to the admissibility of the application, some States have been rather imaginative in presenting preliminary objections. They have also reformulated them after they have been rejected in a particular case or they have substituted others that are entirely different. With such a broad range of possible objections to the admissibility of an application, considering their substance and without offering an opinion of their relevance in the abstract, the objections may be classified into the following categories.

46. *Ibid*., paras. 15, 43, 48, 65, 67-68 and 70.

*(a) Defects of form*. The lack of compliance, real or apparent, with certain requirements of form in presenting the application, as well as with its content, has been among the objections interposed by States.

In the Paniagua Morales *et al*. Case, the Government of Guatemala argued what it called the "objection of the prescription of the right" to file the application due to obvious violations of Articles 51.1 of the Convention and 26 of the former Rules of the Court for failing to comply with the requisites of Article 61.1 of the Convention to refer a case to the Court,[47] since the application had not been accompanied with the original documents of the case. After making a detailed account of how previous cases had been filed, the Court observed that it had been its consistent practice, which had not been objected to, that the initial presentation of applications by telex or fax was followed by the sending, a few days later, of the original documents.[48] Article 26.1 of the former Rules required that the process be completed within fifteen days.

In the Castillo Petruzzi *et al*. Case, the State objected to the ambiguity in the manner of filing the application, asserting that there was no agreement between its purpose and the purpose on which it was based.[49] While the Court implicitly appeared to admit that there was no congruity between what was stated in the body of the application and the pleadings, the Court observed that, in accordance with the principle of *iura novit curia*, it could and should examine the application as a whole and consider its nature and the meaning of the requests of the petitioner in order to evaluate and resolve them.[50]

*(b) The omission of prior procedural requisites*. In the first cases against Honduras, the State objected, *inter alia*, to a) a lack of a formal declaration of admissibility by the Commission, b) a failure to attempt a friendly settlement, c) a failure to carry out an on-site investigation, d) a lack of a prior hearing by the Commission and e) the improper application of Articles 50 and 51 of the Convention,[51] all of which were rejected.

47. *The "Panel Blanca" Case (Paniagua Morales et al.). Preliminary Objections, supra* note 10, para. 23.
48. *Ibid*., paras. 31-42.
49. *Castillo Petruzzi et al. Case. Preliminary Objections, supra* note 26, paras. 27 and 90-93.
50. *Ibid*., para. 92.
51. *Velásquez Rodríguez Case. Preliminary Objections*; *Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 5, paras. 32, 35 and 37,

Among the objections interposed by Suriname in the Gangaram Panday Case, the State invoked the failure to comply with the terms of Articles 47 to 51 of the Convention,[52] while in the Genie Lacayo Case, the Government of Nicaragua alleged procedural errors by the Commission in the processing of the case and the improper joinder of petitions in the application filed with the Court.[53]

In the Cantoral Benavides Case, although the State had alleged lapses in the filing of the application, particularly the request that the Court declare that Peru had violated Article 2 of the Convention by not conforming its anti-terrorist legislation to its obligations under the Convention,[54] what was objected to was that this part of the application had not been raised by the petitioners before the Commission nor transmitted by the Commission to the State nor was it included in the Commission's Report and, therefore, in the absence of these steps it was inadmissible.[55] Under these circumstances, State claimed that the Commission lacked competence.

With respect to this same category of the omission of prior procedural requisites, although it could also be cited under the category of the lack of guarantees for the defense, in the Castillo Petruzzi *et al*. Case the State invoked the premature decision to submit the case to the Court. According to Peru, after it had been notified of the Commission's Report, the Commission granted it an extension to comment on the Report that was still pending when the Commission filed the application and it thus was a premature decision that invalidated the action of the Commission and nullified the filing of the application because it infringed a basic guarantee related to right to due process.[56] The Court observed that the decision of the Commission, "subject to the possible implementation of the recommendations" contained in the report, could be explained by the work system and the schedule that governed its sessions. In addition, the application was not filed immediately with the Court, but almost a month

respectively. In the Fairén Garbi and Solís Case, the Government of Honduras did not invoke the omission of a public hearing.

52. I/A Court H.R., *Gangaram Panday Case. Preliminary Objections*. Judgment of December 4, 1991. Series C No. 12, para. 28.

53. *Genie Lacayo Case. Preliminary Objections, supra* note 37, para. 6.

54. *Cantoral Benavides Case. Preliminary Objections, supra* note 28, paras. 15 and 26.

55. *Ibid*., para. 44.

56. *Castillo Petruzzi et al. Case. Preliminary Objections, supra* note 26, paras. 27 and 87.a.

after the decision to do so and two weeks after the expiration of the extension that had been granted to the State, which in any event did not comply with the Commission's recommendations.[57]

*(c) The extemporaneous filing of the application.* Once a State is notified of the Article 50 Report, Article 51 sets a three-month limit to submit the case to the Court. If the case is not filed within that period, the action is proscribed. In the Cayara Case, the State interposed as a preliminary objection the *litis finito* and the prescription of the application[58] and in the Paniagua Morales *et al*. Case, the Government of Guatemala interposed the objection of the prescription of the right of the Commission to submit the case to the Court for not having exercised this right within the period of three months established by Article 51.1 of the Convention and the objection of the absolute legal invalidity of the application, for obvious violations of Articles 51.1 and 26 of the Court's Rules, for not having complied with the requirements for filing an application with the Court.[59]

Due to some corrections or rectifications purely of form by the Commission in the initial filing of the application in the Castillo Petruzzi *et al*. Case, the State invoked the prescription of the application, because accepting the second text presented by the Commission as the definitive text would be an admission that the application was filed after the period of three months established in Article 51 had elapsed.[60] The Court rejected this objection, *inter alia*, because its President had notified the parties that the document considered valid to prepare their defense and submissions was the original application presented by the Commission.[61]

*(d) The lack of competence of the Commission.* This objection has been alleged, directly or indirectly, on many occasions. The lack of exhaustion of domestic remedies, initially invoked in the first cases against Honduras[62] and repeated in almost all the other cases in which there have

57. *Ibid*., para. 88.
58. *Cayara Case. Preliminary Objections, supra* note 9, para. 6.
59. *The "Panel Blanca" Case (Paniagua Morales et al.). Preliminary Objections, supra* note 10, para. 23.
60. *Castillo Petruzzi et al. Case. Preliminary Objections, supra* note 26, paras. 27 and 95.a.
61. *Ibid*., paras. 29 and 96-97.
62. *Velásquez Rodríguez Case. Preliminary Objections*; *Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 5, paras. 32, 35 and 37, respectively.

been preliminary objections,[63] points precisely to the Commission's competence to hear these cases. Another way of raising this objection may be seen in the Cayara Case in which, in addition to referring expressly to the Commission's lack of competence and to the inadmissibility of the complaint, the State alleged invalidity by estoppel on the part of the Commission,[64] which would obviously also attack the competence of the latter to file an application with the Court.

The invocation of prescription in the presentation of a complaint before the Commission in the Cantoral Benavides Case also impugned the Commission's competence because "the time period for filing the petition had expired, as it had been filed after the period of six months established by Article 46.1.b of the Convention"[65] and, therefore, the Commission lacked competence to hear the case.

A variety of this objection was interposed in the Castillo Petruzzi *et al*. Case, in which the State argued that the Commission lacked competence to hear the case due to the lack of status as a legal entity of the party that presented the complaint in the name of a non-governmental organization and of the lack of standing of that NGO.[66] The State argued that a party acting in the name or in representation of a legal entity has to be duly authorized, either by the by-laws of the organization or by an express authorization. In addition, it had not been accredited that the NGO that presented the petition was recognized as a non-governmental body.[67] The State also objected that the questioning of the sovereign acts of Peru was done by "an alleged legal entity under non-Peruvian private law and/or third persons who are not identified or whose identity is not known to the Peruvian State and who presumedly are not of Peruvian nationality."[68]

*(e) The lack of guarantees for the State's defense*. On more than one occasion a State has objected that the manner in which the Commission

63. See, among the most recent cases, *Cantoral Benavides Case. Preliminary Objections, supra* note 28, paras. 15 and 26; *Cesti Hurtado Case. Preliminary Objections, supra* note 32, paras. 18.1 and 30 and *Castillo Petruzzi et al. Case. Preliminary Objections, supra* note 26, para. 50.

64. *Cayara Case. Preliminary Objections, supra* note 9, para. 6.

65. *Cantoral Benavides Case. Preliminary Objections, supra* note 28, para. 6.

66. *Castillo Petruzzi et al. Case. Preliminary Objections, supra* note 26, paras. 27 and 75.

67. *Ibid*., para. 76.

68. *Ibid*., para. 81.a.

has conducted a case has reflected a manifest lack of impartiality or that the State has been deprived of the right to defend itself. In the Cayara Case, the State maintained that the application was inadmissible because the Commission had accepted the replies of the claimants out of time, it had improperly joined cases and it was manifestly biased.[69] Among the objections interposed in the Gangaram Panday Case, Suriname invoked the abuse of the rights that the Convention grants to the Commission.[70]

On the other hand, in the Castillo Petruzzi *et al*. Case, the State pointed out that the Commission's Report did not contain any recommendation on the alleged violation of Article 29 of the Convention in relation with the Vienna Convention on Consular Relations and that for a failure to exhaust the domestic jurisdiction on this point, the application should be rejected.[71] The Court considered that, while the application does not have to be a simple reiteration of the Commission's Report, it is also true that the application should not include violations of which the State was not aware during the proceedings before the Commission and which it could not refute at the proper time. The Court also recalled that, at that stage, the State could have admitted the facts, rejected them or arrived at a friendly settlement that would have avoided the filing of the application to the Court. According to the Court, if the State is not aware of certain facts or particular statements that are later included in the application, it cannot make use of the rights that it has at that procedural stage.[72] A few months later, in the Cesti Hurtado Case the State also argued that certain claims included in the application, particularly regarding the duty to punish those responsible for the acts that had been perpetrated against the victim and the reference to the violation of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment had not been among the recommendations made to the State in the Commission's Report nor were they among the conclusions contained in the Report[73] and, therefore the State did not have the opportunity to act with respect to them. Unlike what it had held four months previously, the

69. *Cayara Case. Preliminary Objections, supra* note 9, para. 6.
70. *Gangaram Panday Case. Preliminary Objections, supra* note 52, para. 28.
71. *Castillo Petruzzi et al. Case. Preliminary Objections, supra* note 26, paras. 65 and 66.a.
72. *Ibid*., para. 68.
73. *Cesti Hurtado Case. Preliminary Objections, supra* note 32, paras. 49-50 and 53.

Court rejected this objection recalling that, in its consistent jurisprudence, it had affirmed the State's duty to prevent, investigate and punish those responsible for the violations of human rights enshrined in the Convention and that, therefore, it was not essential that the Commission include in its report a reference to the investigation and punishment of the corresponding human rights violations in order that they be raised in the application since the Court could always examine those questions and resolve them in its judgment, regardless of whether they had been raised in the application.[74] In view of the Court's decisions in these two situations, what probably distinguishes the situations is, on the one hand, the existence of facts that were not debated in the Commission and, on the other, the presentation of new legal arguments in the application that did not coincide with what had been previously alleged before the Commission. The dividing line between these two aspects can, however, be very subtle.

## B. THE ADMISSIBILITY OF THE PRELIMINARY OBJECTIONS

The very wide variety of preliminary objections that might be interposed by States makes it necessary to examine the question of their admissibility, which the Court must decide as a preliminary question prior to its examination of the merits. Regardless of the objections' merits, they may be inadmissible because they were presented out of time, had a defect of form that would prevent them from being considered by the Court or because they were not strictly preliminary.

In the specific case of the preliminary objection of the failure to exhaust domestic remedies in the Gangaram Panday Case, although the Court held that it had been presented extemporaneously since the government had interposed this objection without having presented it to the Commission,[75] *ad hoc* judge Cançado Trindade wrote a concurring opinion in which he rejected, under any circumstances, the appropriateness of this objection before the Court. In his opinion, the exhaustion of domestic remedies is a question that is related to the admissibility of the petition

74. *Ibid*., paras. 52 and 54-56.
75. *Gangaram Panday Case. Preliminary Objections, supra* note 52, para. 40.

before the Commission and it is at the Commission where it must be alleged. If a State does not do so at that level it has tacitly waived the objection, the purpose of which is to permit it to remedy the presumed violation before the international organ decides on the merits of the complaint. On the other hand, if the State has not been successful in alleging that objection before the Commission, it may not reopen the discussion before the Court because, under the Convention, the Commission and the Court have clearly defined powers, with the Commission having competence to rule on the admissibility of petitions or communications and the Court having competence to decide, in contentious cases, whether there has been a violation of the Convention. In addition, Cançado Trindade rejected the possibility of considering the question of admissibility twice because it would generate a procedural inequality, creating a disparity between the parties since the individual cannot go to the Court to impugn the Commission's decision that declares inadmissible his petition for failure to exhaust domestic remedies.[76] Although in the Cantoral Benavides Case, the Court observed that the question of the failure to exhaust domestic remedies was "of pure admissibility"[77] (agreeing with the position of Cançado Trindade), the Court did not reject it but examined whether in effect the domestic legal remedies had been exhausted and then, responding affirmatively, rejected the objection interposed by the State.[78]

While there is no definitive list of preliminary objections, neither is there a consensus regarding the appropriateness of a preliminary objection on the inadmissibility of the petition presented to the Commission. In the Cantoral Benavides Case, in response to the Peruvian objection that the petition had been presented out of time to the Commission, the latter argued that such objection must be argued in the proceedings before it, which Peru did not do, and that it was untimely to invoke it before the Court.[79] The Court, however, did not refer to this matter.

In the Gangaram Panday Case, the Government of Suriname filed a preliminary objection for the abuse of the Commission's rights under the

76. *Ibid*., concurring opinion of ad hoc judge Cançado Trindade.
77. *Cantoral Benavides Case. Preliminary Objections, supra* note 28, para. 30.
78. *Ibid*., paras. 31-34.
79. *Ibid*., paras. 36.a and 37.c.

Convention because the latter had "appropriated for itself" the right to find a State responsible for human rights violations, for breaking the rule of confidentiality (which it had apparently done by including information on the case in its Annual Report), for the manner it determined the evidence, making an irregular use of the presumption of the truth of the acts denounced under Article 42 of its Rules and because of the abuses committed and the lack of evidence, the Commission had abused the right of petition in submitting the case to the Court.[80] The Court observed that in drafting its report and including in it the facts and conclusions, the Commission was fulfilling the functions that the Convention assigns it, that the 1990-1991 Annual Report referred to the case but did not reproduce the Article 50 Report and that the case had already been submitted to the Court when the Annual Report was published. In addition, the Court did not find any evidence in the record that the Commission had made use of the presumption of the truth of the acts denounced.[81] The Court, however, did not decide on whether a preliminary objection such as the one that the government called an "abuse of right" has a legal basis under the Convention.

### *1. THE COMPETENT BODY*

Whether the preliminary objections question the jurisdiction of the Court or the admissibility of the application, the competent organ to rule on them is, in any case, the Court itself. The decision of the Court in the Cayara Case could, however, raise doubts on this matter when it stated that while the government filed a preliminary objection that it called "lack of jurisdiction of the Court," in its reasoning "it does not dispute the power of the tribunal to rule on the objections interposed by the Government, for they refer only to the inadmissibility of the application."[82] In this respect, it is timely to recall that, as has been pointed out, the golden rule in this area is the generally accepted principle of law that every tribunal has competence to rule on its own competence.

80. *Gangaram Panday Case. Preliminary Objections, supra* note 52, paras. 29-34.
81. *Ibid*., paras. 31-35.
82. *Cayara Case. Preliminary Objections, supra* note 9, para. 33.

Nonetheless, the argument that the question of the admissibility of the petition is the exclusive competence of the Commission is a matter that has not yet been definitively clarified since the Court's sometimes enigmatic language lends itself to several interpretations. In the Juan Humberto Sánchez Case, the Court repeated "its inherent authority to exercise its jurisdiction *in toto* in the proceeding followed before the bodies of the inter-American system for protection of human rights, without this involving review of the proceeding carried out before the Commission in a case that has been submitted to the Court."[83]

### *2. WHEN TO INTERPOSE PRELIMINARY OBJECTIONS*

Article 27 of the Rules adopted by the Court in August 1980 only indicated that the preliminary objections should be formulated "no later than before the expiration of the period set for the first activity of the written procedure, to be done by the party that interposes the objection."[84] Subsequently, Article 31.1 of the amended Rules provided that preliminary objections could only be interposed within 30 days following notification of the application. A continuing evaluation of the procedures established in the Rules led to the adoption on September 16, 1996 of Article 36.1, which provided that preliminary objections could only be interposed within the two months following the notification of the application. Article 36.1 of the current Rules provides that preliminary objections may only be filed in the reply to the application, that is, within the two months following notification. While the period continues to be identical to the previous period, the fact that the objections must be included in the reply to the application implies a significant change.

There may be special circumstances that justify an extension to the period to present preliminary objections. For example, in the Benavides

83. I/A Court H.R., *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003. Series C No. 99, para. 64.

84. In fact, in the first cases against Honduras, the first submission by the government formulating objections to the admissibility of the application was presented five and a half months after being notified of the application, which was after the expiry of the period established for the government to present its reply to the application. See *Velásquez Rodríguez Case. Preliminary Objections*; *Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections*, *supra* note 5, paras. 3 and 7 in all three cases.

Cevallos Case the State argued that the application had been initially notified in English and, therefore, requested, *inter alia*, an extension of two months to interpose preliminary objections, which was granted.[85] A second request for an extension in this case was, however, rejected.[86] In the Hilaire Case, a few days after the two-month period of the Rules then in force had elapsed, the State interposed preliminary objections and requested an extension of two months to present the legal arguments on those objections, which the President of the Court granted.[87]

In a case in which the Commission presented a "corrected version" of an application, requesting that it replace the original, the State asked the Court which of the two applications should be considered valid. In view of this request, to ensure the transparency of the proceedings the President of the Court decided to suspend the period to answer the application and to interpose preliminary objections until the Commission presented a clarification of the corrections made to the original text of the application. In spite of the foregoing, Peru presented its preliminary objections before the Commission made the clarifications requested by the President. After receiving the clarifications, the President resumed the period to interpose preliminary objections and requested the State to indicate whether it ratified the objections that it had already presented,[88] leaving open the possibility that it present new ones. Peru, however, simply endorsed its preliminary objections.[89]

Under the former Rules, which provided for a period of 30 days to present preliminary objections, in the Castillo Páez and Loayza Tamayo Cases, without discussing the nature of this period, the State claimed that only "working" days should be counted in computing the period, contending that this is what could be concluded from the fact that the Court's Rules gave a period of three months to answer the application[90]

85. I/A Court H.R., *Benavides Cevallos Case*. Judgment of June 19, 1998. Series C No. 38, para. 12.
86. *Ibid*., para. 14.
87. *Hilaire Case, supra* note 10, paras. 19-20.
88. *Castillo Petruzzi et al. Case. Preliminary Objections, supra* note 26, paras. 22 and 25-29.a.
89. *Ibid*., para. 30.
90. *Castillo Páez Case, Preliminary Objections* and *Loayza Tamayo Case. Preliminary Objections*, *supra* note 10, paras. 24 and 23, respectively. According to the Government of Peru, this difference is due to the fact that while the periods in months are counted in a calendar form, the periods in days only include working days.

and that this was consistent with the legislation and jurisprudence of Peru.[91] The Court rejected this position by stating that the difference between a period of months and a period of days in the Rules is not one of reckoning since in international proceedings time limits are not set with the same criteria that are used internally.[92] Unlike what occurs on the local level, international tribunals do not have uniform rules to determine which are non-working days, unless those are found expressly in the norms of international bodies.[93] In addition, it stated that the fact that the Court's Rules do not contain a provision similar to that of Article 77 of the Commission's Rules in the sense that "all time periods in days … shall be understood to be computed as calendar days" should be considered implicit in proceedings before the Court, as there is no point of reference that would permit a different reckoning.[94]

In favor of this position that the periods in days be computed continuously, the Court has cited Article 80.1.b of the Rules of Procedure of the Court of Justice of the European Communities and Articles 46 and 49 of the Rules of the Court of Justice of the Cartagena Agreement. In the former, it is provided that "a period expressed in weeks, months or in years shall end with the expiry of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day during which the event or action from which the period is to be calculated occurred or took place. If, in a period expressed in months or in years, the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last day of that month." For its part, Article 49 of the Rules of the Court of Justice of the Cartagena Agreement indicates that "the periods shall be reckoned in continuous days and be calculated excluding the day of the date on which it begins."[95]

On the other hand, the Court has stated that the procedural system is a means to attain justice and that the latter cannot be sacrificed for the sake of mere formalities. Within certain limits of time and reasonableness, therefore, certain omissions and delays in the compliance of the procedures

91. *Ibid*., paras. 25 and 24, respectively.
92. *Ibid*., paras. 28 and 27, respectively.
93. *Ibid*., paras. 29 and 28, respectively.
94. *Ibid*., paras. 31 and 30, respectively.
95. *Ibid*., paras. 32 and 31, respectively.

may be excused, provided that a suitable balance is maintained between justice and legal certainty.[96] In a case in which the preliminary objections were interposed a few days late with respect to the period set by the former Rules, the Court observed that "*this delay cannot be considered excessive* within the limits of timeliness and reasonableness considered by (the) tribunal as *necessary for excusing a delay in meeting a deadline.* … Further, that this very Court has been *flexible about the periods established in the Convention and in its Rules of Procedure*, including that indicated in Article 31.1 of the Rules of Procedure and has often granted extensions requested by the parties when they have shown reasonable cause."[97] In fact, although the Rules do not expressly so provide, this period has not been considered absolutely peremptory and at its request a State has been given extensions of fifteen days for the presentation of preliminary objections.[98] In cases in which this extension has not been requested, the Court has gone to the extreme of interpreting that the "omission was possibly due to its mistaken computation of the period, excluding the non-working days in accordance with its procedural rules."[99]

It is strange that a tribunal, called upon to apply the law and not to resolve according to abstract notions of justice, would refer to "delays that are not excessive," to the possible "need to excuse the compliance of a period," to the "flexibility with which the periods set in the Convention or its own Rules have been applied previously" or the "frequency with which extensions have been granted." In our opinion, this does not favor legal certainty or even the equality of arms of the parties, especially when the period provided to interpose preliminary objections (30 days in the former Rules or two months in the current Rules) is reasonable and more than sufficient taking into account that, after all the proceedings before the Commission and after having received the Article 50 Report, the application cannot be a surprise for the State in question. The Court not

96. *Cayara Case. Preliminary Objections, supra* note 9, para. 42.

97. *Castillo Páez Case, Preliminary Objections* and *Loayza Tamayo Case. Preliminary Objections*, *supra* note 10, paras. 35 and 34, respectively. (Emphasis added.)

98. I/A Court H.R., *Provisional Measures requested by the Inter-American Commission on Human Rights, Caballero Delgado and Santana Case.* Order of the President of February 16, 1993.

99. *Castillo Páez Case, Preliminary Objections* and *Loayza Tamayo Case. Preliminary Objections*, *supra* note 10, paras. 36 and 35, respectively.

only has not examined whether it is a peremptory or a prescriptive period, but has placed the periods in the Convention and in the Rules on the same level, forgetting that the former are the limits within which the States parties to the Convention have conferred competence on the Court.

In view of the object and purpose of the Convention and recalling the right of every person to be heard within a reasonable period,[100] a principle that should also guide the work of the organs of the system, it appears to us that the periods should be applied more rigorously and that, if the State does not formulate preliminary objections in due time, it should be understood that it has waived its right to interpose them. In this area, by way of analogy, it should be recalled that the Court has stated that the objection of the failure to exhaust domestic remedies in order "to be timely, must be made at an early stage of the proceedings by the State entitled to make it, lest a waiver of the requirement be presumed."[101] In the Mayagna Community Case, the Commission argued that a preliminary objection should be declared inadmissible because, *inter alia*, Nicaragua had tacitly waived it by not presenting it opportunely during the proceeding before the Commission and by "assuming inconsistent attitudes" with regards to its legal grounds. According to the Commission, the State's response to its Report did not raise any objection and even responded to its recommendations, thereby accepting its responsibility. The State was, therefore, estopped from claiming a failure to exhaust domestic remedies because after a long process of meetings between the Commission and the Community this was the first time that the State had presented the argument that domestic remedies had not been exhausted due to a procedural error of the victims.[102] The Court considered that it was evident that the State did not file the objection of the failure to exhaust domestic remedies during the first stages of the proceeding before the Commission and that, effectively, in its reply to the Report of the Commission it stated that it was complying with its recommendations and, therefore, it was impeded

100. Article 8.1 of the Convention.

101. *Velásquez Rodríguez Case. Preliminary Objections*; *Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections*, *supra* note 5, paras. 88, 87 and 90, respectively.

102. *The Mayagna (Sumo) Awas Tingni Case. Preliminary Objections*, *supra* note 27, paras. 46 and 50-51.

from interposing the objection for reasons of estoppel. In the opinion of the Court, in order to validly oppose the admissibility of the complaint presented on October 2, 1995 to the Commission, the State should have expressly and opportunely invoked the rule that domestic remedies must be exhausted.[103]

It is important to underscore that what has been said does not exempt the Court from its duty to ensure that it is competent to hear the case, even after the expiration of the term provided to interpose preliminary objections. Therefore, in the course of the steps necessary to establish its jurisdiction, while the Court could reject out of hand any filing of preliminary objections presented beyond the period, it would have to consider those arguments that object, precisely, to its competence. At the very least, the Court has the obligation to ensure that it has competence to hear the matter that has been submitted to its consideration.

Nevertheless, in the Cayara Case, the President of the Court, after having consulted the other judges, decided not to accept a request for "expanding the scope" of the preliminary objections interposed by the government, because "the proceedings would be reopened, the steps already taken at the appropriate time would be infringed and, furthermore, the procedural equilibrium and equality of the parties would be seriously affected."[104] Otherwise, it would be a proceeding used to avoid the period within which it should interpose the preliminary objections. This is precisely what it appears that Peru attempted in the Cantoral Benavides Case by requesting an extension to present new objections, a request that was rejected by the Court.[105]

On the other hand, the Court has accepted a State's request to take as not presented a filing of preliminary objections due to an error of substance and allowed the State to refile within the initial period.[106]

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103. *Ibid*., paras. 54-55 and 57.

104. *Cayara Case. Preliminary Objections, supra* note 9, para. 13.

105. *Cantoral Benavides Case. Preliminary Objections, supra* note 28, para. 15.

106. *The "Street Children" Case (Villagrán Morales et al.). Preliminary Objections, supra* note 12, paras. 8-10. Curiously, in the first submission four preliminary objections were interposed, while the second submission only included one.

### *3. THEIR GROUNDS AND THE NECESSARY EVIDENCE*

Preliminary objections are essentially juridical, but they do not preclude consideration of important elements of fact on which they are based since support of the objections is an aspect of great transcendence. Evidence may also be presented at this stage of the proceedings. Article 37.2 of the Court's Rules provides that the document setting out the preliminary objections must include the facts on which the objection is based, the legal arguments, the conclusions and supporting documents, as well as any evidence that the party wishes to produce. Applying this provision in the Gangaram Panday Case, as the government did not substantiate in its submissions or at the public hearing its grounds to assert that the Commission had committed the "abuse of the right of petition" in filing the application with the Court, the Court rejected this objection out of hand.[107]. The Court also rejected, because it was not substantiated, the preliminary objection interposed by the government that the Commission had not fully complied with the procedures established in Articles 47-51 of the Convention.[108] In the Castillo Petruzzi *et al*. Case, although the State maintained that the petitioners before the Commission lacked standing to question the sovereign acts of Peruvian authorities, it claimed that this objection related to aspects that should be considered with the merits of the case and, therefore, it reserved the right to argue the point.[109] Logically and in keeping with the purpose of preliminary objections, in its reply during the public hearings the Commission argued that "if the objections are raised now, they should be supported now."[110] In rejecting this objection on the basis of Peru's arguments, the Court did not decide on the need to support it or on the right time to do so.

In the Cantos Case, based on Article 1.2 of the Convention that provides "for the purposes of this Convention, 'person' means every human being," Argentina interposed the preliminary objection that the Convention is not applicable to legal entities and that, therefore, the business interests

107. *Gangaram Panday Case. Preliminary Objections, supra* note 52, para. 36. The reference that the Court makes is to Article 27.2 of its Rules then in force.

108. *Ibid*., para. 41.

109. *Castillo Petruzzi et al. Case. Preliminary Objections, supra* note 26, para. 81.a.

110. *Ibid*., para. 81.b.

of José María Cantos, which were formed under different companies, were not protected by Article 1.2.[111] According to the Court, the State did not explain the logical reasoning that it used to derive its conclusion from the text of that Article. The Court recalled that international jurisprudence has repeated that those who seek to use logic must show the steps used in this operation so that if the interpretation of the provision is based on invalid reasoning, the Court would have to reject the objection on lack of jurisdiction.[112]

As part of the evidentiary process, in the Gangaram Panday Case, the Government of Suriname requested that two witnesses be summoned for the public hearing on preliminary objections, which the Court accepted.[113] In the Cayara Case, the State requested in its preliminary objections and in a subsequent note that the Secretariat of the Court certify the receipt of the original application and "its subsequent withdrawal" by the Commission, a copy of the minutes of the meeting of the Court that accepted the request of the Commission and a copy of the minutes of the meeting at which the Commission adopted Resolution 1/91 and the second Report 29/91, because it had reason to believe that they were adopted after the Commission's session.[114] In the Paniagua Morales *et al*. Case, the Commission forwarded, as proof of the hour in which the application had been received by the Court, a memorandum of the Director of the OAS Department of Human Resources, certifying the hour of the fax sent by the Commission.[115]

The Court may also on its own initiative take steps to obtain evidence that would allow it to rule on the preliminary objections. With respect to the objection of the failure to exhaust domestic remedies in the Durand and Ugarte Case, the President of the Court requested the State to provide

111. I/A Court H.R., *Cantos Case. Preliminary Objections*. Judgment of September 7, 2001. Series C No. 85, para. 22.

112. *Ibid*., para. 31. The Court cites the arbitral award of July 31, 1989 on the maritime border between Guinea-Bissau and Senegal, Reports of International Arbitral Awards, vol. XX, pp. 135-136 and the arbitral award of October 13, 1995 on The Desert Lake, pp. 77-78.

113. In fact, the Government of Suriname did not made use of this right, since it later withdrew the appearance of the witnesses that it had offered. See *Gangaram Panday Case. Preliminary Objections*, *supra* note 52, para. 9.

114. *Cayara Case. Preliminary Objections*, *supra* note 9, paras. 9-10.

115. *The "Panel Blanca" Case (Paniagua Morales et al.). Preliminary Objections*, *supra* note 10, para. 4.

all the documentation on the writs of habeas corpus filed on February 26 and June 26, 1986 and any other writ of habeas corpus issued on behalf of the victims, as well as the case brought against them for the crime of terrorism.[116] In the Cantoral Benavides Case, the Secretariat of the Court in a note of October 1, 1966 requested the State that it ask the Supreme Court of Justice of Peru for a report on whether Mr. Cantoral Benavides or a person representing him had appealed the sentence of that Court of October 6, 1995. That document was not furnished by Peru.[117] Pursuant to the Court's instructions, the Secretariat also requested that Peru provide a duly certified copy of the judicial document that indicates the date of official notification to the alleged victim of the judgment of September 23, 1993 and of the legislation that governed all the procedural aspects related to the extraordinary writ of appeal both in military and ordinary justice. This document was not provided by the State.[118]

## C. THE PROCESSING OF PRELIMINARY OBJECTIONS

Preliminary objections are presented to the Secretariat of the Court and must contain the facts on which the objections are based, the legal arguments, the conclusions and supporting documents as well as any evidence that the State wishes to offer.[119]

The foregoing leads to the conclusion that this is a strictly regulated formal process that requires an express manifestation of will. Preliminary objections are, therefore, not invoked by a simple mention in passing without complying with the formalities or by mere data that are presented without the precise intention to object to the Court's jurisdiction or to the admissibility of the application. Although the preliminary objections were properly presented, the Court rejected the objection of the failure to exhaust domestic remedies in the Castillo Páez and Loayza Tamayo Cases on the grounds that in the proceedings before the Commission reference was made only to the evolution of those proceedings (not as a preliminary objection

116. *Durand and Ugarte Case. Preliminary Objections, supra* note 22, para.21.
117. *Cantoral Benavides Case. Preliminary Objections, supra* note 28, para. 18.
118. *Ibid*., para. 24.
119. Article 37.2 of the current Rules of the Court. Article 31 of the previous Rules required that the submission of preliminary objections be presented in ten copies, which the current Rules do not require.

of admissibility, properly speaking), which in the mind of the Court was not sufficient to consider it presented.[120] In the Constitutional Court and Ivcher Bronstein Cases, although the State limited itself to rejecting the Court's jurisdiction and to requesting that the respective applications be returned, the Court was particularly careful to rule on its competence and, therefore, it handed down two judgments on this specific topic, examining the relevance of the withdrawal by Peru of its acceptance of the Court's jurisdiction.[121]

It is not essential that the document that interposes the preliminary objections has a particular title, but it must be possible to conclude clearly the intention to make, as a preliminary question, objections to the Court's competence or to the admissibility of the application. In the first cases against Honduras, although the initial submission of the government formulated "objections" to the admissibility of the application and the Commission argued that in no part of the Government's submissions had it presented these objections as "preliminary objections," the Court had no problem treating them as such.[122] The Rules of the International Court of Justice are stricter and require, in the submission in which they are interposed, an indication of the facts and the law on which the objection is based, the conclusions of the State that has submitted them and the evidence that supports them.[123]

### *1. THEIR NOTIFICATION*

When the Secretariat of the Court receives the preliminary objections, it immediately notifies the President and the judges of the Court, the Commission (if it is not the complainant), the original complainant, if known, and the victim or his next of kin, if applicable. On this point, the Court's Rules have ignored that under Article 51 of the Convention the application may also be presented by the State concerned. This State may

120. *Castillo Páez Case. Preliminary Objections* and *Loayza Tamayo Case. Preliminary Objections*, *supra* note 10, para. 44 of both cases.

121. *Ivcher Bronstein Case. Competence* and *Constitutional Court Case. Competence*, *supra* note 1.

122. *Velásquez Rodríguez Case. Preliminary Objections*; *Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections*, *supra* note 5, paras. 7, 11, 25 and 28; 7, 11, 30 and 33 and 7, 11, 28 and 31, respectively.

123. Article 79.4 of the Rules of the International Court of Justice.

be the same State that has been denounced before the Commission (a hypothesis in which, of course, there would be no sense in having preliminary objections) or a State that under Article 45 of the Convention has presented to the Commission a communication alleging that another State had violated rights guaranteed by the Convention. Thus, there may be a complainant State that must be furnished with the preliminary objections.

### *2. THE WRITTEN OBSERVATIONS*

Pursuant to Article 36.4 of the Court's Rules, if the parties in the case wish to present written briefs on the preliminary objections, they may do so within a period of thirty days from the receipt of the respective communication. Those briefs could refer either to the merits of the objections or to their admissibility.

The President of the Court may set a deadline for the Commission to present a written brief on the preliminary objections filed by the State.[124] In the exercise of this right and before referring to their merits, in the Castillo Páez Case the Commission requested that the preliminary objections presented by the State be declared inadmissible[125] and it did the same in the Loayza Tamayo Case, asserting that the objections had been presented out of time.[126] In those cases, the State presented a brief that supported its preliminary objections,[127] which gave rise to a request by the Commission that this last submission of the government be considered not presented.[128] As has been pointed out, this raises a preliminary question that the Court must resolve before ruling on the merits of the preliminary objections.[129]

On the other hand, the Court has rejected observations to the preliminary objections made generically by the Commission, in which it made reference to what it had already argued in another case before the

124. *Gangaram Panday Case. Preliminary Objections, supra* note 52, para. 8.
125. *Castillo Páez Case. Preliminary Objections, supra* note 10, para. 8.
126. *Loayza Tamayo Case. Preliminary Objections, supra* note 10, paras. 6-7.
127. *Castillo Páez Case. Preliminary Objections* and *Loayza Tamayo Case. Preliminary Objections, supra* note 10, para. 11 in both cases.
128. *Ibid*.
129. *Ibid*., paras. 23 and 22, respectively.

Court. According to the Court, the Commission's request that the Court consider "as pertinent" arguments that were made in another case does not contribute to the development of the proceedings since, when the Commission presents observations to preliminary objections interposed by a State, it must relate them to the particular circumstances of the respective case. The Court, therefore, refused to examine the observations to the preliminary objections made in the context of other cases.[130]

### *3. THE PUBLIC HEARING*

Pursuant to Article 37.5 of its Rules, the Court, if it considers it essential, may convoke a public hearing to receive the points of view of the parties on the preliminary objections interposed by the State before ruling on them.[131] To date, the Court has almost always made use of this attribute and has held a public hearing to receive the arguments of the parties on the objections. Any of the parties may request that the hearing be postponed.[132]

This consistent practice of the Court was argued by the Commission in the Cantos Case in response to the State's request that a public hearing not be convoked on the preliminary objections and that the judgment be made on the basis of the elements contained in the record. The Commission suggested that, as a result of the Court's practice, the holding of a public hearing was obligatory. In ruling on the State's request, while the President of the Court did not decide on this aspect, after consulting the other judges he thought it best to convoke the public hearing to receive the arguments of the State and the Commission with respect to the preliminary objections.[133]

A case that does not follow the current practice is the Villagrán Morales *et al.* Case, in which the Court ruled on the preliminary objections

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130. *Cesti Hurtado Case. Preliminary Objections, supra* note 32, paras. 28-29.

131. I/A Court H.R., *Neira Alegría et al. Case. Preliminary Objections*. Judgment of December 11, 1991. Series C No.13, para. 9. *See*, also, *Gangaram Panday Case. Preliminary Objections*, *supra* note 52, para. 9 and *Durand and Ugarte Case. Preliminary Objections, supra* note 22, para. 19.

132. *The "Panel Blanca" Case (Paniagua Morales et al.). Preliminary Objections, supra* note 10, para. 10; *Castillo Páez Case. Preliminary Objections, supra* note 10, para. 10 and *Loayza Tamayo Case. Preliminary Objections*, *supra* note 10, para.10.

133. I/A Court H.R., Order of the President of April 23, 2001. *Cantos Case*, paras. 3 and 5 of the expository part and para. 2 of the considerations and the operative part.

solely on the basis of the written submissions. Similarly, in the Constantine *et al*. Case, the Commission waived the convocation of a public hearing on the preliminary objection, a position that was transmitted to the State and, in the absence of a response by the State, the Court decided to accept the Commission's request to dispense with the hearing.[134] Taking into account the decision in that case, in the Benjamin *et al*. Case, also against Trinidad and Tobago, the Court decided not to convoke a public hearing on the preliminary objections filed by the State.[135] It is important to emphasize, however, that in a previous case against Trinidad and Tobago, in which it had interposed the same preliminary objections, there had already been a public hearing[136] and, therefore, the Court had already had the opportunity to hear the arguments of the parties on the matter.

### *4. THEIR JOINING TO THE MERITS*

Although this is a preliminary and special question, which must be decided before ruling on the merits of the application, given the particular nature of the preliminary objection the Court could postpone its decision and order that it be examined with the merits. The objection may be closely related to the merits of the application and, therefore, could not be properly examined without entering into consideration of the merits. It is interesting to observe that the Rules of the International Court of Justice expressly provides for the possibility that an agreement between the parties that the preliminary objection be examined together with the merits of the case is binding on the Court.[137]

The examination of the preliminary objections together with the question of the merits may be part of a State's defense strategy, particularly when the objections are not entirely plausible. For example, in the Cantoral Benavides Case, the State itself requested the Court to admit the preliminary objections or, if not, to join them to the merits.[138] In contrast, in the Mayagna Community Case, it was the Commission that argued that the

134. *Constantine et al. Case*, *supra* note 23, paras. 23-25.
135. *Benjamin et al. Case*, *supra* note 23, para. 18.
136. *Hilaire Case*, *supra* note 23, paras. 19 and 24-25.
137. Articles 79.10 of the Rules of the International Court of Justice.
138. *Cantoral Benavides Case. Preliminary Objections*, *supra* note 28, para. 15.

State's arguments were related in part to the merits of the application and not specifically to the objection and, therefore, the Court should not declare the application inadmissible.[139] This should not be confused, however, with cases in which the objection is considered a defense of the merits and not a preliminary question[140] and with those in which the preliminary nature of the objection is not debated, but a ruling is postponed until after it is analyzed together with the question of the merits.

In the first three cases against Honduras, the Commission contended that the preliminary objection of the failure to exhaust domestic remedies was inseparably related to the merits since the lack of due process and effective domestic remedies in the Honduran legal system during the period when the acts occurred was evidence of a governmental practice of forced disappearance of persons that was exemplified by the cases under consideration.[141] The Court held that the invocation of certain objections to the rule of the exhaustion of domestic remedies, such as the ineffectiveness of such remedies or the absence of due process of law, is not only maintaining that the victim in not obligated to pursue such remedies but is also indirectly charging the State with another violation of its obligations under the Convention and that, in such circumstances, the preliminary objection of the failure to exhaust internal legal remedies is closely related to the merits.[142] In those three cases, there were also some formal considerations that contributed to the Court's ruling. In effect, the Court noted that the government had only responded to the Commission's requests for information, including those relating to domestic remedies, after long delays and without responding to the Commission's questions and that, in receiving the objection that the domestic remedies had not been exhausted, the Commission not only omitted to point out to the government that the objection had been presented out of time but it requested information on whether the domestic remedies had been

139. *The Mayagna (Sumo) Awas Tingni Case. Preliminary Objections, supra* note 27, para. 46.

140. *The "Street Children" Case (Villagrán Morales et al.). Preliminary Objections, supra* note 12, para. 19.

141. *Velásquez Rodríguez Case. Preliminary Objections*; *Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections, supra* note 5, paras. 83, 82 and 85, respectively.

142. *Ibid*., paras. 91, 90 and 93, respectively.

exhausted. Under those conditions, the Court held that it would not be proper to reject *in limine* the preliminary objection of the government without giving both parties the opportunity to substantiate their points of view.[143] Similarly, in the Genie Lacayo Case, which alleged the violation of the right to a fair trial (Article 8), to judicial protection (Article 25) and to equal protection (Article 24), "as the result of the Judicial Branch's reluctance to prosecute and punish those responsible and to order the payment of reparations for the damages caused" by the death of the victim, the Court held that the provisions invoked had to do with the administration of justice and, as is logical, were closely tied to the failure to exhaust the domestic legal remedies alleged by Nicaragua.[144] We must observe that this reasoning of the Court does not necessarily apply to preliminary objections other than the exhaustion of the internal legal remedies.

In other cases the Court has clearly separated the preliminary objection of the failure to exhaust domestic remedies from the question of the merits raised by the application that the procedural norms do not conform to the fundamental guarantees of due process enshrined in the Convention. In the Castillo Petruzzi *et al.* Case, in addition to contending that this defense had not been raised before it, the Commission rejected the allegation of the failure to exhaust internal remedies, pointing out that the complaint was transmitted to Peru after the Supreme Council of Military Justice had delivered its judgment, but added that it would not have been necessary to exhaust them because the procedural and substantive norms that were applied in the case did not conform to the principles of due process of law. The Court did not consider the assessments of the parties as to whether the nature of the proceedings against the alleged victims conformed to the principles of due process of law set forth in the Convention since that analysis should be reserved for the ruling on the merits and rejected this objection for not having been presented opportunely before the Commission.[145] The Court in the Cesti Hurtado Case went further and observed that the topic of the exhaustion of domestic remedies had already been raised before the Commission, which had rejected it because the

143. *Ibid*., paras. 89-90, 89 and 91-92, respectively.
144. *Genie Lacayo Case. Preliminary Objections, supra* note 37, para. 29.
145. *Castillo Petruzzi et al. Case. Preliminary Objections, supra* note 26, paras. 52-53 and 56-57.

remedies had been exhausted at the highest judicial level with the decision on the writ of habeas corpus. According to the Court, while this last question is essentially substantive, the objection of the failure to exhaust domestic remedies is a question of procedure and admissibility. Since the State's arguments referred to the merits, the Court decided to consider it with the examination of the merits of the case and rejected the preliminary objection as inappropriate.[146] It is not entirely clear if the Court rejected the objection of the exhaustion of domestic remedies because it was an objection of pure admissibility that had already been rejected by the Commission,[147] because the domestic remedies had effectively been exhausted with the writ of habeas corpus or because, since consideration of whether the victim had legal due process is an essentially substantive question, it did not concern the objection of the failure of the exhaustion of domestic remedies.

In view of its preliminary nature, in accordance with Article 37.5 of the current Rules, when the Court considers it essential, it convenes a hearing for the preliminary objections after which it rules on them. Article 37.6, however, provides that the Court shall resolve in a single judgment the preliminary objections and the merits of the case under the principle of procedural economy. The Court applied this provision in the Juan Humberto Sánchez Case, in which it requested that the parties provide a definitive list of the witnesses and experts whose testimony and expert opinions would be offered "in a possible public hearing on the preliminary objections and possible determination of the merits and reparations in this case."[148] In the Mack Chang Case, the President of the Court convoked the parties to a hearing to receive the final oral arguments on the preliminary objections, merits and indemnification as well as the testimony and expert opinions offered by the parties.[149]

It is important to emphasize the separate and autonomous nature that the preliminary objections have with respect to the decision on the

146. *Cesti Hurtado Case. Preliminary Objections, supra* note 32, para. 33.

147. That, in the opinion of Judge Cançado Trindade, is the only body competent to rule on the admissibility of the petitions before the Commission.

148. *Case of Juan Humberto Sánchez, supra* note 83, para. 19.

149. I/A Court H.R., Order of the President of November 30, 2002 in the *Case of Myrna Mack Chang*, first point of the operative part.

merits. The fact that a ruling on the former possibly requires consideration of the merits of the application does not mean that the preliminary objections must be considered together with the merits. In any case, preliminary objections must be resolved as a preliminary question and, if accepted by the Court, prevents a ruling on the object of the application. The Court may, therefore, rule on the merits of the application only in the event that such objections have been previously rejected, either in the judgment on the merits or in a prior judgment referring specifically to this matter.

## D. WITHDRAWAL OF THE PRELIMINARY OBJECTIONS

The State may obviously withdraw preliminary objections after filing them. This is what happened in the Aloeboetoe *et al.* Case in which, at the hearing convoked on preliminary objections, the Government of Suriname recognized its responsibility in the case and the right of the Court to determine the relevant reparations.[150]

In the Bámaca Velásquez Case, the State, after having presented a preliminary objection for the failure to exhaust internal remedies, in the reply to the application recognized its responsibility in the case, but warned that this recognition did not imply recognition of the exhaustion of domestic remedies since the Guatemalan judiciary was still considering the case. In such circumstances, the Commission asked the Court to clarify whether the State had withdrawn the preliminary objection to which the State responded that, by having recognized its international responsibility, the preliminary objection should be considered as withdrawn. The Court deemed the objection withdrawn and ordered that the proceedings on the merits be continued.[151]

In the Mack Chang Case, after having presented preliminary objections in the reply to the application, the State sent the Court a brief in which it decided to maintain and reiterate before the Court, in the same and literal terms presented to the Commission, the "international acceptance

150. I/A Court H.R., *Aloeboetoe et al. Case*. Judgment of December 4, 1991. Series C No. 11, para. 22.
151. I/A Court H.R., *Bámaca Velásquez Case*. Judgment of November 25, 2000. Series C No. 70, paras. 22-23 and 25-26.

of its institutional responsibility" in Case 10,636. The Commission and the representatives of the family of the victim considered the terms of this acknowledgement to be ambiguous. Under these circumstances, the State presented another brief, by which it withdrew the preliminary objections, which was confirmed in the oral arguments of the State at the public hearing convoked by the Court.[152] With this background, the Court held that the State had withdrawn the preliminary objections interposed to the application.[153]

## E. THE DECISION OF THE COURT

As has been stated, the Court's decision on preliminary objections must be prior to a ruling on the merits. Pursuant to Article 37.6 of its Rules, however, the Court may resolve in a single judgment the preliminary objections and the merits of the case under the principle of procedural economy.

The Court is not obligated to examine the preliminary objections in the same order as proposed by the State. Although in principle it must deal with each of the objections, logic suggests that it begin with the study of those referring to its competence or those that, by their peremptory nature, if admitted, would have the effect of completely ending the proceedings, making it unnecessary to rule on the others.

The Court rules on the preliminary objections in a single judgment that may accept them, accept them partially (with the effect of rejecting part of the application), reject them or determine that they are not of a preliminary nature.

The decision on preliminary objections, whether it accepts or rejects them, does not prejudge the merits. This decision is final and cannot be appealed and has the effect of *res judicata*. Whatever is resolved at this stage cannot, therefore, be reopened at the merits stage or at other steps in the proceedings.

152. I/A Court H.R., Order of February 18, 2003 in the Case of *Myrna Mack Chang*, paras. 2, 4-6 and 8 of the expository part.

153. *Ibid*., para. 1 of the considerations and operative para. 1.

## Chapter XIV

## THE PROCEDURAL STAGES ON THE MERITS

Under the heading "Procedure," Articles 66 to 69 of the Convention refer to the judgment that, in the last instance, the Court renders. Since those provisions do not fully regulate the proceedings to be observed in cases that are submitted to it, the Court's Statute and Rules of Procedure supplement those provisions of the Convention. The Court's Statute was adopted by the OAS General Assembly (Resolution No. 448), at its Ninth Regular Session held in La Paz, Bolivia in October 1979. The Court adopts its own Rules. At its Second Regular Session held January 10 to 25, 1980, the Court drafted a set of provisional Rules and, at its Third Regular Session held June 30 to August 9, 1980, it adopted definitive Rules, which have been amended several times. The current Rules, which were adopted by the Court on November 24, 2000, entered into force on June 1, 2001 and were amended on November 25, 2003.

The lack of a more precise regulation of the Court's procedures might give rise to the temptation to apply, by analogy, institutions of domestic law to fill possible gaps. The Court, however, has emphasized that, as an international tribunal, its proceedings have their own particularities and characteristics and, therefore, all the elements of domestic legal proceedings are not automatically applicable.[1] In any event, the situations not covered by the Rules have been resolved through decisions adopted by the Court in specific cases.

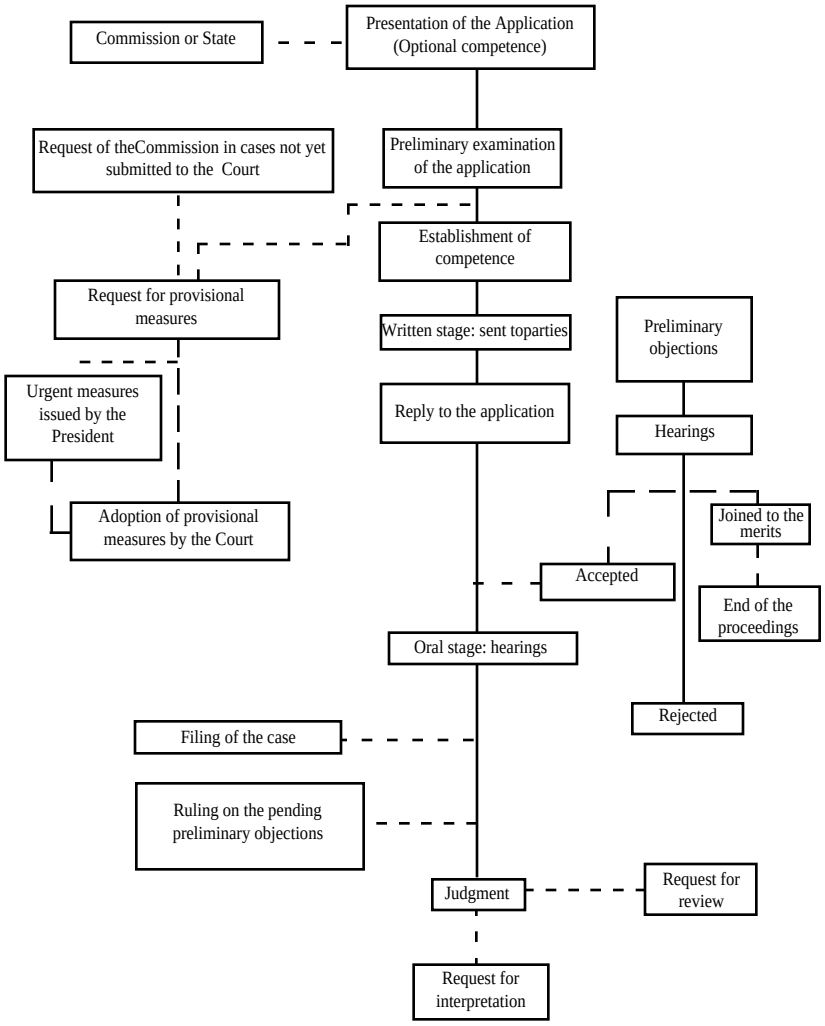
In the case of the International Court of Justice, whose procedures cover an entirely different type of conflict, Article 31 of its Rules provides that its President consults the opinion of the parties with respect to the procedure to follow. Similarly, pursuant to Article 39 of the Rules of the Inter-American Court, after the reply to the application has been received

1. I/A Court H.R., *Velásquez Rodríguez Case.* Judgment of July 29, 1988. Series C No. 4, para. 132; *Godínez Cruz Case*. Judgment of January 20, 1989. Series C No. 5, para. 138 and *Fairén Garbi and Solís Corrales Case*. Judgment of March 15, 1989. Series C No. 6, para. 134.

and before opening the oral procedure, the parties may request the President to allow additional written pleadings. In that case, the President, if he sees fit, establishes a deadline for the presentation of the relevant documents.

The following diagram illustrates the different stages of the procedure before the Court and their possible ramifications.

**Diagram No. 2**
**Contentious Proceedings before the Inter-American Court of Human Rights**



In proceedings before the Court, regardless of whether they have been commenced at the initiative of the Commission or a State party, the Commission must appear as it is a party to all cases relating to the Court's jurisdictional function.[2] The Court has held that the Convention, in addition to granting the Commission standing to submit cases to the Court, gives it a clear auxiliary role of justice in the proceedings, such as a *Ministério Público* of the inter-American system.[3] This characterization of the Commission's function underscores its essential role, which differs from that of the other participants, particularly because it must ensure that the procedures provided for in Articles 48 to 50 of the Convention are carried out. Otherwise, the Court could not hear the case. The other parties to the proceedings are the respondent State and possibly a complainant State.

Pursuant to Article 69 of its Rules, the Commission appoints one or more of its members and its Executive Secretary to represent it as delegates in the consideration of any matter before the Court. That representation is in effect as long as the delegate is a Commission member or its Executive Secretary. In special circumstances, the Commission may extend the duration of the representation. This same provision allows the Commission to include the petitioner as part of the delegation, if he so requests. In appointing its delegation, the Commission gives it the instructions deemed necessary to guide its participation before the Court. When more than one delegate is designated, the Commission assigns one of them the responsibility to resolve situations not foreseen in the instructions and to clarify any doubts raised by a delegate. The delegates may be assisted by any person chosen by the Commission. In discharging their functions, the advisors must act in accordance with the instructions of the delegates.

Although an individual, through his petition, may have initiated the proceedings before the Commission, he was not originally considered a party to the proceedings before the Court. According to the Court, "the individual has no standing to go to the Court, since under Article 61.1 of the Convention, only the States Parties and the Commission have the right to submit a case to the decision of the Court. This does not mean that the

2. Articles 57 of the Convention and 28 of the Statute of the Court.
3. I/A Court H.R., *In the Matter of Viviana Gallardo et al.* Series A No. G 101/81. Decision of November 13, 1981, para. 22.

Court may never hear cases that come from individuals, since when an individual presents a case to the Commission, it may be sent to the Court either by a State Party or by the Commission."[4] This situation has changed radically with the entry into force of the Court's new Rules[5] since its Article 2.23 considers as "parties to the case" the victim or the alleged victim, the State and, only procedurally, the Commission. Notwithstanding the foregoing, the individual's indirect intervention had already been ensured in proceedings before the Court. Article 71.4 of the former Rules of the Commission had for many years provided that the Commission's delegates could be assisted by any person appointed by it. In fact, in every case referred to the Court, the Commission has been assisted by the petitioner's lawyers or representatives.[6] This practice was not only accepted by the Court but was confirmed by Article 22.1 of its former Rules, which provided that the delegates of the Commission could be assisted by "any persons of their choice." Moreover, Article 22.2 of the same Rules expressly provided that the lawyers designated by the petitioner, the victim or his family could be advisors. Furthermore, Article 28 of those Rules required the Secretary of the Court to communicate the application, *inter alia*, to the original petitioner, if known, and to the victim and his family, if applicable.

In practice, since the petitioners are normally non-governmental human rights organizations or are assisted by them, those organizations have a leading role in proceedings before the Court. They often have greater technical, human and even financial resources than the Commission or the Court to gather evidence and to examine determined legal issues. These organizations also have a greater possibility to travel than the Convention organs and have a more immediate and direct access to the victims of human rights violations, their families and possible witnesses. It is not a mere coincidence that non-governmental organizations have had a decisive participation in many of the cases submitted to the Commission and in every case that the Court has heard.

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4. ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1990. General Secretariat of the Organization of American States, Washington, D.C., 1994, p. 8.

5. Adopted by the Court at its XLIX Regular Session, held November 16-25, 2000 and in force since June 1, 2001.

6. *See, e.g.*, I/A Court H.R., *Velásquez Rodríguez Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 14; *Fairén Garbi and Solís Corrales Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 2, para. 14 and *Godínez Cruz Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 3, para. 14.

## A. THE CONDITIONS OF ADMISSIBILITY OF THE APPLICATION

The Convention, in addition to norms on the Court's jurisdiction, also sets forth certain conditions of admissibility for applications filed with the Court that must be met before the Court may hear the case.

Pursuant to Article 51 of the Convention, the Commission or the States parties have three months from the date that the Commission's report is transmitted to the States concerned to submit the case to the Court. There has been a broad discussion as to whether this period is peremptory and, once elapsed, would impede a judicial decision on the case or whether it is prescriptive, established in favor of the respondent State, and would have to be claimed by the State and could be suspended.

The nature and characteristics of this three-month period, as well as the effect of its expiry, was amply examined by the Court in the Cayara Case. The Commission adopted its report on the case on February 20, 1991, transmitted it to the respondent State on March 1, which received it on April 5, and submitted the case to the Court on May 30, 1991, although the application was sent by fax on June 3. On June 20, the Chairman of the Commission informed the President of the Court that the Commission had decided to withdraw it, at the request of the State, in order to reconsider the case and possibly resubmit it, once the observations of Peru were re-evaluated. On October 27, 1991, the Commission adopted Report 1/91, which was transmitted to the government on November 14 and by which it decided to resubmit the case to the Court, which it did on February 14, 1992.[7] This complex sequence of events, which certainly makes it difficult to determine exactly when the three-month period had elapsed, has an additional element. At the public hearing on the preliminary objections interposed by Peru, the representative of Peru pointed out that "the application arrived in due form on June 7, 1991, for it was only on that date that the requirements of Article 25 of the Rules of Procedure of the Court then in force were complied with … that the time limit provided

7. I/A Court H.R., *Cayara Case. Preliminary Objections*. Judgment of February 3, 1993. Series C No. 14, paras. 23-24, 26, 30, 32-33 and 40.

under Article 51.1 of the Convention having fallen due on May 31, 1991, the application entered the Court after the deadline had passed, that is, on June 7."[8]

This issue had also been raised in the Neira Alegría *et al*. Case, in which the Commission granted the government a period of 90 days to comply with its recommendations, which was extended another 30 days at the request of the government. Under these circumstances, the Court held that, in accordance with the principle of good faith that governs all international relations, Peru could not invoke the expiration of the period when it had requested the extension and, therefore, the application of the Commission could not be deemed to have been submitted beyond the deadline but, on the contrary, had been presented within the period granted to the government.[9] In both this and the Cayara Case, the Court appears to have confused the period that Article 51 grants to the Commission to decide whether to file the application with the Court with the period for the State to comply with the Commission's recommendations. In our opinion, while the first period is a precise period, stipulated in the Convention as peremptory, the second is established by the Commission, which may suspend or extend it. The Government of Peru argued in the Cayara Case that the period to submit a case to the Court cannot be modified unilaterally by the Commission or by common agreement between the Commission and the State. Moreover, even if the period could be suspended, it could only be done within the time frame established by the Convention and not after its expiration.[10] The Court held, however, that the period stipulated in Article 51.1 was not final and could be extended.[11]

According to the Court, this provision establishes that, if the matter has not been settled, the Commission must decide within the three months following the transmittal of the report whether to submit the case to the Court or to issue its opinion and conclusions. During that period, however, a number of circumstances may occur that would interrupt the period or even require drafting a new report or the resumption of the period from

8. *Ibid*., para. 34.
9. I/A Court H.R., *Neira Alegría et al. Case. Preliminary Objections*. Judgment of December 11, 1991. Series C No. 13, para. 34.
10. *Cayara Case. Preliminary Objections, supra* note 7, para. 47.
11. *Ibid*., para. 38.

the beginning. It would, therefore, be necessary to analyze each case to determine whether the period had expired and the circumstances that could have reasonably interrupted it.[12] Curiously, the Court stated that "legal certainty requires that States know what norms they are to follow. The Commission cannot be permitted to apply the time limits in arbitrary fashion, particularly when they are spelled out in the Convention."[13] In any event, the Court in the Cayara Case judged that a period of more than seven months far exceeded the timely and reasonable limits that, in its opinion, should govern the proceedings.[14]

In the Cayara Case, the Court noted that the Commission's report was transmitted to the government on March 1, 1991 and that the period to submit it to the Court had expired on May 31,[15] but the original application was received by fax on June 3, 1991. The Court, admitting that the original application had arrived three days after the deadline,[16] nonetheless stated that "an application containing such serious charges as those which are before us now cannot be deemed to have lapsed simply on those grounds."[17] The Court held that in order to arrive at a satisfactory resolution of the objections presented by the government, it must ratify its often stated opinion that the object and purpose of the treaty is the effective protection of human rights and that the interpretation of all its provisions must be subordinated to that object and purpose, as provided in Article 31 of the Vienna Convention on the Law of Treaties.[18]

The Court rejected Peru's objection that the application had arrived in due form on June 7, 1991, the date on which the file was received, and that it was only on that date that the requirements of Article 25 of the Rules then in force had been fulfilled. That article provided that if the Commission intended to submit a case to the Court it had to file, together

12. *Ibid*., para. 39.
13. *Ibid*., para. 38.
14. *Ibid*., para. 60.
15. In fact, the period established by Article 51.1 of the Convention is three months and not 90 days, which is not exactly the same. Both the Commission and the Court often confuse this circumstance and refer to the supposed period of 90 days.
16. *Cayara Case. Preliminary Objections, supra* note 7, para. 40.
17. *Ibid*.
18. *Ibid*., para. 37.

with the report, its duly signed application.[19] According to the Court, that rule could not be applied to distort the object and purpose of the Convention and that the procedural system was a means of attaining justice, which cannot be sacrificed for the sake of mere formalities. "Within certain timely and reasonable limits" some omissions and delays in complying with the procedures could, therefore, be excused provided that a suitable balance between justice and legal certainty is preserved.[20] In any event, while this interpretation is absolutely reasonable with respect to the Rules, it appears to us that the same cannot be said regarding omissions or delays in complying with the procedures established by the Convention.

On the other hand, it is evident that the matter cannot be submitted to the Court before the Article 50 Report has been drafted and sent to the State concerned. In the Matter of Viviana Gallardo *et al.*, the Court noted that Article 61.2 was sufficiently clear and that, pursuant to this provision, it could not hear any case until the procedures set forth in Articles 48 to 50 of the Convention had been completed, which are indispensable in order that the Court intervene in a case.[21] The Court admitted the possibility, not completely obvious to the author, that this procedure could be waived or excused in a matter that is initially presented by a State against another State but not by an individual against a State.[22]

An aspect closely associated with the foregoing is the Commission's competence to submit a matter to the Court within the three-month period of Article 51 but prior to the expiration of an extension that has been granted to the State to implement the Commission's recommendations. In the Castillo Petruzzi *et al*. Case the State objected to what it called the Commission's "premature" decision to submit the case to the Court since it was filed during the additional period granted Peru to make observations to the Commission's report.[23] The Court rejected this argument, observing that the Commission's decision was adopted subject to the State's eventual

19. The application entered on June 3, 1991 but the report was not received in the Secretariat of the Court until June 7. Article 26 of the current Court's Rules refers to the requirements of an application in the same terms as the provision invoked in this case.

20. *Cayara Case. Preliminary Objections, supra* note 7, para. 42.

21. *In the Matter of Viviana Gallardo et al., supra* note 3, paras. 12.a, 14, 17, 20 and 27-28.

22. *Ibid*., para. 25.

23. I/A Court H.R., *Castillo Petruzzi et al. Case. Preliminary Objections.* Judgment of September 4, 1998, paras. 86-87.

implementation of the recommendations contained in the report, which the State did not do, and that the application was filed after the period granted to the State had expired and did not prejudice the State in such a way as to affect the exercise of its rights.[24] It did not, however, decide whether the period that the State has to implement the Commission's recommendations suspends the Commission's right to submit the case to the Court, resulting in the inadmissibility of an application submitted during that period.

As has been stated, the Court must ensure, as a preliminary procedural question, that the procedures set forth in Articles 48 to 50 of the Convention are completed in order for the intervention of the Court to be formally valid. The Commission affirmed this criterion in the Matter of Viviana Gallardo *et al*. maintaining that a case could not be submitted to the Court if the procedures in Articles 48 to 50 were omitted.[25] It should be observed that this decision arose in a case submitted to the Court directly by the State and that the Court's decision expressly indicates that the procedures before the Commission were not created for the sole benefit of the State but also to allow for the exercise of important individual rights and, therefore, they could not be waived unless it was clearly established that their omission would not impair the functions that the Convention assigns to the Commission "as might be the case when a matter is initially presented by a State against another State and not by an individual against a State."[26]

Sharing the opinion of the Commission, the Court also observed that the procedures before the Commission were not conceived solely in the interest of the State, but very especially that of the victims, and, therefore, the procedures before the Commission cannot be omitted without impairing the institutional integrity of the system of protection guaranteed by the Convention.[27] In any event, the Court expressly left open the possibility of waiving this procedure "as might be the case when a matter is initially presented by a State against another State and not by an individual

24. *Ibid*., para. 88.
25. See the communication of October 13, 1981 of the Chairman of the Commission to the President of the Court. *In the Matter of Viviana Gallardo et al., supra* note 3, p. 43.
26. *Ibid*., para. 25.
27. *Ibid*., paras. 20-21 and 25.

against a State."[28] Given the amplitude of Court's jurisdiction *ratione materiae*, it may be assumed that the obligation to exhaust the procedures before the Commission is not absolute, since this procedure may not be applicable under all circumstances. Thomas Buergenthal presents the hypothetical of a dispute between two States that does not involve the violation of any rights guaranteed by the Convention but refers, for example, to the diplomatic immunities of the Court's judges that is submitted to the Court by means of a special agreement. Pursuant to Article 45 of the Convention, that case could not be brought to the Commission but it could be validly submitted to the Court since it refers to the interpretation and application of the Convention and a special agreement to that effect would be perfectly legitimate.[29] The matter, however, could not be submitted to the Commission by a State under Article 45, but could be submitted by an individual or group of individuals under Article 44 of the Convention. Nevertheless, given the role that the Convention assigns to the Commission in cases that involve a violation of human rights, States cannot avoid its proceedings by means of a special agreement.

It is important to emphasize that in the first cases against Honduras the Court attenuated its position with respect to the strict fulfillment of the procedures before the Commission, holding that these provisions must be interpreted so that the Convention is given its "appropriate effects" in order to enable the international protection of human rights to reach, if necessary, judicial control.[30] Procedural defects that do not affect the rights that the Convention seeks to protect or the State's ability to present its defense are irrelevant and do not annul the proceedings before the Court.[31] This does not, however, imply providing direct access of a petitioner or the Commission before the Court, without having complied with the procedure before the Commission.

28. *Ibid*., para. 25.

29. See Thomas Buergenthal, *The Inter-American Court of Human Rights*, in THE AMERICAN JOURNAL OF INTERNATIONAL LAW, vol. 76, No. 2, p. 238 *et seq.*

30. *Velásquez Rodríguez Case. Preliminary Objections; Fairén Garbi and Solís Corrales Case. Preliminary Objections* and *Godínez Cruz Case. Preliminary Objections*, *supra* note 6, paras. 30, 35 and 33, respectively.

31. *Ibid*., paras. 74, 74 and 77, respectively.

Article 33 of the Court's Rules lists the formal requirements that must be fulfilled in order to file an application and which might be used to question its admissibility. In the Gangaram Panday Case, the Government of Suriname referred to what it called some "questions of form" that in its opinion were not preliminary objections but that could affect the application's admissibility and, therefore, it requested that the Court rule on them. These aspects referred to the lack of a signature on the memorial submitted to the Court, that the Commission's representation was not composed of its members and the presence of the victim's representative on the Commission's delegation.[32] With respect to the first point, the Court held that the filing of the application was perfected with the written submission, which was duly signed, and that, under the Rules, the memorial is not the document that refers the case to the Court but is the procedural act that initiates the written stage of the proceedings and, therefore, its omission is not a non-fulfillment of a formality or a requisite stipulated in the Rules.[33] Regarding the designation of persons who were not members of the Commission on its delegation, which included the victim's lawyer, the Court recalled that, according to Article 22 of its Rules then in force, the Commission is represented by the delegates whom it designates and that those delegates may be assisted by any person of their choice and, therefore, it considered that the Commission had complied with the requisites established in that norm.[34]

Article 33 of the current Rules provides that the application state: the claims (including those referring to reparations and costs), an indication of the parties to the case, a statement of the facts, an indication of the orders opening the proceedings and on the admissibility of the complaint by the Commission, the supporting evidence (with an indication of which facts it supports), personal data on the witnesses and expert witnesses and the subject of their statements, the legal arguments and the pertinent conclusions. The application must also include the name and address of the original complainant, as well as the name and address of the alleged

32. I/A Court H.R., *Gangaram Panday Case. Preliminary Objections*. Judgment of December 4, 1991. Series C No. 12, para. 17.

33. *Ibid*., paras. 23-24.

34. *Ibid*., paras. 25-27. In what is probably a typographical error, the Court cites Article 21 of its Rules and not Article 22.

victims or their duly accredited representatives, if possible, and the names of the agents or of the delegates of the Commission. Under Article 34 of the Rules, if during a preliminary review of the application the President of the Court finds that the "basic" requirements have not been met, he requests the petitioner to correct the defects within 20 days. In the Constitutional Court Case, a preliminary examination of the application found that some annexes were incomplete or illegible and that the application did not include the names and addresses of all the complainants. Invoking Article 34, the Court requested that the Commission correct those defects. The Court noted that the Commission only "forwarded part of the requested documentation,"[35] so it could be assumed that the other documentation was not considered fundamental and its absence would not halt the course of the proceedings.

## B. THE FILING OF THE APPLICATION

Whether it is a State party or the Commission that submits the application, its filing is made to the Secretariat of the Court. The application must be filed in a working language of the Court and state the parties to the case, the subject of the application, a statement of the facts, the supporting evidence (indicating which facts they support), personal data on the witnesses and expert witnesses, the legal arguments and the pertinent conclusions. If the Commission files the application, it must attach a copy of its Article 50 Report.[36] The application must also contain the names of the agents of the respondent State and the delegates of the Commission.

Pursuant to Article 32 of the Court's Rules, applications submitted under Article 61.1 of the Convention must be filed with the Secretariat of the Court in a working language of the Court. If the application has been submitted in only one of those languages, the proceedings are not suspended but a translation to one or another of the working languages, if applicable, must be presented within 30 days. Although almost all of the applications have been filed and processed in Spanish, in the Hilaire, Constantine and

35. I/A Court H.R., *Constitutional Court Case.* Judgment of January 31, 2001. Series C No. 71, para. 16.

36. Article 33 of the Rules of the Court. Article 25 of the original Rules required that the application also indicate the rights involved.

Benjamin *et al*. Cases the filing of the applications and their processing were in English.[37]

Article 26 of the Rules provides that the submission of pleadings, motions and evidence and the other written material addressed to the Court may be presented in person, by courier, fax, telex, mail or any other method generally used. When transmitted by electronic means, the original documents and accompanying evidence must be sent within seven days. The original application, reply, pleadings, motions and evidence, reply to the preliminary objections, as well as the respective annexes, must be filed in three copies. The President of the Court, after consulting the Permanent Commission, may reject any communication of the parties that he considers manifestly inadmissible, which are returned to the interested party.

As stated, Article 33 of the Rules provides that the application state: the claims (including those referring to reparations and costs), an indication of the parties to the case, a statement of the facts, an indication of the orders opening the proceedings and on the admissibility of the complaint by the Commission, the supporting evidence (with an indication of which facts it supports), personal data on the witnesses and expert witnesses and the subject of their statements, the legal arguments and the pertinent conclusions. The application must also include the name and address of the original complainant, as well as the name and address of the alleged victims or their duly accredited representatives, if possible, and the names of the agents of the respondent State and of the delegates of the Commission. The latest reform of the Rules added the name and address of the representatives of the alleged victims or their families. In the event that the latter information is not included in the application and to ensure that the victims' rights are protected, the Commission acts on their behalf as guarantor of the public interest under the Convention. If the Commission files the application, it must attach its Article 50 Report. Similarly, Article 72 of the Commission's Rules provides that the application shall indicate: "a) claims on the merits, and reparations and costs sought: b) parties in the case; c) presentation of the facts; d) information on the opening of the

37. I/A Court H.R.,*Case of Hilaire, Constantine and Benjamin et al*. Judgment of June 21, 2002. Series C No. 94, para. 4, footnote 3.

procedure and admissibility of the petition; e) individualization of the witnesses and experts and the purpose of their statements; f) legal grounds and the pertinent conclusions; g) available information on the original complainant, the alleged victims, their family members or duly accredited representatives; h) names of its delegates; and i) the report provided for in Article 50 of the American Convention." The Commission's application may also be accompanied by certified copies of the parts of the record that the Commission or its delegate deems appropriate.

Pursuant to Article 69 of its Rules, the Commission entrusts one or more of its members and its Executive Secretary to represent it and to participate as delegates in the consideration of any matter before the Court. The representation is in effect as long as the delegate is a member of the Commission or serves as its Executive Secretary, although the Commission may, under special circumstances, extend the duration of such representation. According to the terms of Article 69.2, if the petitioner so requests, the Commission includes him as a delegate. In designating its delegate or delegates, the Commission gives the instructions that it considers necessary to guide their actions before the Court. When more than one delegate is named, the Commission assigns one of them the responsibility of resolving the situations not foreseen in the instructions and in clarifying the doubts raised by a delegate. The delegates may be assisted by any person designated for that effect by the Commission. In the discharge of their functions, the advisors act in accordance with the instructions of the delegates.

Applications filed by a State should include, if necessary, its objections to the Commission's opinion. If the case is before the Commission, the application must include the parties to the case and the date of the Article 50 Report of the Commission.

As to the behavior that is expected of the parties during the proceedings, in the Mayagna Community Case the Commission requested that the Court order the State to adopt the measures necessary to ensure that its officials did not act in a manner that would pressure the Community to withdraw its complaint or interfere in the relationship between the Community and its lawyers and that it cease negotiating with members of the Community without a prior agreement or understanding with the

Commission and the Court. Although the State was requested to present its observations on the Commission's request, which it did by denying the allegations, the Court did not adopt any decision on this matter.[38]

### *1. THE PRELIMINARY EXAMINATION OF THE APPLICATION*

Pursuant to Article 34 of the Court's Rules, the President makes a preliminary review of the application to ensure that it complies with the basic requirements. If it does not, he asks that the defects be corrected within 20 days.

The Rules require that the application be presented in a working language. The fact that the application is submitted in only one of these languages does not, for the effects of the period set forth in Article 51 of the Convention, suspend the processing but the translation into the other language or languages, if applicable, must be presented within 30 days.

Defects or omissions usually refer to the incomplete or illegible annexes that accompany the application, that some documents are not identified in relation to the annexes, that others that were so identified were not presented with the application, that the subject of the statements of witnesses and experts offered in the application was not indicated or that the Article 50 Report was not signed by the members of the Commission. The Commission must indicate which of its advisors are the victim's representatives, forward the respective powers granted by him and indicate the address at which those representatives may receive the Court's communications. The Court may also request the addresses of the original complainants in order to send them a copy of the application when they are notified.[39]

Although it is not a requisite of the application, at this stage the Court may also ask the Commission for the original file of the case.[40] The

38. I/A Court H.R.,*The Mayagna (Sumo) Awas Tingni Community Case*. Judgment of August 31, 2001. Series C No. 79, paras. 48-49.

39. *See, e.g.*, the communication dated April 20, 1999 of the Secretariat of the Court to the Delegates of the Commission in the Ivcher Bronstein Case.

40. *Ibid*.

lack of this documentation or its delay in arriving at the Court does not affect the processing of the application or prevent its notification.

It is possible that the Commission may not fully comply with the requirements of the President of the Court for the effects of correcting the defects found in the application. For example, in the Constitutional Court Case, the Court noted that some annexes were incomplete or illegible and that the application did not contain the names and addresses of all of the complainants and requested that the Commission correct those defects. The Commission, however only sent part of the documentation requested.[41] In the Baena Ricardo *et al.* Case, the Secretariat of the Court requested the Commission to inform it of the purpose of the testimony of the witnesses proposed by the Commission since this information had not been included in the application.[42]

With respect to the legal grounds of the application, it should be underscored that their total or partial absence, their presentation out of time or their incorrect application, whether by the Commission or the respondent State, does not release the Court from its obligation to decide according to the law, in application of the principle of *iura novit curia.* In the Castillo Petruzzi *et al*. Case, the Court observed that the Commission had not alleged a violation of Article 7 of the Convention in its application, but had done so in its final pleading, and pointed out that this fact did not prevent the Court from examining in its judgment on the merits the problem arising from the petitioners' prolonged detention that was raised by the Commission.[43]

### *2. NOTIFICATION OF THE APPLICATION*

The Secretariat notifies the application only after its preliminary review by the President of the Court.[44] According to the precise terms of

41. *Constitutional Court Case, supra* note 35, para. 16.

42. I/A Court H.R., *Baena Ricardo et al. Case*. Judgment of February 2, 2001. Series C No. 72, para. 22.

43. I/A Court H.R.,*Castillo Petruzzi et al. Case*. Judgment of May 30, 1999, Series C No. 41, para. 107. *See, also,* paras. 116, 166 and 178 in the same judgment referring to other omissions of the Commission in its application.

44. *See, e.g., Cayara Case. Preliminary Objections*, *supra* note 7, para. 4; I/A Court H.R. *El Amparo Case*. Judgment of January 18, 1995. Series C No. 19, para. 7 and *Caballero Delgado and Santana Case*. Judgment of December 8, 1995. Series C No. 22, para. 8.

Article 35 of the Court's Rules, once the application is received, the Secretary sends a copy to the President and judges of the Court, the respondent State, the Commission (when it is not the applicant), the original complainant, if known, and the victim, his next of kin or his duly accredited representatives, if applicable. In addition, the Secretary informs the other States parties to the Convention and the OAS Secretary General. Pursuant to Article 36 of the Rules, once the application is notified to the alleged victim, his next of kin or his duly accredited representatives, they have a period of two months, which cannot be extended, to present autonomously their pleadings, motions and evidence to the Court.

The application in the Villagrán Morales *et al*. Case was filed in English and, although the Secretariat of the Court informed the Commission that the application would be notified once it was received in Spanish, since the translation contained several errors the application was notified in English and a corrected version of the translation was later sent to the State.[45]

In principle, the application is notified after the Commission has corrected the defects of form that have been found or after the Commission has sent the documentation that was lacking. In the Barrios Altos Case, however, the Court forwarded the application and its annexes to the State and informed it that it had requested the Commission to resend some annexes that were defective, which would be forwarded as soon as they were received.[46]

The application is notified to the body that represents the respondent State and that acts in its name in foreign affairs. As the Court is not an international organization to which States accredit ambassadors, under classical international law the Head of State or the Minister of Foreign Affairs represents the State. They are, therefore, the only ones who can designate the agents of the State in a particular case. An agent, however, may always be replaced. For example, Argentina replaced its agents twice in the Cantos Case.[47]

45. I/A Court H.R., *The "Street Children" Case (Villagran Morales et al.).* Judgment of November 19, 1999. Series C No. 63, paras. 36-38 and 40-41.

46. I/A Court H.R., *Barrios Altos Case*. Judgment of March 14, 2001. Series C No. 75, paras. 22-23.

47. I/A Court H.R., *Cantos Case*. *Preliminary Objections*. Judgment of September 7, 2001. Series C No. 85, para. 14.

Pursuant to Article 38 of the Court's Rules, the State must give its written response to the application within four months of its notification and its reply must include the same elements listed in Article 33 of the Rules for filling an application. The Secretary communicates the reply to the President and judges of the Court, to the Commission, to the original complainant, if known, and to the alleged victim, his next of kin or his duly accredited representatives, if applicable.

### *3. THE REPRESENTATION OF THE PARTIES*

In notifying the application, the Secretary requests that the respondent State appoint an agent within one month. Under the terms of Article 21 of the Court's Rules, the agent may be assisted by any person of his choosing. When a State replaces its agent it must notify the Court and the replacement is not effective until notification is received at the seat of the Court. In practice, it is not infrequent that a State replaces its agent more than once.[48] What is not provided is the designation of substitute agents, which has been expressly rejected by the Court.[49] Under the Rules, an alternate agent may be appointed who assists the agent in the exercise of his functions and replaces him during his temporary absences. The Rules also provide that the agent may be assisted by advisers, lawyers or any other person of his choosing. In designating its agent, the State must indicate the official address to which all relevant communications are to be sent.

Pursuant to Article 22 of the Court's Rules, the Commission is represented by the delegates that it appoints, who may be assisted by any person of their choosing. If the Commission is not the complainant, under Article 35.3 of the Rules the Secretary of the Court, in notifying the application, requests the Commission to name its delegates within 30 days. Until the delegates have been appointed, the Commission is represented by its Chairman for all effects of the case.

48. *See, e.g.*, the appointment of several agents in I/A Court H.R., *Case of Bulacio.* Judgment of September 18, 2003. Series C No.100, para. 15.

49. See the note of the Secretariat of the Court to the Agent of the State in the first cases against Honduras. Ref.CDH-CH/032 of September 26, 1986.

Under Article 33.3 of the Court's Rules, when the application does not contain the names and addresses of the representatives of the alleged victims and their next of kin, to ensure that their rights are protected the Commission acts on their behalf as guarantor of the public interest under the Convention.

### *4. THE INTERVENTION OF THE INDIVIDUAL*

The current Rules of the Court introduce an important innovation by indicating that, after the application has been admitted, the alleged victims, their next of kin or their duly accredited representatives may present their pleadings, motions and evidence autonomously at any stage of the proceedings. This considerably strengthens the procedural capacity of the individual (be he the original complainant, the alleged victim, a member of his family or his representative) in the inter-American human rights system and is in keeping with the evolution of international law regarding the individual's status as a subject of this legal order.

According to the Rules, if there are several alleged victims, next of kin or duly accredited representatives, they must appoint a common intervener who is the only person authorized to present pleadings, motions and evidence during the proceedings, including the public hearings. The Court resolves any disagreement. In the Hilaire, Constantine and Benjamin *et al.* Cases, which joined three cases with 32 victims, the representatives of the victims designated one person as the sole representative in the case.[50]

### *5. THE CONTENT OF THE APPLICATION*

A controversy about the content of the application that has arisen concerns the purported necessity that it reflect, in principle, the content of the Article 50 Report transmitted to the State. The Court had held that, while it is true that the application does not have to be an exact replica of the Commission's Report, it should not contain violations of which the State was not aware during the proceedings before the Commission and which it could not refute at the proper time. If the State is not aware of

50. *Case of Hilaire, Constantine and Benjamin et al., supra* note 37, para. 41.

certain facts or particular statements that are later raised in the application, it was unable to employ its rights at that stage of the proceedings.[51] In a case in which the application accused the State of a violation of Article 29 of the Convention in relation with the Vienna Convention on Consular Relations, the Court observed that the charge was not included in the Commission's Report and it was not one of the general obligations set forth in the Convention, such as those under Articles 1.1 and 2, the compliance of which the Court must officially examine.[52] However, since it was a question of due process that was before the Commission, it does not seem unreasonable to expect the Court to examine whether access to the consular authorities of his country by a foreigner accused of a crime forms part of the "due guarantees" referred to in Article 8.1 of the Convention or whether it can be understood as a question of the "adequate time and means for the preparation of his defense," provided for in Article 8.2.c, a matter that, in accordance with the principle of *iura novit curia*, could be examined by the Court, as it has done with respect to issues that had not been included in the application.[53]

Similarly, in the Mayagna Community Case, in addition to the alleged violations included in the application, the Commission in its final pleadings contended that, given the nature of the relationship that the Community had with its traditional land and natural resources, the State was also responsible for the violation of other rights protected by the Convention. The Commission maintained that, by ignoring and rejecting the territorial claim of the Community and granting a logging concession within the traditional land of the Community without consulting its opinion "the State breached a combination" of the following articles of the Convention: 4 (Right to Life), 11 (Right to Privacy), 12 (Freedom of Conscience and Religion), 16 (Freedom of Association), 17 (Rights of the Family), 22 (Freedom of Movement and Residence) and 23 (Right to Participate in Government). In its judgment the Court observed that the fact that the violation of an article of the Convention was not alleged in the application

51. *Castillo Petruzzi et al. Case. Preliminary Objections, supra* note 43, para. 68.
52. *Ibid*.
53. *Castillo Petruzzi et al. Case.* Judgment of May 30, 1999. Series C No. 52, paras. 107, 116, 166 and 178.

did not preclude the Court from declaring that, if the proven facts led to the conclusion that it did in fact occur, such violation existed. The Court, however, referred to what it had resolved with regard to the rights to property and the judicial protection of the members of the Mayagna Community and dismissed "the violation of rights protected in the abovementioned article because the Commission did not state the grounds for it in its brief on final arguments."[54] The Court, once again, did not rule on a fundamental aspect of the exercise of its contentious jurisdiction, which is the application of the principle of *iura novit curia*.

The Court has also observed that there should be a congruence between what is manifested in the body of the application and what, in virtue of that, is asked for in the application in view of the natural continuity that logically should exist between both elements.[55] The Court has, however, advised that, in accordance with the principle of *iura novit curia*, it may and must examine the application as a whole and clarify the nature and sense of the petitioner's claims in order to duly weigh them and resolve what is appropriate.[56]

In an irregular situation not provided for by the Court's Rules, after the application had been filed and even after it had been notified to the State in the Castillo Petruzzi *et al*. Case, the Commission presented a "corrected version of the Spanish text of the application" and pointed out that it contained "corrections of minor errors, above all in style" and that it "should replace the earlier version."[57] The corrected application was also transmitted to Peru. Although the State did not formally object to this procedure, it requested the Court to clarify whether it should consider as valid the corrected application or whether the original version was valid. Following instructions of the President of the Court, the Secretariat informed Peru that, in view of the request for clarification by the State and to ensure the transparency of the proceedings, the President had decided to suspend the deadline to answer the application and to interpose preliminary objections until the Commission presented clarification of the

54. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 38, paras. 156-157.
55. *Castillo Petruzzi et al. Case. Preliminary Objections*, *supra* note 53, para. 92.
56. *Ibid*.
57. *Ibid*., para. 22.

corrections made to the original text of the application.[58] The State, however, presented its preliminary objections before the Commission presented its clarifications on the revised version of the application.[59] The Commission then presented a communication in which it added a "list of the corrections … made to the application," which was transmitted to Peru with a deadline to present its observations.[60] In spite of not receiving the observations of the State, the President of the Court issued an order in which he decided: a) that the text of the application that the parties should take as valid to prepare their defense and arguments was that presented originally by the Commission, b) that only the corrections presented by the Commission in its submission of October 6,1997 could be incorporated into the application, c) that the Commission's request to replace the original text of the application with the text presented to the Court on August 26 and 28, 1997 was inadmissible and d) that the proceedings in the case be continued and the periods to answer the application and to present the preliminary objections be resumed.[61] In any event, considering the characteristics and consequences of the proceedings, the Court recognized that there cannot be more than one text of the application, suggesting that it is the original that is valid and that modifications should not be made to the original claims.[62] A similar situation was presented in Las Palmeras Case in which the Commission in its reply added to the provisions violated "the principles recognized in Article 3 of the 1949 Geneva Conventions" and asked that the State be ordered to adopt the necessary reforms so that the Armed Forces of Colombia conduct their military operations "in accordance with the international instruments and international practice in the matter of domestic armed conflicts." The State contended that the Commission utilized its reply to reformulate petitions set forth in the application. In response, the Court, recalling its judgment of September 10, 1993 in the Aloeboetoe *et al*. Case stated that "in proceedings before an international court a party may modify its application provided that the other party has the procedural opportunity to state its views on the subject"

58. *Ibid*., paras. 25-26.
59. *Ibid*., paras. 27-28.
60. *Ibid*., para. 28.
61. *Ibid*., para. 29.
62. *Ibid*., para. 96.

and decided that it would apply its case law and regard the last arguments as definitive provided that the other party has the procedural opportunity to state its views.[63]

The problem of correcting the application was also raised in the Baena Ricardo *et al*. Case, in which, at the public hearing and in its final arguments, the Commission alleged a violation of the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) based on the State's application of its Law 25 affecting the exercise of the right to freedom of trade union association in general (one of whose elements is the right to strike), which is guaranteed by Article 8 of that Protocol. At the same hearing, the State objected that the Commission was trying to add a new fact to the application, which was the violation of Articles 1 and 8 of the Protocol. The Court rejected the Commission's position because at the moment of the acts denounced Panama, while it had signed the Protocol but had not ratified it, could not be accused of violating a treaty to which it was not a party.[64] It must be observed that this was not a case of a modification of the application in terms of the facts that were considered to be a violation of human rights but the legal qualification of those facts, which, in accordance with the principle of *iura novit curia*, was for the Court to determine.

In our opinion, if a new submission does not alter the original application, it should be considered complementary and not necessarily inadmissible. However, Article 26 of the Court's Rules, which refers to the form of the presentation of "the application, its reply … as well as any other written material addressed to the Court," authorizes the President, in consultation with the Permanent Commission, to reject any submission of the parties that he considers manifestly inadmissible. On the other hand, if this new submission is substantially distinct from the original, either as to its subject or as to the statement of facts, in order to be admissible it

63. I/A Court H.R., *Las Palmeras Case*, Judgment of December 6, 2001. Series C No. 90, paras. 22-23 and 31 and *Aloeboetoe et al. Case. Reparations* (Art. 63.1 American Convention on Human Rights). Judgment of September 10, 1993. Series C No. 15, para. 81.

64. *Baena Ricardo et al. Case, supra* note 42, paras. 95-96 and 99.

must be submitted within the period prescribed by Article 51 of the Convention. Even if this new submission refers to mere corrections or "clarifications," it must be transmitted to the State so that it may present its observations.[65] What remains to be defined is whether, if the application is withdrawn and the three-month period provided for in Article 51 of the Convention has not elapsed, the Commission may file a new application. In view of the object and purpose of the Convention, which is the protection of human rights, the response would appear to be affirmative.

## C. THE REPLY TO THE APPLICATION AND THE STAGES OF THE PROCEEDINGS

In accordance with the Court's Rules, proceedings before the Court in contentious cases are comprised of a written stage, which is initiated with the application, and an oral stage. In addition, if the elements listed in the Rules, which will be examined later, are present the Court may order the joinder of cases and the proceedings. These proceedings, the purpose of which is to establish the facts of the case, conclude with the Court's judgment.

### *1. THE JOINDER OF CASES AND THE PROCEEDINGS*

Article 28 of the Court's Rules establishes that the Court may, at any stage, order the joinder of interrelated cases, when there is identity of parties, subject matter and legal grounds.

Applying this provision, since the parties in three cases were the same, the subject matter of the applications was essentially the same in that they all referred to a violation of judicial guarantees due to the obligatory imposition of the death penalty for those persons found guilty of intentional homicide and that the provisions of the Convention violated were fundamentally the same, by order of November 30, 2001 the Court joined the Hilaire, Constantine *et al*. and Benjamin *et al*. Cases and their proceedings into what came to be known as the Case of Hilaire, Constantine

65. *See*, in this respect, *Castillo Petruzzi et al. Case*, *supra* note 53, para. 29.

and Benjamin *et al*.[66] This situation was also presented in the Ivcher Bronstein and Constitutional Court Cases at the stage in which the State did not recognize the Court's competence. Although the subject matter of the controversy was the same and the parties were the same (the Commission and Peru), the Court did not join the proceedings and delivered two separate judgments on its competence.[67]

Pursuant to Article 28 of its Rules, the Court may also order that the written or oral proceedings in several cases, including the presentation of witnesses, be done jointly. After consulting the agent and the delegate, the President of the Court may order that two or more cases be heard together. In this respect, the Court ordered the same hearing on the request for provisional measures in the Bámaca Velásquez, Carpio Nicolle and Colotenango Cases, all against Guatemala.[68]

While the Rules of the Court did not then expressly provide for the joinder of proceedings, in the first three cases against Honduras, which were submitted on the same date, denounced similar facts that reflected a pattern of systematic conduct that violated the same provisions of the Convention, the parties were the same and in several procedural aspects the Court treated them as one, the Court rendered three separate judgments.

### *2. THE WRITTEN STAGE*

The written procedure, which concerns mainly the application and the reply, is governed by Article 26 *et seq*. of the Court's Rules. Pursuant to these provisions, the application, the reply and the other submissions directed to the Court may be presented in person, by courier, fax, telex, mail or any other generally used method. If sent electronically, the original

66. I/A Court H.R., *Joinder of the cases and proceedings ordered by the Inter-American Court of Human Rights in the Matter of Trinidad and Tobago. Hilaire, Constantine et al. and Benjamin et al. Cases*. Order of November 30, 2001, in ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 2001. San José, Costa Rica, 2002, Vol. II, p. 1119 *et seq.*

67. I/A Court H.R., *Ivcher Bronstein Case. Competence*. Judgment of September 24, 1999. Series C No. 54 and *Constitutional Court Case. Competence*. Judgment of September 24, 1999. Series C No. 55. In any event, it must be observed that, at that time, the current Rules were not in force. These Rules consider the victim or the alleged victim as parties to the case and expressly provide for the joinder of cases and proceedings.

68. *See* the communications of the Secretariat of the Court of February 20, 2001, REF. CDH-S/174, and March 1, 2001, REF. CDH-S/190.

documents must be presented within seven days. Although it has not been a frequent practice, at the compliance stage of the judgment in the Baena Ricardo *et al.* Case some victims presented their observations by e-mail.[69]

### *a) The period to answer the application*

Pursuant to Article 38.1 of the Court's Rules, the State concerned must respond in writing to the application within four months, which may not be extended, of notification. Within this same period, the State must transmit its observations to the pleadings, motions and evidence, which may be included in the reply or separately. Formerly, when the application was notified in a language that was not official in the respondent State, this was taken into account in justifying an extension of the period to answer.[70] However, the period to answer the application was then shorter and could be extended.

Until November 25, 2003 when the current Rules were adopted, the period to respond to the application did not appear to be peremptory. Of course, if the reply was presented beyond the time period, to ensure transparency the Court, in fact if not in law, had to consider the State's arguments. Moreover, the practice of the Court had been to extend this period.[71] In a case where the State was denied the extension that it had requested until January 5, 1998 to respond to the application, at the same time that it pointed out that the period for the presentation of the reply could not be extended, the Secretariat of the Court, upon instructions of the President, eased its criteria and informed the State that since the Court would be closed from December 25 until January 5, 1998, the State had until that date to present its reply.[72]

### *b) The formal requisites*

The reply must contain the same requisites listed for the application and must be presented in one of the working languages of the Court. If the reply does not comply with these requisites or if there is some defect in

69. *Baena Ricardo et al. Case, supra* note 42, paras. 34, 36, 40 and 47.

70. *See, e.g.*, I/A Court H.R., *Benavides Cevallos Case*. Judgment of June 19, 1998. Series C No. 38, para. 12.

71. I/A Court H.R., *Caballero Delgado and Santana Case. Preliminary Objections*. Judgment of January 21, 1994. Series C No. 17, para. 5.

72. *Castillo Petruzzi et al. Case. Preliminary Objections, supra* note 43, para. 33.

the documentation presented to the Court, the Secretariat may request the State to correct it before notifying the reply to the Commission. In the Bulacio Case, although the State responded to the application on July 18, 2001, it sent several annexes that were illegible or lacked several pages. The Secretariat, therefore, had to request several times a copy of the missing or illegible pages and could not transmit the reply to the Commission until October 14, 2001.[73]

### *c) The content of the reply*

In its reply, the State must express whether it accepts the facts and the claims in the application or whether it refutes them. The Court may consider as admitted those facts that have not been expressly denied and the claims that have not been expressly refuted by the State.

While the contents of the application are spelled out in the Rules, until recently there were no precise indications as to those of the reply. In response to the President of the Court's order in the Blake Case, which granted the Government of Guatemala one month to clarify and present the evidence that it considered relevant, the government presented a brief manifesting its disagreement with the order because it considered that its reply had strictly complied with the Court's Rules in offering the evidence that it proposed to present at the corresponding procedural stage and because there was nothing in the Court's Rules that authorized the President to require a State to clarify and present evidence on the merits of the case in the reply. Reserving the right to issue a general resolution on the issue, the Court clarified that what had been requested of the government, in keeping with the principle of procedural economy, had been the individualization of the evidence and the presentation of the available evidence.[74] Article 38.1 of the current Rules of the Court provides that the reply contain the same requisites found in Article 33.

**i)** ***Rejection of the application*****.** In its reply, the State normally denies the allegations or its responsibility, gives them a different legal interpretation or rejects the result that is alleged to have arisen from those acts.

73. *Case of Bulacio, supra* note 48, para. 16.

74. I/A Court H.R., Order of the Court of January 28, 1996. Blake Case, paras. 1-2 of the expository part, para. 2 of the considerations and the operative part.

As part of the adversary proceedings, in addition to expressing the State's position the reply may request that the Commission exhibit the documents that would assist the State to prepare its defense. For example, in the Castillo Petruzzi *et al.* Case Peru requested the Court that it require, as the Court did, the Commission to "exhibit all of its proceedings in this case."[75]

**ii)** ***Acceptance by the State of all or part of the charges*.** While the filing of an application implies, at the least, that the State has not implemented the Commission's recommendations, there is a possibility that the State agrees with all or part of them, as has been done in the Aloeboetoe *et al.*,[76] El Amparo,[77] Garrido and Baigorria,[78] Caracazo[79]and Bulacio[80] Cases.

This acceptance does not mean that the State necessarily accepts every claim in the application. In such situations, the State normally accepts its international responsibility for the acts, or part of them, of which it is accused, but maintains some type of objection to the applicable right or to the reparations or compensation claimed in the application or to an acceptance of the damages that are requested to be indemnified. In Las Palmeras Case the State expressly recognized its responsibility of the violation of Article 4 of the Convention for the death of some of the victims but not of others and did not accept its responsibility regarding the accusations of other violations of the Convention.[81] In the Mack Chang Case, after having interposed preliminary objections in its reply to the application, the State informed the Court that it had decided to maintain and repeat, in the same and literal terms presented to the Commission, the "international acceptance of its institutional responsibility" in Case 10,636. The Commission observed that this acknowledgement by Guatemala reproduced the terms of its acknowledgement made on March 3, 2000,

75. *Castillo Petruzzi et al. Case. Preliminary Objections, supra* note 43, para. 40.
76. I/A Court H.R., *Aloeboetoe et al. Case.* Judgment of December 4, 1991. Series C No. 11, paras. 22-23.
77. *El Amparo Case, supra* note 44, paras. 17 and 19-20.
78. I/A Court H.R., *Garrido and Baigorria Case.* Judgment of February 2, 1996. Series C No. 26, para. 27.
79. I/A Court H.R., *Del Caracazo Case*. Judgment of November 11, 1999. Series C No. 58, paras. 37, 39 and 41.
80. *Case of Bulacio, supra* note 48, paras. 27 and 31.
81. *Las Palmeras Case, supra* note 63, para. 19.

prior to the Commission's decision to file the application, and that the acknowledgement was not general but partial and, therefore, it did not fully clarify the facts nor was it an effective remedy of the violations alleged in the application. The Commission, therefore, requested the Court to continue processing the case, to determine the scope of the acknowledgement of responsibility of the State and the facts that gave rise to the application, to determine the violations of the Convention and to order the appropriate reparations. According to the representatives of the families of the victim, the State's acknowledgement was general and vague and had the purpose of forcing the Court to move directly to the stage of reparations without allowing a ruling on the facts pertaining to the merits of the case and that both the families of the victim and Guatemalan society had the right to obtain more than a mere presumption of responsibility. In those circumstances, the State presented a brief withdrawing its preliminary objections and stating that it would partially accept the facts.[82] During the public hearing convoked by the Court, the Commission argued that the State's partial acknowledgement of responsibility before the Court had already occurred before the Commission and that this acknowledgement was based on its Constitution and not on international law. Moreover, in order to determine the perpetrators and the nature of the violation of the rights involved in the case, the Commission believed that it was essential to hold the public hearing to analyze the merits of the matter so that the Court could consider the scope of this generic and partial recognition in its judgment on the merits.[83] In such circumstances, the Court held that there remained a dispute between the parties regarding the scope of the State's acknowledgement of responsibility on the facts and rights violated and that the State's partial acceptance of the facts and the law did not interrupt the process of receiving the evidence ordered.[84] The Court, therefore, resolved to continue with the public hearing and the other procedural actions relating to the merits and the reparations that might be proper in the case.[85]

82. I/A Court H.R., Order of the Court of February 18, 2003. Case of Myrna Mack Chang, paras. 2 and 4-6 of the expository part.

83. *Ibid*., para. 10.

84. *Ibid*., paras. 2-3 of the considerations.

85. *Ibid*., operative para. 2.

It is possible that a State acknowledge responsibility at a later stage of the proceedings. In the Barrios Altos Case, although initially the State had objected to the Court's jurisdiction to hear the case and had refused to participate, as a result of the resignation or dismissal from office of Alberto Fujimori as President, Peru recognized its international responsibility and announced that it would "initiate a friendly settlement procedure with the Inter-American Commission of Human Rights, and with the petitioners" and indicated that it would send the pertinent communications to "initiate formal discussions and reach the above-mentioned agreement." Given the tenor of the communication, the Court convoked the parties to a public hearing to receive their positions regarding the agreement.[86] At the hearing, the Commission requested that, in view of the State's acquiescence, the Court should not only establish the specific violations of the Convention in which the State had incurred but also specifically establish the need to clarify the events, so as to protect the right to truth, the need to investigate and punish those responsible, the incompatibility of amnesty laws with the Convention and the State's obligation to repeal those laws.[87] On the basis of the statements of the parties and in view of Peru's acceptance of the facts and acknowledgement of its international responsibility, the Court considered that the dispute had ceased between the State and the Commission with respect to the facts that gave rise to the case and, therefore, considered as admitted the allegations in the application. As had been expressly recognized by the State, the Court also considered that the State was internationally responsible for the violation of Articles 4, 5, 8 and 25 of the Convention and that it had not complied with Articles 1.1 and 2 of the Convention as a consequence of the enactment and application of the amnesty laws.[88] The Court did recognize that Peru's acknowledgment was a positive contribution to the proceedings and to the principles that the Convention inspires.[89]

86. *Barrios Altos Case*, *supra* note 46, paras. 31-32.
87. *Ibid*., paras. 35-36.
88. *Ibid*., paras. 38-39.
89. *Ibid*., para. 40.

### *d) The transmittal of the reply*

After making the necessary modifications, the Secretary of the Court communicates the answer to the same parties that, according to Article 35.1 of the Rules, are notified of the application, that is, the President and judges of the Court, the Commission, the complainant State, if there is one, the original complainant, if known, and the victim, his family or his duly accredited representative, if applicable.

### *e) The other documents of the written stage*

In proceedings before the International Court of Justice, its Rules provide that the Court, at the request of any of the parties, may extend the periods prescribed for the presentation of the pleadings or may decide to consider as valid any step taken after the expiration of the pertinent period, as long as it considers that the request is adequately justified. In either case, the other party is given an opportunity to state its views.[90]

In the inter-American system, the written stage has seen several changes. Initially, there was a distinction between the application as such and the subsequent presentation of a memorial, which was the submission that the State answered with a counter-memorial within three months of its notification.[91] According to this practice, the President of the Court, in agreement with the agent of the State and the delegate of the Commission, and in consultation with the Permanent Commission, set the date for the presentation of the memorial and the counter-memorial.[92] That distinction, copied from the practice of the International Court of Justice, does not appear to be justified in this type of proceedings and contributes unnecessarily to their prolongation. In fact, in the Caballero Delgado and Santana Case the application was followed by the reply without the Commission transmitting a memorial in addition to the application.[93]

90. Article 44.3 of the Rules of the International Court of Justice of April 14, 1978, with the amendments introduced on December 5, 2000.

91. *See, e.g., Aloeboetoe et al. Case*, *supra* note 76, para. 5; I/A Court H.R., *Gangaram Panday Case*. Judgment of January 21, 1994. Series C No. 16, para. 15 and *Neira Alegría et al. Case*. Judgment of January 19, 1995. Series C No. 20, para. 16.

92. *Ibid*.

93. *Caballero Delgado and Santana Case*, *supra* note 44, paras. 8 and 10-11.

The Court's Rules initially provided that, after the application is answered, the Court may in exceptional cases authorize the presentation of additional submissions, such as the reply and the rejoinder. Under a later version of the Rules the President of the Court asked the State's agent and the Commission's delegate whether they considered additional submissions to be necessary at the written stage, other than the memorial, counter-memorial (or the application and its reply) and, if so, he set deadlines for the transmittal of the relevant documents. Article 39 of the current Rules provides that, when the application is answered, and before the oral proceedings, the parties may request the President to present additional written pleadings and, if the President sees fit, he prescribes the periods for the presentation of the relevant documents. This provision is the result of a progressive reform of the Court's Rules, adopted to simplify the proceedings and to avoid their undue prolongation. In order to avoid purely delaying steps, Article 26.3 of the Rules authorizes the President, in consultation with the Permanent Committee, to reject any submission that he considers manifestly inadmissible and to return it to the interested party.[94]

In view of the changes to the Rules, the Court has, on occasion, received replies and the rejoinders. After the application was answered in Las Palmeras Case, the Commission requested that there be other written submissions, which was accepted by the President of the Court, who set a period for both parties to present the relevant briefs.[95] In the Baena Ricardo *et al*. Case, the Commission informed the Court that it considered it extremely important that there be other written submissions and it requested that it be granted a period of two months to present the reply. The Secretariat informed the Commission and the State that the President, pursuant to Article 38 of the Rules, had granted the former a period of two months for the presentation of the reply, which would then be transmitted to the State so that, also within two months, it might present the rejoinder. The State, however, requested an extension of a month for the presentation of its rejoinder, which was granted.[96] In the Bulacio Case, the Commission

94. This provision was added to Article 29 of the Rules on July 16, 1993.
95. *Las Palmeras Case*, *supra* note 63, para. 21.
96. *Baena Ricardo et al. Case*, *supra* note 42, paras. 23-24 and 28.

requested the President that it be allowed to present other written submissions, which was granted, giving the parties a period of one month to present their reply and joinder.[97]

A comparison of the practice of the Inter-American Court with that of the International Court of Justice demonstrates that in the latter written proceedings are governed by the terms of the agreement between the parties unless the ICJ, after hearing the opinion of the parties, decides otherwise. If the agreement does not contain provisions on written proceedings, after the presentation of the memorial and the counter-memorial, the ICJ does not authorize the presentation of replies, unless considered necessary. Replies and rejoinders must address issues that still divide the parties and not be a repetition of what has already been argued. Any slip or error that has occurred in a pleading already submitted to the ICJ may, however, be corrected at any time with the consent of the other party or with the permission of the President, notifying the other party in the same way as with the pleading to which it relates.[98] After the written proceedings have been closed, no other document may be presented except with the consent of the other party, which will be presumed if it does not lodge any objection.[99]

The President of the Inter-American Court may, in consultation with the Permanent Commission, reject any submission of the parties that he considers manifestly inadmissible and return it to the interested party.

All documents that are part of the written stage are deposited with the Secretariat of the Court and are communicated to the President and the judges of the Court, the States concerned,[100] the Commission, the original complainant, if known, and the victim and his family, if applicable.

97. *Case of Bulacio, supra* note 48, para. 17.

98. Articles 46-52 of the Rules of the International Court of Justice of April14, 1978, with the amendments of December 5, 2000.

99. *Ibid*., Article 56.

100. Article 28.1 of the Rules of the Court only mentions the defendant State, but it is obvious that, if there is a complainant State, it would have the right to be notified of the activities of the proceedings.

### *3. THE ORAL STAGE*

Articles 39 to 42 of the Court's Rules govern oral proceedings. When a case is ready for a hearing before the Court, the President sets the date for the opening of the oral stage and establishes the number of hearings that are necessary.[101] In a previous version of the Rules, the President did so after consulting with the State's agent and the Commission's delegate. The Court, however, has reserved the right to determine what is considered necessary, indicating *a priori* the length of the hearings. In the Villagrán Morales *et al*. Case, the Court set the hearing for January 28-29, 1999, rejecting *a priori* the possibility of an extension, requested the parties to take the necessary measures to ensure that all the offered testimony be received and reserved the right to decide when the examination and cross-examination of a witness had been sufficient.[102] The Court, through its President, may also indicate the precise object of the hearing, specifying, for example, that it is designed to receive the statements and reports of the witnesses and expert witnesses.[103]

The purpose of the hearings is expressed in the convocation. Until relatively recently, each stage of the proceedings had hearings to receive oral arguments and testimony and expert opinions. The most recent practice of the Court suggests that the same hearing may serve different ends. In the Mack Chang Case, the President of the Court convoked the parties to a hearing to receive the final oral arguments on the preliminary objections, the merits and reparations and the testimony and expert opinion proposed by the parties.[104]

#### *a) The date and hour of the hearings*

The date and the hour fixed for the hearings may be changed on the Court's own motion as a result of the need to restructure its calendar[105] or

101. *See, e.g.*, the Order of June 3, 1993, in which the President of the Court convoked a public hearing for July 15, 1993 at 3 p.m. to receive the observations of the parties on the preliminary objections interposed by the Government of Colombia in the Caballero Delgado and Santana Case.

102. *See* the notes REF. CDH-11.383/139 and REF. CDH-11.383/104 of the Secretariat of the Court of January 21, 1999,.

103. *See, e.g*., I/A Court H.R., Order of the President of September 14, 2000. The Mayagna (Sumo) Awas Tingni Community Case.

104. *See, e.g.*, I/A Court H.R., Order of the President of November 30, 2002. Case of Myrna Mack Chang, operative para. 1.

105. See., e.g., I/A Court H.R., Order of the President of March 18, 1997. Blake Case. See, also, Order of the President of October 20, 2000. The Mayagna (Sumo) Awas Tingni Community Case.

at the request of one of the parties because its agent or delegate cannot appear on the date initially set,[106] especially if the opposing party agrees to the postponement.[107] In the Castillo Páez and Loayza Tamayo Cases, whose hearings had been set for September 23, 1995 at 4 p.m. and 10 a.m., respectively, the Commission orally requested the inversion of the hours of the two hearings. The Court agreed since the Commission's reasons were understandable and the change would not prejudice the rights of the parties.[108] In the absence of a justifiable reason or considerations powerful enough to force a modification of the date or the hour, the Court may refuse to postpone the hearing. In this respect, in view of its imminence and the fact that arrangements had already been made for its organization and the appearance of the witnesses and given the calendar of the Court, in the Villagrán Morales *et al*. Case the Court rejected the government's request to postpone the hearings.[109]

***b) The site of the hearings***

In principle, the hearings take place at the seat of the Court. They may, however, be held elsewhere for exceptional reasons. For example, in the first cases against Honduras, in which the State invoked "reasons of security," the hearing to receive testimony took place in the installations of the Costa Rican police at the San José airport.[110] Similarly, in the Bámaca Velásquez Case, in which the Court considered that it would be useful to hear the testimony of two persons who could not travel to San José, the Court convoked a public hearing at OAS headquarters in Washington, DC and commissioned three of its judges to attend the hearing and receive the testimony.[111]

106. *See, e.g.*, I/A Court H.R., Order of the President of September 9, 1999. Aguilera La Rosa et al. Case, later known as Del Caracazo Case.

107. *Ibid*.

108. I/A Court H.R., Order of the President of September 11, 1995. Castillo Páez Case and Order of the President of September 11, 1995. Loayza Tamayo Case.

109. See communication REF. CDH-11.383/ 140 bis of the Secretariat of the Court dated January 21, 1999, addressed to the Agent of the Government of Guatemala.

110. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 1, paras. 31 and 33-34, 33 and 35-36 and 32, 34 and 36, respectively.

111. I/A Court H.R., Order of the Court of September 1, 1998. Bámaca Velásquez Case, operative paras. 1 and 4.

In the Baena Ricardo *et al.* Case, in view of the special importance that all the interested parties attend and the large number of victims in the case, the Court decided, on its own motion, that the public hearing on preliminary objections be held at the Supreme Court of Justice of Costa Rica.[112] The public hearing on the provisional measures requested by the Commission on behalf of the Peace Community of San José de Apartadó was held in the auditorium of the Supreme Electoral Tribunal of Costa Rica.[113]

In the Mayagna Community Case, the Commission requested the Court's good offices to hold the hearing on the merits at the Supreme Court of Costa Rica because of the large number of people who had expressed an interest in attending. In view of the fundamental importance that all interested persons be able to attend the hearing, the President of the Court initially agreed and ordered that the hearing be held at the Supreme Electoral Tribunal of Costa Rica. However, Nicaragua contended that the reasons alleged were not a "sufficient juridical reason to justify the transfer" of the hearing and the Commission reported that only 19 members of the Awas Tingni Community would attend the hearing as observers. In view of this information from the Commission the reason for holding the hearing outside the seat of the Court no longer existed and, therefore, the President revoked the former order and decided to hold the hearing at the Court.[114]

### *c) The proceedings*

The Court's practice is to meet with two representatives of each party before the public hearing. In convoking the hearing, the Secretariat of the Court requests the parties to accredit the persons who will represent them at the public hearing with an indication of which of them will attend the preliminary meeting. The purpose of the preliminary meeting is to discuss details of the public hearing.

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112. *Baena Ricardo et al. Case*, *supra* note 42. See also communications REF. CDH-11.325/097 and REF. CDH-11.325/098 of the Secretariat of the Court of January 19, 1999, addressed to the Delegates of the Commission and the Agent of the State.

113. *See* communication REF. CDH-S/649 of the Secretariat of the Court of October 19, 2000, addressed to the Delegates of the Commission in the processing of this request.

114. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 38, paras. 56-60.

Pursuant to Articles 21.1 and 22 of the Court's Rules, the agent of the State and the delegate of the Commission may be assisted by any person of their choice at the hearing. In addition, once the application has been admitted, Article 23 authorizes the alleged victim, his family or his duly accredited representatives to present their pleadings, motions, and evidence autonomously.

The role of these advisors is especially relevant during the oral stage, whether on the preliminary objections or on the merits of the controversy and while the Rules do not indicate when the designation should be made, the Court has held that they should be notified to the parties before the hearings. In the Genie Lacayo Case, the Government of Nicaragua successfully objected to the designation of Ariel Dulitzky as an advisor to the Commission for the public hearing because it was presented out of time[115] and, therefore, the Government did not have sufficient time to modify the strategy that it had prepared for its defense. The Court pointed out that it was important that the parties knew who would represent the opposing party and their role in order to prepare adequately their defense and, therefore, it rejected the last-minute accreditation of Mr. Dulitzky as an advisor to the Commission.[116]

The President of the Court directs the debate, decides the order in which the eligible persons (the State's agent and the Commission's delegate and the persons of their choice) intervene and determines the necessary measures so that the hearings run smoothly. Under Article 41 of the Court's Rules, the judges may ask the questions that they deem relevant to any person appearing before the Court. The witnesses, experts and any other person the Court decides to hear may be questioned, subject to the control of the President, by the persons who represent or advise the parties. The President may resolve the relevance of the questions and excuse a response, unless the Court decides otherwise. Leading questions are not permitted.

There is no provision that specifically refers to the length of the interventions of the parties or their content. On the other hand, Article 60

115. In fact, the notification was made the same day that the hearings began.

116. I/A Court H.R., Order of the Court of November 27, 1995. Genie Lacayo Case, para. 1 of the expository part, paras. 2-3 of the considerations and the operative part.

of the Rules of the International Court of Justice indicates that the statements of the parties should be as succinct as possible within the limits of what is required for their adequate presentation and that, therefore, they should be directed to the topics that still divide the parties and not simply a repetition of everything covered in the pleadings or of the facts and arguments on which they are based. Article 61 provides that the judges may indicate at any time, prior to or during the hearing, the aspects that they would like the parties to discuss or the points that they consider have already been sufficiently debated.

Pursuant to Article 43 of the Rules of the Inter-American Court, summary minutes are taken of each hearing that contain: a) the names of the judges present, b) the names of the representatives of the State, the representatives of the Commission and of the alleged victims who were present, c) the names and personal data of the witnesses, experts and other persons who appeared, d) the statements made expressly to be placed in the minutes by the States Parties, the Commission, the victims or the alleged victims, their families or their duly accredited representatives, e) the statements of the witnesses, experts and other persons who appeared as well as the questions asked and the respective responses, f) the text of the questions formulated by the judges and the respective representatives and g) the text of any decisions that the Court has made during the hearing. Previously the agent, delegate, victims and alleged victims, their families or their duly accredited representatives, as well as the witnesses, experts and other persons who appeared received a copy of the pertinent parts of the transcription of the hearing so that they could correct errors of transcription. With the reform of the Rules, the Secretariat now records the hearings and attaches a copy of the recording to the case file. The agent, delegate, victims or alleged victims, their families or duly accredited representatives as well as the witnesses, experts and other persons who have appeared receive a copy of the recording of the public hearing at its conclusion or within 15 days.

### *4. THE FINAL ARGUMENTS*

While this step is not expressly provided for in the Court's Rules, after the evidence has been received at the public hearings on the merits,

the parties have been invited to present their final oral arguments. It has also been the Court's consistent and uniform practice to grant the parties the opportunity to present final written arguments, which are a summary of the positions that the parties manifested at the public hearing on the merits. These final arguments are not subject to additional observations by the parties.[117] The period set by the President of the Court for the presentation of these final written arguments, normally 30 days, has sometimes begun to run after the recording of the public hearing has been transmitted to the parties.[118] In other cases, this period has begun to run at the conclusion of the public hearing.[119]

If a party requests an extension to submit these arguments, it is granted to both parties. The Court has been sufficiently flexible to accept these arguments even when they are presented out of time. In the Baena Ricardo *et al*. Case Panama presented its final written arguments out of time, but the Court admitted them, based on "reasonableness and timeliness criteria" since the delay did not affect the balance that the Court must maintain between the protection of human rights and legal certainty and procedural equality.[120]

In the case of the Mayagna Community, Nicaragua objected that the parties were granted the possibility of presenting final written arguments and requested that, if the Court decided to admit such pleadings, it be given an extension to submit them. The Secretariat of the Court, following instructions of the President, informed the State that it had been its consistent and uniform practice to grant to the parties the opportunity to submit final written arguments, taken to be a summary of the positions that the parties stated at the public hearing on the merits, in the understanding that such briefs are not subject to additional observations by the parties. With respect to the request to extend the period for the presentation of the final arguments, the Secretariat stated that, following

117. *See, e.g., The Mayagna (Sumo) Awas Tingni Community Case, supra* note 38, para. 70.

118. *Case of Bulacio, supra* note 48, para. 29. This judgment, prior to the reform of the Rules of November 25, 2003, refers to the transcription and not the recording of the hearing.

119. I/A Court H.R., *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003. Series C No. 99, para. 22.

120. *Baena Ricardo et al. Case, supra* note 42, para. 50.

the instructions of the President, in view of the time that the parties had had to present their final written arguments and to avoid affecting the balance that the Court must maintain between the protection of human rights and legal certainty and procedural equality, a period was granted to both parties until August 17, 2001, which could not be extended.[121]

### *5. THE INTERVENTION OF AMICUS CURIAE*

Frequently, non-governmental organizations or individuals who are not parties to the proceedings before the Court intervene in the written stage as *amici curiae*.[122] This type of intervention has not been limited to the proceedings on the merits or on reparations but has been extended to the compliance of the judgment stage.[123] While in all of these cases the Court has simply acknowledged receipt of these *amicus curiae* briefs without referring to them further, it is important that they have been admitted and added to the case file. It must also be agreed that this type of intervention is not irrelevant and that, while it may be that they are not read by all of the judges, they do produce some sort of effect on the Court's frame of mind.

The *amicus curiae* brief comes from Anglo-Saxon law and is the intervention of a third party authorized to participate in the proceedings in order to offer information or to defend the general interest so that, beyond the interest of the parties, it may also be considered by the Court or may develop the legal arguments of one of the parties. In the inter-American system for the protection of human rights, this means of intervention has been used to offer information (for which it also has a evidentiary connotation) and to present the position of the *amicus* on the applicable law. According to the Court, the role of the *amicus curiae* is simply that of collaborating with the Court in the examination and resolution of the

121. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 38, para. 70.

122. *See, e.g.,Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case, supra* note 1, paras. 38, 40 and 47, respectively; I/A Court H.R., *Velásquez Rodríguez Case. Compensatory damages.* Judgment of July 21, 1989. Series C No. 7, para. 19 and *Godínez Cruz Case. Compensatory damages.* Judgment of July 21, 1989. Series C No. 8, para. 19; *Aloeboetoe et al. Case. Reparations, supra* note 63, para. 38 and *Gangaram Panday Case*, *supra* note 91, para. 37.

123. *Baena Ricardo et al. Case, supra* note 42, paras. 20 and 46.

matters submitted to its jurisdiction, but it is not that of petitioning the Court to decide in one or another sense.[124]

The legal grounds of the *amicus curiae* brief may be found in Article 45.1 of the Court's Rules, which authorizes it to hear any person whose opinion it deems relevant. This intervention does not require the consent of the parties and depends entirely on whether the Court deems it appropriate. The term "any person" is sufficiently broad to include even those who act in representation of a State body, such as occurred in the Baena Ricardo *et al*. Case where the Court received an *amicus curiae* brief from the Ombudsman of Panama.[125] There have also been *amicus curiae* briefs prepared by law firms in the name of or in representation of an interested third party. Such was the case, for example, of the *amicus curiae* brief presented in the name of the petitioners in the Mayagna Community Case.[126]

On the other hand and although to date this type of intervention has only occurred in the written stage of the proceedings, it appears that there is no legal impediment for its appearance at the oral stage at which it could make an equally valuable contribution. In fact, in its advisory proceedings the Court has accepted the intervention of *amici curiae* during the hearings. Moreover, just as the Court may admit or authorize the intervention of whoever wishes to participate in the proceedings as *amicus curiae*, it may also take the initiative and invite an expert to give his opinion to the Court.

In spite of their obvious utility and notwithstanding that they are not expressly provided for in its Rules, it is unfortunate that the Court has not taken these briefs with sufficient seriousness by examining the arguments of the *amici*, which may be different than those of the parties and may also be of interest for the defense of the rights enshrined in the Convention.

124. I/A Court H.R., Order of the Court. Velásquez Rodríguez, Fairén Garbi and Solís Corrales and Godínez Cruz Cases.

125. *Baena Ricardo et al. Case, supra* note 42, para. 37.

126. *The Mayagna (Sumo) Awas Tingni Community Case, supra* note 38, para. 52.

## D. ESTABLISHING THE FACTS

In proceedings before international tribunals and particularly in disputes between States, the controversy generally centers more on questions of law rather than of facts. The rules in the area of evidence, therefore, normally have a secondary importance. It is the reverse in the area of human rights. The evidence on what happened, the determination of who did what and evidence on damages has a transcendental importance. In fact, when the parties have not furnished evidence that would allow determining compensation or when this matter has not been discussed during the proceedings, the Court limits itself to an *in genere* judgment when it has not been able to determine the amount of compensation and leaves the agreement to the parties. If eventually there is no agreement, the Court makes a final decision.[127]

What has to be proven, of course, are the facts in question, but this does not preclude the State from admitting, in their entirety, the allegations in the application[128] or from admitting facts that, *per se*, do not involve its international responsibility.[129] In any event, it is important to note that before an international tribunal, such as the Inter-American Court, domestic law is a fact whose existence must be recognized.[130]

When a case is before the Court, the State's agreement to comply with the recommendations in the Commission's Article 50 Report cannot be interpreted as an acceptance of the facts or the State's international responsibility and does not exempt the Court from ruling on those aspects.[131]

According to the Court, the evidentiary file of a case is unique and indivisible and is made up of the evidence presented during all stages of

127. *Neira Alegría et al. Case*, *supra* note 91, paras. 90, 91.3 and 91.5 and *Caballlero Delgado and Santana Case*, *supra* note 44, paras. 71 and 72. In both cases the Court also pointed out the necessity of proving the expenses that the next of kin of the victims had in their steps before the national authorities.

128. *El Amparo Case, supra* note 44 and *Garrido and Baigorria Case, supra* note 78.

129. *See, e.g.*, the note of September 20, 1990 addressed to the Commission by the Minister of Foreign Affairs of Peru in which he states that "The allegedly missing persons Víctor Neira Alegría, Edgar Zenteno Escobar and William Zenteno Escobar, are not among the rioters who surrendered in the events of the San Juan Bautista prison… nor were their bodies among the few that could be identified," which allowed the Court to consider proved the allegations. *Neira Alegría et al. Case, supra* note 91, para. 67.

130. *Case of Hilaire, Constantine and Benjamin et al., supra* note 37, para. 84.

131. I/A Court H.R., *Ivcher Bronstein Case*. Judgment of February 6, 2001. Series C No. 74, para. 76.aa.

the proceedings. The documentary evidence presented by the State and by the Commission during the preliminary objections stage becomes, therefore, part of the evidentiary file of the same case at its later stages.[132]

### *1. AN AGREEMENT BETWEEN THE PARTIES*

Once the application is filed, the State may recognize its international responsibility for the acts denounced and save the Court the complex evidentiary stage. In the Aloeboetoe *et al*.,[133] El Amparo[134] and Garrido and Baigorria[135] Cases the States accepted as true the acts denounced and their international responsibility.

Acknowledgement of the facts may also be the result of an agreement between the parties. In the Barrios Altos Case, although the State had initially objected to the Court's jurisdiction, it later recognized its international responsibility and announced that it "would initiate a friendly settlement proceedings before the Inter-American Commission on Human Rights, as well as before the petitioners" and indicated that it would send the pertinent communications "to initiate formal conversations and reach the aforementioned agreement." In view of the tenor of this communication, the Court convoked the parties to a public hearing in order to receive their positions with respect to the agreement.[136] At the hearing, the Commission requested that, in light of the State's acquiescence, the Court should not only establish the specific violations of the Convention by the State but also specifically establish the need to clarify the events so as to protect the right to truth, the need to investigate and punish those responsible, the incompatibility of amnesty laws with the provisions of the Convention and the State's obligation to repeal such laws.[137]

On the basis of the statements of the parties and in view of Peru's acceptance of the facts and recognition of its international responsibility,

132. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 38, para. 98.
133. *Aloeboetoe et al. Case*, *supra* note 76, first operative paragraph.
134. *El Amparo Case*, *supra* note 44, operative part, especially paras. 1-2.
135. *Garrido and Baigorria Case*, *supra* note 78, operative paras. 1-2.
136. *Barrios Altos Case*, *supra* note 46, paras. 31-32.
137. *Ibid*., paras. 35-36.

the Court considered that the dispute had ceased between the State and the Commission with respect to the facts that gave rise to the case and, therefore, considered as admitted the allegations in the application. As had been expressly recognized by the State, the Court also held that the State was internationally responsible for the violation of Articles 4, 5, 8 and 25 of the Convention and that it was responsible for not complying with Articles 1.1 and 2 of the Convention as a consequence of the enactment and application of the amnesty laws.[138]

Similarly, in the Bulacio Case, which was being heard by the Court, before the evidentiary stage the Commission and the representatives of the victim's families reached a partial friendly settlement in which the State recognized its international responsibility and agreed to whatever the Court might order in reparations. That agreement was complemented by a clarifying document in which it was pointed out that the State recognized its responsibility for the violation of Articles 2, 7, 5, 19, 4, 8 and 25 of the Convention. In the original agreement the Court was requested to accept the designation of an advisory body with the object, if necessary, of adjusting and modernizing domestic norms in the areas related to the case (particularly the conditions of detention of minors) for which it would invite experts and organizations of civil society to give their opinions.[139] In light of this agreement, the Court noted the willingness of the parties to put an end to the controversy with respect to the merits of the matter.[140] In fact, the agreement signed between the parties required the Court to rule on certain questions of law present in the case, particularly relating to the application of Article 7 of the Convention and the condition of the detention of the children.

### *2. THE ATTRIBUTES OF THE COURT TO RECEIVE EVIDENCE*

The Convention does not expressly grant the Court any specific competence regarding the establishment of the facts. While this attribute

138. *Ibid*., paras. 38-39.
139. *Case of Bulacio, supra* note 48, paras. 31-33.
140. *Ibid*., para. 38.

may be understood to be implicit in the judicial nature of its function, to comply fully with it presents several aspects that the Court has had the opportunity to examine and develop.

The attributes of the Court in the area of evidence should be analyzed in at least three aspects: a) receiving and evaluating the evidence that is submitted to it by the parties, b) ordering on its own motion the evaluation of the evidence and c) requiring the cooperation of the States in the production of any evidence.

***a) The competence of the Court to receive evidence***

Notwithstanding the evidence that the parties submit to the Commission or that the Commission itself has gathered, the Court, as a jurisdictional organ, has competence to examine the case as a whole and may receive the evidence that is offered by the parties and the other evidence that it deems essential on its own motion in order to fulfill its mission. In accordance with this criterion, the actions of the Commission in the area of evidence as well as its opinion on the facts is not conclusive and may be reviewed by the Court.

It is obvious that this matter is not free of controversy and that it must be analyzed with particular care. Thomas Buergenthal believes that it is necessary to ask whether the Court has an independent function of fact-finding and, if so, how it interacts with the Commission's attributes in this area.[141] In his opinion, the scope of the judicial functions in the area of fact-finding depends on whether the respective organ is a tribunal of first or second instance but the Convention does not specify to which category the Court belongs. Neither the Convention nor the Court's Statute obliges the conclusion that, in relation to the Commission, the Court is simply an appellate court without independent powers for fact-finding. Buergenthal contends that those instruments indicate that the drafters of the Convention assumed that, in principle, fact-finding was for the Commission and the Court was left with the review of questions of fact,

141. Thomas Buergenthal, *Judicial Fact-Finding: Inter-American Human Rights Court*, in FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS, ELEVENTH SOKOL COLLOQUIUM, edited by Richard B. Lillich, Transnational Publishers, Inc. Ardsley-on-Hudson, New York, 1992, p. 262.

or of law, in the dispute, but that its role in the area of fact-finding would be merely that of completing the activities of the Commission.[142] This was also the Court's opinion in The Matter of Viviana Gallardo *et al.* where it held that the Commission has an investigatory function of the allegations as a violation of the human rights set forth in the Convention and that the Court, as a judicial organ, may carry out its own investigations, particularly if they are necessary to provide its members with the information that they need to discharge their functions. The system of the Convention, however, entrusts to the Commission the initial phase of the investigation into the allegations.[143]

Buergenthal maintains that this division of work means that fact-finding takes place at the Commission, which is better equipped than the Court to conduct such a task, and that only when it has failed to do so must the Court assume this function. In his opinion, this is what occurred in the first three cases against Honduras in which the Commission was unsuccessful in obtaining the cooperation of the State and did not convoke a hearing of the parties, thus basing its conclusions on the presumption of the truth of the allegations under Article 42 of the then Rules of the Commission for cases in which the State does not furnish the relevant information.[144] In its arguments before the Court the Government of Honduras denied the allegations that were presumed to be true by the Commission. The Commission, for its part, offered other evidence to demonstrate the truth of the allegations. The fact that the Court had to establish the facts for a second time was the result of the manner in which those matters were handled before the Commission and the position assumed by the parties when these cases were submitted to the Court. In the opinion of Buergenthal, since the Convention is sufficiently vague on this matter, these cases suggest that the Court is free to act either as an appellate court or as a tribunal of first instance, depending on the characteristics of the case that is submitted to it.[145]

142. *Ibid*., pp. 262-264.
143. *In the Matter of Viviana Gallardo et al.* Decision of November 13, 1981, *supra* note 3, para. 22.
144. *Judicial Fact-Finding: Inter-American Human Rights Court*, *supra* note 141, p. 264.
145. *Ibid*., p. 265.

***b) The determination of what is considered necessary***

The Court has reserved the right to determine whether the evidence that it receives is essential to decide the case before it. Article 47.1 of its Rules provides that the Court determines when the parties present their witnesses and expert witnesses "whom the Court considers it necessary to hear." In the exercise of this inherent attribute, in the Genie Lacayo Case, in which the Commission had asked that a retired Army General be re-summoned and that General Joaquín Cuadra also be called as a witness, the Court decided that, as the matter referred to acts that implied the violation of procedural norms, such testimony was not necessary and did not affect the final decision. The Court, therefore, considered that the evidence presented was sufficient for it to have the elements necessary to decide on the merits of the controversy and that a procedural act that would lead to an unnecessary delay was not justified.[146]

***c) The evidentiary actions on its own motion***

Among its attributes, the Court may order on its own motion that certain evidentiary activities be carried out or that the parties be requested to present certain evidence. Article 45 of its Rules provides that at any stage of the proceedings the Court may a) obtain on its own motion any evidence that it considers helpful and may hear as a witness, expert witness or in any other capacity, any person whose testimony, statement or opinion it deems to be relevant, b) request that the parties provide any available evidence or any explanation or statement that in its opinion may be useful, c) request any entity, office, organ or authority of its choice to obtain information, express an opinion or make a report or provide an opinion on any given point and d) commission one or more of its members to gather evidence, either at the seat of the Court or elsewhere.

Pursuant to Article 73 of its Rules, the Commission must send to the Court, at the latter's request, any other evidence, document or information concerning the case except for documents referring to an unsuccessful attempt to reach a friendly settlement. According to the Commission's

146. I/A Court H.R., Order of the Court of January 22, 1997. Genie Lacayo Case, para. 3 of the expository part, paras. 5-6 of the considerations and operative para. 1.

Rules, however, the transmittal of those documents is subject, in each case, to the decision of the Commission, which must withhold the name and identity of the petitioner, if he does not authorize that it be revealed.

In the exercise of its attributes in the area of evidence, in Las Palmeras Case, the Court ordered the exhumation of the mortal remains of two victims whose identity had not been faithfully established. Following the recommendation of an expert appointed for the case, the Court ordered tests of the residue of the gunshot found among the remains of one of the victims, using inductively coupled plasma mass spectometry.[147]

Similarly, in the Durand and Ugarte Case, the President of the Court requested that the State provide all the documentation on the writs of habeas corpus presented on behalf of the affected persons, as well on the case brought against them for the crime of terrorism.[148] Although the State did not comply with this request,[149] the Court delivered its judgment on the basis of the evidence in the file. In the Baena Ricardo *et al*. Case, the Secretariat of the Court, following instructions of the President and on the basis of its attributes under Article 44 of the Rules, requested of the State, in order to facilitate adjudication of the case, *inter alia*, 1) the file of the proceedings before the Cabinet Council against the workers dismissed pursuant to Law 25 of December 25, 1990, 2) the file of the acts of the Ninth Prosecutor and the Seventh Criminal Court of the Judicial Circuit of Panama for the crime of "sedition against the internal personality of the State" against some of the petitioners, 3) the minutes of the deliberations of the Cabinet Council for the month of December 1990 and those held on the debate of Resolution No. 10 of January 23, 1991, 4) Resolution No. 10 of January 23, 1991 of the Cabinet Council, 5) the judicial files of the contentious-administrative petitions presented by some of the claimants and 6) the judicial file on the writ of unconstitutionality against Law 25 presented by one of the petitioners.[150] The State presented only part of

147. *Las Palmeras Case, supra* note 63, paras. 27-28.

148. I/A Court H.R., *Durand and Ugarte Case. Preliminary Objections*. Judgment of May 28, 1999. Series C No. 50, para. 21.

149. *Ibid*., para. 25.

150. *Baena Ricardo et al. Case, supra* note 42, para. 51.

this documentation.[151] The Court has not ignored the frequent total or partial lack of compliance with respect to its requests for evidence and considers that the parties must furnish it with the evidence that it requests, whether documentary, testimonial, expert or any other. In its opinion, the Commission and the State must provide "all items of evidence required – either on their own motion, as evidence to broaden the knowledge on the matter, or at the request of one party– in order for the Court to have at its disposal the greatest number of elements of judgment to know the facts and support its decisions." According to the Court, it is necessary to take into account that in proceedings on human rights violations, it may occur that the complainant does not have the possibility to submit evidence that may only be obtained through the cooperation of the State.[152]

In the Mayagna Community Case, the Secretariat of the Court requested the State to furnish various documents offered as annexes to its reply and on the preliminary objections, but which had not been presented, including maps and physical descriptions offered in one of the annexes, as well as documents regarding the titles of the neighboring communities to Awas Tingni offered in the same annex, documents on the estimated projections of the geographical location of the area claimed by the Awas Tingni Community, claims by other communities, overlap of claims, *ejido* lands, national lands and other relevant illustrations, certification of the articles of the Legal Codes of Nicaragua, relevant laws and decrees, etc. Nicaragua provided some of the requested documents but informed the Court that it would not present the maps and physical descriptions offered as annex 15 in its reply, because "the maps submitted with the brief on preliminary objections show the geographical location of the area claimed by the Community, claims by other communities, physical descriptions, and so forth." It also stated that it would not present the INRA certification regarding the titles of the Awas Tingni Community, offered as annex 10 of the brief on preliminary objections "because that same brief…included a certification issued by that institution on this same affair, on August 5, 1998." Regarding pages 129 and 130 of annex 10 of the answer, the State indicated that said annex had only 128 pages. With respect to the documents

151. *Ibid*., para. 53.
152. *Ibid*., para. 81.

pertaining to the titles of other indigenous communities, the State pointed out that, if it deemed it appropriate, it would submit them at a later stage of the proceedings.[153] Other documents requested by the Court to facilitate adjudication of the case were also not submitted.[154]

The Secretariat of the Court itself has sometimes requested the respondent State to present evidence to facilitate adjudication of the case.[155] In the Durand and Ugarte Case, the Secretariat also asked the OAS Secretary General to inform whether Peru had notified it with respect to states of emergency or suspension of guarantees between June 1, 1986 and July 20, 1987, as required by Article 27.3 of the Convention.[156]

The Court has also held that evidence proved in a previous case may be used in a controversy pending before it. In the Durand and Ugarte Case the Court asked the Commission that it indicate what evidence from the Neira Alegría *et al.* Case was relevant to the Durand and Ugarte Case.[157] This decision was, however, adopted with respect to two cases based on the same facts and against the same State and that the State had already had sufficient time to challenge the press clippings on the events at the Lurigancho, El Frontón and Santa Bárbara prisons. The other evidence that the Commission requested to be included in the Durand and Ugarte Case was official documents (specifically, the Minority Opinion of the Congressional Committee of Inquiry of Peru on the acts that occurred on June 18 and 19, 1986 in the aforementioned jails, the reports on the autopsies performed on the bodies of the inmates of El Frontón and the military case regarding El Frontón) or from the Court itself (specifically, the transcript of the statements of the witnesses who appeared before the Court at the public hearings held on July 6 and 10, 1993).[158]

### *d) The obligation of the States to cooperate with the Court*

As a complement to the foregoing, Article 24 of the Court's Rules provides that the States parties to a case have the obligation to cooperate

153. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 38, para. 40.
154. *Ibid*., para. 69.
155. *Durand and Ugarte Case*, *supra* note 148, para. 27.
156. *Ibid*., para. 26.
157. *Ibid*., para. 22.
158. *Ibid*., para. 23.

so that all notices, communications or summons addressed to persons subject to their jurisdiction be duly executed and that they facilitate compliance with the summons to appear of those persons who reside or who are present within their territory. The same rule is applicable to any proceeding that the Court decides to order in the territory of a State party to the case. When the execution of any of the measures referred to Article 24 requires the cooperation of any other State, the President of the Court requests the respective government to provide the requisite assistance. This provision of the Rules is based on Article 33 of the Convention, which names the Court as one of the competent organs to hear matters relating to the fulfillment of the commitments made by the States and on Article 26 of the Vienna Convention on the Law of Treaties, which provides that a treaty is binding on the parties and must be performed by them in good faith.

In keeping with Article 24 of its Rules, the Court has stated that for the effects of any summons the State must collaborate in the case of witnesses who are present in its territory, both in summoning them and in providing details on their addresses or other data to locate them.[159]

In the Mayagna Community Case, in which the State did not submit the documentation requested by the Court, the Court observed that the parties must furnish the Court with the evidence requested, whether documentary, testimonial, expert or any other. According to the Court, the Commission and the State must provide "all items of evidence required –either on their own motion, as evidence to broaden the knowledge on the matter, or at the request of one party– in order for the Court to have at its disposal the greatest number of elements of judgment to know the facts and support its decisions." According to the Court, it is necessary to take into account that in proceedings on human rights violations, it may occur that the complainant does not have the possibility to submit evidence that may only be obtained through the cooperation of the State.[160] In this same case, an order of the President of the Court requested Nicaragua to facilitate the departure and re-entry of those witnesses and experts who resided there and had been summoned to give testimony and expertise with respect

159. I/A Court H.R., Order of the President of July 20, 2000, Paniagua Morales *et al*. Case.
160. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 38, operative para. 2.

to the merits of the case.[161] On the other hand, in the Genie Lacayo Case, in which the State did not present a witness because he did not work for the government and, therefore, it could not be responsible for his appearance and did not present a second witness because of "reasons of national security of the State…(that) prevented him from leaving the country," the Court, perhaps because that evidence was not considered necessary, did not make reference to the State's duty to cooperate with it.[162]

It is important to underscore that the Commission must also comply with the Court's requests in evidentiary matters. Specifically, it has been the Court's consistent practice to request the Commission that it be responsible for the notification of the witnesses that it proposes.

***e) The protection of witnesses and experts***

A particularly relevant aspect in this area, which is closely associated with the State's commitment to cooperate with the Court, refers to the protection of witnesses and experts. Article 50 of the Court's Rules provides that the States may not prosecute witnesses or expert witnesses or bring illicit pressure to bear on them or their families because of their statements or opinions before the Court. This duty of the States is based on Article 62.1 of the Convention, referring to the acceptance of the Court's jurisdiction, and Article 26 of the Vienna Convention on the Law of Treaties, which imposes on States the duty to fulfill their international commitments in good faith.

On the other hand, the Host Country Agreement signed between Costa Rica and the Court[163] includes a system of privileges and immunities for the Court, its judges, its personnel and the persons who appear before it. Article 26 of the Agreement provides that the Government of Costa Rica recognizes for the representatives of the parties, their advisors and lawyers, for the representatives of the Commission and for those persons who are asked to attend as well as for witnesses, experts and other persons whom the Court decides to hear, the privileges and immunities that would

161. I/A Court H.R., Order of the President of October 20, 2000. The Mayagna (Sumo) Awas Tingni Community Case, operative para. 2.

162. Order of the Court of January 22, 1997, *supra* note 146, para. 2 of the considerations.

163. Signed in San José, Costa Rica on September 10, 1981.

enable their intervention before the Court. In particular, Costa Rica agreed to grant a) the immediate issuance of visas that would allow their entry into and their stay in Costa Rica, b) the immediate issuance of a travel document that would enable them to appear before the Court when this is necessary because of a lack of such a document and the impossibility to obtain one in their country of origin or residence and c) immunity from all administrative or judicial proceedings during their stay in Costa Rica, although this may be waived by the Court, when deemed appropriate. These same privileges and immunities are granted to those persons who appear as victims or complainants in the cases. The persons referred to in Article 26 may not be held responsible for acts or written or oral statements made in the course of the proceedings before the Court. These privileges and immunities exist from the moment that the Court has informed the Government of Costa Rica of the summons of the persons indicated until the conclusion of the proceedings.

### *3. THE BURDEN OF PROOF*

In accordance with a firmly established principle, the burden of proof falls on those who affirm and not on those who deny. This principle was ratified by the Court in the first cases against Honduras when it stated that since the Commission was the complainant it had the burden of proving the allegations contained in its application.[164] When the Commission objected to the veracity of the documents and certifications submitted by Honduras to prove the migratory movement of the alleged victims in one of those cases, the Court noted that the Commission had not presented evidence to support its objection.[165]

The Court has held, however, that, unlike domestic criminal law, in proceedings on human rights violations the State cannot rely on the defense that the complainant has failed to present evidence that, in many cases, cannot be obtained without the State's cooperation.[166] In a case of

164. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 1, paras. 123, 129 and 126, respectively.

165. *Fairén Garbi and Solís Corrales Case*, *supra* note 1, para. 137.

166. *Velásquez Rodríguez Case*, *supra* note 1, para. 135 and *Godínez Cruz Case*, *supra* note 1, para. 141.

disappearances that resulted from measures adopted by a government to suppress a prison uprising, the Court felt that it was not up to the Commission to determine the whereabouts of those persons but, since at that time the places of detention and the investigations were under the exclusive control of the government, the burden of proof was on the State because the evidence was, or should have been, in the hands of the government if it had acted with the diligence required.[167] According to the Court, a State controls the means to verify the acts that occur in its territory.[168] Nonetheless, the State has not always taken advantage of the opportunity to present evidence to support its claims.[169] With respect to the physical integrity and life of persons who have been detained and who, therefore, are under the custody of the State, in the Bulacio and Juan Humberto Sánchez Cases the Court held that the condition of guarantor of the right to life obligates the State to prevent those situations that might lead, by action or omission, to the suppression of those rights. Therefore, if a person was detained in good health and later died, the State has the obligation to provide a satisfactory and convincing explanation of what happened in order to be able to refute the allegations of its responsibility through valid evidence. For the Court, the State has both the responsibility of ensuring the rights of the individual under its custody and of furnishing information and evidence on what occurred to the detainee.[170]

As a corollary, in evaluating the evidence in its power, the Court has considered it legitimate to attribute a legal effect to the conduct of the State and especially to its inaction or silence with respect to the evidence. In the first three cases against Honduras, the Court held that the manner in which the State had conducted its defense would have sufficed to prove many of the Commission's allegations by virtue of the principle that, except in criminal matters, the silence of the accused or elusive or ambiguous answers may be interpreted as an acknowledgement of the allegations provided that the contrary does not appear in the record or is not compelled as a matter of law. Without giving up its discretionary power to weigh the

167. *Neira Alegría et al. Case, supra* note 91, para. 65.
168. *Velásquez Rodríguez Case, supra* note 1, para. 136 and *Godínez Cruz Case, supra* note 1, para. 142.
169. *Neira Alegría et al. Case, supra* note 91, para. 44.
170. *Case of Juan Humberto Sánchez, supra* note 119, paras. 110-111 and Case of Bulacio, *supra* note 48, para. 138.

State's silence or inaction, the Court tried to compensate for those procedural deficiencies by admitting all of the evidence offered, even if untimely, and by ordering on its own motion other evidence.[171] In the Hilaire, Constantine and Benjamin *et al*. Case, the Court observed that "the State failed to discharge its procedural responsibility of presenting evidence in the course of the procedural stages set out in Article 43 of the Rules of Procedure.… The Court considers, as it has in other cases, that when the State does not specifically contest the application, the facts on which it remains silent are presumed to be true, provided that the existing evidence leads to conclusions consistent with those facts."[172]

An aspect closely related to the burden of proof refers to the costs involved. Article 46 of the Court's Rules provides that the party that proposes evidence is responsible for the costs of producing it. That cost may be prohibitive for the victim and may mean the difference between a judgment that is in his favor and one that is not. In summoning the experts proposed by the Commission, the Court has indicated that, with respect to the details and costs of transportation to the Court, they should communicate with the Commission.[173]

In contrast, Article 68 of the Rules of the International Court of Justice provides that the appearance of the witnesses and experts whose presence has been requested by the Court, as well as persons chosen to conduct an investigation or to give their expert opinion, are paid with funds of the Court, where appropriate.

### *a) The offering of evidence*

In keeping with the consistent practice of the Inter-American Court, at the beginning of each procedural stage the parties indicate, at their first opportunity, the evidence that they will offer. Pursuant to Article 33.1 of the Court's Rules the evidence that is offered by the Commission must indicate in the application (although it does not have to accompany it) the acts about which it is offered. The application should also list the witnesses

171. *Velásquez Rodríguez Case, supra* note 1, para. 138 and *Godínez Cruz Case, supra* note 1, para. 144.
172. *Case of Hilaire, Constantine and Benjamin et al., supra* note 37, para. 67.
173. *See, e.g.*, communication REF. CDH-11.577/090 of the Secretariat of the Court dated March 20, 2000, addressed to Rodolfo Stavenhagen with respect to the Mayagna Community Case.

and experts that the Commission plans to present and the subject of their statements. According to Article 38.1 of the Rules, the State's reply should contain the same requisites as the application. Therefore, the State should list the evidence that it will offer, with an indication of the acts about which it is offered and a list of the witnesses and experts and the subject of their statements. This rule relating to the admission of evidence is repeated in Article 44.1 of the Rules, which provides that the evidence proposed by the parties will only be admitted if it is offered in the application or its reply and, when appropriate, in the brief of preliminary objections and its reply. The offer of evidence should also be included at the beginning of the reparations stage, although the Rules do not specifically so state. Pursuant to Article 38.1 of the Court's Rules, the State, within the same period set out for the reply to the application, which cannot be extended, must present with the reply or in a separate submission its observations to the brief on pleadings, motions and evidence.

Article 44.3 of the Rules provides for the possibility that the Court admit evidence submitted out of time if a party pleads *force majeure*, serious impediment or supervening events provided that the opposing party is guaranteed the right to defense. According to the Court, the "contradiction principle" governs the area of evidence and ensures the right of defense of the parties. That principle is one of the foundations of Article 43 of the Rules and refers to when the evidence is to be submitted to ensure equality between the parties.[174] In the Paniagua Morales *et al*. Case, in which the Commission communicated part of the definitive list of witnesses and experts, which was completed in a later submission with the request that a person be summoned to appear who had not been included in that list, the President of the Court accepted this addition because he considered that the State's right of defense regarding the Commission's request had been recognized, unless the appearance of the witness had been questioned and unless some objection or challenge had been presented.[175]

Articles 23.1 and 36 of the Rules of the Court provide that, once the application has been notified, the alleged victim, his next of kin or his

174. *Baena Ricardo et al. Case, supra* note 42, para. 68.

175. I/A Court H.R., Order of the President of July 20, 2000. Paniagua Morales et al. Case, paras. 5-6 and 8 of the expository part and para. 1 of the considerations.

duly accredited representatives have a period of two months, which cannot be extended, to present autonomously their pleadings, motions and evidence. In any case, in offering their evidence they are bound by the same requisites included in Article 33.1 of the Rules, which refers to the evidence offered by the Commission.

The Court, however, is loathe to accept that the witnesses and experts who were initially offered be heard in a different capacity. In the Mayagna Community Case, the Commission, after having presented a list of witnesses and experts, submitted a definitive list of its witnesses and experts that included as an expert a person who had originally been proposed as a witness. The Court rejected this proposal, for being out of time, but did allow the person to appear as a witness, as had been originally proposed.[176]

On the other hand, in the same case the Commission presented extemporaneously a brief on reparations and costs, which was not accepted by the Court. The brief was presented twelve days after the expiration of the period and the Court considered that, according to its jurisprudence, the time elapsed was not reasonable. The Court held that the delay was not due to a simple error in computing the period and that legal certainty and procedural equality require that deadlines be observed, except when there are exceptional circumstances, which were not present in this case.[177]

***b) When to present the evidence***

The Court has repeatedly emphasized the importance of the "contradiction principle," pointing out that it is the foundation of Article 44 of its Rules on when the evidence should be offered to ensure equality between the parties.[178]

Article 44 of the Rules provides that the evidence offered by the parties may only be admitted if it is indicated in the application or its reply and, when appropriate, in the brief of preliminary objections and its reply. The Court may, under special circumstances, admit evidence that has been

176. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 38, paras. 54-55.
177. *Ibid*., paras. 73 and 159.
178. *Ibid*., para. 86. The Court refers to Article 43 of the Rules, which is now Article 44.

offered out of time when a party pleads *force majeure*, serious impediment or supervening events provided that the opposing party is guaranteed the right of defense. This exception was applied in the Constitutional Court Case, in which some of the documents offered by the Commission during the public hearing on the merits related to events subsequent to the filing of application and, therefore, the Court ordered them incorporated into the evidentiary file.[179] In the reparations stage of the Cesti Hurtado Case, the Court accepted a resolution of the Full Chamber of the Supreme Council of Military Justice, which had not been presented at the opportune time, because it referred to a supervening event that justified its late presentation and, therefore, it could be included in the evidentiary file.[180] Similarly, in the Juan Humberto Sánchez Case the Court admitted documents offered during the public hearing, including three announcements of rewards printed in newspapers of national circulation, documents relating to the actions of the prosecutor and lower court judge and documents concerning the efforts to capture one of the persons thought to be responsible for the acts in the case, which were produced after the filing of the application.[181]

The Court initially was more flexible, which does not correspond to current norms. To the extent that the Court considered that it should have all of the evidence necessary to decide the case, it held that there was no impediment to proposing the testimony of witnesses after the filing of the application.[182] In the first cases against Honduras, the Court admitted all the evidence that was presented, even though it was extemporaneous.[183] In rejecting the idea that it was indispensable that the witnesses be offered in the application, the Court suggested, in passing, that it was only necessary that they be offered with sufficient time before the hearings,[184] which obviously makes sense in an adversary proceeding. In the Mayagna Community Case, the Court found useful three documents presented extemporaneously by the Commission, especially since they were not

179. *Constitutional Court Case*, *supra* note 35, para. 51.

180. I/A Court H.R., *Cesti Hurtado Case*. *Reparations*. Judgment of May 31, 2001. Series C No. 78, para. 29.

181. *Case of Juan Humberto Sánchez*, *supra* note 119, para. 46.

182. I/A Court H.R., Order of the Court of November 28, 1995. Genie Lacayo Case, para. 3.

183. *Velásquez Rodríguez Case*, *supra* note 1, para. 138 and *Godínez Cruz Case*, *supra* note 1, para. 144.

184. Order of the Court of November 28, 1995, *supra* note 182, para. 7

challenged or disputed and their authenticity or veracity was not questioned.[185]

Under this initial practice, the President of the Court prescribed a period for the parties to offer and present evidence, as well as to formulate observations on the submissions.[186] The Court also held public hearings to receive the State's arguments and the Commission's observations to the State's opposition to some of its witnesses and set a period for the Commission to present its experts' résumés and reports.[187] Emphasizing the importance of those periods, in the Neira Alegría *et al.* Case the Court rejected the Commission's request to extend the period to present its experts' résumés and reports "in view of the fact that the Commission has had the opportunity and time necessary to submit said information by the deadline set and that, by their very nature, judicial deadlines must be met except for exceptional circumstances which are not present in this case."[188] In receiving the documents out of time and rejecting the government's request that they be returned to the Commission, the Court underscored that those time periods were not peremptory and ordered that the documents be maintained in the file so that they could be examined at the proper time. It also authorized the President, after consulting the Permanent Commission, to decide whether to receive the statement of the Commission's experts, as in effect they were received.[189] Neither has the Court objected to a modification of the list of witnesses proposed by the parties.[190]

In its recent jurisprudence, the Court no longer follows the excessive rigor of Article 43 of its Rules with respect to the formalities in offering evidence. It has held that receiving evidence and incorporating certain elements into the evidentiary file of the case must be done by paying special attention to the circumstances of the specific case and bearing in mind respect for legal certainty and the procedural equality of the parties. The Court recalled what it had expressed in its judgment in the Cayara Case that "the procedural system is a means of attaining justice and that it cannot

185. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 38, para. 97.
186. *Neira Alegría et al. Case*, *supra* note 91, para. 24.
187. *Ibid*., para. 27.
188. *Ibid*., para. 30.
189. *Ibid*., paras. 31-33, 35, 47-48 and 56-57.
190. *See, e.g.*, *Caballero Delgado and Santana Case*, *supra* note 44, paras. 16-17.

be sacrificed for the sake of mere formalities. Keeping within certain timely and reasonable limits, some omissions or delays in complying with the procedure may be excused, provided that a suitable balance between justice and legal security is preserved."[191] At that same time, the Court admitted two documents presented out of time by the State since they contained information referring to events after the date of the application and, although the State did not plead this circumstance, the Court held that, pursuant to Article 43 of its Rules, they should be incorporated into the evidentiary file of the case. In contrast, other documents that included information on the events that occurred before the deadline for the presentation of evidence, also submitted out of time, were not admitted as evidence since the State did not plead *force majeure*, serious impediment or supervening events.[192]

Evidence that has been presented extemporaneously without pleading any of the special circumstances listed in Article 44.3 of the Court's Rules does not necessarily have to be excluded. In the Ivcher Bronstein Case, although the Court observed that the documents furnished by the Commission during the public hearing were out of time and that the exceptions found in the former Article 43 of the Rules were applicable only in the case that the party pleaded *force majeure*, serious impediment or supervening event, circumstances that the Commission had not pleaded in this case, it decided to admit those documents, in application of the provisions of Article 44.1 of the Rules then in force that authorized the Court to obtain on its own motion any evidence that it deemed useful because it considered them useful for the evaluation of the facts.[193]

With respect to the presentation of evidence at the reparations stage, the Court has pointed out that, according to its consistent practice, the parties must indicate what evidence they are offering at the first occasion that they have to present a brief on reparations. The Court has also recalled that, in the exercise of its discretionary powers under Article 45 of its Rules, it may request the parties to provide additional evidence, but this

191. *Castillo Petruzzi et al. Case, supra* note 53 and *Constitutional Court Case, supra* note 35, para. 45.
192. *Castillo Petruzzi et al. Case, supra* note 53, para. 72.
193. *Ivcher Bronstein Case, supra* note 131, para. 71. The provisions cited by the Court correspond to Articles 44 and 45.1 of the current Rules.

does not grant the parties a new opportunity to expand or complete their arguments or offer new evidence, unless the Court so allows.[194]

### *4. THE ELEMENTS OF EVIDENCE*

The Court has stated that direct evidence, whether testimonial or documentary, is not the only type that may be legitimately considered in reaching a decision. It may also use circumstantial evidence, indicia and presumptions, as long as they lead to conclusions consistent with the facts.[195]

The Court has interpreted that it has a very broad margin as to the type of evidence that it may admit. Moreover, in addition to the evidence that the parties submit, under Article 45.1 of the Rules the Court may obtain on its own motion any evidence that it deems helpful to shed light on the allegations of the case. It may particularly hear as witness, expert or in any other capacity any person whose testimony, statements or opinions it deems relevant in order to fulfill its mission. The Court may also, at any stage of the proceedings, request any entity, office, organ or authority of its choice to gather information, express an opinion or draft a report on a given point,[196] an attribute that the Court has exercised without problems. Pursuant to the aforementioned Article, those reports may not be published without the authorization of the Court.

In the Mayagna Community Case, however, the State submitted a brief indicating "the names of the persons who w(ould) explain the content and scope of the documentary evidence offered at the appropriate time."[197]

#### *a) The evidence of witnesses*

As with other evidence, witnesses, with their names and the subject of their statements, must be offered in the application or in the reply. The

194. *Cesti Hurtado Case. Reparations*, *supra* note 180, para. 20.

195. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 1, paras. 130, 136 and 133, respectively.

196. According to a previous version of the Rules, the exercise of this power requires the prior consent of the parties.

197. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 38, para. 47.

victim, his next of kin or his duly accredited representatives must inform the Court within 30 days of receiving notification of the application. Under Article 44.3 of its Rules, the Court may, in special circumstances, admit the statements of witnesses that had been offered extemporaneously, if *force majeure*, impediment or supervening event is pleaded and provided that the opposing party is ensured the right of defense. In the Ivcher Bronstein Case, after the filing of the application and after it had already been convoked to a public hearing to receive the testimony of the witnesses, the Commission informed the Court that, due to *force majeure*, some witnesses and experts could not appear and, therefore, it requested that they be replaced by other witnesses, whom they requested be summoned. The Secretariat of the Court granted the State a period of ten days to present its observations on the substitution of witnesses requested by the Commission. Since the State did not do so, the President of the Court released the original witnesses and convoked those whom the Commission had requested as substitutes.[198]

Any party to the proceedings may offer witnesses, either to corroborate its version of the events or to prove the nature and amount of damages, when appropriate. In addition and without prejudice to re-summoning witnesses who do not appear, in its practice the Court has also decided on its own motion to summon persons who had not been offered as witnesses by any of the parties, but whose testimony was considered essential.[199]

In the initial Rules of the Court, the witnesses, experts and other persons whom the Court decided to hear were summoned by its Secretary. The summons indicated the names of the parties, the subject of the inquiry, expert opinion or any other measure ordered by the Court and "any provisions taken for payment of the sum due to the person summoned." On the other hand, Article 47.1 of the current Rules provides that the Court determines when the parties are to call their witnesses and experts whom the Court considers it necessary to hear. Pursuant to Article 46 of the

198. *Ivcher Bronstein Case, supra* note 131, paras. 36-38 and 40-41.

199. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 1, paras. 29, 31 and 30, respectively.

Rules, the party proposing the evidence bears its cost and according to Article 47, in summoning the witness or expert, the Court indicates the subject of the testimony or expert opinion.

A witness may be objected to by any of the parties before testifying, but the Court may, if it considers it necessary, hear for purposes of information any person who cannot be heard as a witness. To ensure that the object of the testimony is in keeping with what the party who proposed him has announced, the Court may decide that the examination and cross-examination of a witness has been sufficient.[200]

To receive the testimony offered by the parties, the President convokes public hearings held, in principle, at the seat of the Court. In the first cases against Honduras, invoking "strict security reasons" with respect to the organizational chart of a battalion or simply "security reasons" with respect to active duty personnel of the Honduran Armed Forces, the government requested that the testimony of certain witnesses be received in a closed hearing. The Court agreed but left it very clear that the hearing was conducted "in the presence of the parties."[201] The hearing took place in the installations of the Costa Rican police at the San José airport, obviously without the presence of the public, which left doubts in the minds of the lawyers of the Commission as to the identity of one of the Army officers summoned to testify, suggesting that he might have been replaced by another person.[202] In any case, this experience has served to question, as a matter of principle, the holding of closed hearings and to underscore that they should be reserved for the most extraordinary circumstances.[203]

If the circumstances so require, in exceptional circumstances testimony may be given outside the seat of the Court in the presence of whomever the Courts commissions for that effect. For example, in the

200. *See* notes REF. CDH-11.383/139 and REF. CDH-11.383.140 of the Secretariat of the Court of January 21, 1999. Paniagua Morales et al. Case.

201. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 1, paras. 31 and 33-34, 33, 35-36 and 32, 34 and 36, respectively.

202. See Juan E. Méndez and José Miguel Vivanco, *Disappearances and the Inter-American Court: Reflections on a litigation experience*, in HAMLINE LAW REVIEW, Vol. 13, No. 3, summer 1990, p. 560.

203. *Ibid*.

Caballero Delgado and Santana Case, the Commission requested that, due to the ill health of one of its witnesses, her testimony be taken in Colombia. The President of the Court, with the consent of the Government of Colombia, named Professor Bernardo Gaitán Mahecha, as an expert representing the Court, to oversee the questioning of Mrs. Rosa Delia Valderrama by representatives of the Commission and the State.[204] In this same case, the Court also appointed as experts Gabriel Burgos Mantilla and Bernardo Gaitán Mahecha to take the testimony in Colombia of Gonzalo Arias Alturo and Diego Hernán Velandia Pastrana, who, for different reasons, had not appeared to testify before the Court.[205] The Court ordered its Secretariat to furnish the experts with the information necessary to carry out this task, indicating that such testimony should be received as soon as possible in the presence of the agent of the government and the delegate of the Commission who could participate in the questioning, and that the testimony should be recorded so that it could then be transcribed and communicated to the parties.[206] Similarly, in the Bámaca Velásquez Case, in which it was impossible for two of the witnesses to appear before the Court at its seat in Costa Rica, the Court convoked a hearing at OAS headquarters in Washington and commissioned three judges to attend the hearing and receive the testimony, as it was deemed useful to receive it.[207]

The witnesses or experts, upon entering the seat of the Court, are led to an isolated room until they give their testimony or statement. If at the end of the public hearing each day the witness or expert has not yet appeared before the Court or has not concluded his appearance, he may leave the seat of the Court and return the next day.[208]

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204. I/A Court H.R., Order of the President of July 18, 1994 and the judgment in Caballero Delgado and Santana Case, *supra* note 44, para. 16.

205. I/A Court H.R., Order of the Court of January 25, 1995. Caballero Delgado and Santana Case. In executing this Order, on March 11, 1995 testimony was taken from Gonzalo Arias Alturo. The witness Velandia Pastrana could not be questioned because of problems of her voluntary appearance and the Government of Colombia that was the party that proposed her declined to follow through because it did not consider it essential. *Caballero Delgado and Santana Case, supra* note 44, para. 21.

206. *Ibid*., operative para. 2.

207. I/A Court H.R., Order of the Court of September 1, 1998. Bámaca Velásquez Case, operative paras. 1 and 4.

208. *See, e.g.*, the communication of March 20, 2000, *supra* note 173.

Pursuant to Article 47.3 of its Rules, the Court may request that certain witnesses and experts offered by the parties give their testimony or expert opinions through sworn statements or affidavits. Once the statement or affidavit is received, it is transmitted to the other parties so that they might present their observations. The presentation of testimony by means of a sworn statement may also be the consequence of *force majeure*. In the Juan Humberto Sánchez Case, the Commission supplied a medical certificate that justified the absence of a witness and furnished his sworn statement.[209] The State objected to the evidentiary value of the document since the person did not appear in the oral proceedings, which in its opinion was contrary to the norms of equity. The Court observed that the content of the statement and the signature of the person were certified by a notary public, which gave it credibility. The Court, therefore, decided not to consider it conclusive evidence, but rather to judge it in the context of the other evidence in the case, applying the rules of "competent analysis."[210]

On the other hand, the Court lacks independent powers to require the appearance of a witness or an expert or to sanction a witness for refusing to appear or for perjury. The Court depends entirely on the cooperation of the States, through which it may request that persons subject to their jurisdiction be summoned or that other measures ordered by the Court be implemented. In the case of a witness who refused to testify, both before the Court at its seat in San José as well as before an expert appointed by it to direct the questioning in the territory of the respondent State, the Commission simply informed on this circumstance without requesting the adoption of measures that would require the State's cooperation. The Court simply excused the testimony of that witness, given the reasons offered by the Commission.[211] Similarly, in the Ivcher Bronstein Case, the Commission proposed as a witness Vladimiro Montesinos Torres but informed the Court that he was in Panama and requested the Court to take the necessary steps with the Government of Panama to ensure his presence at the public hearing on the merits. The Secretariat of the Court asked the Commission to furnish information on the steps taken by it so that the

209. *Case of Juan Humberto Sánchez*, supra note 109, para. 36.
210. *Ibid*., paras. 54-55.
211. *Delgado and Santana Case*, *supra* note 44, para. 4 of the considerations and operative para. 1.

summons for the hearing on the merits reached the prospective witness. After it received this information, the Secretariat took the relevant steps before the diplomatic authorities of Panama. In spite of having been convoked, the witness, together with several others summoned to appear in this case, did not appear at the public hearing.[212] The Court did not refer to this matter and did not insist on the appearance of those witnesses and simply proceeded to deliver its judgment. Article 52 of the Court's Rules provides that the Court inform the States when the persons summoned to appear or testify do not appear or refuse to testify without a legitimate reason or when, in the opinion of the Court, they have violated the oath or solemn declaration, so that the appropriate action may be taken under the respective national legislation. Thus, in the absence of its own coercive mechanisms, the Court's Rules remit these cases to the national authorities in the hope that they will apply the provisions of domestic law for the cases of non-appearance, refusal to testify or perjury. The Court's Rules, which were amended on November 25, 2003, provide in its Article 47.2 that the party that offers the evidence of witnesses or experts is responsible for their appearance. In our opinion, this provision places an excessive burden on the Commission and on the victims' representatives, since the witnesses or experts proposed by them may be prevented from appearing before the Court as a consequence of pressure brought by the State or as a result of the obstacles that the latter have placed to prevent their appearance.

***b) The evidence of experts***

In the inter-American system, expert evidence has also been broadly used by the parties, either to show the violation of a right enshrined in the Convention or to prove, for example, the type of injuries caused by torture[213] or to show the existence of pecuniary or non-pecuniary damages[214] for which reparations are being sought. Pursuant to Article 47 of its Rules, the Court determines when the parties are to call their witnesses and experts whom the Court considers necessary to hear. The summons indicates the name of the witness or expert and the subject of the testimony.

212. *Ivcher Bronstein Case, supra* note 131, paras. 37, 39 and 44.
213. *Gangaram Panday Case, supra* note 91, paras. 53-54.
214. *Velásquez Rodríguez Case. Compensatory damages, supra* note 122, paras. 12 and 51 and *Godínez Cruz Case. Compensatory damages, supra* note 122, paras. 11 and 49.

When deemed necessary, the Court has also ordered on its own motion the presentation of reports from experts. The Court used this evidentiary means for the first time in the Fairén Garbi and Solís Corrales Case. On that occasion, the President of the Court, with the authorization of the Court and after consulting the Permanent Commission, requested a hand-writing expert to determine the authenticity of a signature that appeared on an immigration form, which the expert did.[215] Unfortunately, there was no opportunity to cross-examine the expert and challenge his conclusions in view of the statement of a witness who claimed to be a member of Battalion 316 of Honduras and who stated that the falsification of public documents and signatures was part of the activities of that unit.[216]

On other occasions, the President of the Court, or the Court itself, has requested technical opinions on criminal and psychiatric aspects of a case,[217] has requested the "expert opinion" of the judicial investigatory body of a State not involved in the case on the medical reports, videotape and slides furnished by the parties[218] and has appointed experts in order to obtain more complete information to determine the amount of the reparations.[219]

Given the adversary nature of the proceedings, the information furnished through this expertise should obviously be opportunely transmitted to the parties in order to allow them to formulate their observations. While this was the solution adopted in the Aloeboetoe *et al.* Case,[220] in another case when the Commission requested that it be allowed to reserve the right to question any expert that the Court might call, the President, having consulted the Permanent Commission, rejected the Commission's petition on the grounds that the expert opinion had been ordered by the Court to furnish better proof on matters that it had already considered and was known to the parties.[221]

215. *Fairén Garbi and Solís Corrales Case*, *supra* note 1, paras. 38, 124.a and 138.
216. *Ibid*., para. 46.
217. *Gangaram Panday Case*, *supra* note 91, para. 30.
218. *Ibid*.
219. *Aloeboetoe et al. Case*, *supra* note 63, para. 39.
220. *Ibid*.
221. *Gangaram Panday Case*, *supra* note 91, para. 31.

With respect to the manner of submitting to the Court the experts' statements, it is not possible to conclude from the Court's Rules that the experts must appear before it and present their statements orally. Article 47 of its Rules provides that the Court determines when the witnesses and experts present the testimony that the Court "considers it necessary to hear" and the subject of the testimony. Of course, the appearance of an expert and his availability to be cross-examined is a guarantee for the parties to the proceedings. In the Constitutional Court Case, however, the Commission submitted a brief containing the *technical opinion* of Enrique Bernales, who had been offered as an expert but who could not attend the hearing to which he had been convoked. The Secretariat transmitted the document to the State in order that it might present its observations, but the State did not respond and, therefore, did not challenge the document.[222] Although the Court considered this *expert opinion* useful, under its powers pursuant to Article 45 of the Rules the Court incorporated it into the evidentiary file as documentary evidence.[223]

***c) Documentary evidence***

The parties may submit any type of public or private documents, whether written, video or audio recordings or another type, as evidence on the allegations of the application. In the practice of the Court, this has included written statements of witnesses (without excluding statements given to domestic courts), press clippings, plans, maps, reports of legislative commissions, videotapes, statistical graphs, texts of national laws or regulations, judicial files, books, immigration forms, autopsy reports, slides, transcriptions of statements made to legislative commissions, expert opinions, copies of court decisions, etc.

In its jurisprudence on the evidentiary value of press clippings, the Court has held that, while newspaper articles "are not really documentary evidence," they are important to corroborate other evidence that has been received and when they refer to well-known and public facts or statements of State officials.[224] The Court has, therefore, added press clippings to the

222. *Constitutional Court Case*, *supra* note 35, para. 30.
223. *Ibid*., para. 50.
224. *Ivcher Bronstein Case*, *supra* note 131, para. 70 and *Constitutional Court Case*, *supra* note 35, para. 53.

evidentiary file as an appropriate means of verifying, in conjunction with other evidence, the truth of the allegations.

To date, the Court has not reacted to the excessive proliferation of documents that are not relevant or are merely repetitive. In contrast, the International Court of Justice, in its Practice Directions, has urged the parties to avoid excessive annexes with their written submissions and that they attach only those that are strictly necessary.[225]

Notwithstanding the documentary evidence received from the parties, as part of fact-finding the Court may also request, on its own motion or at the petition of a party, whether it be the Commission, a State party to the case or a third party, the presentation of certain documents or other evidence, as it has done on various occasions. In exercising this attribute, the Court has requested a State to provide the organizational chart of a battalion with an indication of its place within the structure of the Armed Forces,[226] has requested of the Commission the immigration forms and the automobile entry permit of the alleged victims,[227] has requested the dentist of an alleged victim to furnish the dental records of that person,[228] has asked the government of a State that was not party to the controversy (although a State party to the Convention) for a copy of the personal data of the alleged victims in the possession of the immigration authorities when a passport was issued[229] and has requested that the Bar Association of Honduras explain the legal procedure for the exhumation of a body in that country and the right of a foreigner to request it.[230] The respondent State has also been asked to furnish a copy of the records of the trials that were held regarding the disappearance of the alleged victims,[231], statistics of suicides among the Hindu population of Suriname[232] and official texts (duly translated to Spanish) of the Constitution of Suriname and the criminal

225. International Court of Justice, Practice Directions, adopted February 7, 2002, Practice Directions III.

226. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 1, paras. 29, 31 and 30, respectively.

227. *Fairén Garbi and Solís Corrales Case*, *supra* note 1, para. 30.

228. *Ibid*.

229. *Ibid*.

230. *Ibid*.

231. *Caballero Delgado and Santana Case*, *supra* note 44, para. 14.

232. *Gangaram Panday Case*, *supra* note 91, para. 29.

and criminal procedure codes that governed the cases of detentions at the time of the allegations.[233] More recently, the Secretariat of the Court, following instructions of the President, has requested of the defendant State a true copy of the laws and regulations applied in the domestic trials of the alleged victims in the case, as well as a certified copy of the complete judicial files of those trials.[234] The Court, through its Secretariat, has also requested the OAS Secretary General that he inform regarding notification of a suspension of guarantees from January 1, 1993 to June 1, 1994 and whether such notification included an indication of the provisions suspended, the reasons for the suspension, its territorial reach and the corresponding date of termination.[235] At the request of a State, the Court has asked the Commission to furnish the minutes of the meeting at which it decided to submit a case to the Court, together with any document that notes that the alleged victims knew of the actions taken on their behalf before the Commission.[236] Another option is that the Court proceed on its own motion to incorporate documents from the evidentiary file of another case heard by the Court that are relevant to the case before it[237] or other documents in the possession of the Court.[238]

The Court, however, does not have coercive means to require the cooperation of the respondent State. In fact, the practice of the States in response to the Court's requests has been very different. While in some cases the State has furnished the requested documents,[239] in others the request has been ignored.[240] Moreover, there is no sanction for the lack of cooperation of a State, which is not the respondent State, that is requested to furnish evidence that is located within its jurisdiction, as there is with the respondent State, for example, by presuming the truth of the allegations.[241] This difficulty was made clear in the Fairén Garbi and

233. *Ibid*., para. 33.

234. *Castillo Petruzzi et al. Case. Preliminary Objections, supra* note 43, para. 41.

235. *Castillo Petruzzi et al. Case, supra* note 53, para. 50.

236. *Ibid*., para. 42.

237. *Ibid*., para. 40. In this case the parties were notified that the legal texts of Peru in the Loayza Tamayo Case would be incorporated into the file.

238. *Ivcher Bronstein Case, supra* note 131, para. 61.

239. *See, e.g., Caballero Delgado and Santana Case, supra* note 44, para. 20.

240. *Gangaram Panday Case, supra* note 91, paras. 29 and 33.

241. For example, in the Fairén Garbi and Solís Corrales Case, the Commission offered as witnesses several immigration officials of Guatemala, who did not appear before the Court. In this same case, the

Solís Corrales Case in which it was alleged that the victims had crossed the border from Honduras to Guatemala and proceeded towards El Salvador, and in which the Court pointed out that, in addition to the unclear nature of those acts (as a result of contradictory information furnished by the Government of Guatemala), their investigation and clarification met, *inter alia*, with the difficulty that Guatemala and El Salvador were not parties to the case.[242]

In spite of its nature, in the incidental proceedings on provisional measures, the Court has also requested the government of the respondent State to present documents that were not directly known by the Commission.[243]

On the other hand, while documentary evidence would normally be submitted by the parties or requested by the Court on its own motion, it may also be furnished by witnesses who testify in a case, as occurred in the Caballero Delgado and Santana Case[244] and in the Mayagna Community Case where one of the witnesses offered documents to support his testimony.[245] It is the Court that determines, in the end, whether, in the use of its powers to facilitate adjudication of the case, to admit the evidence offered by the witnesses or experts.

An aspect that has not been covered is verification by the Court of the translations of the documents furnished by the parties. Article 70 of the Rules of the International Court of Justice provides that the Secretary make the necessary arrangements for the verification of the translations furnished by one of the parties of evidence given on its behalf.

***d) Judicial inspections***

Closely related to the powers conferred by Article 45 of its Rules with respect to obtaining any evidence that it considers helpful to shed light on the facts, the Court may, at any stage of the case, commission one

Governments of Gualemala and El Salvador, which were not parties to the case, provided contradictory information that the Court was unable to clarify. *Fairén Garbi and Solís Corrales Case*, *supra* note 1, paras. 29 and 155.

242. *Ibid*., paras. 144 and 155.

243. *Caballero Delgado and Santana Case*, *supra* note 44, para. 25.

244. *Ibid*., para. 47.c and 47.d.

245. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 38, paras. 63-64.

or more of its members to gather evidence.[246] In this respect, pursuant to Article 24.2 of the Court's Rules, the States have the duty to cooperate with the activities that the Court decides to conduct or order in their territories.

There have not been any requests to date for these measures, nor has the Court considered it necessary to resort to them. The closest that it has come was in the Aloeboetoe *et al*. Case in which, at the reparations stage, it sent the Deputy Secretary of the Court to Suriname to gather additional information on the economic, financial and banking situation in the country, as well as to visit the village of Gujaba to obtain information that would enable the Court to arrive at a decision adjusted to the Surinamese reality.[247] To the extent, however, that the visit was not undertaken by the Court and that the Deputy Secretary cannot be considered a judge of the Court, it was obviously more a question of a staff member's expert opinion.

Another example that was very close to a judicial inspection was in the Caballero Delgado and Santana Case in which the Commission initially requested the exhumation of the remains of the alleged victims and the convocation of qualified experts to collaborate with those whom the Court appointed to identify the remains.[248] When the government furnished a copy of the report of the National Office of Public Prosecutors of Colombia concerning the judicial inspection conducted by the Bucaramanga section where, according to information supplied by a witness, the remains of one of the alleged victims could be found, the Commission objected because it was done without the presence of the representatives of the victims and "without the intervention of a magistrate commissioned by the Court."[249]

***e) Indicia or presumptions***

The importance of this evidentiary means in a system for the protection of human rights is obvious. According to the Court, in addition

246. Article 34.4 of the Rules of the Court.
247. *Aloeboetoe et al. Case. Reparations*, *supra* note 63, para. 40.
248. *Caballero Delgado and Santana Case*, *supra* note 44, para. 24.
249. *Ibid*., para. 27.

to direct evidence, international, as well as domestic, tribunals, may base their decision on circumstantial evidence, indicia and presumptions, "provided that solid conclusions as to the facts can be inferred therefrom."[250]

The lack of cooperation of the State concerned is a prime element to consider in resorting to the use of presumptions. Article 39 of the Commission's Rules provides for the presumption of the truth of the acts denounced when the State concerned has not supplied the relevant information after having received the pertinent parts of the allegations. Similarly, Article 38.2 of its Rules provides that the Court may consider as accepted those facts that have not been expressly denied in the reply to the application and the claims have not been expressly contested. In its jurisprudence, the Court has held that, in principle, it is possible to presume the truth of the allegations about which the State remains silent, provided that from the evidence conclusions may be inferred that are consistent with them.[251]

Presumptions may also result from a lack of cooperation on the part of the State. In a case in which the government of the State in question did not furnish the official texts of its Constitution and the criminal and criminal procedure codes that were in force at the moment of the detention of the alleged victim or offer any explanation for this omission, the Court inferred from the position of the government that this person had been illegally detained by members of the military police.[252]

Another consideration concerning presumptions that should be kept in mind is the existence of a systematic practice of specific human rights violations by the State in question. In the first cases against Honduras, the Commission alleged the existence in that country of a systematic and selective practice of forced disappearances between 1981 and 1984 coinciding with the era in which the victims in these cases had disappeared and that that policy, sponsored and tolerated by the government, had as its purpose to conceal and destroy the evidence on disappearances.[253] In its

250. *Castillo Petruzzi et al. Case, supra* note 53, para. 62.
251. *Ivcher Bronstein Case, supra* note 131, para. 68.
252. *Gangaram Panday Case, supra* note 91, paras. 50-51.
253. *Velásquez Rodríguez Case, supra* note 1, para. 131 and *Godínez Cruz Case, supra* note 1, para. 137.

judgment the Court held that, if it could be shown that an official practice of disappearances existed in Honduras, carried out by the government or at least tolerated by it and if the disappearance of the victims in these case could be linked to it, the allegations in the application would have been proved before the Court.[254] In the opinion of the Court, in cases of complaints on the forced disappearance of persons, the circumstantial and presumptive evidence has a special importance, since "this type of repression is characterized by an attempt to suppress all information about the kidnapping, whereabouts and fate of the victims."[255] The Court has, however, also insisted in the necessity that the sufficient proof be presented to link the disappearance of the alleged victim to the aforementioned official practice.[256] One indication could be, for example, being a journalist, politician or trade union leader in opposition to the government, a circumstance that was especially taken into account in the Velásquez Rodríguez and Godínez Cruz Cases but was not present in the Fairén Garbi and Solís Corrales Case, where there was no evidence that the alleged victims had been under surveillance or suspicion by the Honduran authorities.[257] In any event, in the context of a systematic practice of forced disappearances, to exonerate the State in question from responsibility for the simple reason that it had not been shown that the disappeared person could be considered a threat to the government does not take into account the fact that the person could have been detained by mistake or for having witnessed an event that could cause harm to the government or the security forces of the State if it were divulged. That same pattern of forced disappearances and extra-legal executions of "dangerous" or "suspicious" persons alleged to be existing in Honduras during the decade of the 1980s until the beginning of the 1990s, the responsibility of which was attributed to the Honduran military forces, was established in the Juan Humberto Sánchez Case.[258] The Court considered proved that, during his detention

254. *Ibid*., paras. 126 and 132, respectively.

255. *Ibid*., paras. 131 and 137, respectively.

256. *Fairén Garbi and Solís Corrales Case, supra* note 1, para. 158.

257. *Ibid*., paras. 157 and 159. Unlike the other two cases against Honduras, in this case there were no witnesses to the detention nor any other evidence of the circumstances in which the detention could have been produced. Moreover, according to the Court, there were numerous and insurmountable difficulties of proof to establish that these disappearances had occurred in Honduras, since there was the possibility that the alleged victims had left the country.

258. *Case of Juan Humberto Sánchez, supra* note 119, para. 70.A.1.

Mr. Sánchez was subjected to interrogations that led necessarily to the infliction of torture in order to obtain information.[259] In this case, the use of torture was also considered established as a consequence of the unlawfulness of the detention. According to the Court, while it did not have sufficient evidence to determine precisely the days or the hours in which Mr. Sánchez was detained, given the unlawfulness of the detention a brief period was enough to be an infringement of his psychological and moral integrity according to the standards of the international law of human rights and when such circumstances occur, even without other evidence, it could be inferred that the treatment that the victim received while being incommunicado was inhumane, degrading and extremely aggressive.[260] After noting that the corpse of the victim was found with his hands and feet tied behind his back, his nose, ears and genitals severed, his back flayed and a bullet hole in the forehead that exited the base of the skull, the Court held that there existed the presumption of State responsibility for the mistreatment and torture of a person who had been under the custody of State agents.[261]

In the Caballero Delgado and Santana Case, given the existence of other concurring elements of evidence, the Court stated that there existed sufficient evidence to infer that the detention and disappearance of the alleged victims had been carried out by persons who belonged to the army and by several civilians who collaborated with it. Moreover, the fact that more than six years after the events there had been no news of the victims permitted the Court to reasonably conclude that they were dead.[262]

In our opinion, this means of evidence is also relevant in cases in which direct evidence is, by its very nature, highly difficult to obtain since human rights violations are frequently accompanied by the destruction of all evidence of them.

With respect to the proof of damages, the Court has indirectly concluded that this means of evidence is sufficient to show moral damages

259. *Ibid*., para. 97.
260. *Ibid*., para. 98.
261. *Ibid*., para. 99.
262. *Caballero Delgado and Santana Case*, *supra* note 44, para. 53.b. *See*, also, para. 53.c-e, which were the basis of this presumption.

in holding that no evidence is required to arrive at this conclusion "since it is characteristic of human nature that anybody subjected to aggression and abuse … will experience moral suffering."[263]

On the other hand and although it must be used with caution, it should be noted that, while it is not a direct proof but results from using known facts to infer others that are not known, recourse to this type of evidence does not impose an excessive burden on the State in question since it is a matter of reasonable conclusions, derived from experience, that may be refuted by the State. Furthermore, this same type of reasoning may also lead to the State being exempted from responsibility of the charges. In the Fairén Garbi and Solís Corrales Case, the Court observed that there was evidence that showed that the alleged victims might have been able to continue their journey from Honduras to Guatemala and possibly to El Salvador.[264]

***f) Proof rendered before the Commission***

As part of the evidentiary file, Article 44.2 of the Court's Rules provides that evidence given to the Commission may also be incorporated into the file, provided that it has been received in adversary proceedings, unless the Court considers it essential that it should be repeated before the Court.

### *5. ADMISSIBILITY OF THE EVIDENCE*

The practice of both the Court and the States also raises some questions as to the relevance of the evidence offered by the parties in a particular case. Specifically, in the Neira Alegría *et al*. Case the Government of Peru objected to testimonial evidence deeming it improper and unnecessary and objected, although unsuccessfully, to the appearance of the witnesses and experts offered by the Commission.[265]

The measures adopted by the Court in the area of evidence show that it has not been indifferent with respect to the relevance of the evidence

263. *Aloeboetoe et al. Case. Reparations*, *supra* note 63, para. 52.
264. *Fairén Garbi and Solís Corrales Case*, *supra* note 1, para. 156.
265. *Neira Alegría et al. Case*, *supra* note 91, para. 25.

offered, although this concern may be related to other evidentiary means that are admissible. In the first cases against Honduras, the Court adopted, as a procedural question, a decision in which it held that, within 30 days of notification, the Commission had to ratify in writing its request for evidence, although it could amend or supplement it, indicating the facts that each item of proof was intended to prove and how, when and under what circumstances it wished to present it. In the same decision, it instructed its President, without prejudice to raising the question before the plenary Court, to admit or reject evidence already offered or might be offered by the parties, to order the filing of those that were not testimonial and, in consultation with the parties, to convoke a hearing in which, *inter alia*, the evidence would be incorporated and the testimony of the witnesses and experts heard.[266] In compliance with this decision, the President of the Court admitted, in these cases, the testimonial and documentary evidence offered by the Commission and the documentary evidence offered by the government.[267]

The Court has also rejected evidence that was unnecessary because it was repetitive. In the Constitutional Court Case, with respect to the press clippings offered by the Commission in its arguments on the expenses and costs, the Court observed that, except for two of them, they had already been presented during the public hearing on the merits and, therefore, it was not necessary that they be included in the evidentiary file.[268]

On the other hand, in the Hilaire, Constantine and Benjamin *et al*. Case, in which the State did not intervene in the proceedings on the merits, the Court noted that the documents on the trial, sentence and appeal of the alleged victims before the domestic courts, which were attached by the Commission to the applications in each case, possessed the necessary authenticity as they did not present any inconsistencies and met the minimum formal standards of admissibility and they had an obvious evidentiary value because they came from reliable sources. The Court

266. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 1, paras. 24.2 and 24.3, 26. 2 and 26.3 and 23.2 and 23.3, respectively.

267. *Ibid*., paras. 27, 29 and 26, respectively.

268. *Constitutional Court Case*, *supra* note 35, para. 52.

also admitted as documentary evidence the relevant legislation and the jurisprudence of the courts of Trinidad and Tobago presented by the Commission.[269]

### *6. CONTROL AND IMMEDIACY OF THE EVIDENCE*

The Court has held that in probatory matters the principle of adversary proceedings, which establishes the respect for the right of defense of the parties, is applicable and that there must be equality among the parties.[270] Regarding the reception of evidence, the Rules are careful to safeguard the right of the opposing party, which must have the opportunity to refute it. Pursuant to Articles 41.1 and 42.2 of the Court's Rules, the witnesses, experts and any other person the Court decides to hear may be examined by the representatives of the parties. The judges may also ask the questions that they deem proper of any person who appears before the Court. Article 44.3 of the Rules repeats that same principle, pointing out that in exceptional circumstances evidence may be admitted at a time other than that provided by the Rules, but the opposing party must always be guaranteed the right of defense. Moreover, Article 44.2 of the Rules provides that the evidence given before the Commission may be incorporated into the file provided that it has been received in adversary proceedings.

In the Bámaca Velásquez Case, the Commission indicated that one of the witnesses could not travel to the seat of the Court so it requested that a delegation be appointed to take testimony in the United State and that possibly the testimony of other witnesses would have to be received by video to ensure that the Court receive it. In application of the aforementioned principles, after making a preliminary study of the evidence attached to the file, the Court determined that it would be useful to hear such testimony and resolved that, in accordance with the principle of control and immediacy of the evidence, such testimony should be received at a hearing in the presence of the parties to the case.[271] Similarly, in the Bulacio

269. *Case of Hilaire, Constantine and Benjamin et al., supra* note 37, para. 79.

270. *Case of Bulacio, supra* note 48, para. 40.

271. I/A Court H.R., Order of the Court of September 1, 1998. Bámaca Velásquez Case, paras. 4-8 of the expository part, paras. 2 and 5-6 of the considerations and operative paras. 1 and 4-5.

Case, while the Court admitted the briefs of the experts, in order to respect the principle of adversary proceedings it gave the opposing party the opportunity to present its observations to the expert opinions.[272]

### *7. OBJECTIONS TO THE EVIDENCE*

An aspect closely related to the weighing and evaluation of the evidence is the objection that a party may make to the evidence offered and particularly to the witnesses and experts. Since the Convention does not refer to evidentiary matters, it does not indicate whether the parties may object to the documentary or other type of evidence and whether they may object to witnesses or experts, nor does it mention when or for what reasons the objection may be made. This matter is covered, although only partially, with respect to witnesses and experts by Articles 49 and 50 of the Court's Rules and, therefore, to a great extent the issues that have been raised have had to be resolved through jurisprudence.

Article 49 of the Court's Rules indicates that witnesses may be objected to by any of the parties before being sworn in. Nevertheless, the Court may, if it deems it useful, hear for the purposes of information a person who cannot testify as a witness. Under this same provision, the value of the testimony and that of the objections of the parties is weighed by the Court. At the preliminary objections stage of the Trujillo Oroza Case the State offered as evidence the testimony of Ambassador Marlene Fernández del Granado, Permanent Representative of Bolivia to the OAS, which was objected to by the Commission. The Court decided to convoke the Ambassador to testify during the public hearing on preliminary objections on the negotiations between the Commission and the representatives of the petitioner, on the instructions received from her government and on the hearings held before the Commission.[273] It is important to note that the decision of the President of the Court does not indicate whether the Ambassador would be heard as a witness.

272. *Case of Bulacio, supra* note 48, para. 62.

273. I/A Court H.R., Order of the President of December 6, 1999. Trujillo Oroza Case. Preliminary Objections, operative para. 2.

Article 50 of the Court's Rules provides that experts may be objected to for the same reasons that judges may be disqualified under Article 19.1 of the Court's Statute. The objection must be presented within 15 days following notification of the appointment of the expert. If the expert contests the reason given, the Court decides. If the Court is not in session, the President in consultation with the Permanent Commission may order that the evidence be received, informing the Court, which definitively resolves its value. When it is necessary to appoint another expert, the Court decides. However, if it is urgent to receive the evidence, the President in consultation with the Permanent Commission makes the appointment, informing the Court, which definitively resolves its value.

Of course, within the framework of an adversary proceeding, the evidence offered by the parties that has not been objected to nor contradicted and whose authenticity has not been placed in doubt has an evidentiary value whose weight and relevance must be evaluated by the Court. Evidence offered by third persons, which has not been objected to, may be incorporated into the evidentiary file under the provisions of Article 45.1 of the Rules, which allows the Court to obtain *de oficio* any evidence that it deems helpful.[274]

***a) Objections to witnesses and experts***

Although Article 49 of the Court's Rules does not list reasons for objecting to a witness, it does state that they must be objected to before they are sworn in. The current Rules eliminate the possibility of objecting to a witness at a later stage if grounds for disqualification became known thereafter, as was provided for in Article 38 of the previous version of the Rules. In any event, if the Court deems it appropriate, it may hear for informational purposes a person who is not qualified to appear as a witness. In fact, the Court has been rather cautious in sustaining objections, inclining to receive testimonial evidence no matter the value that might later be attributed to it.

In evaluating the testimony and in rejecting objections to the Commission's witnesses, in the first cases against Honduras the Court

274. *See, e.g., Baena Ricardo et al. Case, supra* note 42, para. 79.

held that it had to weigh the evidence and that a violation of the human rights guaranteed by the Convention is established by the facts found by the Court and not by the means used to prove them.[275] This opinion was ratified by the Court in the Genie Lacayo Case where it rejected the objections that the Government of Nicaragua had made to the appearance of some of the Commission's witnesses on the grounds that those persons were not on the list proposed by the Commission in its application. In rejecting the objections to other witnesses, the Court stated that in international proceedings on human rights what is important is to determine whether the alleged acts constitute a violation of the Convention. The means, therefore, of obtaining the evidence are subordinated to the object and purpose of the Convention.[276]

In referring to the possible lack of objectivity of witnesses based on reasons of ideology, origin or nationality or parentage, the Court stated that many factors may influence a witness' truthfulness, but pointed out that the government, rather than showing that the witnesses would not have told the truth, had only made general observations on their lack of competence and impartiality, which was not sufficient to rebut the testimony that fundamentally coincided with that of other witnesses and, therefore, the testimony could not be ignored by the Court.[277] Repeating its jurisprudence in the Ivcher Bronstein Case, with respect to the testimony of Mr. Ivcher Bronstein the Court believed that since he was the alleged victim and had a direct interest in the case, his statements could not be evaluated in isolation but in a context of the evidence and that the Court had to consider that his statements had a special value to the extent that they could provide greater information on certain facts and on the alleged violations committed against him.[278] Similarly, in the Juan Humberto Sánchez Case, with regard to the statements of those who at the time of the events were Army officers, the Court indicated that, while they had a direct interest in the case, their statements should be weighed in the relevant

275. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 1, paras. 141, 147 and 139, respectively.

276. Order of the Court of November 28, 1995, *supra* note 182, para. 8.

277. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 1, paras. 143, 149 and 141, respectively.

278. *Ivcher Bronstein Case*, *supra* note 131, para. 75.

context and, therefore, they were accepted to the extent to which they agreed with the rest of the evidence.[279]

The Court has also rejected the position that a witness with a criminal background or was pending trial was, *per se*, sufficient to make him unsuitable[280] or that the proposed witness might be accused in the domestic courts that gave rise to the proceedings before the Court might prevent it from receiving that testimony.[281] Finally, the Court has held that the insinuation that those who use the inter-American human rights system are disloyal to their country is unacceptable and cannot be the grounds for any sanction or negative consequence.[282]

In other cases, the Court has reserved the right to evaluate at the time of the judgment the statements of the witnesses who have been objected to, repeating that the criteria of evaluation of the evidence before an international human rights tribunal have special characteristics and that the grounds for objecting to a witness do not operate in the same way as in domestic law, since the investigation into a State's international responsibility for the violation of human rights gives the Court a greater latitude to use logic and experience to evaluate the testimony.[283]

Article 50 of the Court's Rules applies to experts the same grounds for disqualification as that of judges, that is, if they or their next of kin have a direct interest in the case or if they have participated as agents, advisors or lawyers, or as members of a national or international tribunal or an investigatory commission or in any other capacity. Pursuant to this Rule, the objection must be made within 15 days following notification of the appointment. If the expert does not agree with the grounds of the objection, the Court decides whether they are appropriate. When the Court is not in session, the President in consultation with the Permanent Commission may order that the evidence be received, informing the Court,

279. *Case of Juan Humberto Sánchez, supra* note 119, para. 58.

280. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 1, paras. 145, 151 and 143, respectively.

281. Order of the Court of November 28, 1995, *supra* note 182, paras. 4 and 8.

282. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 1, paras. 144, 150 and 142, respectively.

283. I/A Court H.R., *Loayza Tamayo Case*. Judgment of September 17, 1997. Series C No. 33, para. 42 and *Castillo Petruzzi et al. Case*, *supra* note 53, para. 83.

which definitively resolves its value. In the Juan Humberto Sánchez Case, the Court rejected the State's objection with respect to an expert who had made a statement reported in the press of his country that "the State would lose the case." The Court held that that circumstance was not sufficient to invalidate the expert opinion.[284]

***b) Objections to other evidence***

With respect to documentary evidence, in a case in which the State objected to the information provided by the OAS General Secretariat that it had not received notification of the suspension of guarantees by the State during the period indicated by the Court, the Court accepted that it was a document issued by a representative of the OAS General Secretariat, which was the appropriate body to inform on the matter consulted and, therefore, ordered its incorporation into the evidentiary file.[285]

The Court, when the documentary evidence has been objected to, has sometimes forwarded it to the opposing party so that it might make its observations within a defined period, normally 30 days.[286] However, if these observations or objections are presented out of time but before the Court delivers its judgment, it may be assumed that in evaluating that evidence the Court will take into consideration such objections. The Court may also decide to rule directly on these objections. In the Baena Ricardo *et al*. Case, the State objected to the admission of certain documentary annexes presented by the Commission in its reply, arguing that such evidence was not legible, not authentic and not duly certified. The Court recalled that the procedural system is a means of attaining justice and that it cannot be sacrificed for the sake of mere formalities and repeated its jurisprudence that the proceedings before an international tribunal dealing with human rights violations, such as the Court, are more flexible and informal than those followed by the domestic authorities. The Court, therefore, rejected the objection and accepted such documents as appropriate evidence.[287]

284. *Case of Juan Humberto Sánchez, supra* note 119, para. 59.
285. *Castillo Petruzzi et al. Case, supra* note 53, paras. 78-79.
286. *Ibid*., paras. 42-43.
287. *Baena Ricardo et al. Case, supra* note 42, paras. 75-77.

## *8. WEIGHING THE EVIDENCE*

An especially relevant aspect concerns the criteria for evaluating or weighing the evidence offered and presented to the Court. As a first element, according to the practice of the Court, the evidence presented at all stages of the proceedings is incorporated into the same evidentiary file, which is considered as a whole.[288] In the Hilaire, Constantine and Benjamin *et al*. Case, which was the joinder of three cases that, until the stage of preliminary objections, had been processed separately, the Court resolved to incorporate the evidence presented in the three cases into the same evidentiary file, considering it as one.[289]

With respect to evaluating the evidence and in view of its liberal policy of admitting it, the Court has reserved the right to weigh its evidentiary value observing that, while neither the Convention, its Statute nor its Rules refers to this matter, "international jurisprudence has recognized the power of the courts to weigh the evidence freely, although it has always avoided a rigid rule regarding the amount of proof necessary to support the judgment."[290] Even documents that are not controversial, are objected to, and are of doubtful authenticity are incorporated into the evidentiary file subject to the Court's evaluation. In the Bulacio Case, the Court decided not to consider two expert written opinions conclusive evidence, but to weigh their contents in the context of the evidentiary file and to apply the rules of "competent analysis."[291] In cases of extra-legal executions, the Court has recognized "the high evidentiary value" of testimony, circumstantial evidence and pertinent logical inferences, with all the evidentiary difficulties that are derived from them, when they occur within the framework of a practice of grave human rights violations promoted or tolerated by the State.[292]

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288. *Case of Bulacio, supra* note 48, para. 68.

289. *Case of Hilaire, Constantine and Benjamin et al., supra* note 37, para. 78.

290. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 1, paras. 127, 133 and 130, respectively. These judgments include references to judgments of the International Court of Justice in the *Corfu Channel Cases* (1949) and the case concerning the military and paramilitary activities in and against Nicaragua, Nicaragua vs. United States (1986).

291. *Case of Bulacio, supra* note 48, para. 62.

292. *Case of Juan Humberto Sánchez, supra* note 119, para. 108.

In any event, the Court has not evaded its responsibility to set criteria for weighing the evidence to prove the truth of the allegations. The Court has held that it has some discretionary powers to weigh the statements or expressions that are presented to it, written or otherwise, and to make an adequate evaluation of the evidence, according to the rule of "competent analysis," which allows it to arrive at a conviction on the truth of the acts denounced, taking into consideration the object and purpose of the Convention. In the interest of obtaining the largest possible amount of evidence, the Court has been very flexible in admitting and evaluating evidence, in accordance with the rules of logic and on the basis of its experience. This informality in the evaluation of evidence is due to the fact that proceedings before the Court have their own characteristics that are different than those under domestic law, since the former are not subject to the formalities of the latter. It is for this reason that, according to the Court, the "competent analysis" and the lack of requirement of formalities in the admission and evaluation of the evidence, which is valued as a whole and rationally, are basic criteria to evaluate it.[293]

The Court has held that the standards of proof for an international tribunal are less formal than that in domestic legal systems, which recognize different burdens of proof depending on the nature, character and gravity of the case.[294] The Court has stated that it is conscious that the determination of a State's international responsibility for human rights violations requires a greater flexibility in weighing the evidence, in accordance with the rules of logic and based on experience.[295] The Court has also held that it cannot ignore the special seriousness in finding that a State party to the Convention has violated human rights and, thus, it must apply a standard of proof that takes into account the seriousness of the charge and that is capable of establishing the truth of the allegations in a convincing manner.[296] As a result of an opinion that was formed of a

293. *Baena Ricardo et al. Case, supra* note 42, paras. 69-72.

294. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 1, paras. 128, 134 and 131, respectively. See, also, I/A Court H.R., *"The Last Temptation of Christ" Case (Olmedo Bustos et al.)*. Judgment of February 5, 2001. Series C No. 73, paras. 49 and 51.

295. *"The Last Temptation of Christ" Case (Olmedo Bustos et al.), supra* note 294, para.50.

296. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 1, paras. 129, 135 and 132, respectively. Also, *Neira Alegría et al. Case*, *supra* note 91, para. 86 and the *Caballero Delgado and Santana Case*, *supra* note 44, para. 65.

witness from the manner in which he testified, his attitude during the public hearing and the personality he revealed, the Court was able to reject his testimony.[297] Inversely, notwithstanding that the testimony of the witnesses may differ in details as to the precise place and time of the detention, the Court has found sufficient evidence to infer the detention and the identity of those responsible.[298] With regards to the testimony of the victim's next of kin, the Court has pointed out that because of her direct interest in the case, her statements cannot be evaluated in an isolated manner but only in the context of the body of evidence of the proceedings and that in the area of reparations the testimony of the victim's next of kin is useful to the extent that it may provide additional information on the consequences of the violations that might have occurred.[299]

The fact that the standard of proof is less formal for an international tribunal than in domestic legal systems is not to deny all value to the formalities of the presentation of the evidence. In the Ivcher Bronstein Case, the Court admitted the testimony offered in the proceedings only to the extent that it was in agreement with the object of the questioning proposed by the Commission and admitted the expert opinion of Samuel Abad Yupanqui with regard to his knowledge of constitutional issues referring to nationality and due process of law.[300] The Court also takes into consideration the relevance of the evidence offered. For example, in the Bulacio Case, the Court observed that the statements of experts offered by the State were directed to rebut facts regarding the merits of the case and that, since the State had accepted its responsibility, it would not incorporate these statements into the evidentiary file.[301]

It is important to note that, as part of evaluating the evidence in adversary proceedings, the Court also invites the parties to present their written observations.[302] As a corollary, the Court gives probative value to the documents submitted with the application and at the public hearing

297. *Aloeboetoe et al. Case. Reparations, supra* note 63, para. 58.
298. *Caballero Delgado and Santana Case, supra* note 44, para. 53.b.
299. *Case of Bulacio, supra* note 48, para. 66.
300. *Ivcher Bronstein Case, supra* note 131, para. 74.
301. *Case of Bulacio, supra* note 48, para. 59.
302. *See, e.g., Neira Alegría et al. Case, supra* note 91, para. 38.

that have not been contested or challenged or their authenticity doubted.[303] In the Hilaire, Constantine and Benjamin *et al.* Case, the Court considered that the reports of the experts, evaluated with the rest of the evidence in accordance with the rules of "competent analysis" and experience, allowed it to reach conclusions consistent with the facts and, within the context and circumstances of each case, to give them a high probative value. To reinforce this conclusion, the Court observed that the State could have presented its own witnesses and experts and rebutted the evidence offered by the parties at the different stages of the proceedings, but did not do so.[304]

With regard to the quality and consistency of the evidence necessary to conclude that there has been a violation of the rights guaranteed by the Convention, it is necessary to recall that these proceedings are not comparable to a criminal trial in which it is necessary to have proof beyond a reasonable doubt in order to convict. The Court, without ignoring the seriousness of the charges, has, therefore, required that the standard of proof must simply be "capable of establishing the truth of the allegations in a convincing manner."[305] Notwithstanding the above, convincing the Court of the truth of the allegations is not a simple task. In the Fairén Garbi and Solís Corrales Case, although the Court considered proven that in the era in which the acts occurred there existed in Honduras a repressive practice of the forced disappearance of persons for political reasons, it held that the sole proof of this practice was not enough, in the absence of other proof, even circumstantial or indirect, to show that a person whose whereabouts were unknown was the victim of that practice. The Court, therefore, observed that there were insurmountable difficulties of proof to establish whether those disappearances had occurred in Honduras and whether the State was legally responsible.[306] Similarly, in a case in which the Commission used various types of proof to show that the alleged victim had been tortured (including a videotape and the opinion of a pathologist)

303. *Ivcher Bronstein Case, supra* note 131, para. 73.
304. *Case of Hilaire, Constantine and Benjamin et al., supra* note 37, paras. 82-83.
305. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 1, paras. 129, 135 and 132, respectively.
306. *Fairén Garbi and Solís Corrales Case*, *supra* note 1, para. 157.

and in which the Court requested other opinions, the Court held that its evaluation of the evidence did not lead to conclusive or convincing proof that would allow it to determine the truth of the allegations that Mr. Gangaram Panday had been tortured during his detention.[307] In the Caballero Delgado and Santana Case, the Court stated that there was not sufficient proof to show that the alleged victims had been tortured or mistreated during their detention, since the accusation was supported only by the "vague testimony" of two witnesses, which was not in accord with the statements of the other witnesses.[308]

The Court's criteria regarding the probative value of press clippings have been very cautious. It has held that they cannot be given the character of documentary evidence as such, but it has accepted their relevance, considering such information to be a manifestation of public and notorious acts (that as such do not require proof) or that their value consists in reproducing textually the statements of public officials or are important to corroborate testimony received during the proceedings[309] or as a means of establishing the consequences of the facts of the case together with other evidence supplied, insofar as it is relevant.[310]

## E. THE EFFECT OF THE NON-APPEARANCE OF A STATE

As of February 2004 the State had refused to appear before the Court in the first stages of the Ivcher Bronstein and Constitutional Court Cases and at the merits stage in the cases against Trinidad and Tobago. This non-appearance, which occurs relatively frequently in international proceedings,[311] may have important practical consequences on the proceedings and may also have an impact on the decision that is adopted.

307. *Gangaram Panday Case*, *supra* note 91, para. 56.

308. *Caballero Delgado and Santana Case*, *supra* note 44, para. 53.f.

309. *Velásquez Rodríguez Case*; *Godínez Cruz Case* and *Fairén Garbi and Solís Corrales Case*, *supra* note 1, paras. 146, 152 and 145, respectively.

310. *Case of Bulacio*, *supra* note 48, para. 63.

311. In fact, in several of the applications filed with the International Court of Justice, the defendant State has refused to participate in the proceedings, as occurred with Turkey in the *Aegean Sea Continental Shelf Case* or with Iran in the *United States Diplomatic and Consular Staff in Tehran Case*. There have also been occasions that the defendant State has not appeared at the second stage of the proceedings, as Albania did in the *Corfu Channel Case* or more recently in the case of the *United States Military and Paramilitary Activities in and against Nicaragua*.

Unlike the Statute of the International Court of Justice,[312] the Convention does not regulate the effect of the non-appearance of a State, which permits the Court, after ensuring that it has jurisdiction for the case, to continue the proceedings and draw, in the area of evidence, the consequences that derive from the lack of cooperation of the State. Article 27 of the Court's Rules provides that when a party does not appear in or continue with a case, the Court, *de oficio*, takes the measures to complete the consideration of the case and when a State appears late it takes the proceedings at that stage. In any event and notwithstanding the presumption of truth that may be derived from this circumstance, the Commission or the complainant State is not exempted from its obligation to prove the allegations.

The experience in the cases against Peru and Trinidad and Tobago, in which those States did not appear in all or in part of the proceedings, was not the same and, thus, the Court had a different reaction for each case. In the Ivcher Bronstein Case, the State initially acknowledged receipt of the application, named its agents, gave the address to receive communications concerning the case and requested an extension of the period to appoint an *ad hoc* judge. A few weeks later, however, the State returned the application and its annexes to the Court because it had decided to withdraw its recognition of the Court's contentious jurisdiction with immediate effect. The State, therefore, proceeded to annul the appointment of the agents that it had previously named.[313] In the Constitutional Court Case, when the State was notified of the application, it referred to its withdrawal and returned it to the Court.[314] In both cases, this circumstance led the Court to deliver judgments on its competence.[315] Those decisions were also returned to the Court with a series of notes in which Peru expressed its position, stating, *inter alia*, that they were not procedurally provided for in any of the existing human rights instruments in the inter-American system, that the Court lacked jurisdiction to issue any rulings

312. Article 53 of the Statute of the International Court of Justice.
313. *Ivcher Bronstein Case, supra* note 131, paras. 22-26.
314. *Constitutional Court Case, supra* note 35, paras. 17-18.
315. *Ivcher Bronstein Case. Competence*, *supra* note 67 and *Constitutional Court Case. Competence*, *supra* note 67.

on the legal validity of the decision of the Government of Peru to withdraw from the contentious jurisdiction and that, therefore, Peru was not subject to that jurisdiction in the cases in which those judgments had been rendered because it was not a party to those proceedings.[316] Notwithstanding the above, the Court continued to hear both cases, this time on the merits and convoked the parties to a public hearing, at which the State did not appear.[317] In refusing to participate in the proceedings, Peru was not able to interrogate the witnesses proposed by the Commission, to object to the rest of the evidence presented by the Commission or to present its final arguments. Before the judgment was handed down, Peru, through its Embassy in Costa Rica, submitted to the Court a copy of the legislative decree that repealed the resolution ordering withdrawal of the recognition of the Court's contentious jurisdiction and reestablished that recognition.[318]

It is important to underscore that in the Ivcher Bronstein and Constitutional Court Cases, after having defined the proven facts that the Court considered relevant but before ruling on whether they compromised the State's international responsibility, the Court first examined the Commission's arguments on the non-appearance of the State. The Court left it clear that the State did not offer any defense and did not appear when it had been summoned and recalled that Article 27 of its Rules establishes, *inter alia*, that when a party does not appear in or continue with the case, the Court, *de oficio*, takes the measures to complete the consideration of the case, as it did in these cases. According to the Court, the appearance of the parties in the proceedings is a procedural duty and not a legal obligation and thus the failure to take part in the proceedings does not result in a sanction nor does it affect the continuation of the proceedings but instead it may prejudice the party that decides not to exercise its right of defense or perform the appropriate procedural activities that are in its interest, in accordance with the principle *audi alteram partem.* Moreover, as has been recognized in international jurisprudence, the absence of a party at any stage of a case does not affect the validity of the

316. *Ivcher Bronstein Case*, *supra* note 131, paras. 32-33 and *Constitutional Court Case*, *supra* note 35, para. 22.

317. *Ibid*., paras. 36 and 44 and 24-25, respectively.

318. *Ibid*., paras. 49 and 31, respectively.

judgment, so that, in accordance with Article 68.1 of the Convention, Peru was still obligated to comply with the Court's decisions in both cases.[319]

The non-appearance of Trinidad and Tobago was different. While the State did not contest the application or name an *ad hoc* judge, it interposed a preliminary objection to the Court's jurisdiction to hear the Hilaire, Constantine and Benjamin *et al*. Cases and participated actively in the respective proceedings. It was when the Court rejected that preliminary objection that the State did not recognize the Court's jurisdiction to continue hearing the cases and refused to participate in the stages on the merits and on reparations. In a note dated February 8, 2002, in which it informed that it would not attend the public hearing convoked by the Court, the State insisted that, in the absence of a special agreement recognizing the Court's jurisdiction in this matter, it did not have jurisdiction with respect to those cases.[320] The State did not answer the application, name agents to represent it at the stage on the merits, present observations to the briefs presented by the Commission, appear at the public hearing convoked by the Court, present its own evidence or object to the evidence presented by the Commission. The Court reiterated that, as any international body with jurisdictional functions, it had the inherent authority to determine the scope of its own jurisdiction and pointed out that the State's arguments regarding the Court's jurisdiction to hear these cases had been resolved at the appropriate procedural stage and since the allegations contained in the applications were prior to the date on which the State's denunciation of the Convention had taken effect, the Court, pursuant to Articles 62.3 and 78.2 of the Convention, was competent to hear the cases and render a judgment.[321]

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319. *Ibid*., paras. 77-82 and 57-62, respectively. The reference is to the judgments of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judment, I.C.J. Reports 1986, para. 27; *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, para. 12; *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, I.C.J. Reports 1974, para. 17; *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, I.C.J. Reports 1974, para. 15; *Aegean Sea Continental Shelf*, Judgment, I.C.J. Reports 1978, para. 15 and *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, para. 33.

320. *Case of Hilaire, Constantine and Benjamin et al., supra* note 37, para. 16.

321. *Ibid*., paras. 17 and 20.

## F. CLOSING THE CASE

While the Convention does not provide for the possibility of withdrawing or discontinuing an application, Article 53.1 of its Rules states that, when the party that brought the case notifies the Court of its intention to discontinue the application, after the opinion of the other parties to the case is heard, the Court decides whether to discontinue the case and whether to strike it from its list and declare an end to the matter.

On the other hand, Article 53.2 of the Rules points out that, if the respondent State communicates to the Court its acceptance of the claims of the complainant and that of the representatives of the alleged victims, their next of kin or representatives, the Court, having heard the opinion of the parties to the case, decides on the appropriateness of the acceptance and its juridical effect. The Court then determines the appropriate reparations and indemnities, if applicable. A very close situation to that provided for in the Rules occurred in El Amparo Case, in which the State admitted the allegations in the application, accepted its international responsibility and requested that the Court ask the Commission "to come together to a non-litigious procedure with the object of determining in friendly fashion … the reparations applicable."[322] In spite of the position of Venezuela, there was no discontinuance on the part of the Commission and, while it accepted the request of the State, the Court reserved the right to review and approve the agreement that the parties might eventually reach.[323] In our opinion, it would have been more appropriate if, before the judgment, Venezuela would have proposed to the Commission an agreement, suggesting that it discontinue the case (as occurred in the Maqueda Case), or would have requested the Court to suspend the proceedings while it attempted to reach a friendly settlement with the Commission, a solution that was never reached.

What is perfectly possible under international law is much more than a mere theoretical possibility in the inter-American system. In fact, something very similar to the discontinuance of the application was posed in the Cayara Case, in which, according to the interpretation of the Court,

322. *El Amparo Case*, *supra* note 44, para. 19.
323. *Ibid*., operative para. 4.

the first three preliminary objections interposed by the Government of Peru were based "on the withdrawal of the case by the Commission after it had been submitted to the Court."[324] In effect, on June 20, 1991, the Chairman of the Commission informed the President of the Court that, in accordance with a request of the government, the Commission had decided to withdraw the case in order to reconsider it and possibly present it again, after evaluating the observations presented by the government.[325] In view of this situation and after having consulted the Permanent Commission, the Secretary of the Court simply took note of the withdrawal, without qualifying it or its timeliness, because the President of the Court had not yet considered the matter and its processing had not begun.[326] According to the Court, although the withdrawal of the application is not regulated expressly by the Convention, this does not mean that it is inadmissible since the general principles of procedural law allow the accusing party to request that his complaint not be processed as long as the court had not yet begun to hear the matter, which generally begins with the notification to the other party. Withdrawal of an application would be a valid option under the Convention, by which the initial jurisdiction of the Court depends on the will of the Commission or the States parties.[327] In this case, the Court seems to have forgotten its role as the organ charged with overseeing compliance of the human rights obligations that the States have assumed and that the object and purpose of the treaty is the protection of human rights, to which it is necessary to subordinate the interpretation of all of its provisions.[328]

The discontinuance could also be the result of a friendly settlement reached by the parties, of an agreement or other relevant fact to resolve

324. *Cayara Case. Preliminary Objections, supra* note 7, para. 44.
325. *Ibid*., paras. 26 and 36.
326. *Ibid*., paras. 36 and 53. It is difficult to understand how a matter that the Commission had referred to the Court on May 30, 1991, even before there had been a preliminary examination of the application, could be withdrawn by an organ that had lost its competence in the case, notwithstanding that the Court stated, in paragraph 63 of the judgment, that it is a matter "aimed at ensuring the protection of the interests of the victims" and that Article 43.3 of the Rules of the Court, perhaps applicable by analogy, provided that the Court, taking into account its responsabilities to protect human rights, may decide to continue the examination of the case even in the event of a withdrawl by the claimant or a friendly settlement reached by this parties.
327. *Ibid*., para. 48.
328. *Ibid*., para. 37.

the case that the parties have communicated to the Court, which, after hearing the lawyers appointed by the original complainant, the alleged victim or his next of kin, could strike the case from its list. Article 53 of its Rules provides that, when the parties to a case before the Court inform it of the existence of an agreement, the Court may declare an end to the matter. This situation was posed for the first time in the Maqueda Case, against Argentina where, after initiating the proceedings before the Court, the Commission notified it of its decision to discontinue the action, based on the fact that there was an agreement between the parties.[329] Similarly, in the Mayagna Community Case, although the State manifested its willingness to seek a friendly settlement "through direct and exclusive conversations with the Commission," such an agreement was never reached.[330] While a friendly settlement is possible even after the case has been submitted to the Court, this does not correspond to the procedure provided by Article 48.1.f of the Convention, which is limited to the proceedings before the Commission. In addition, in the event that there is a friendly settlement between the parties at this stage, that settlement has to be ratified by the Court. In any event, in accordance with Article 56.2 of its Rules, if the Court has been informed that the parties have arrived at a friendly settlement with respect to compliance of the judgment on the merits, it verifies that the agreement conforms to the Convention and orders that it be complied with.

The Court is not obligated to close a case simply because the complainant, the respondent State or even both parties to the proceedings so desire. Article 54 of its Rules provides that, in view of its responsibilities to protect human rights, the Court may decide to continue examining a case even when the parties agree to close it. In the Cantoral Benavides Case, after having pardoned the person affected, Peru requested that the case be closed. The Court rejected that request because it considered that it was not a sufficient reason.[331] In fact, taking into account its responsibility as an organ of protection of human rights, the Court may decide to continue the examination of a case, even in the event of a discontinuance on the

329. I/A Court H.R., Order of January 17, 1995. Maqueda Case, para. 16.
330. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 38, para. 49.
331. I/A Court H.R., Order of June 18, 1998. Cantoral Benavides Case.

part of the complainant or a friendly solution reached by the parties or a recognition of responsibility on the part of the State. In the Maqueda Case, the Court requested of the Commission all of the documentation related to the discontinuance of the action and sought the opinion of the government and the complainants on the discontinuance.[332] After those steps had been completed, it consented to the discontinuance but reserved the power to reopen and continue the proceedings if there was a change in the circumstances that gave rise to the agreement.[333] Similarly, in its judgment in the Aloeboetoe *et al*. Case, although the Government of Suriname recognized its responsibility for the acts denounced, the Court pointed out that the recognition had terminated the controversy on the facts that gave rise to the case, but it decided to leave open the proceedings for the effects of determining the corresponding amount of reparations and costs.[334]

332. Order of January 17, 1995, *supra* note 329, paras. 17 and 20.
333. *Ibid*., para. 27 of the considerations and operative para. 3.
334. *Aloeboetoe et al. Case*, *supra* note 76, operative paras. 1-2.

# Chapter XV

## JUDGMENTS AND RULINGS ON REPARATIONS

Pursuant to the terms of Article 29 of the Court's Rules, the judgments and orders that conclude the proceedings are the exclusive competence of the Court. All other orders are rendered by the Court or its President if the Court is not in session, unless otherwise provided.

The Convention specifies that reasons must be given for the Court's judgment, that is, the Court must develop the facts and their legal effect. The judgment is final and not subject to appeal. As a first step in arriving at a judgment, the Court appoints a judge as rapporteur, who prepares a draft judgment and submits it to the Court's consideration. If the judgment does not reflect in whole or in part the unanimous opinion of the judges, any judge may attach to it his dissenting or separate opinion. While not expressly stated in the Convention, it may be supposed that, as with the judgment, a dissenting opinion should provide the reasoning behind it and not merely express disagreement or rejection without any grounds or justification. Article 56.2 of the Court's Rules provides that a judge who has participated in the examination of the case has the right to attach to the judgment his dissenting or concurring vote, which must refer to issues covered in the judgment.

In addition, a judgment must meet the minimum requirements listed in Article 56.1 of the Rules with respect to its content. Notwithstanding that it is final and not subject to appeal, a judgment may be open to remedies that are not appeals, such as the request for interpretation or the request for revision.

### A. THE INTERNAL DISCUSSIONS AND PRACTICE OF THE COURT

A particularly important aspect, which is not covered by the Rules, refers to the Court's internal practice. Article 55.2 of the Rules provides

that any judge who has participated in the examination of a case may attach his concurring or dissenting opinion to the judgment. These opinions must be presented within a period set by the President so that the judges have them before notification of the judgment. The opinions may only refer to issues covered in the judgment. Except for this provision, the Rules do not govern the internal discussions or how the Court prepares or adopts its decisions. It is, therefore, interesting to make a comparison with the provisions of the Rules of the International Court of Justice and that Court's practice.

Pursuant to Article 19 of the Rules of the ICJ, its internal practice is governed by the resolutions that it adopts on a matter. Article 21, however, provides that the deliberations of the ICJ are held in private and remain secret, but the Court may at any time decide to publish all or part of its deliberations that do not refer to judicial issues. Only judges and the advisors appointed under Article 9 of the Rules may take part in these deliberations, although the latter obviously cannot vote. The Registrar and Deputy Registrar are present during the deliberations as are other members of the Secretariat as necessary. No one else may be present, except with the permission of the Court. The minutes of the deliberations of the Court only record the title or nature of the issues discussed and the results of any vote that has taken place. The minutes, however, do not include details of the discussions and the views expressed. Any judge may require that a statement made by him be included in the minutes.

In addition, the ICJ adopted a *Resolution concerning the Internal Judicial Practice of the Court*,[1] although the Court need not follow it in a given case if justified by the circumstances. According to this Resolution, after the conclusion of the written proceedings and before the oral proceedings the judges exchange views on the case and indicate the points with respect to which they consider it may be necessary to hear additional explanations during the oral proceedings. If there are two exchanges of oral arguments, after the conclusion of the first of them a further deliberation is held having the same object. The Court may also meet in private during

1. Resolution Concerning the Internal Judicial Practice of the Court (Rules of the Court, Art. 19), of July 5, 1968, amended on April 12, 1976.

the oral proceedings to enable the judges to exchange views concerning the case and to inform each other of the possible questions that they intend to formulate during the hearing. After the oral proceedings, the judges have an appropriate period to study the arguments presented to the Court. At the expiration of that period, the judges meet to deliberate and the President outlines the issues that he believes will require discussion and decision by the Court. Any judge may comment on the President's statement or call attention to any other issue that he considers relevant and he may have distributed a written text formulating new questions or reformulating those already asked. During the deliberations, any judge may comment on the relevance of any issues or questions arising from the case. The President invites the judges to indicate their preliminary impressions on any issue or question. At a suitable interval after this deliberation, each judge prepares a written note to be distributed to the other judges indicating, *inter alia*: a) whether any of the questions raised should be eliminated from future consideration or should not or need not be decided by the Court, b) the precise questions that should be answered by the Court, c) his tentative opinion with respect to the answers to be given to the questions and his reasoning and d) his tentative conclusion as to the correct disposal of the case. After the judges have had an opportunity to examine these notes, a meeting is held in which the President calls upon the judges, in inverse order of seniority, to express their views. Any judge may make comments or request further explanations with respect to the views of a judge. During this deliberation, any judge may circulate the text of an additional question or a reformulation of a question already posed. At the request of a judge, the President asks the Court whether it is necessary to vote on any question. On the basis of the views expressed during the deliberations and in the written notes, the Court names a drafting committee by secret ballot and an absolute majority vote of the judges present. The two members of the drafting committee are elected among the judges whose oral statements and written notes have reflected most closely and effectively what at that moment appears to be the majority opinion of the Court. The President is a member, *ex oficio*, of the drafting committee unless he does not share what appears to be the majority opinion of the Court, in which case the Vice President takes his place. If the latter is ineligible for the same reason, the Court proceeds to elect a third member,

in which case the senior judge presides. If the President is not a member of the drafting committee, the committee discusses the draft with him before submitting it to the Court. If the President suggests amendments that the committee does not find acceptable, the committee submits the proposals of the President together with its draft. This preliminary version of the judgment is circulated among the judges who may make written suggestions for changes. After considering the proposals, the drafting committee submits to the Court a revised version for a first reading. The judges who wish to issue a separate or dissenting opinion must make their texts available to the Court after the first reading is concluded and within a deadline set by the Court. The drafting committee circulates an amended draft judgment for a second reading at which the President inquires whether any judge wishes to propose further amendments. Judges who issue separate or dissenting opinions may make changes or additions to their opinions only to the extent that changes have been made in the draft judgment. Those changes must be announced during the second reading of the draft and a deadline is fixed for filing the revised text of the opinions, copies of which are distributed to the judges. At the conclusion of the second reading, the President calls upon the judges, in inverse order of seniority, to vote on the final decision or the conclusion of the matter. In cases in which the decision deals with issues that are separable, unless the exigencies of the case require a different course, any judge may ask for a separate vote on each issue. Any vote on particular issues of the Court's jurisdiction or the admissibility of the application is followed by a vote on the question of whether the Court may rule on the merits of the case or, if this stage has already been reached, on the global question of whether the Court is competent or the claim admissible. When the judges are called upon to make their final vote, they may only express their agreement or disagreement with the conclusion that is submitted to a vote. Although because of illness or other justified cause in the opinion of the President, a judge who has not attended part of the public hearing or the Court's internal proceedings may nevertheless participate in the final vote provided that a) during most of the proceedings he has remained at the seat of the Court or where the Court is sitting, b) with respect to the public hearing, he has been able to read the official transcript of the proceedings, c) with respect

to the internal proceedings he has been able to submit his own written note, read those of the other judges and study the drafts of the drafting committee and d) with respect to the proceedings as a whole, he has taken a sufficient part in the public hearing and in the internal proceedings to enable him to arrive at a judicial determination on all issues of fact and law material to the decision of the case. The judges who are qualified to participate in the final vote must vote in person. If a judge is unable to vote because of physical incapacitation, and if circumstances permit, the vote is postponed until he can attend. If, in the opinion of the Court, circumstances do not permit that suspension or it is not advisable, the Court may, with the purpose of allowing him to vote, decide to meet elsewhere than the normal meeting place. If none of these options is possible, the judge may be authorized to vote in any other manner that is compatible with the Court's Statute.

The practice of the Inter-American Court is to appoint, before the hearing of a case, a rapporteur who is charged with preparing a draft judgment that is presented to the consideration of the Court.

## B. THE IDENTIFICATION OF THE CASE

The nomenclature used in each legal system to identify the decisions of its tribunals not only provides a key to locate the pertinent jurisprudence but also gives an idea of the area of the decision –criminal, civil, labor, mercantile etc.– or by its object –writ of *amparo*, preliminary objection to the jurisdiction of the tribunal, request for provisional measures, appeal of cassation, constitutionality of a law or the interpretation of a judgment. As a general rule and without ignoring other elements such as the date in which they are adopted, these decisions are identified by the names of the parties to the controversy.

The Inter-American Court does not have a systematic and coherent practice for identifying its judgments. While most of them have the names of the victims as the title, the Court has not followed this rule in other cases and has referred to a collective body (the Mayagna Community and Peace Community of San José de Apartadó Cases or the Communities of the Jiguamiandó and the Curbaradó Case), to the institution to which the

victims belonged (the Constitutional Court Case, although without indicating which country), to the company where the victims worked or of which they were owners or shareholders (illustrated by *La Nación* Newspaper Case in the proceedings on provisional measures), to where the acts occurred (the Cayara, El Amparo, Las Palmeras and Barrios Altos Cases or the Chunimá and Colotenango Cases with respect to provisional measures), to a combination of the affected community and its geographical location (the Mayagna (Sumo) Awas Tingni Community Case), to what might be called a characterization of the acts that gave rise to the application (the *Caracazo* Case), to the means of transport used in the human rights violation (the "White Van" Case), to the type of persons affected by the human rights violation (the 19 Businessmen, the Five Pensioners and the "Street Children" Cases), although with respect to the latter only as a sub-title, and in the area of provisional measures the Haitians and Dominicans of Haitian Origin in the Dominican Republic Case, and, finally, to a partial indication of the object of the controversy referred to the Court ("The Last Temptation of Christ" Case), although in addition to the name of the film that had been censored the usual nomenclature of the names of the victims was used as a sub-title.

The nomenclature has not been used in a systematic and coherent fashion even in the same case. For example, what had been the Paniagua Morales *et al*. Case, in the judgment on reparations became the "White Van" Case and what the Court had initially named the Torres Benvenuto *et al*. Case was changed to the Five Pensioners Case and then in the judgment on the merits became the "Five Pensioners" vs. Peru Case.[2]

Starting in mid-2001, the Court began to identify some cases with the names of both parties to the controversy by adding to the victim's name that of the State in question,[3] as is the practice of the European Court of Human Rights. In other cases, it has used the names of both

2. I/A Court H.R., *Case of the "Five Pensioners."* Judgment of February 28, 2003. Series C No. 98, para. 19.

3. As of February 15, 2004, this may be seen in the judgments on preliminary objections in the Hilaire, Benjamin *et al.*, Constantine *et al.* and Cantos Cases; in the judgments on the merits in the Hilaire, Constantine and Benjamin *et al*., Mayagna (Sumo) Awas Tingni Community and "Five Pensioners" Cases and in the judgments on reparations in the Bámaca Velásquez, Trujillo Oroza and Durand and Ugarte Cases.

parties but only as a sub-title.[4] The *Caracazo* Case is curious in that in the judgment on reparations it is known as the *Caracazo* vs. Venezuela Case, although *Caracazo* cannot be said to be a party to the case. Notwithstanding this recent tendency, the Court has not yet consolidated the use of the names of both parties to the controversy (although only in the sub-title) to identify its cases. In fact, some recent judgments do not refer to the State in question.[5] As part of this lack of coherence, in the Cantos Case, which at the preliminary objections stage was known as the Cantos vs. Argentina Case, in the judgment on the merits of November 2002 the Court once again only used the name of the petitioner before the Commission. In any event, the Court is to be congratulated for finally having adopted a uniform standard that identifies the cases submitted to it with the names of both parties to the controversy.

While the judgments on the merits of the controversy are identified with the aforementioned elements, the other judgments specify whether they refer to the preliminary objections presented by the State, to the reparations stemming from a judgment in which the State has been found responsible for a human rights violation (initially qualified as compensatory damages) or to a request for interpretation of a judgment. Exceptionally, the Court has issued judgments ruling on its competence to hear the case referred to it. In addition, among its many interlocutory orders are those on the provisional measures ordered as part of the principal proceedings or independently in a proceeding that does not correspond to a case before the Court.

4. The judgments on reparations in the Paniagua Morales *et al.* Case and in the "Street Children" Case are subtitled Paniagua Morales *et al.* vs. Guatemala and Villagrán Morales *et al.* vs. Guatemala, respectively. Similarly, in the Barrios Altos Case, in the judgments on the merits and on reparations as well as the judgment on the interpretation of the judgment on the merits is sub-titled Chumbipuma Aguirre *et al*. vs. Peru. In addition, the judgments on the interpretation of the judgments on the merits and on reparations in the Ivcher Bronstein and Cesti Hurtado Cases are sub-titled Baruch Ivcher Bronstein vs. Peru and Gustavo Adolfo Cesti Hurtado vs. Peru, respectively. Similarly, the judgment on the merits of the Constitutional Court Case is subtitled Aguirre Roca, Rey Terry and Revoredo Marsano vs. Peru and 270 workers vs. Panama is added to the judgment on the merits in the Baena Ricardo *et al*. Case.

5. *See, e.g.*, I/A Court H.R., *Cantoral Benavides Case. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of December 3, 2001. Series C No. 88; *Las Palmeras Case*. Judgment of December 6, 2001. Series C No. 90 and *Case of Cantos*. Judgment of November 28, 2002. Series C No. 97.

## C. THE CONTENT OF THE JUDGMENT

After establishing the facts, the judgment rules on the responsibility of a State with respect to the allegations and, in the event of finding responsibility, orders that the injured party be ensured the enjoyment of the right or freedom infringed, resolves the applicable reparations and damages and decides on the payment of costs.

Article 56 of the Rules provides that the judgment contain: a) the names of the President, the judges who rendered it, and the Secretary and Deputy Secretary, b) the identity of the parties and their representatives, c) a description of the proceedings, d) the facts of the case, e) the conclusions of the parties, f) the legal arguments, g) the ruling on the case, h) the decision, if any, on reparations and costs, i) the result of the voting and j) a statement indicating the authentic text. This structure permits the Court to delegate a large part of its preparation to the Secretariat, leaving for the Court the drafting of the substantive part with the considerations that it has taken into account in deciding, particularly with regards to the weighing of the evidence and the facts that have been established, the applicable law and the decision as such.

Under the terms of Article 58.3 of the Court's Rules, the judgments are signed by all of the judges who participate in the voting and by the Secretary. Nevertheless, a judgment signed only by a majority of the judges and by the Secretary is valid. Dissenting or concurring opinions are signed by their authors and by the Secretary. According to Article 58.5, the judgments conclude with an order, signed by the President and the Secretary, providing for their communication and execution.

The originals of the judgments are deposited in the files of the Court. The Secretary sends certified copies to the States parties, the parties to the case, the OAS Permanent Council through its President, the OAS Secretary General and any other interested person who so requests.

### *1. ESTABLISHMENT OF THE FACTS*

Whether one accepts the position that the Court may independently establish the facts or that this is an exclusive function of the Commission,

a thesis that we do not share, the judgment obviously should indicate which facts have been established.

If there is no dispute on the facts or if the dispute on the facts that gave rise to the application has ceased, the Court may consider as proved the allegations presented by the Commission,[6] even though there may be differences as to their legal qualification or as to other facts such as those related to the determination of the true damages, the appropriate reparations and their scope.[7] Even in these circumstances, the Court must hear the opinion of the parties.[8]

Although a State has admitted responsibility for the acts denounced, the Court must verify that there is no longer a dispute about them. The State recognized its international responsibility in the Bámaca Velásquez Case but claimed that it was not able to identify those criminally responsible for the acts and requested that its international responsibility be recognized "with regard to the facts outlined under numeral II of the application." As the Court could not conclude from an examination of the written submissions of Guatemala that it had accepted the acts set out in the application, the Court decided to continue hearing the matter.[9]

### *2. THE LEGAL QUALIFICATION OF THE FACTS*

The fact that there is no dispute on the allegations in the application does not exempt the Court from its obligation to rule on their legal qualification. Pursuant to Article 63.1of the Convention, when the Court decides that there has been a violation of a right or freedom protected by the Convention, it orders that "the injured party be ensured the enjoyment

6. I/A Court H.R., *El Amparo Case. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of September 14, 1996. Series C No. 28, para. 13.

7. I/A Court H.R., *Aloeboetoe et al. Case*. Judgment of December 4, 1991, Series C No. 11, para. 23; *Aloeboetoe et al. Case*. *Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of September 10, 1993. Series C No. 15, para. 42. *See*, also, I/A Court H.R., *El Amparo Case*. Judgment of January 18, 1995. Series C No. 19, para. 20.

8. *See*, in this respect, the Order of the President of the Court of December 9, 1995 in the Garrido and Baigorria Case. Merits.

9. I/A Court H.R., *Bámaca Velásquez Case*. Judgment of November 25, 2000. Series C No. 70, paras. 23-24 and 27 and Order of the Court of February 5, 1997.

of his right or freedom that was violated" and, "if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

There is no doubt that this rule implies that the Court must determine whether the allegations constitute a violation of the Convention and, if so, the provisions that have been violated. The Court has stated that Article 63.1 of the Convention "indicates that (it) must decide if there is a violation of the Convention."[10] In the Cantoral Benavides Case the Court held that, although the Commission had not alleged in its application a violation of Article 2 of the Convention, it was authorized to examine the issue, *motu proprio*, and that Article 2, like Article 1.1, sets forth general obligations in addition to the specific obligations regarding each of the protected rights that the Court has the duty to examine as the system's judicial organ.[11]

Notwithstanding the foregoing, curiously in the Aloeboetoe *et al.*, El Amparo and Garrido and Baigorria Cases in which the respective States accepted the acts denounced in the application and their international responsibility, the Court held as proved that those facts were a violation of the Convention without characterizing them or indicating precisely what provisions of the Convention had been infringed.[12] In its unfortunate judgments in those three cases, the Court did not decide that the acts denounced constituted a violation of the Convention. In the Aloeboetoe *et al*. Case this circumstance was especially grave since at the hearing on December 2, 1991, in response to a question of the Commission's Delegate, the State's representative manifested that Suriname accepted its responsibility and "consequently, the Court has the right to close the case, file it, determine the compensation payable or do whatever is appropriate under the law."[13] This recognition clearly only referred to the facts of the

10. I/A Court H.R., ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1990, General Secretariat of the Organization of American States, Washington, D.C., 1994, p. 8.

11. I/A Court H.R., *Cantoral Benavides Case. Preliminary Objections.* Judgment of September 3, 1998. Series C No. 40, para. 46.

12. I/A Court H.R.,*Aloeboetoe et al. Case*, supra note 7, operative para. 1; El Amparo Case, *supra* note 7, operative paragraphs, especially paras. 1-2 and *Garrido and Baigorria Case*. Judgment of February 2, 1996. Series C No. 26, operative paras. 1-2.

13. *Aloeboetoe et al. Case*, *supra* note 7, para. 22.

case, leaving the Court to determine what the law was and did not preclude closing or filing the case if it considered that the facts did not constitute a violation of the Convention. The judgments in those three cases led to the reparations stage at which compensation was ordered without an indication of whether the facts in each case constituted a violation of the Convention and which specific provisions. As Judge García Ramírez stated in the Bulacio Case, the recognition of responsibility implies that the State believes that there was conduct of its agents that affected the rights of the victim.[14] In any event, the Court has the duty to legally qualify the facts.

The Court cannot ignore its obligation to legally qualify the facts. When a State accepts the allegations in the application, the Court is obligated to hold these facts as established but it is not bound by their legal qualification by the Commission and it cannot evade ruling on the issue. In the Bulacio Case, in which the parties reached an agreement that terminated the dispute on the facts and in which the State recognized in an explanatory document its responsibility for the violation of Articles 2, 7, 5, 19, 4, 8 and 25 of the Convention, in light of the agreement and the evidence furnished by the parties the Court noted that the dispute between the parties as to the facts that gave rise to the case had ceased. The Court, however, concluded that in addition to the rights guaranteed in the aforementioned articles and to the State's obligations under Article 2 of the Convention, the State had also violated its general obligations under Article 1.1.[15] In the Hilaire, Constantine and Benjamin *et al*. Case, in spite of the fact that the Commission did not allege the violation of Article 2 of the Convention in its application but did so in its final arguments, the Court held that it was not prevented from considering such a violation by virtue of the principle of *iura novit curia*, which confers on the Court the power and the duty to apply the relevant norms in a case even when the parties have not expressly invoked them.[16] Although the Commission alleged the violation of Article 5, concerning the conditions of detention

14. *See* I/A Court H.R., *Case of Bulacio.* Judgment of September 18, 2003, Series C No. 100, para. 8 of his concurring opinion.

15. *Ibid.*, paras. 31-33 and 38.

16. I/A Court H.R.,*Case of Hilaire, Constantine and Benjamin et al*. Judgment of June 21, 2002. Series C No. 94, para. 107. *See*, also, *Castillo Petruzzi et al. Case*. Judgment of May 30, 1999. Series C No. 52, para. 166.

of some death row inmates that was considered cruel, inhuman and degrading treatment, the Court concluded, by virtue of the principle of *iura novit curia* from the evidence presented during the proceedings, including expert opinions on the conditions of detention, that the conditions described were general conditions of the penitentiary system of Trinidad and Tobago and, therefore, Article 5 had been violated for all of the victims of the case.[17]

In Las Palmeras Case the Court held that the ruling of the national courts that the State was responsible for the death of some of the victims in the case[18] exempted it from having to rule on the violation of the right to life of those persons. However, according to Judges Cançado Trindade and Pacheco Gómez, the *res judicata* of domestic law is not binding on an international tribunal, such as the Inter-American Court, since the latter must determine, *motu proprio*, a State's responsibility. In their opinion, the Court cannot refrain from such determination even if the decision on the merits of the national court entirely coincides with that of the Court. Otherwise, "this would lead to a total juridical relativism, illustrated by the 'endorsement' of a decision of a national tribunal when it is considered in accordance with the Convention or else the determination that it does not generate, or ought not to generate, legal effects when it is considered incompatible" with the Convention, as the Court decided in the Barrios Altos and Cantoral Benavides Cases.[19] In the Cesti Hurtado Case, the Court rejected the State's preliminary objection to its competence to rule on the personal freedom of an individual whose legal situation had already been resolved by a final judgment with the authority of *res judicata* and stated that in international jurisdiction the parties and the matter in controversy differ, by definition, from those in the domestic jurisdiction since the fundamental aspect of the controversy before the Inter-American Court is whether the State has violated the international obligations that it assumed in becoming a party to the Convention.[20] Consistent with this decision, Judges Cançado Trindade and Pacheco Gómez stated that from

17. *Castillo Petruzzi et al. Case*, *supra* note 16, para. 170.
18. *Las Palmeras Case*, *supra* note 5, paras. 32, 34 and 71.1 and operative para. 1.
19. *See* his joint separate opinion in *Las Palmeras Case*, *supra* note 5, para. 4 of the opinion.
20. I/A Court H.R.,*Cesti Hurtado Case. Preliminary Objections*. Judgment of January 26, 1999. Series C No. 49, para. 47.

the standpoint of the Inter-American Court the only thing that is definitive is its own determination of the compatibility or incompatibility of a State's administrative acts and practices, national laws and judicial decisions with the Convention.[21] They added that international jurisprudence considers civil responsibility as insufficient to meet the requirements of the international protection of human rights.[22]

The legal qualification of the facts includes, whenever necessary, the duty of the Court to rule on the incompatibility of the norms of domestic law with the provisions of the Convention, regardless of whether such norms have been applied in a specific case. In one of its misnamed advisory *opinions*, the Court stated that the Convention does not include any provision that permitted it to decide, in the exercise of its contentious jurisdiction, whether a law that had not yet affected the rights and freedoms protected for determined individuals is contrary to the Convention and that such a ruling could only be issued in the exercise of its advisory jurisdiction.[23] In El Amparo Case, the Court pointed out that it was refraining from ruling in the abstract on the compatibility of the Code of Military Justice of Venezuela and its regulations and instructions with the Convention.[24] Judge Cançado Trindade dissented from this unfortunate decision. In his dissent, he superbly dismantled the Court's arguments and defended its jurisdiction to rule on the incompatibility of domestic laws with the Convention. In his opinion, the mere existence of a legal provision may, *per se*, create a situation that directly affects rights protected by the Convention and may violate those rights by virtue of its existence because of the real threat that it represents to the persons who find themselves in the situation created by the law. According to Judge Cançado Trindade, it is not necessary to wait for the damage to occur for a law to be challenged since that would be contrary to the duty of prevention, which has a broad scope that includes legislative, administrative and other measures that promote the safeguarding of human rights. In his opinion,

21. *See* his joint separate opinion in *Las Palmeras Case*, *supra* note 5, para. 6 of the opinion.
22. *Ibid*., paras. 10-11.
23. I/A Court H.R., *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (Arts.1 and 2 American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 49.
24. *El Amparo Case. Reparations*, *supra* note 6, para. 60.

the generic concept of reparations includes the duty of prevention and of ensuring that the acts that violate human rights not be repeated. Finally, Judge Cançado Trindade recalled that, under Article 62.1 and 62.3 of the Convention, the Court's contentious jurisdiction extends to all cases of the interpretation and application of the Convention.[25] This unfortunate decision of the Court was corrected in the Loayza Tamayo Case in which two decree-laws were declared incompatible with the Convention.[26] Moreover, in the Suárez Rosero Case the Court recalled that the States parties to the Convention cannot enact measures that violate the rights and freedoms recognized in the Convention and, with respect to Article 114 bis of the Criminal Code of Ecuador that authorized the release of inmates when the conditions of the law were met, expressed the view that an exception to the law deprived some inmates of a fundamental right because of the crime for which they were convicted and hence intrinsically harmed all inmates in that category. According to the Court, that norm, *per se,* violated Article 2 of the Convention irrespective of whether it had been applied in a specific case.[27] The Court recently insisted on the incompatibility of two decree-laws with the Convention and held that the State had the duty to comply with its obligations under Article 2 of the Convention, which requires the States to undertake to adopt the legislative and other measures as may be necessary to give effect to the rights and freedoms guaranteed by the Convention.[28] In the Castillo Petruzzi *et al*. Case the Court stated that "domestic laws that place civilians under the jurisdiction of the military courts are a violation of the principles of the American Convention. Therefore, the State is to adopt the appropriate measures to amend those laws and ensure the enjoyment of the rights recognized in the Convention to all persons within its jurisdiction, without exception."[29]

One aspect of the legal qualification of the facts is the Court's jurisdiction to rule on an issue that was not originally raised by the parties

25. *Ibid.*, especially paras. 2-11 of the dissenting opinion.
26. I/A Court H.R., *Loayza Tamayo Case*. Judgment of September 17, 1997. Series C No. 33, para. 68.
27. I/A Court H.R., *Suárez Rosero Case.* Judgment of November 12, 1997. Series C No. 35.
28. I/A Court H.R., *Loayza Tamayo Case. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of November 27, 1998. Series C No. 42, para. 164.
29. *Castillo Petruzzi et al. Case, supra* note 16, para. 122.

to the controversy. In a request for interpretation of a previous judgment and without rendering a decision *ultra petita*, the Permanent Court of International Justice deemed that within reasonable limits it is authorized to expand the scope of the matter that has been submitted to it with the only purpose of being able to decide it adequately.[30] In the inter-American system, although the Court has no knowledge of facts or situations that have not been submitted to it, it appears obvious that it has jurisdiction to qualify the facts of the case before it in a manner other than that suggested by the parties and to determine the consequences to be derived from a violation of the Convention, regardless of the measures that the Commission or the State in question had requested.

### *3. THE DETERMINATION OF STATE RESPONSIBILITY*

A judgment is not a mere declaration that a State has violated the Convention, it must also contain the specific measures that the State must adopt if a violation is found. The determination of State responsibility for the allegations referred to the Court requires establishing not only the manner in which the State has been responsible and the agency through which it acted but also implies the need to indicate what the State must do to re-establish the legal order violated. According to the Court, Article 63.1 of the Convention distinguishes between the behavior that the State responsible for a violation must observe from the moment of the Court's judgment and the consequences of that same State's attitude when the violation occurred. With respect to the future, that Article provides that the injured party be ensured the enjoyment of the right or freedom infringed and, with respect to the past, it empowers the Court to grant reparations and a fair compensation for the consequences of the violation.[31]

This task may be facilitated by a full recognition of State responsibility, as in the Aloeboetoe *et al*., El Amparo and Garrido and Baigorria Cases, in which the States accepted as true the facts in the

30. Permanent Court of International Justice, *Interpretation of Judgments 7 and 8 (Factory of Chorzow)*, judgment of September 16, 1927, serie A No. 13, in Manley O. Hudson, WORLD COURT REPORTS, Oceana, Dobbs Ferry, New York, 1969, vol. I, p. 632 *et seq*.

31. *Aloeboetoe et al. Reparations, supra* note 7, para. 46.

application and their ensuing international responsibility or partial responsibility, as in the Blake Case.[32]

## *4. THE OBLIGATIONS ARISING FROM THE RESPONSIBILITY OF THE STATE*

Article 63 of the Convention provides that, if in the Court's judgment there was a violation of a right or freedom protected by the Convention, it orders that "the injured party be ensured the enjoyment of his right or freedom that was violated" and, "if appropriate, that the consequences of the measure or situation that constituted the violation of such right or freedom be remedied and that fair compensation be paid to the injured party."

### *a) The guarantee of the right infringed*

The greatest satisfaction that may be offered a victim of a violation of his human rights consists precisely in ensuring him the exercise of the right violated that gave rise to the proceedings before the Court, that is, that the violation cease, its causes eliminated and its effects terminated. In view of the nature of the violation committed, however, the judgment cannot always require that the right infringed be ensured in the sense of re-establishing the *statu quo ante*. For example, the experience suffered by someone who has been tortured cannot be erased with a judgment nor can a judgment return to life someone who has been arbitrarily executed. In the Gangaram Panday Case, the Court observed that since the victim had died it was impossible to ensure to him the enjoyment of his rights or to make full reparation for the consequences of the measure that violated the Convention.[33] Similarly, in the Neira Alegría *et al*. Case in which it was concluded that the victims lost their life and that it was not possible to identify their bodies as a consequence of the disproportionate use of force to control an prison uprising by demolishing it, the Court could only

32. In this case the recognition of responsibility by the State referred only to the allegations on the unjustified delay in the application of justice in the Blake Case without touching the other allegations contained in the complaint presented to the Commission. I/A Court H.R., Blake Case, Order of April 17, para. 1 of the considerations and operative para. 2.

33. I/A Court H.R., *Gangaram Panday Case.* Judgment of January 21, 1994. Series C No. 16, para. 69.

conclude that under those circumstances it could not order that the enjoyment of the rights and freedoms infringed be ensured to the victims.[34] A decision of this nature, for example, would be particularly adequate in cases in which judicial guarantees were infringed and the proceedings could be re-established at a prior stage or when freedom of expression or information or the right of association had been unduly restrained.

If the right infringed has been personal freedom, there is certainly no way to restore to the injured party the time that he was deprived of his freedom, but what can be restored is the exercise of that right by ordering the release of the victim. In the Loayza Tamayo Case the Court's ordered the State to release María Elena Loayza Tamayo within a reasonable period,[35] which it did as was proved by her appearance at a public hearing before the Court.[36] On the other hand, in a case in which the victims of the human rights violations were convicted in a criminal trial without the guarantees of due process, the Court declared invalid the proceedings and the decision and ordered the State to conduct a new trial within a reasonable period but did not rule on the provisional release of the accused because that was a measure for the national tribunals.[37]

This institution might have found a partial application in the Aloeboetoe *et al*. Case in which the Commission had indicated that the victims were stripped of some of their assets and belongings at the time of their detention. Since the Commission did not present a specific claim in that regard, which could have been raised in the context of reparations or indemnification, the Court refrained from ruling on the matter and did not order that the belongings be returned to their rightful owners.[38]

***b) The duty to make reparation and to pay fair compensation***

A necessary consequence of a violation of the Convention is certainly the duty to make reparation and to pay fair compensation to the injured party. Whenever it has been determined that a State has violated rights enshrined in the Convention, the Court's judgment has referred to

34. I/A Court H.R., *Neira Alegría et al. Case*. Judgment of January 19, 1995. Series C No. 20, para. 89.
35. *Loayza Tamayo Case, supra* note 26, para. 84 of the considerations and operative para. 5.
36. *Loayza Tamayo Case. Reparations, supra* note 28, para. 4.
37. *Castillo Petruzzi et al. Case, supra* note 16, para. 221.
38. *Aloeboetoe et al. Case, supra* note 7, para. 80.

this obligation, although in different ways. The Convention does not provide for the participation of the victim but since he has a special interest in demonstrating the nature of the damages and in claiming the relevant indemnification it is at this stage of the proceedings where the autonomous participation of the victim or his representative is most necessary in proceedings before the Court.

According to the Court, the State becomes internationally responsible for a violation of international law when an unlawful act imputable to the State occurs and a new juridical relationship for the State emerges from this responsibility, which is the obligation to make reparation.[39]

### *c) The guarantee against recidivism*

The Court has pointed out that, with respect to reparations, the State must adopt the positive measures that are necessary to ensure that the acts that have been found to be a violation are not repeated.[40] This obligation does not derive solely from the State's international responsibility but is also the result of the commitment assumed by the States under Article 2 of the Convention, according to which they undertake to adopt the legislative and other measures necessary to give effect to the rights and freedoms enshrined in the Convention.

### *d) The obligation to investigate the facts and punish those responsible*

The obligation to investigate the facts and to punish those responsible has been a constant in the Court's jurisprudence. In the first cases against Honduras, while the Commission and the widows of Manfredo Velásquez and Saúl Godínez requested in the respective proceedings the adoption of several measures regarding reparations, some of which transcended the particular case and concerned the general human rights situation in that country,[41] with respect to those that referred to the

39. I/A Court H.R., *Garrido and Baigorria Case. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of August 27, 1998. Series C No. 39, para. 40.

40. *See, e.g., Case of Bulacio, supra* note 15, para. 73.

41. Such as the public dissemination of a complete and accurate official report on the situation and fate of all the disappeared persons, a public and official commitment that human rights will be respected, the demobilization and breaking up of the repressive bodies that were created to kidnap, torture, make disappear and murder persons and, in general, measures to avoid the repetition of similar situations.

investigation of the facts regarding the forced disappearance of those two persons or the punishment of those responsible[42] the Court repeated what it had stated in its judgments on the merits in the sense that as long as the fate of a disappeared person was unknown the State had the duty to investigate, which is in addition to the duty to prevent forced disappearances and punish those directly responsible.[43]

In El Amparo Case the Court recalled that this obligation to investigate must be complied with seriously and not as a mere formality.[44] This is an extremely important issue that is closely related to the frequent impunity of human rights violations and the concomitant danger of their repetition because there is no incentive not to do it, which has also been touched on in later cases. This problem was again raised in the Paniagua Morales *et al.* Case as a result of the Commission's request that Guatemala be obligated to identify those responsible for the kidnapping, torture and execution of the victims and to impose the appropriate punishment. The Court noted that there had existed and was existing at the time of the judgment a situation of impunity in Guatemala with respect to the allegations in the application. The Court held that impunity implies the total lack of investigation, prosecution, capture, trial and conviction of those responsible for the violation of human rights protected by the Convention and that the State has the obligation to combat such situations by all available legal means since impunity fosters the chronic recidivism of violations of human rights and the total defenselessness of the victims and their next of kin.[45] The Court stated in the Loayza Tamayo Case that the Convention imposes on the States the obligation to prevent, investigate, identify and punish the intellectual authors and accessories after the fact of human rights violations and that States cannot, to avoid complying with their international obligations, invoke provisions of their domestic law,

42. I/A Court H.R., *Velásquez Rodríguez Case. Compensatory damages* (Art. 63(1) American Convention on Human Rights). Judgment of July 21, 1989. Series C No. 7, paras, 8 and 32 and *Godínez Cruz Case. Compensatory damages* (Art. 63(1) American Convention on Human Rights). Judgment of July 21, 1989. Series C No. 8, paras. 7 and 30.

43. *Ibid*., paras. 34 and 32, respectively.

44. *El Amparo Case. Reparations, supra* note 6, para. 61.

45. I/A Court H.R., *The "White Van" Case (Paniagua Morales et al.).* Judgment of March 8, 1998. Series C No. 37, paras. 169 and 173.

such as the Peruvian amnesty law that in the Court's judgment precluded the investigation and prevented access to justice.[46] According to the Court, the State has the duty to investigate human rights violations, prosecute those responsible and avoid impunity, adopting the domestic laws that are necessary to ensure compliance of their obligations under Article 2 of the Convention.[47]

In its judgment in the Constitutional Court Case, the Court added an element by ordering the State to publish the results of the investigation conducted to determine who was responsible for the violations of human rights referred to in the judgment.[48]

In its recent jurisprudence, the Court has held that the States parties have the duty to investigate human rights violations and to punish their perpetrators and the accessories after the fact. The Court has also held that any person thought to be a victim of these violations or his next of kin must be guaranteed access to justice in order that the State comply with this duty both for the victim's benefit and for that of society as a whole.[49] According to the Court, a State's function is not exhausted by providing due process that guarantees the defense in a trial but it must also ensure within a reasonable period the right of the victim or of his next of kin to know the truth of what happened and that those found responsible be punished. The right to effective judicial protection requires that the judges conduct trials so as to avoid undue delays and obstacles that lead to impunity, frustrating the judicial protection of human rights.[50] The Court has held that laws on prescription or any obstacle of domestic law that

46. *Loayza Tamayo Case. Reparations*, *supra* note 28, para. 168.

47. *Velásquez Rodríguez Case. Compensatory damages*, *supra* note 42, paras. 8 and 32 and *Godínez Cruz Case. Compensatory damages*, *supra* note 42, paras. 170-171.

48. I/A Court H.R., *Constitutional Court Case*. Judgment of January 31, 2001. Series C No. 71, operative para. 130.4.

49. *Cantoral Benavides Case. Reparations*, *supra* note 5, paras. 69-70; I/A Court H.R., *Case of Bámaca Velásquez. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of February 22, 2002, Series C No. 91, paras. 76-77; *Case of Trujillo Oroza. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of February 27, 2002. Series C No. 92, para. 99; *Case of Las Palmeras. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of November 26, 2002, Series C No. 96, para. 66; *Case of the Caracazo. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of August 29, 2002. Series C No. 95, para. 115; *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003. Series C No. 99, para. 184 and *Case of Bulacio*, *supra* note 15, para. 110.

50. *Case of Bulacio*, *supra* note 15, paras. 114-115.

prevents the investigation and punishment of those responsible for human rights violations are prohibited.[51] Pursuant to the obligations that States assume under the Convention, no provision of domestic law, including amnesty and prescription, may be used to avoid compliance with the Court's decisions regarding the investigation and punishment of those responsible for human rights violations.[52]

## D. REPARATIONS AND INDEMNIFICATION

Article 63.1 of the Convention, in addition to providing that the injured party be ensured the enjoyment of the right or freedom infringed, states that the judgment should order, when appropriate, that the consequences of the measure or situation that constituted the violation of the right be remedied and that fair compensation be paid to the injured party. According to the terms of Article 31 of the Court's Rules, Article 63.1 may be invoked at any stage of the proceedings. Moreover, Article 57 of the Rules provides that when the judgment on the merits does not also rule on reparations, the Court sets the time and determines the procedure for the decision on the reparations.

### *1. THE OBLIGATION TO MAKE REPARATION IN INTERNATIONAL LAW*

In the field of human rights in which the victims and their next of kin know the untold irreparable damage caused by the very nature of a human rights violation, there is no reparation that will put an end to the suffering. According to Judge Cançado Trindade, reparations for human rights violations under certain circumstances only provide the victims the means for easing their suffering, making it less unbearable. In his opinion, the historic sense of reparations is that they also avoid revenge or private justice, whose corrosive power destroys the social fabric.[53] Judge Cançado Trindade believes that reparations do not put an end to what happened

51. I/A Court H.R., *Barrios Altos Case. Interpretation of the Judgment on the Merits* (Art. 67 American Convention on Human Rights). Judgment of September 3, 2001. Series C No. 83, para. 15; *Case of Trujillo Oroza. Reparations, supra* note 49, para. 106 and *Case of Bulacio, supra* note 15, para. 116.

52. *Case of Bulacio, supra* note 15, para. 117.

53. *See* his separate opinion in *ibid*., paras. 25, 31 and 34.

since the wrong has already been committed but they may avoid that the consequences are aggravated by the indifference of society, by impunity or by forgetfulness. Reparations, therefore, have a double meaning: providing satisfaction to the victims of the human rights violation or to their next of kin and re-establishing the legal order that has been weakened by those violations.[54]

The obligation in international law to make reparation is the necessary consequence of an unlawful act imputable to a State that involves its international responsibility. The International Court of Justice has stated that it is a principle of international law that the violation of a commitment implies the obligation to make adequate reparation.[55] For its part, the Inter-American Court has held that Article 63.1 of the Convention codifies a rule of customary law that is one of the fundamental principles of international law in the area of State responsibility.[56] The Court has expressed the view that the obligation to make reparation established by international tribunals is governed by international law in all of its aspects, such as its scope, characteristics and beneficiaries, and may not be modified by a State invoking its domestic law.[57]

The obligation to make reparation is undoubtedly based on the aforementioned customary rule of international law, while the Court's authority to order it is Article 63.1 of the Convention. In the Baena Ricardo *et al*. Case the Court was curiously requested "based on Article 10 of the Convention" to order that the State be obligated to "reinstate individuals in the exercise of their rights, to pay a fair compensatory indemnification to the victims, and to repair the consequences that its violations have

54. *Ibid*., para. 37.

55. International Court of Justice. *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion. I.C.J. Reports, 1949, p. 184. In fact, the recognition of this principle goes back very much further and the ICJ is citing one of the decisions of the Permanent Court of International Justice in *German Interests in Polish Upper Silesia and the Factory at Chorzow*, Judgment No. 8 (Jurisdiction), July 26, 1927, Serie A, No. 9, p. 21.

56. *Aloeboetoe et al. Case. Reparations*, *supra* note 7, para. 43.

57. I/A Court H.R.,*Neira Alegría et al. Case. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of September 19, 1996. Series C No. 29, para. 37; *Caballero Delgado and Santana Case. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of January 29, 1997. Series C No. 31, para. 16; *Garrido and Baigorria Case. Reparations*, *supra* note 39, para. 42; I/A Court H.R., *Castillo Páez Case. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of November 27, 1998. Series C No. 43, para. 49 and *Loayza Tamayo Case. Reparations*, *supra* note 28, para. 86.

generated." The Commission also requested "that the Court establish the payment of the costs of this proceeding and that it recognize the right of the victims and their representatives before the Commission and before the Court to be reimbursed for expenses incurred before the Panamanian authorities and the inter-American system bodies."[58] It should be pointed out that Article 10 of the Convention refers to the right of those persons who have been sentenced by a final judgment through a miscarriage of justice to be compensated, in conformity with the law of the State in question. That provision provides for compensation under domestic law in a very precise situation, but does not cover every violation of the Convention nor does it provide for the re-establishment of the right violated or any type of reparation other than compensation. The intervention of the organs of the inter-American system would only be possible if that right to compensation in the case of a miscarriage of justice that ends in a criminal conviction is not duly observed by the State.

Under the terms of the Convention, when the responsibility of the State is established, the State has the primary obligation to remedy the consequences of the measure or situation that constituted the violation of the rights or freedoms infringed and to pay fair compensation to the injured party.[59] According to the Court, reparation consists in the measures that are intended to eliminate the effects of the violations committed and, therefore, its nature and amount depend on the damage done on both the pecuniary and non-pecuniary levels and must be consistent with the violations found.[60] When it has been concluded that there has been a human rights violation, the Court's function is not only to determine the amount of compensation but, above all, to indicate the specific measures that the State must adopt to remedy the consequences of its illegal act.[61] It is a question of two consequences of the violation that have the same relationship as genus to species, compensation being one, but not the only one, of the many forms that reparation may assume. In fact, the payment

58. I/A Court H.R., *Baena Ricardo et al. Case*, Judgment of February 2, 2001, Series C No. 72, para. 194.

59. Article 63.1 of the Convention.

60. *See, e.g.*, I/A Court H.R., *Cesti Hurtado Case. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of May 31, 2001. Series C No. 78, paras. 36-37.

61. For example, releasing a prisoner or nullifying a sentence that was the result of an irregular proceeding and ordering a new trial.

of compensation does not exempt the State of its obligation to adopt all necessary measures to avoid impunity and specifically to investigate and punish those responsible for the human rights violation. It has rightfully been observed that the terms of Article 63.1 of the Convention opens a wide horizon for the Court in the area of reparation.[62]

In the Gangaram Panday Case the Court suggested that reparation and indemnification were two different methods and that because it could not fully remedy the consequences of the measure that violated the right infringed, the payment of fair compensation was appropriate.[63] The Aloeboetoe *et al*. Case[64] indicates that reparation may be accumulative. This accumulation refers to the re-establishment of the right infringed or to the reparation of that which can be remedied or compensation for that which cannot be restored or remedied.

Punishment of those responsible is also a form of reparation that re-establishes justice not only with respect to the victim or his next of kin but also to society as a whole. It must be emphasized that, in the area of human rights, the right to reparation also has a preventive function and is one of the means to combat impunity of human rights violations.[65]

### *2. THE DISTINCTION BETWEEN "REPARATION" AND "COMPENSATION"*

In spite of being two different ideas that have the same relationship as genus to species, it is necessary to point out that in a system for the protection of human rights both reparation and compensation play a role of transcendental importance. Payment of compensation to the victim or his heirs, the purpose of which is to provide a compensating equivalent to the damage caused, cannot preclude the adoption of non-pecuniary measures of reparation, the function of which is to comply with the State's international obligations to respect and ensure human rights and avoid the repetition of similar acts. In the opinion of the Court, the reparation

62. *See* the joint opinion of Judges Cançado Trindade and Abreu Burelli in the *Loayza Tamayo Case. Reparations*, *supra* note 28, para. 29 of their opinion.

63. *Gangaram Panday Case*, *supra* note 33, para. 69.

64. *Aloeboetoe et al. Case*, *supra* note 7, operative paras. 1 and 5.

65. *See*, in this respect, L. Joinet, *The adminstration of justice and the human rights of detainees*, E/CN.4/Sub.2/1996/18, para. 19.

mentioned in Article 63.1 of the Convention attempts to erase the consequences that the unlawful act may have had with respect to the injured party or his next of kin. Although the victim of a human rights violation could waive the compensation due him and could even pardon its author, the State is obligated to punish those responsible[66] because its obligation to investigate the acts and punish those responsible does not erase the consequences of the unlawful act for the injured party but has the purpose that each State party ensure in its legal system the rights and freedoms guaranteed in the Convention.[67]

On the other hand, according to Judge Pacheco, when the alleged violation of a human right or fundamental freedom does not stem from the action of an organ or agent of the Executive Branch but from acts or omissions of other branches of the State that equally involve its international responsibility, the only possible form of reparation is through a new judgment by the competent judicial organ or the promulgation of a new law by the legislature.[68]

Compensation is not appropriate in all circumstances and cannot be used as a substitute for the State's obligation to remedy the consequences of its violation of human rights. The State has the obligation to investigate the acts that gave rise to the violation and to punish those responsible. That the parents of Jean Paul Genie Lacayo, who rejected the compensation of $20,000 awarded as fair compensation by the Court[69] and who insisted that what they were seeking was that those responsible were punished and that the compensation did not have "any moral or legal basis," were disgusted and upset is, therefore, understandable.[70] Showing a greater

66. *Garrido and Baigorria Case. Reparations*, *supra* note 39, para. 72.

67. *Ibid*.

68. I/A Court H.R., *Reports of the Inter-American Commission on Human Rights* (Art. 51 American Convention on Human Rights). Advisory Opinion OC-15/97 of November 14, 1997. Series A No. 15, para. 29 of his dissenting opinion.

69. I/A Court H.R., *Genie Lacayo Case*. Judgment of January 29, 1997. Series C No. 30, paras. 95 and 97.4.

70. *See* the letter of Raymond and Gloria Angeles Genie of December 1, 1997 addressed to John Donaldson, Chairman of the Commission, requesting that it be forwarded to the Court and copied to other persons. The Court does not refer to this letter. Judge Cançado Trindade makes the only reference to it in his separate opinion in signing the Order of the Court of August 29, 1998 on the Genie Lacayo Case. In that Order, after taking note of the information provided by Nicaragua that it had deposited with a notary public the sum of $20,000 in the name of Raymond Genie Peñalba and that he had not accepted it "under the terms of the law," the Court decided that Nicaragua had complied with its judgment and closed the case.

sensibility to the victims' aspirations of justice, in the Caballero Delgado and Santana Case the Court stated that "to ensure fully the rights recognized in the Convention, it is not sufficient that the Government undertake an investigation and try to sanction those guilty; rather it is also necessary that all this Government activity culminate in the reparation of the injured party."[71]

In interpreting the meaning and scope of these two expressions (reparation and compensation), the purposes of the Convention as an instrument designed to ensure the respect and guarantee of the human rights of every person must not be overlooked. While measures of reparation pursue very broad ends and may be the reflection of the objective nature of the obligations assumed by the State with respect to the obligations *erga omnes* that cover all persons, compensation only satisfies the particular interest of the claimant.

The Court has held that a violation of an international obligation creates the duty to make adequate reparation and that compensation is its most common form.[72] According to the Court, reparation of the harm caused by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the situation and reparation of the consequences of the violation and indemnification for pecuniary and non-pecuniary damages.[73] To some extent, this coincides with the idea that reparation should be moral as well as monetary[74] and may include measures of moral reparation or, in conformity with Article 2 of the Convention, the adoption of provisions that prevent the repetition of similar acts. Even in its first decisions, the Court clearly distinguished these concepts and pointed out that the investigation of the facts that had led to a human rights violation, the

71. I/A Court H.R., *Caballero Delgado and Santana Case*. Judgment of December 8, 1995. Series C No. 22, para. 58. It would appear unnecessary to point out that, with the "reparation of the injured party," the Court seemed to refer to the indemnification that might be due him..

72. *Velásquez Rodríguez Case. Compensatory damages, supra* note 42, para. 25 and *Godínez Cruz Case. Compensatory damages, supra* note 42, para. 23.

73. *Ibid*., paras. 26 and 24, respectively.

74. *See* the petition of the lawyers of the victims, accredited as advisors or assistants of the Commission in the *Velásquez Rodríguez Case. Compensatory damages, supra* note 42, para. 9 and *Godínez Cruz Case. Compensatory damages, supra* note 42, para. 8.

punishment of those responsible, a public statement condemning practices that violate human rights, honoring the memory of the victims and other similar measures are part of the *reparation* of the consequences of the situation that violated the rights or freedoms enshrined in the Convention and not part of the *compensation*.[75] In its recent jurisprudence, the Court has held that reparation is a generic term that includes the different ways that a State may redress the international responsibility it has incurred, whether by full restitution (*restitutio in integrum)*, satisfaction or the assurance that the violations will not be repeated.[76] Reparation of the damage requires, whenever feasible, full restitution that involves the re-establishment of the situation before the violation. If that is not possible, the Court must order the State to adopt measures that, in addition to ensuring respect for the rights infringed, will remedy the consequences of the violations and result in the payment of compensation for the damage caused.[77]

This is an area that, at least in its early days, was not correctly handled by the Court when it occasionally reflected a notion of the concept of reparation distinct from that indicated in the above paragraph and that would appear to identify it with compensation. In its judgment in the Velásquez Rodríguez Case,[78] the Court referred only to the fair compensation that Honduras was obligated to pay the victim's next of kin, granting the Government and the Commission a period of six months to reach an agreement on the matter and leaving the proceedings open to determine the amount if the parties did not reach an agreement. In the Godínez Cruz Case, the Court again referred only to fair compensation, reserving the decision on its form and amount to a later stage.[79] In implementing these decisions, the Court held public hearings to receive the views of the parties on compensation and rendered, in each case, an

75. *Ibid*., paras. 32-33 and 30-31, respectively.

76. *Castillo Páez Case. Reparations*, *supra* note 57, para. 48 and *Loayza Tamayo Case. Reparations*, *supra* note 28, para. 85.

77. *Case of Bulacio*, *supra* note 15, para. 72 and *Case of Juan Humberto Sánchez*, *supra* note 49, para. 149.

78. I/A Court H.R., *Velásquez Rodríguez Case.* Judgment of July 29, 1988. Series C No. 4, operative para. 194.6.

79. I/A Court H.R., *Godínez Cruz Case*, Judgment of January 20, 1989. Series C No. 5, operative para. 6.

additional judgment on compensatory damages.[80] In spite of the foregoing, both judgments included measures other than compensation stemming from the obligation to respect and to ensure found in Article 1 of the Convention, such as the investigation into the facts of the forced disappearances of Manfredo Velásquez and Saúl Godínez and the punishment of those responsible, which is a broader concept of reparation.[81]

This incorrect interpretation of Article 63.1 of the Convention appeared to have been corrected in the Aloeboetoe *et al.* Case in which the Court retained the case on its docket to set *reparations and costs*,[82] which it did in a judgment on *reparations*[83] that covered aspects that went further than a mere compensatory indemnification and included measures of reparation of general interest, such as the order to "reopen the school located in Gujaba and staff it with the teaching and administrative personnel so that it function on a permanent basis as of 1994 and make the medical dispensary already in place in that locality operational during that same year."[84] Similarly, in the Mayagna Community Case, the Court ordered the State to invest as reparations for non-pecuniary damages the sum of $50,000 in works or services of collective interest for the benefit of the Awas Tingni Community, by common agreement with the Community and under the supervision of the Commission.[85] In the Hilaire, Constantine and Benjamin *et al*. Case, in addition to providing that the State refrain from applying the Offenses against the Person Act and amend it to conform to the American Convention, guaranteeing the respect and enjoyment of the rights to life, personal integrity, a fair trial and judicial guarantees, the Court considered it relevant to order the State to bring prison conditions up to international standards.[86]

The salutary effects of the judgment rendered in the Aloeboetoe *et al*. Case did not last long nor were they applied consistently. In spite of

80 . *Velásquez Rodríguez Case. Compensatory damages, supra* note 42 and *Godínez Cruz Case. Compensatory damages, supra* note 42.

81. *Ibid*., paras. 32-33 and 30-31, respectively.

82. *Aloeboetoe et al. Case, supra* note 7, operative para. 2.

83. *Aloeboetoe et al. Case. Reparations, supra* note 7.

84. *Ibid*., operative para. 116.5.

85. I/A Court H.R.,*The Mayagna (Sumo) Awas Tingni Community Case*. Judgment of August 31, 2001. Series C No. 79, para. 167.

86. *Case of Hilaire, Constantine and Benjamin et al., supra* note 16, paras. 212 and 217

the failure of the negotiations ordered by the Court in the Velásquez Rodríguez Case, the Court has sometimes returned to the practice initiated in that case in which it charged the Commission and the State in question to determine the manner and the amount of the compensation but reserved the right to review the agreement and, if no agreement was reached within six months, to determine directly the amount, as occurred in El Amparo, Neira Alegría *et al*. and Garrido and Baigorria Cases.[87]

The judgment on the merits rendered in El Amparo Case raises new difficulties regarding the Court's interpretation of Article 63 of the Convention and the scope of the obligation to make reparation contained in that provision. The Court's judgment does not rule expressly on some of the petitions formulated in the Commission's application, including the payment of fair compensation to the victims' next of kin, the punishment of the intellectual authors (it does not mention perpetrators) and accessories of the crime of homicide with respect to the victims of the massacre in El Amparo and a declaration that certain provisions of the Code of Military Justice of Venezuela were not compatible with the object and purpose of the American Convention and that, therefore, it must be amended to conform to the latter.[88] In the decision on the appropriate reparations in that case, the Court held that, as Article 54 of the Code of Military Justice had not been applied, it would not rule in the abstract on the compatibility of the Code (including its regulations and instructions) with the American Convention and that, therefore, it would not order the reform requested by the Commission.[89] Judge Cançado Trindade[90] dissented, which is commented upon in another part of this study, in an opinion whose solid reasoning has led the Court, beginning with the Loayza Tamayo Case,[91] to change its criterion on this issue and order, as a measure of reparation, the relevant legal reforms whenever necessary. In the "Street Children" Case, the Court held that Guatemala must incorporate into its domestic law, in accordance with Article 2 of the Convention, the legislative, administrative

87. *El Amparo Case*, *supra* note 7, operative paras. 3-4; *Neira Alegría et al. Case*, *supra* note 34, para. 91.4 and 91.5 and *Garrido and Baigorria Case*, *supra* note 12, para. 31.3 and 31.4.

88. *El Amparo Case*, *supra* note 7, paras. 4 and 14 of the considerations and operative paras. 2-3.

89. *El Amparo Case. Reparations*, *supra* note 6, paras. 58-60.

90. *Ibid*., dissenting opinion.

91. *Loayza Tamayo Case*, *supra* note 26, para. 68 and *Suárez Rosero Case*, *supra* note 27, paras. 93-98.

and any other measures that were necessary to adapt its norms to Article 19 of the Convention in order to prevent the future occurrence of acts like those examined in that case. In spite of what it had previously stated, the Court indicated that it was not in a position to list those measures or whether they should consist, as had been requested by the representatives of the victims' next of kin and the Commission, in the repeal of the 1979 Minors Code and the bringing into force the Children and Youth Code adopted by the Congress in 1996 and the Plan of Action for Street Children of 1997.[92]

The operative part of the judgment in El Amparo Case, however, states that "Venezuela is liable for the payment of damages and to pay a fair indemnification to the surviving victims and the next of kin of the dead" and that "the reparations and form and amount of the indemnification shall be determined" by Venezuela and the Commission."[93] Because that agreement was never reached, the Court delivered a judgment on reparations.[94] This situation differs from that of the Velásquez Rodríguez Case in that initially the State and the Commission were entrusted with arriving at an agreement only as to the form and amount of the compensation, excluding, therefore, any other type of reparation,[95] which could still have been taken up by the Court. In theory, the determination of the amount of the compensation is a matter that certainly can be negotiated between the parties[96] but which involves practical difficulties that cannot be ignored. It is not always easy for a State to agree voluntarily to pay compensation in a case in which the domestic courts have not rendered a judgment that in any way accepts State responsibility. In El Amparo Case this situation was aggravated by the existence in Venezuela of a Law for the Safeguarding of the Public Patrimony, which could be used to punish any official who unduly compromised the assets of the State.[97] At this stage of the proceedings it does not appear reasonable for

92. I/A Court H.R., *The "Street Children" Case (Villagrán Morales et al.). Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of May 26, 2001. Series C No. 77, para. 98.

93. *El Amparo Case*, *supra* note 7, operative paras. 2-3.

94. *El Amparo Case*. *Reparations*, *supra* note 6.

95. *Velásquez Rodríguez Case*, *supra* note 78, para. 194.6.

96. In truth, the practice of the International Court of Justice also has jurisprudence in this sense, as was demonstrated in the judgment in the case of the hostages in Tehran. *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, judgment of 24 May 1980, operative para. 6.

97. Although international law is part of a group of norms that must be applied on the local level, there are many judges and lawyers who do not perceive it as such, not to mention those who simply ignore the existence of the American Convention on Human Rights.

the Court to submit to an agreement between the Commission and the State the decision on the type of *reparation* that would be appropriate. With this decision, the Court appears to have again confused the difference between *reparation* and *compensation* and its function to determine one or the other in accordance with its duty under Article 63.1 of the Convention to order "that the consequences of the measure or situation that constituted the breach of such rights or freedoms be remedied." The dissenting opinion of Judge Cançado Trindade, although it does not mention the State's obligation to identify and punish those responsible for the acts, points out one of the most glaring deficiencies of the judgment when he regrets that it did not expressly refer to the incompatibility of Article 54.2 and 54.3 of the Code of Military Justice of Venezuela with the Convention. To have declared that incompatibility would have had important effects of reparation since it would obligate giving preference to the Convention over those provisions of the Code of Military Justice and would have imposed on the State the duty to repeal or adjust them to the obligations contracted under the Convention. Inexplicably and regrettably, the Court granted the Commission and the State six months to define the type of measures of reparation that the case required, a function that Article 63.1 of the Convention assigns to the Court and that cannot be delegated. The Court, however, reserved the right to review and approve such agreement.[98] When it did not receive information that an agreement had been reached at the expiration of the period, the Court initiated proceedings on reparations.[99]

On the other hand, after Argentina recognized its responsibility in the Garrido and Baigorria Case, with the approval of the Court the parties signed an agreement on *reparations* that went further than a mere agreement on compensation. The agreement provided for the creation of an arbitral tribunal to determine the amount of the compensation that should be paid to the victims' next of kin and the creation of an *ad hoc* commission to investigate the acts related to the forced disappearances.[100] Among the functions of the commission was that of ascertaining the truth, issuing a

98. *El Amparo Case*, *supra* note 7, operative paras. 3-4.
99. *El Amparo Case*. *Reparations*, *supra* note 6, paras. 7-8.
100. *Garrido and Baigorria Case*. *Reparations*, *supra* note 39, paras. 17-18.

decision on the events surrounding the disappearances, indicating those responsible for the acts and developments in the internal investigation and suggesting measures to be taken with respect to the case.[101]

### *3. REPARATION IN THE BROAD SENSE*

According to the Court, reparation consists of the measures intended to eliminate the effects of the violations committed.[102] As has been shown, reparation need not be just pecuniary. In addition to the patrimonial damage stemming from a human rights violation, the Court has considered other injurious effects that do not have a financial or patrimonial character and may be redressed through State action. These actions may include the investigation and punishment of those responsible, acts that honor the memory of the victim, provide consolation to his heirs and signify an official reproach of the human rights violations and measures that involve the commitment that acts of this nature will not reoccur.[103] In synthesis, reparation includes the following elements: a) if possible, the restitution of the legal situation infringed, guaranteeing to the injured person the enjoyment of his rights or freedoms violated, b) appropriate pecuniary compensation, c) non-pecuniary reparation, d) investigation of the facts and the corresponding punishment of those responsible, e) guarantees that the acts that gave rise to the application will not be repeated and f) conforming domestic norms to the provisions of the Convention.

It is obvious that the reparations that are ordered in a judgment must be related to the human rights violations imputed to the State and to the damage that they have caused. In the Caballero Delgado and Santana Case, with respect to the reform of the Colombian legislation relating to the writ of habeas corpus requested by the Commission as a non-pecuniary reparation, the Court observed that in its judgment on the merits it had decided that Colombia had not violated Articles 2, 8 and 25 of the Convention regarding the obligation to adopt measures to give effect to the rights and freedoms guaranteed in the Convention, the right to a fair

101. *Ibid*., para. 20.
102. *Cesti Hurtado Case. Reparations*, *supra* note 60, para. 36.
103. *See*, in this respect, *Case of Bulacio*, *supra* note 15, para. 105.

trial and judicial guarantees. It was, therefore, prevented from reconsidering that question, which was raised only at the stage of reparations and not in the application.[104]

In the words of the Court, reparation "is achieved through measures that serve to 'repair' the effects of the violation committed. Their quality and their amount depend on the damage done both at the material level and at the moral level. Reparations are not meant to enrich or impoverish the victim or his heirs."[105] Measures of reparation other than compensation may assume many different forms, some of which may be essentially symbolic while others may have important practical repercussions. In the Loayza Tamayo Case, the Commission requested that the Court instruct the State that it expressly recognize that the freedom that it had granted the victim by virtue of the Court's judgment on the merits was "permanent, unqualified and unrestricted." The Court did not consider it necessary to accede to this request because in its judgment on the merits it had ordered the State to release the victim and that it was clear that the freedom ordered by the judgment was definitive, final, unconditional and unqualified and, therefore, it was understood that the release of the victim could be inferred from its judgment.[106] While the Court has the duty to order that the injured party be ensured the enjoyment of his rights or freedoms infringed, in the Ivcher Bronstein Case the Court observed that the State had declared null and void the resolution that annulled the nationality of Mr. Ivcher Bronstein and, therefore, the Commission's request was immaterial.[107] With respect to the Commission's request that Peru be instructed to adopt the legislative and administrative measures necessary to avoid that acts of the same nature be repeated, the Court observed that it was a well-known fact that the State had already taken measures with that purpose and, therefore, it deemed that it was not necessary to rule on the matter.[108] In the Cesti Hurtado Case, the Court observed that the State, by means of a resolution of the Plenary of the Supreme Council of Military Justice of September 14, 2000

104. *Caballero Delgado and Santana Case. Reparations, supra* note 57, paras. 53-55.
105. *Garrido and Baigorria Case. Reparations, supra* note 39, para. 43.
106. *Loayza Tamayo Case. Reparations, supra* note 28, paras. 107 and 109.
107. I/A Court H.R., *Ivcher Bronstein Case*, Judgment of February 6, 2001, Series C No. 74, paras. 179-180.
108. *Ibid*., para. 185.

regarding the trial before the Military Court, had ordered the suspension of the orders restricting Mr. Cesti's freedom and the embargo of his assets and, therefore, held that the Commission's request concerning the enjoyment and exercise of personal freedom, which included the consequences that imprisonment might have had on his health and the lifting of the embargo on his assets, was unfounded. With respect to the request on the reparation for the damage to Mr. Cesti's reputation and honor, the Court believed that its judgment on the merits in which it held that Peru was responsible for the violation of his human rights and the judgment on reparations were, *per se*, adequate reparation in that respect.[109]

In the Baena Ricardo *et al*. Case, the Court pointed out that it had the obligation to order that the injured parties be ensured the enjoyment of their rights and freedoms violated. The Court observed that, although some workers might have been reinstated in their jobs as the State had claimed, the Court had not been informed as to exactly how many and if they had been reinstated to the same positions that they had before being dismissed or in positions at a similar level and remuneration. The Court resolved that the State was obligated to reinstate the surviving victims to their former positions and, if that were not possible, to give them employment alternatives that respected the work conditions, salaries and other remuneration that they had when they were dismissed. If the latter were not possible, it decided that the State must pay the indemnification that was due for the termination of employment in accordance with the domestic labor laws. With respect to the heirs of the victims who had died, it ordered that the State provide them with such pension or retirement retributions as were appropriate.[110]

The Court, however, did not find it necessary to rule on the Commission's request with respect to the incompatibility of Article 43 of the Constitution of Panama with the Convention because it had resolved the question of the retroactivity of the laws in the context of the particularities of the case. The Court had already declared that Law 25 violated the Convention but, as it was only in effect until December 31,

109. *Cesti Hurtado Case. Reparations*, *supra* note 60, paras. 58-59.
110. *Baena Ricardo et al. Case, supra* note 58, para. 203.

1991, it was no longer part of the legal order of Panama and, therefore, it was not relevant to rule on its repeal, as the Commission had requested in its application.[111]

We have already referred to the State's duty to investigate the facts and punish those responsible. In this respect, by ordering Guatemala to conduct an effective investigation to identify and punish those responsible for the human rights violations in the "Street Children" Case, the Court affirmed that the obligation to ensure and give effect to the rights and freedoms provided by the Convention is autonomous and distinct from that of making reparation because while the State has the obligation to investigate the acts and punish those responsible, the victim or, if that is not possible, his next of kin may waive the measures of reparation for the damages caused.[112] The duty to investigate and punish those responsible for the violation, however, is not just one more simple obligation of the State but is also a form of reparation. The Court has expressed the view that in the cases of forced disappearances the victims' next of kin have the right to know the truth and be informed of the whereabouts of their loved ones. The Court has indicated that the State has the obligation to combat impunity by all available legal means because it promotes the chronic repetition of human rights violations and the defenselessness of the victims and their next of kin.[113] According to the Court's jurisprudence, the victims' next of kin must have full access and capacity to act at all stages and steps of the investigations according to the domestic legislation and the provisions of the Convention and the results of those investigations must be divulged so that the public knows the complete facts of the case.[114]

With respect to honoring the victims' memory, in the first cases against Honduras the Court held that its judgments on the merits were, *per se*, a form of reparation and moral satisfaction that were significant and important for the victims' next of kin.[115] Similarly, with respect to a request in the Loayza Tamayo Case that the State publicly ask for forgiveness and

111. *Ibid*., paras. 210-211.
112. *The "Street Children" Case (Villagrán Morales et al.). Reparations, supra* note 92, para. 99.
113. *The "White Van" Case (Paniagua Morales et al.), supra* note 45, para. 173.
114. *The Case of Bulacio, supra* note 15, para. 121.
115. *Velásquez Rodríguez Case. Compensatory damages, supra* note 42, para. 36 and *Godínez Cruz Case. Compensatory damages, supra* note 42, para. 34.

ensure that the honor of the victim and her family be restored, the Court believed that the judgment on the merits that held that Peru was responsible for violation of the human rights of the victim and the judgment on reparations were, *per se*, adequate reparation.[116] In the Castillo Petruzzi *et al*. Case, without prejudice to other forms of reparation the Court held that its judgment on the merits was, *per se*, a form of reparation and moral satisfaction of significance and importance to the victims and their next of kin.[117] In some recent cases, however, the Court has ordered as a measure of satisfaction the publication of part of its judgment, including its operative part, in the Official Register of the State and sometimes in a nationally-circulated newspaper or a press release of the National Police and the Armed Forces.[118] The Court has also ordered a State to publicly acknowledge its responsibility concerning the facts of the case and "of amends" to the victims.[119] In the "Street Children" Case, the Court ordered the State to designate an educational center with the names of the victims in the case and place a plaque there with their names to contribute to raising an awareness to avoid the repetition of harmful acts such as those that occurred in this case and to preserve the memory of the victims.[120]

Another type of reparation was presented in the Aloeboetoe *et al*. Case, in which the victims' next of kin asked, *inter alia*, and as a non-pecuniary form of reparation, that the bodies of six of the victims be unearthed and returned to their respective next of kin.[121] The Court repeated what it had held in the Velásquez Rodríguez and Godínez Cruz Cases in the sense that the right of the next of kin to learn the whereabouts of the victims' remains is a just expectation that the State must satisfy with the means at its disposal.[122] In recent cases, the Court has repeated that, as part of the just expectation, the victims' next of kin have the right to know

116. *Loayza Tamayo Case. Reparations, supra* note 28, para. 158.
117. *Castillo Petruzzi et al. Case, supra* note 16, para. 225.
118. *Case of the Caracazo. Reparations, supra* note 49, para. 128; *Case of Las Palmeras. Reparations, supra* note 49, para. 75; *Case of Juan Humberto Sánchez, supra* note 49, para. 188 and *Case of Bulacio, supra* note 15, para. 145.
119. *Case of Juan Humberto Sánchez, supra* note 49, para. 188.
120. *The "Street Children" Case (Villagrán Morales et al.), supra* note 92, para. 103.
121. *Aloeboetoe et al. Case. Reparations, supra* note 7, para. 20.
122. *Ibid*., para. 109.

the whereabouts of the remains of their loved ones and that giving them the mortal remains is, *per se*, an act of reparation because it leads to a restoration of the victim's dignity, to honoring the value that their memory has for their loved ones and to permitting the latter to give them a decent burial.[123]

Reparation may also be sought to reinstate a person's employment. In the Loayza Tamayo Case the Court held that the State had the obligation to do everything necessary within its power to reinstate the victim into the teaching positions that she had in public institutions at the time of her detention with the understanding that her salary and other benefits should be equal to the remuneration for her activities in the public and private sectors when she was detained with the value adjusted to the date of the judgment.[124] The Court, however, observed that the evidence and the medical opinions on her health showed that it would be difficult to reincorporate her into her former job. It thus ruled that the State had the obligation to make every effort to ensure that the victim receive her salaries, social security and employment benefits from the date of the judgment until she was able to rejoin the teaching profession.[125] Moreover, the Court held that the State was obligated to re-enter the victim in the relevant retirement register with retroactive effect to the date of her removal and to ensure that she had the same retirement rights that she had before being detained.[126] In addition to the purely employment significance that these measures might have, the Commission requested, as reparation, that her criminal, judicial and jail records be expunged, that the proceedings and respective judgments of the local courts be vacated and that the victim be given the proper court records and that the nullification of the trial and the release of the victim be published in the Official Register, which published judicial rulings. In response to these requests, the Court resolved that the State was obligated to adopt all the measures of domestic law that might

123. *Bámaca Velásquez Case. Reparations*, *supra* note 49, paras. 76 and 81; *Case of Trujillo Oroza. Reparations, supra* note 49, paras. 114-115; *Case of the Caracazo*. *Reparations, supra* note 49, para. 123; *Case of Las Palmeras. Reparations, supra* note 49 and *Case of Juan Humberto Sánchez, supra* note 49, para. 187.

124. *Loayza Tamayo Case. Reparations*, *supra* note 28, paras. 113 and 192.1.

125. *Ibid*., paras. 115-116.

126. *Ibid*., paras. 114 and 192.2.

be derived from the finding that the second trial to which the victim was subjected was in violation of the Convention and that, therefore, any conviction in those proceedings had no legal effect, which meant that the proceedings and records were null and void.[127]

It is possible that the measures requested under reparation will no longer be necessary when the judgment is rendered. In the Ivcher Bronstein Case, the Court rejected the Commission's request that Peru be ordered to adopt the legislative and administrative measures that were necessary to avoid a repetition of acts of the same nature because it considered that it was a well-known fact that the State had already taken those measures.[128]

With respect to reparation for moral damages, the Court has observed that other international tribunals have often decided that a finding of international responsibility was, *per se*, adequate reparation. The Court, however, has been of the view that that was not the case when the moral suffering of the victims and their next of kin could only be remedied through a pecuniary indemnification.[129] In El Amparo Case, the Court observed that "while a condemnatory judgment may in itself constitute a form of reparation and moral satisfaction, whether or not there has been recognition on the part of the State, it would not suffice in the instant case, given the extreme gravity of the violation of the right to life and of the moral suffering inflicted on the victims and their next of kin, who should be compensated *on an equitable basis.*"[130] Similarly, in the Ivcher Bronstein Case, while the Court repeated that in accordance with extensive international jurisprudence obtaining a judgment that protects the victim's claims is, *per se*, a form of satisfaction, it also believed that in view of the acts of persecution suffered by the victim it was relevant to award an additional compensation for moral damages that should be set fairly on the basis of a prudent appraisal since it was not susceptible to a precise number.[131] On

127. *Ibid*., paras. 118-119, 122 and 192.3.

128. *Ivcher Bronstein Case, supra* note 107, para. 185.

129. *Castillo* Páez *Case. Reparations, supra* note 57, para. 84.

130. *El Amparo Case. Reparations, supra* note 6, para. 35. (Emphasis added.) It is noteworthy that the Court, as the court of law that it is, does not invoke the legal norms on which it bases the indemnification but rather determines that the compensation should be "on an equitable basis," a subjective and unstable idea that can change according to the Court's spirit and composition.

131. *Ivcher Bronstein Case, supra* note 107, para. 183.

the other hand, the Court observed that the Constitutional Court Case involved magistrates of a high constitutional court who were dismissed but who, through a Congressional resolution, were reinstated in their functions by the same body that had removed them. This resolution was published in the Official Register *El Peruano* and the Court held that those facts were, *per se*, moral reparation and that its judgment entailed an equal reparation.[132]

In the field of human rights where the violations are the result of actions of State agents, the obligation to make reparation must include sufficient guarantees that the act will not be repeated. In that respect, Article 2 of the Convention obligates the States to adopt the legislative and other measures that are necessary to give effect to the rights and freedoms enshrined in the Convention. The Court has, therefore, held that a State is obligated to ensure to every person access to the administration of justice and, above all, to an effective, prompt and simple recourse that ensures the protection of his rights. According to the Court, Article 25 of the Convention is "one of the basic pillars, not only of the Convention, but also of the rule of law in a democratic society according to the Convention" and has a direct relationship with Article 8.1 of the Convention that enshrines the right of every person to a hearing with due guarantees and within a reasonable period by an independent and impartial judge or tribunal for the determination of his rights, whatever their nature. The Court, therefore, in the Cesti Hurtado Case held that Peru had the obligation to ensure and give effect to the judicial guarantees for the protection of fundamental rights and freedoms, among which are the writs of habeas corpus and *amparo*.[133] According to the Court's jurisprudence, the active protection of the rights enshrined in the Convention is set within the framework of the State's duty to ensure the free and full exercise of the rights of every person subject to its jurisdiction and requires that the State adopt the necessary measures to punish human rights violations as well as to prevent that any of these rights are violated by its security forces or third persons acting with its acquiescence.[134]

132. *Constitutional Court Case*, *supra* note 48, para. 122.
133. *Cesti Hurtado Case*. *Reparations*, *supra* note 60, paras. 66-67.
134. *See, e.g.*, *Case of Bulacio*, *supra* note 15, para. 111.

As a type of reparation, the Court will sometimes order that a new trial be held, a matter that might be questionable in the light of the general principle of law found in Article 14.7 of the International Covenant on Civil and Political Rights, which prohibits a person from being judged twice for the same acts, and in the light of Article 5.2 of the Convention, which prohibits that a person be subjected to cruel or inhuman treatment, which may be a characterization of being judged more than once for the same acts.[135] In the Castillo Petruzzi *et al*. Case, however, the Court ordered a new trial, considering that the prior trial was null and void and thus there was no violation of the principle of *non bis in idem* since there never had been a valid trial. The Court pointed out that if the proceedings on which a decision was based had serious defects that deprived them of the efficacy that they must have under normal circumstances, the decision cannot stand since the validity of the proceedings is a precondition to the validity of the judgment.[136] According to the Court, this situation must be distinguished from the example of a tribunal that misapplies the law, incorrectly weighs the evidence or does not give adequate grounds for its judgment. Those judgments stand even though they might be unfair or incorrect. The decision is valid and may be sustained because it is based on valid proceedings conducted in accordance with the law. That, however, is not the case of a decision that lacks the proper procedural underpinnings because it is built upon a foundation that cannot endure.[137] The Court found that in that case there were numerous violations of the Convention, beginning at the investigatory stage by the police (National Direction against Terrorism) and continuing through the proceedings in the military courts. In effect, the proceedings were before a jurisdictional body that could not be considered a *competent court* for the type of acts and defendants as in this case. In these proceedings the judges and prosecutors

135. Unlike the International Covenant on Civil and Political Rights, which provides that "no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted…," Article 8.4 of the American Convention establishes that "an accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause." In our opinion, in the inter-American system anyone who has been found guilty may, in any case, invoke the provisions of Article 5.2 of the American Convention.

136. *Castillo Petruzzi et al. Case*, *supra* note 16, para. 219.

137. *Ibid*., para. 220.

were masked, the defendants did not have a lawyer of their choosing from the time of their detention and the lawyers who finally defended them could not interview them in private, read the file at an appropriate time, present their own evidence, rebut the evidence of the prosecutors and adequately prepare their briefs. In light of these facts, the Court believed that it was dealing with proceedings that would not satisfy the minimum requirements of due process of law and, therefore, they were invalid as was the judgment that did not meet the requirements to be sustained and to have the appropriate effects. The Court, therefore, ordered as reparation a new trial that would satisfy *ab initio* the requirements of due process of law before regular courts with full guarantees of a hearing and defense for the accused.[138] Similarly, in the Hilaire, Constantine and Benjamin *et al*. Case, after declaring that the Offenses against the Person Law was, *per se*, in violation of the Convention and ordering that Trinidad and Tobago must not apply it and within a reasonable period must adjust it to the Convention ensuring the rights to life, personal integrity, due process of law and judicial guarantees, as reparation the Court determined that the State should re-try the victims in the case, applying the amended criminal laws to the new trials.[139] In view of the human rights violations in this case, the Court also decided that pursuant to Article 63.1 of the Convention, the State should refrain on the grounds of equity from executing the victims in this case, except for the one who had already been executed, regardless of the outcome of the new trials and independently of whether there are new trials.[140]

### *4. COMPENSATION AS A FORM OF REPARATION*

If reparation of the consequences of the human rights violation cannot be fully made, the Convention expressly provides for compensation and it has been granted by the Court in every case to date in which it has found a human rights violation. The Court has stated that when *restitutio in integrum* is not possible because the right to life is involved, it is necessary

138. *Ibid*., para. 221.
139. *Case of Hilaire, Constantine and Benjamin et al., supra* note 16, paras. 211-212 and 214.
140. *Ibid*., para. 215.

to find substitutes such as pecuniary indemnification for the victims' next of kin and dependents.[141]

Indemnification of this type is appropriate when the consequences of the measure or situation that gave rise to the violation of the rights enshrined in the Convention cannot be remedied in any other way. In the Loayza Tamayo Case the Court stated that the victim's release was not sufficient to remedy fully the consequences of the human rights violations perpetuated against her. In arriving at this conclusion, the Court took into account the length of time that the victim had been incarcerated and her suffering as a result of the cruel, inhumane and degrading treatment to which she was subjected, as well as being held incommunicado during the detention and being paraded before the mass media in her prison dress, her solitary confinement in a small cell without ventilation or natural light, the beatings and other abuses, such as the threat of drowning, intimidation by threats of further violence and the restricted prison privileges, which would have had consequences that could not be fully redressed. In the opinion of the Court, this made it necessary to find alternative forms of reparation, such as pecuniary reparations in favor of the victim and, where appropriate, her family, which should include both pecuniary and moral damages.[142] Similarly, in the Baena Ricardo *et al*. Case the Court held that in line with consistent international jurisprudence obtaining a judgment that sustains the claims of the victims is, *per se*, a form of satisfaction and that because of the suffering inflicted upon the victims and their heirs for the manner in which the victims had been dismissed, the moral damages must, in addition, be repaired by an alternate form such as a pecuniary indemnification that would be fair and based on a prudent appraisal of moral damages, which is not susceptible of a precise number.[143]

### *a) The scope of the indemnification*

Article 63.1 of the Convention provides, *inter alia*, "that fair compensation be paid to the injured party." What remains to be defined is what the international system for the protection of human rights considers *fair compensation* and who is the *injured party*. With respect to the former,

141. *Caballero Delgado and Santana Case. Reparations, supra* note 57, para. 17.
142. *Loayza Tamayo Case. Reparations, supra* note 28, paras. 123-124.
143. *Baena Ricardo et al. Case, supra* note 58, para. 206.

this is not a simple task since the affected legal rights (such as life, freedom, physical integrity, intimacy or, in general, human dignity) cannot be measured and quantified in monetary terms. There are, however, some basic criteria that may be used in formulating an answer, among them obviously are the fundamental nature assigned to the rights protected and the characteristics of a compensation that may be considered *fair*.

Although what may be considered *fair* in terms of a compensatory indemnification may be very subjective, as has been reflected in the Court's jurisprudence that has granted a very considerable range of compensation from one case to the next, the criteria used to determine the nature of the compensation may, in contrast, be completely objective. Compensation cannot be determined in a discretionary or arbitrary manner and must take into account the characteristics of the specific case. Its fairness depends on objective elements that refer as much to the amount of the compensation as to the manner of payment. The Court has stated that *reparations* (a word that in this context may be understood as a synonym of *indemnification*) that are established in the judgment must be related to the human rights violations for which the State has been found responsible. *Reparations* (understood as *indemnification*) cannot, however, imply the enrichment or impoverishment of the victim or his heirs.[144]

In accordance with a widely known and almost sacred formula, international law has emphasized that compensation, to be fair and equitable, must be prompt, adequate and effective.[145] While this thesis has been much questioned both with respect to whether the indemnification is obligatory and to the type of compensation to grant in the case of the expropriation of foreigners' assets,[146] there is no doubt that it is absolutely

144. *Castillo Páez Case. Reparations, supra* note 57, paras. 51 and 53 and *Garrido and Baigorria. Reparations, supra* note 39, para. 43.

145. *See, e.g.*, Article 25 of the Economic Agreement of Bogotá, adopted at the Ninth International Conference of American States, held in Bogotá from March 30 to May 2, 1948, which also adopted the OAS Charter and the American Declaration of the Rights and Duties of Man. *See*, also, Louis B. Sohn and Richard R. Baxter, *Draft Convention on the International Responsibility of States for Injuries to Aliens*, THE AMERICAN JOURNAL OF INTERNATIONAL LAW, vol. 55, 1961, p. 548, especially Article 10 of the draft.

146. *See, e.g.*, Jorge Casteñeda, *La Carta de Derechos y Deberes Económicos de los Estados desde el punto de vista del Derecho Internacional*, in JUSTICIA ECONÓMICA INTERNACIONAL, Fondo de Cultura Económica, México, 1976, p. 107 *et seq*. and Eduardo Novoa Monreal, *La nacionalización en su aspecto jurídico*, in DERECHO ECONÓMICO INTERNACIONAL, Jorge Castañeda and others, Fondo de Cultura Económico, Mexico, 1976, p. 153 *et seq*.

relevant in the inter-American human rights system in which States have voluntarily committed themselves to pay compensation for violations of their obligations under the Convention as long as this compensation is fair. In the Suárez Rosero Case the Court, which had ordered payment of compensation exempt from taxes, stated that the calculation of the amount took into account the material damages suffered by the victim and his next of kin, moral damages and reimbursement of costs related to proceedings before the domestic jurisdiction. According to the Court, the result was the fair compensation to which Article 63.1 refers that must be paid promptly and in full to the beneficiaries designated by the Court.[147] The Court did not consider it appropriate to rule on the victim's position that Ecuadorian law imposed a 1% surcharge on each monetary transaction done through the banks making up the financial system. The Court, however, thought it necessary to clarify that the text of the judgment on reparations clearly shows the State's obligation to pay the amount ordered and to do so in full. In the opinion of the Court, the State had to apply the most appropriate mechanisms to ensure full, prompt and effective compliance of its obligation and to adopt the necessary measures to ensure that the legal deduction made by the financial institutions on monetary transactions did not affect the beneficiaries' right to receive the full amount of the judgment.[148] After the beneficiaries had received the effective and full payment of the fair compensation that was due them, it becomes part of their respective assets and, as of that moment, its use or administration could be subject to the tributary norms applicable in the domestic law.[149]

As to the adequacy of the compensation, in the case of trusts ordered in favor of minor beneficiaries the Court has taken special care in stipulating the measures that the State must adopt to preserve the value of the compensation ordered by it. In the Suárez Rosero Case, with respect to the compensation awarded to the minor Suárez Ramadán, the Court held that the State must set up a trust in a solvent and secure financial institution on the most favorable terms that the laws and banking practice permit and that the interest earned be added to the principal, which should be conveyed

147. I/A Court H.R., *Suárez Rosero Case. Interpretation of the Judgment of Reparations* (Art. 67 American Convention on Human Rights). Judgment of May 29, 1999. Series C No. 51, para. 26.

148. *Ibid*., paras. 25 and 28.2

149. *Ibid*., para. 29.

to the beneficiary when she reaches the age of majority.[150] In addition to indicating that the State must take all measures necessary to ensure that the payment ordered in favor of the minor be placed in a trust in the full amount and that it was not subject to any tax at the moment of the creation of the trust, the Court emphasized that the State had the duty to take all necessary measures to ensure that the interests of the minor were not affected by inflation, insolvency, negligence or the incompetence of the person managing the trust.[151]

### *b) The elements of an adequate compensation*

Compensation is adequate if it is fair. In order to be *adequate* it must be sufficient to compensate fully with an equivalent amount the pecuniary and non-pecuniary damages caused. The Commission argued that a State that violates the Convention must indemnify the injured party for the pecuniary and non-pecuniary damages resulting from its failure to comply with its obligations in order that the consequences of the violation are promptly remedied by virtue of the principle of *restitutio in integrum.*[152] The Court has, however, stated that this principle refers to the manner in which the effect of the unlawful act may be remedied, but it is not the only way and there may be cases in which it is not possible, sufficient or adequate.[153]

Notwithstanding other measures that may be adopted as reparation, to be adequate the compensation must cover various aspects. In the cases submitted to the Court to date, it has been argued that it should include material damages (that is, consequential damages and lost income), moral damages[154] and possibly punitive damages.[155] Moreover, the Court has recently introduced a new concept that refers to the damage caused to the

150. I/A Court H.R.. *Suárez Rosero Case. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of January 20, 1999. Series C No. 44, para. 107.

151. *Suárez Rosero Case. Interpretation of the Judgment of Reparations, supra* note 147, para. 32.

152. *See*, for example, the brief on reparations and costs presented by the Commission in the Aloeboetoe *et al.* Case cited by the Court in the *Aloeboetoe et al. Case. Reparations, supra* note 7, para. 15. The Spanish text of the judgment uses the expression employed by the Commission "*in integrum restitutio.*"

153. *Ibid*., para. 49.

154. *Velásquez Rodríguez Case. Compensatory damages*, *supra* note 42, para. 9; *Godínez Cruz Case. Compensatory damages, supra* note 42, para. 8 or *Aloeboetoe et al. Case. Reparations, supra* note 7, para. 9.

155. *Velásquez Rodríguez Case. Compensatory damages, supra* note 42, para. 9 and *Godínez Cruz Case. Compensatory damages, supra* note 42, para. 8.

*life plan*[156] and in the Caballero Delgado and Santana Case it also referred to social damage, although this must be demonstrated with sufficient evidence as to its existence and extent.[157] Moreover, as will be seen, in its recent jurisprudence the Court has also incorporated the concept of non-pecuniary damages. Curiously, in the Gangaram Panday Case the Court ordered as a *nominal amount as compensation*[158] the payment of $10,000 without identifying to which category it belonged. In the Genie Lacayo Case the Court ordered, *in equity*, the payment of a pecuniary compensation of $20,000[159] without indicating whether it was for material damages, moral damages or even the costs of processing the case before the organs of the inter-American system and without it being obvious whether the reference to *equity* was the grounds for indemnification (an improbable hypothesis in a tribunal whose function is to apply the law)[160] or simply was the method to determine the amount. Similarly, in the Hilaire, Constantine and Benjamin *et al*. Case the Court held that the State had arbitrarily deprived Joey Ramiah of his life despite provisional measures of protection that had the purpose of staying his execution until the organs of the inter-American human rights system could definitively rule on the case. It was presumed that this was to the detriment of Mrs. Carol Ramcharan and their son, Joanus Ramiah, and, therefore, it was appropriate that Trinidad and Tobago, in equity, should grant an indemnity to Mrs. Ramcharan of $50,000 for the support and education of Joanus Ramiah.[161]

Judges Cançado Trindade and Abreu Burelli have observed that the juridical concepts, mostly derived from civil law, that have been used to determine the amount of the compensation (such as the concepts of material

156. *Loayza Tamayo Case. Reparations*, *supra* note 28, paras. 144-154.

157. *Caballero Delgado and Santana Case. Reparations*, *supra* note 57, para. 22.

158. *Gangaram Panday Case*, *supra* note 33, para. 70 of the considerations and operative para. 4.

159. *Genie Lacayo Case*, *supra* note 69, paras. 95 and 97.4. In a letter addressed to the Chairman of the Commission with the express request that it be forwarded to the Court, this indemnification was rejected by the parents of the victim, not because of the amount but rather with the broader argument that they had gone to the Court seeking that justice be done, something that they had not obtained, and not a monetary compensation. In any event, they asserted that this indemnification had no moral or legal backing.

160. As an example, pursuant to Article 38.2 of the Statute of the International Court of Justice, that Court may resolve a dispute according to equity (*ex aequo et bono*), exempting it from applying the law only if the parties agree.

161. *Case of Hilaire, Constantine and Benjamin et al*., *supra* note 16, para. 216. Operative para. 223.12 is clear that it concerns an indemnification for non-pecuniary damages but it is not obvious what type of non-pecuniary damages are referred to.

damage, moral damage and *damnum emergente* and *lucrum cessans* as elements of the latter) have been strongly determined by a patrimonial content and interest, marginalizing what is most important in the human person, which is his condition of spiritual being. These concepts are inadequate or insufficient when they are transferred to the field of human rights. In the framework of the latter, reparations ought to be determined not only on the grounds of criteria that are based on the relationship of the human being with his goods or his patrimony or upon his capacity to work and upon the projection of those elements in time, but also on the "integrality" of the victim's personality and the impact on it that the violation of his human rights has had.[162] It is in that sense that in its recent jurisprudence the Court has substituted references to moral damages for the broader notion of non-pecuniary damages that includes different facets of the non-material damages caused to the victim and his next of kin as a consequence of the human rights violation.[163] According to Judges Cançado Trindade and Abreu Burelli, it is necessary to reorient and enrich the international jurisprudence in the area of reparations with an approach and contribution proper to the international law of human rights. Hence, the importance that both judges attribute to the recognition of the damage to the project of life of the victim as a first step in that direction.[164]

It is important to emphasize that the State only has to indemnify those damages that are the direct consequence of its conduct that is in violation of the Convention. According to the Court, the law requires that the responsible party only repair the immediate effects of its unlawful acts and only to the degree legally recognized.[165]

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162. *Loayza Tamayo Case. Reparations, supra* note 28, paras. 6-10 of the joint opinion of Judges Cançado Trindade and Abreu Burelli.

163. *Cantoral Benavides Case. Reparations, supra* note 5, paras. 42, 53 and 57; *Case of Bámaca Velásquez. Reparations, supra* note 49, paras. 56 and 60; *Case of Trujillo Oroza. Reparations, supra* note 49, paras. 63, 77 and 83; *Case of the Caracazo. Reparations, supra* note 49, paras. 94 and 99; *Case of Las Palmeras. Reparations, supra* note 49, paras. 39 and 58; *Case of Juan Humberto Sánchez, supra* note 49, paras. 156, 168, 172 and 177; *Case of Bulacio, supra* note 15, paras. 78-79, 90 and 96 and I/A Court H.R., *Case of Myrna Mack Chang.* Judgment of November 25, 2003. Series C No. 101, paras. 237, 243, 255, 260-262 and 264-265 and 267.

164. *Loayza Tamayo Case. Reparations, supra* note 28, para. 12 of their separate opinion.

165. *Aloeboetoe et al. Case. Reparations, supra* note 7, para. 49.

***i. Material damages.*** This category has traditionally included consequential damages (*damnum emergente*) and lost income (*lucrum cessans*). The Court has, however, recently incorporated an additional element, damage to family estate,[166] which is independent of the other two. To determine material damages, the Court has also believed it necessary to ascertain what family, labor, business, agricultural, industrial or any other activity has undergone damage due to the human rights violation and who has suffered. The Court has also pointed out that it must ascertain who has sustained a loss of income due to the human rights violation.[167]

*(a) Consequential damages.* Consequential damages are the direct detriment to, diminishing of or material destruction of assets, independent of the other effects, patrimonial or otherwise, that may be derived from the act that gave rise to the damages. They include the value of the destroyed assets, the costs in obtaining information on the whereabouts of the victims, including the recuperation and burial of the body, and the additional cost that this violation may have caused the victim, including that of rehabilitation in the case of an injured person. This last aspect has been cited as one of the key components of reparations and has been the object of a special study by Theo van Boven, as special rapporteur of the former Sub-Commission for the Prevention of Discrimination and the Protection of Minorities (which has now become the Sub-Commission for the Promotion and Protection of Human Rights), on the right to restitution, compensation and rehabilitation for the victims of flagrant violations of human rights and fundamental freedoms.[168]

In its recent jurisprudence the Court has held these damages also include the cost of medical treatment, including psychological assistance, received by the victim's next of kin as a consequence of illnesses that they have suffered as a result of the violation of the victim's rights and the costs of moving the victim's family to another community as a consequence of the harassment to which it was exposed after the facts of the case.[169]

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166. *Case of Bulacio, supra* note 15, para. 88.

167. *Garrido and Baigorria Case. Reparations, supra* note 39, para. 58.

168. E/CN.4/Sub.2/1992/8. *See*, also, Resolution 1990/36 of the UN Commission on Human Rights entitled *Compensation for victims of gross violations of human rights*, adopted March 2, 1990.

169. *Case of Juan Humberto Sánchez, supra* note 49, para. 166.a and 166.d.

*(b) Lost earnings*. Until relatively recently this category was examined under the concept of *lucrum cessans*, a part of civil law. Lost earnings are the profit or benefit that is lost as a consequence of the violation of the right. According to the Court, calculating the compensation in the case of survivors must take into account, *inter alia*, the time that the victim is out of work.[170] However, in calculating this amount in the first cases against Honduras, the Court pointed out the need to distinguish the situation in which the victim is permanently disabled from that in which he dies, leaving beneficiaries who could work and obtain their own income.[171] Taking into account life expectancy, it is difficult to perceive the relationship of the damage inflicted to the ability of the beneficiary of the indemnification to work and obtain his own income. This type of decision would lead to the absurdity that, if compensation has to be paid, it would be better for the State to kill the victim than simply to leave him disabled.

The Court's recent jurisprudence has taken into account the loss of income that, as a result of the human rights violation, the victim's next of kin might have incurred. In the Juan Humberto Sánchez Case, the Court referred to the lost income of the victim's companion in attempting to locate him and of his sisters who lost their jobs because of what they had to do in order to testify before the Court. As the victims' representatives did not estimate the amount of damages, the Court, in equity, established the sum at $1,500 for each of them.[172]

In arriving at a figure for these damages, income from the victim's employment must be calculated on the basis of his true salary, taking into account his possibilities of advancement and the other economic benefits provided for by domestic legal norms. In the cases of those who did not have a stable employment, the Court has held that in view of a lack of precise information on the real earnings of the victims it should use the minimum wage for non-agricultural activities.[173]

170. *El Amparo Case. Reparations*, *supra* note 6, para. 28 and *Loayza Tamayo Case. Reparations*, *supra* note 28, para. 128.

171. *Velásquez Rodríguez Case. Compensatory damages*, *supra* note 42, paras. 47-48 and *Godínez Cruz Case. Compensatory damages*, *supra* note 42, paras. 45-46.

172. *Case of Juan Humberto Sánchez*, *supra* note 49, para. 166.b.

173. *The "Street Children" Case (Villagrán Morales et al.). Reparations*, *supra* note 92, para. 79.

*(c) Damage to family estate*. In the Loayza Tamayo Case, considering the information received, its own jurisprudence and the proven facts, the Court declared that the compensation for material damages should include the following sums: a) the salaries that the victim ceased to receive from the time that she was detained to the date of the judgment, plus interest until the date of the sentence, b) the victim's medical expenses during her incarceration since, in the judgment of the Court, there was sufficient evidence to show that her ailments originated during her confinement, a fact that had not been denied by the State, c) travel expenses of her next of kin to visit the victim during her incarceration and d) future medical expenses of the victim and her children since there was sufficient evidence to show that her ailments originated during her incarceration, a fact that had not been denied by the State.[174] In contrast, the Court rejected the victim's claims for groceries, articles of personal hygiene, crafts, clothing, shoes and the education of her children since before her incarceration the victim paid for these articles from her own funds and that the reparations ordered for lost income implicitly included those expenses.[175] It also rejected the claim of lost income of Carolina Loayza Tamayo, the victim's sister, who was forced to give up a contract with the Ministry of Foreign Affairs to devote herself to the victim's defense since, in the opinion of the Court, there was no evidence that proved such facts or their connection with the violations perpetuated against the victim. Moreover, it rejected the lost income resulting from the visits of her lawyer Carolina Loayza Tamayo to the penitentiary where she was incarcerated since those expenses were legal costs, the relevance of which would be studied in connection with costs and expenses.[176]

The judgment in that case is noteworthy because the indemnification included the costs of travel of the next of kin to visit the victim during her incarceration and the future medical expenses of the victim and her children, since there was sufficient evidence to show that her ailments originated in her incarceration, a fact that was not denied by the State. In the Bulacio Case, the Court treated this issue under the title *damage to family estate*.

174. *Loayza Tamayo Case. Reparations*, *supra* note 28, para. 129.
175. *Ibid*., para. 130.
176. *Ibid*., paras. 131-132.

The Court observed that the victim's next of kin lost their employment or the possibility of carrying out their daily activities due to the change of personal circumstances as a result of the facts of the case. In addition, they had medical expenses for the various ailments caused by those facts.[177] What is most notable, after indicating that neither the representatives of the next of kin nor the Commission estimated the costs of these expenses, the Court considered it equitable to set the damage to family estate at $21,000.[178] In reality, neither the representatives of the next of kin nor the Commission requested compensation for this concept, a question that the Court decided *ultra petita*. In the area of human rights, given the terms of Article 63.1 of the Convention, this measure is not incompatible with the purpose of the Convention and with the Court's function as an organ of protection of the system. It should be observed that when a violation of a right or freedom protected by the Convention has been found, the Court may order, if appropriate, that the consequences of the measure or situation that constituted the violation of those rights be remedied and that fair compensation be paid to the injured party. This is a duty of the Court that does not require the initiative of the parties.

***ii. Non-pecuniary damages.*** The Court covered this area under the concept of moral damages until the end of 2001. In cases of human rights violations, moral damages are undoubtedly the most significant element because of the humiliation that the victim is subjected to, the failure to recognize his human dignity and the suffering and hurt caused by a violation of his human rights. It is the effect that the violation has on the family with all the anguish and suffering that is transmitted to its members. Moral damages are also reflected in the psychological consequences that the human rights violation may have on the victim and on his next of kin. Their nature makes reparation difficult and most often the only compensation is a pecuniary indemnification. According to the Court, these damages correspond to the harmful effects of the facts of the case that are not economic or patrimonial and that, therefore, cannot be measured in monetary terms. Moral damages may include both the suffering and the distress caused to the direct victims and their next of kin, the impairment

177. *Case of Bulacio, supra* note 15, para. 88.
178. *Ibid*.

of values that are highly significant to them and other sufferings that cannot be measured financially.[179] In El Amparo Case, the Commission argued that a victim's moral damages were not directly related to his social position or economic situation,[180] an argument that was not refuted by the State and did not merit a negative comment on the part of the Court, which simply included it in its judgment.

For the effects of full reparation, the Court has indicated that it is not possible to assign a precise monetary equivalent to moral damages but that it can be compensated in two ways: by the payment of a sum of money or the assignment of goods or services that can be assessed monetarily, as prudently determined by the Court applying judicial discretion and the principle of equity, and by the execution of acts or works of a public nature or repercussion, which have effects such as honoring the memory of the victims, re-establishing their reputation, consoling their next of kin or transmitting a message of official condemnation of the human rights violations in question and the commitment of efforts so that they do not reoccur.[181]

As of December 2001 in the Cantoral Benavides Case,[182] the Court has been inclined to omit all references to moral damages and instead use the term non-pecuniary damages, which is broader and includes the traditional idea of moral damages. This change, which is not merely semantic, has an eminently qualitative character and is a first step in replacing a civil law notion with one that more properly reflects the nature of reparation under the law of human rights, taking into account the individual as a whole and weighing the impact that human rights violations have on him. In this respect, the Court has held that non-pecuniary damages may include the sufferings and distress caused to the direct victims and their next of kin, the impairment of values that are highly significant to them as well as the non-pecuniary alterations to the life of the victim or his next of kin.[183]

179. *The "Street Children" Case (Villagrán Morales et al.). Reparations, supra* note 92, para. 84.
180. *El Amparo Case. Reparations, supra* note 6, para. 31.
181. *The "Street Children" Case (Villagrán Morales et al.). Reparations, supra* note 92, para. 84.
182. *Cantoral Benavides Case. Reparations, supra* note 5, paras. 42, 53 and 57.
183. *Case of Trujillo Oroza. Reparations, supra* note 49, para. 77; *Case of the Caracazo. Reparations, supra* note 49, para. 94; *Case of Juan Humberto Sánchez, supra* note 49, para.168 and *Case of Bulacio, supra* note 15, para. 90.

In the first cases against Honduras, the Court held that its judgments on the merits were, *per se*, a form of reparation and moral satisfaction, which were important and significant for the victims' next of kin.[184] The Court, however, also established a pecuniary indemnification for the concept of moral damages.[185] It is noteworthy that in the Aloeboetoe *et al*. Case the relevance of moral damage was expressly recognized by the Government of Suriname in spite of having argued that it had not been proved in that case.[186] The Court noted that the victims suffered moral damage in being abused by an armed band that deprived them of their freedom and then killed them. The beatings, the pain of knowing that they were condemned to die for no reason and the torture of having to dig their own graves were, in the opinion of the Court, all part of the moral damage suffered by the victims. The Court also took into account that the victim who did not immediately die had to bear the pain of his wounds being invaded by maggots and to see the bodies of his friends being devoured by vultures.[187]

A human rights violation may not only cause moral damage to the direct victim but also to his next of kin. In the words of the Court, "the right to compensation for damages suffered by the victims up to the time of their death is transmitted to their heirs by succession. On the other hand, the damages owed the victim's next of kin or to injured third parties for causing the victim's death are an inherent right that belongs to the injured parties."[188] In the Loayza Tamayo Case the victim argued that there were moral damages because of her detention in inhumane conditions, the separation from her children, parents and siblings, the inhuman and degrading treatment during her detention and solitary confinement and her parading before the press as a *criminal terrorist* and that suffering would have left psychological scars. In addition, her children and other family members were directly affected by the abuses that she suffered and were socially stigmatized and one of her sisters was directly harmed by

184. *Velásquez Rodríguez Case. Compensatory damages*, *supra* note 42, paras. 8 and 32 and *Godínez Cruz Case. Compensatory damages*, *supra* note 42, paras. 36 and 34.
185. *Ibid*., paras. 39 and 37, respectively.
186. *Aloeboetoe et al. Case. Reparations*, *supra* note 7, para. 28.
187. *Ibid*., para. 51.
188. *Garrido and Baigorria Case. Reparations*, *supra* note 39, para. 50.

being the target of intimidating tactics and false accusations by the State as she had been included in a list of lawyers under investigation.[189] The Court considered that the moral damage to the victim was obvious since it is part of human nature that anyone subjected to aggressions and abuse, as were proven in this case, experiences moral suffering.[190] The Court also indicated that it could be presumed that the grave violations against the victim would have a repercussion on her children, who were kept apart from her and who were aware of and shared her suffering. With respect to her parents, it was also presumed and not refuted by the State that it is part of human nature that any individual would suffer when confronted with the torment of a son or daughter and that these considerations were equally applicable to the victim's siblings who, as members of a close family, could not be indifferent to her terrible suffering.[191] With respect to the moral damage that may be caused by an unlawful or arbitrary detention, in the Bulacio Case the Court pointed out that it is part of human nature that a person subjected to arbitrary detention experiences deep suffering, which is accentuated in the case of children, and that this distress extends to the closest members of the family, particularly those who had a close emotional contact with the victim.[192]

In determining how the Court has arrived at moral damages in its jurisprudence, interesting extracts may be found in the Castillo Páez Case where the Commission affirmed that moral damages responded, in the first place, to the suffering of the victim's next of kin because of his disappearance, which had as an immediate consequence threats to his sister, who had to flee her country. In the second place, moral damages related to the suffering caused to the victim himself for the violent circumstances in which the acts occurred, having been proved that he suffered a series of abuses during his detention.[193] The victim's next of kin emphasized the pain of his loss, the move of his sister to Sweden and then to the Netherlands, the breaking up of the family nucleus and its reunion in the latter country after nearly eight years, in addition to the psychological

189. *Loayza Tamayo Case. Reparations, supra* note 28, para. 134.
190. *Ibid*., para. 138.
191. *Ibid*., paras. 140 and 142-143.
192. *Case of Bulacio, supra* note 15, para. 98.
193. *Castillo Páez Case. Reparations, supra* note 57, para. 79.

consequences of a forced disappearance and exile.[194] According to the Court, the moral damage inflicted on the victim was obvious since it is part of human nature that anyone subjected to the aggressions and abuse that were committed against him (illegal detention, cruel and inhuman treatment, disappearance and death) experienced a terrible moral suffering. The Court also considered that the anguish and uncertainty that the disappearance and the lack of information about the victim caused moral damage to the next of kin. In the case of the victim's sister, the Court held as proved that she suffered psychological consequences as a result of the victim's disappearance and death because he was her only brother, they had lived together and she experienced, together with their parents, the uncertainty of the victim's whereabouts and because she was forced to move to Europe, where she lived as a refugee in the Netherlands.[195]

The injured party in the Blake Case referred to the emotional damage caused by the disappearance and death of the victim, whose brothers devoted part of their lives to looking for him. According to the Commission, that suffering arose, *inter alia*, from the circumstances of the forced disappearance, the burning of his mortal remains to destroy any trace of him and the lack of cooperation of the Guatemalan authorities.[196] The Court believed that the circumstances of the victim's disappearance caused suffering and anguish to his parents and brothers in addition to a sense of insecurity. According to the Court, that suffering, a violation of Article 5 of the Convention, could not be disassociated from the situation created by the victim's forced disappearance, which lasted until his remains were found. As a result of the foregoing, the Court considered proved the grave moral damage that the victim's next of kin suffered.[197]

Moral damage certainly need not only result from such grave acts as the deprivation of life, the violation of physical integrity or the deprivation of personal freedom. In the Ivcher Bronstein Case, in view of persecution suffered by the victim, who had been intimidated in different ways to change

194. *Ibid*., para. 81. In fact, the family members referred to the consequences of "asylum" and not "exile."

195. *Ibid*., paras. 86-89.

196. I/A Court H.R., *Blake Case. Reparations* (Art. 63 (1) American Convention on Human Rights). Judgment of January 22, 1999. Series C No. 48, paras. 51-52.

197. *Ibid*., paras. 56-57.

the editorial line of a television channel of which he was the president, whose Peruvian nationality was annulled, who was deprived of the administration of the TV channel and whose family, staff and clients of the companies also had been the target of criminal actions and other intimidating acts, the Court thought it relevant to grant compensation for moral damage.[198]

In line with its repeated jurisprudence, the Court believes that a judgment that sustains the victim's claims is, *per se*, a form of satisfaction. On more than one occasion, however, it has held that moral damages require an additional monetary compensation. In the Baena Ricardo *et al*. Case, the Court considered that, due to the suffering caused to the victims and their heirs for the manner in which they were dismissed, the moral damage must also be remedied by means of a pecuniary indemnification.[199]

The term moral damage is obviously not always the most suitable way to characterize the damage for which compensation is claimed and thus the Court in its recent jurisprudence has replaced it with non-pecuniary damages. In the Mayagna Community Case, the Court referred to non-pecuniary damages caused to the Community due to the lack of the delimitation, demarcation and titling of their communal property. Under the circumstances of the case, based on a prudent estimate of the non-pecuniary damages that could not be precisely evaluated and in view of what had been decided in similar cases, the Court decided that the State should invest as non-pecuniary damages the sum of $50,000 in works or services of a collective interest for the benefit of the Awas Tingni Community, by agreement with the Community and under the supervision of the Commission.[200] The term was also used by the Court in the Bulacio Case to characterize not only the sufferings that the acts caused to the victim and his next of kin but also the change in the family's living conditions and the other non-material or non-pecuniary consequences that they suffered.[201] In that respect, in spite of not having been included in the Commission's claims or the victim's representatives, in view of the

198. *Ivcher Bronstein Case, supra* note 107, paras. 76 and 183.
199. *Baena Ricardo et al. Case, supra* note 58, para. 206.
200. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 85, para. 167.
201. *Case of Bulacio, supra* note 15, para. 96.

information received, its own jurisprudence and the proven facts, the Court declared that the compensation for non-pecuniary damages should include sums for future medical expenses of the victim's next of kin, which the Court estimated at $10,000, since there was sufficient evidence to show that their sufferings originated with what happened to the victim and in the subsequent pattern of impunity.[202]

***iii. Damage to the project of life (life plan).*** In the Loayza Tamayo Case the victim's representative requested that the Court rule on the compensation that might be due her under the concept of damage to her *life plan*.[203] This claim, which initially was not supported by the Commission, was based on a recent doctrine[204] that distinguishes between the different manifestations of harm to the person and is a broader concept than moral damages, which is only a type of the former. The request was primarily based on the work of Professor Carlos Fernández Sessarego,[205] of the University of Lima, who developed this important doctrine. Fernández Sessarego contends that damage to the life plan affects the freedom of the person, who consciously or unconsciously has chosen a way of life that gives sense to his life and that responds to his desires. It is a damage that alters or frustrates the life plan that each person freely elects and that prevents the person from freely developing his personality. It is a radical damage to the person's health, which prevents him from fulfilling his existential project and to be himself and it is a damage that marks the future of the person and that, although it is not current, is nevertheless still true.[206] This idea is associated with that of freedom, understood as the human being's capacity to decide his life plan, with his inherent limitations or circumstances that makes him unique and not interchangeable. It is associated with the power to decide or to elect with regard to the most

202. *Ibid*., para. 100.

203. *Loayza Tamayo Case. Reparations*, *supra* note 28, para. 144.

204. *See, e.g.*, Giulio Ponzanelli, *Il contributo della doctrina*, in LA VALUTAZIONE DEL DANNO ALLA SALUTE; Jorge Mosset Iturraspe, RESPONSIBILIDAD POR DAÑOS, Ediar, Buenos Aires, 1982 and Gennaro Giannini, *Questioni giuridische in tema de danno psicologico*, in DANNO BIOLOGICO E DANNO PSICOLOGICO, Giuffré, Milano, 1990.

205. *See, e.g.*, Carlos Fernández Sassarego, PROTECCIÓN JURÍDICA DE LA PERSONA, Universidad de Lima/ Facultad de Derecho y Ciencias Políticas, Lima, 1992; *Daño al proyecto de vida*, in REVISTA DE LA FACULTAD DE DERECHO DE LA PONTIFICIA UNIVERSIDAD CATÓLICA DEL PERU, No. 50, December 1996, p. 45 *et seq.* and *Daño psíquico*, REVISTA SCRIBAS, Arequipa, año II, No. 3, 1998, p. 111 *et seq.*

206. *Protección Jurídica de la persona*, *supra* note 205, pp. 165-167.

important decisions of his life because the future of the human being is given in the present in the form of a plan. It is a psychosomatic damage that hinders the exercise of that freedom in the future and makes it impossible to carry out what was his life plan, whose possibilities were already given before the harm occurred. As an example, Fernández Sessarego suggests the case of an artist for whom, being who he is, the experiences of beauty have a special interest in that they give sense to his life and if he suffers a damage that prevents him from experiencing or materializing the value of beauty, his life would have lost sense and would produce an existential vacuum that could even lead to his self-destruction.[207]

Although not reflected in the amount of compensation, the Court's judgment accepted the claim of damage to the *life plan*. After accepting that the concept of the *life plan* has been analyzed by the recent doctrine and jurisprudence, the Court admitted that this was a notion distinct from that of consequential damage and of lost earnings because it is not an immediate and direct harm to a victim's assets as in the case of consequential damage nor does it refer to the loss of future economic income, which can be quantified by certain measurable and objective indicators, as in the case of lost earnings. It deals with the full self-actualization of the person concerned, taking into account his calling in life, particular circumstances, potential and ambitions, all of which allows him to set reasonably specific expectations and attaining them.[208] Damage to the *life plan*, understood as an expectation that is reasonable and attainable, implies the loss or severe diminution in a manner that is irreparable or almost irreparable of a person's prospects of self-development.[209] As part of this project of life and the harm to it, the Court has considered the career prospects of the victim.[210]

According to the Court, the *life plan* is related to the concept of personal fulfillment, which in turn is based on the person's options to conduct his life and achieve his goals. These options are the manifestation

207. *Ibid*., pp. 166-167.
208. *Loayza Tamayo Case*. *Reparations*, *supra* note 28, para. 147.
209. *Ibid*., para. 150.
210. *Ibid*., para. 117.

and guarantee of freedom. An individual can hardly be said to be truly free if he does not have options to pursue in life and to carry that life to its natural conclusion. These options have an important existential value and, therefore, their elimination or curtailment objectively abridges freedom and constitutes the loss of a valuable asset that cannot be disregarded by the Court.[211] Plans that are cut short do not have to lead to an inevitable result, it is enough for the Court that they be plausible, not merely possible, given the subject's natural and foreseeable development that was disrupted and upset by events that violated his human rights. Those events drastically altered the course of his life, introduced new and adverse circumstances and upset the plans and projects that a person makes based on the ordinary conditions in which his life unfolds and his own aptitudes to carry out those plans with a likelihood of success.[212]

The Court deemed it reasonable to assert that acts that violate human rights seriously obstruct and impair obtaining the anticipated and expected project of life and thereby substantially alter the individual's development. A person's life is, therefore, altered by factors that, although beyond his control, are unfairly and arbitrarily thrust upon him in violation of existing laws and in a breach of trust that the person had in the State organs that were obligated to protect him and provide him with the security necessary to exercise his rights and to satisfy his legitimate interests. The Court has, therefore, admitted claims seeking reparation to the extent possible and by appropriate means of the victim's loss of options caused by a violation of the Convention, since reparation is thus closer to what it should be in order to satisfy the requirements of justice: the complete redress of the wrongful harm, which is close to the ideal of *restitutio in integrum*.[213]

Although in the Loayza Tamayo Case the Court curiously recognized the existence of a grave harm to the victim's life plan as a result of the violation of her human rights and although it accepted the claim in the application that this harm should be indemnified as an element independent of consequential damages and lost earnings, it did not grant compensation

211. *Ibid*., para. 148.
212. *Ibid*., para. 149.
213. *Ibid*., paras. 150-151.

for this concept. In his partially dissenting opinion, Judge de Roux Rengifo expressed the view that the judgment should have included "a sum of money specifically intended to redress the damage to her life plan"[214] and in their joint opinion Judges Cançado Trindade and Abreu Burelli expressed the view that the recognition of the harm to the project of life is "a first step in that direction,"[215] providing hope that in the near future that recognition will finally materialize in the appropriate compensation. According to the Court, the jurisprudence and doctrine had not evolved to the point, at the time of the judgment of translating this recognition into economic terms and, therefore, it did not quantify it.[216] This suggests incorrectly that the doctrine and the jurisprudence are mechanisms of the creation of law[217] and while the tautological reasoning of the Court would prevent the evolution of the jurisprudence,[218] it appears to us that this decision is undoubtedly a step forward in the development of law that in the short or medium term will permit compensation for harm to the project of life. Its contradictions can only be explained by differences of opinion that might have existed within the Court and that probably resulted in a compromise. Going deeper into these contradictions, although it is difficult to imagine how this could establish a project of life or compensate the harm caused, the Court has held that the very access to international jurisdiction and the ensuing judgment would be "some measure of satisfaction for damages of these kinds" and that "the condemnation represented by the material and moral damages ordered on other points of this judgment should be some compensation for the victim for the suffering these violations have caused her; still, it would be difficult to restore or

214. *Ibid*., para. 1 of his partially dissenting opinion.

215. *Ibid*., paras. 12 and 17 of their joint opinion.

216. *Ibid*., para. 153.

217. In contrast, Article 38.1.d of the Statute of the International Court of Justice clearly indicates that "judicial decisions and the teachings of the most highly qualified publicists of the various nations" are only a "subsidiary means for the determination of rules of law," but are not a mechanism that creates the rules of law (as would be domestic laws, treaties or legal precedent in international law) nor can it be confused with the rule of law. While the doctrine explains the law, judicial decisions apply existing rules of law. But none of them can replace the juridical norm, whose mechanism of creation is the result of a different process in which neither the judge nor the publicist have legislative functions.

218. According to this standard, as the existing jurisprudence in the field does not offer any precedent to support it, the new decisions that are adopted cannot stray from this jurisprudence.

offer back to her the options for personal fulfillment of which she has been unjustly deprived."[219]

In later cases, the Court has not rejected out of hand the payment of compensation for harm to the project of life, provided that there is a showing of the existence of some damage of this type.[220] In other cases this concept has been denatured, losing its specificity and juridical autonomy. In the "Street Children" Case in which the victims' next of kin included as moral damages the destruction of the project of life of the youths who had been killed and their next of kin, the Court took into account those distinct aspects of the harm alleged by the victims' representatives and by the Commission insofar as they were relevant and would respond to the particularities of each case in order to establish, in equity, the value of the compensation *for non-pecuniary damage* that should be given to each of the direct victims and their immediate next of kin.[221]

The parties have used a different name for this figure, calling it *loss of opportunity*. In the Bulacio Case, the representatives of the victim's next of kin requested that the Court in determining the relevant compensation consider, *inter alia*, that the victim "would not have worked all his life as a golf caddy" since he intended to become a lawyer, that this *loss of opportunity* should also be fully compensated taking into account that he was in his last year of high school, that he surely would have entered the university and then the job market.[222] The Commission also contended that the Court should consider that it was foreseeable that the victim would obtain a high school degree, enter the university, that as a lawyer his income would increase by approximately $200 and that, therefore, an additional sum was necessary for the concept of *loss of opportunity*.[223] The Court considered that it was reasonable to presume that the victim would not be a caddy for the rest of his life but that it was not possible to ascertain his future activity or profession. In the opinion of the Court, sufficient grounds did not exist to determine the loss of a definite chance, which must be

219. *Loayza Tamayo Case. Reparations*, *supra* note 28, para. 154.
220. *Castillo Páez Case. Reparations*, *supra* note 57, para. 74.
221. *The "Street Children" Case (Villagrán Morales et al.). Reparations*, *supra* note 92, paras. 89-90.
222. *Case of Bulacio*, *supra* note 15, para. 81.c.
223. *Ibid*., para. 82.c.

estimated "on the basis of certain damage with sufficient grounds to establish the probable realization of said damage." In the Juan Humberto Sánchez Case the Commission argued that the elimination and the cutting short of the victim's *life options* did not fall under pecuniary or non-pecuniary damages and that the determination of damages must be based on a comprehensive and not solely patrimonial perspective and that the State must pay an amount in fairness for having deprived the victim of his life project.[224] The Court did not specifically refer to the Commission's request in its judgment but simply set a compensation, in fairness, *for the various aspects of the damage* to be paid to the victim or to his next of kin.[225]

With respect to the project of life that is altered as a consequence of the violation of human rights, as an additional element in the Bulacio Case Judge Cançado Trindade suggested taking into consideration the expectations that the family deposited in their eldest son who was an excellent student, which were extinguished by his death at the hand of a policeman.[226]

***iv. The claim of punitive damages.*** In the first cases against Honduras the request for punitive damages as part of the indemnification was supported by *amicus curiae* briefs that maintained that human rights violations could not be treated as a simple compensation for civil damages in which death was the result of mere negligence. They also contended that this type of compensation could act as a deterrent for future cases and that its punitive nature could help to re-establish social peace and restore confidence in the rule of law. The Court rejected this request because it considered that the appropriate compensation ordered by it as an integral part of reparations for the injured party was compensatory and not punitive. The Court pointed out that international law does not provide damages meant to deter or serve as an example.[227] More categorically, in its

224. *Case of Juan Humberto Sánchez, supra* note 49, para. 170.c.

225. *Ibid*.

226. *See* his separate opinion in the *Case of Bulacio, supra* note 15, para. 3.

227. *Velásquez Rodríguez Case. Compensatory damages, supra* note 42, para. 38 and *Godínez Cruz Case. Compensatory damages, supra* note 42, para. 36. In these two cases, the payment of punitive damages had been requested by the lawyers accredited as "advisors or assistants" of the Commission.

judgment in the Fairén Garbi and Solís Corrales Case the Court recalled that the purpose of the international law of human rights is not to punish individuals who are guilty of human rights violations but to protect the victims and order the reparation for the damages caused.[228] In the Garrido and Baigorria Case the representatives of the victims' next of kin insisted on indemnifications that, in the opinion of the Court, went further than compensation for the damages caused and had a certain punitive nature since they called for exemplary damages. The Court pointed out that these functions are not in the nature of the Court and are not within its power. It also considered that there was no reason to deviate from the precedents established in the cases against Honduras.[229]

In the inter-American system for human rights protection, which has the function of remedying the consequences of violations of those rights, it is difficult to assign a place for this institution that comes from Anglo-Saxon law and is not in the nature of reparation but rather of punishment. It must also be borne in mind that, in the manner in which it has been raised, its purpose is not precisely to punish the direct author of the human rights violation but to obtain a more substantial compensation from the State.

### *c) The amount of compensation*

The amount of compensation must obviously be related to the nature of the human rights violations in each case and the responsibility of the State. Any comparison has to take into account these variables and only serves as a point of historical reference. In setting the amount of the compensation, the Court has also distinguished between those cases in which the State has accepted the facts and acknowledged its responsibility and those in which it has not.[230]

Notwithstanding the differences in the types of violation or the gravity of the acts, both the amount and the type of compensation that has been ordered by the Court has varied notably and has ranged from very

228. I/A Court H.R., *Fairén Garbi and Solís Corrales Case*. Judgment of March 15, 1989. Series C No. 6, para. 136.

229. *Garrido and Baigorria Case. Reparations*, *supra* note 39, paras. 43-44.

230. *El Amparo Case. Reparations*, *supra* note 6, para. 34.

modest amounts ($10,000 in the Gangaram Panday Case) to others of greater significance (equivalent at the time of the judgment to $245,000 in the Velásquez Rodríguez Case) in conformity with the importance of the rights protected by the Convention, which contrasts with the much more restricted amounts of the compensation subsequently ordered in the Neira Alegría *et al*., Caballero Delgado and Santana and El Amparo Cases.

The total amount of compensation ordered in cases of violation to the right to life has varied considerably. The largest amount that has been paid is one million dollars, which was agreed to by the parties and approved by the Court in the Benavides Cevallos Case. Other than that case, the compensation has ranged from 750,000 lempiras (approximately $245,000 at the time of the judgment) in the Velásquez Rodríguez Case, 650,000 lempiras in the Godínez Cruz Case (approximately $213,000 at the time of the judgment) and reaching the equivalent of $453,102 for the beneficiaries of all seven victims in the Aloeboetoe *et al*. Case, although in the latter case the compensation could be paid in local currency. To date, the lowest compensation ordered is that in the Castillo Petruzzi *et al.* Case in which the State was ordered to pay the four victims a total of $10,000, or its equivalent in local currency, only for the expenses and costs incurred in those cases[231] and the Gangaram Panday Case with the same amount of $10,000, or its equivalent in local currency.[232] Coincidentally, the latter two compensations were established in the judgments on the merits and not as a result of a separate proceedings to determine the appropriate reparations. It is important to observe that in none of these cases was the State found responsible for the violation of the right to life, a circumstance that must have influenced the amount of compensation. While in the first case the State was found responsible for a violation of the right to physical integrity (Article 5 of the Convention), some guarantees of the right to personal freedom (Article 7.5 and 7.6), some judicial guarantees (some aspects of Articles 8 and 25) and for the violation of *ex post facto* criminal laws (Article 9), in the second case the Court found the State responsible only for the violation of the right to personal freedom, independently of the fact that this violation had led to

231. *Castillo Petruzzi et al. Case*, *supra* note 16, para. 226.15.
232. *Gangaram Panday Case*, *supra* note 33, operative para. 4.

the victim's death while he was in State custody and rejected the part of the Commission's application that attributed to the State the violation of the rights to life and physical integrity.

The amounts referred to in the preceding paragraph are global figures that generally include both pecuniary and non-pecuniary damages. The former undoubtedly depends on many circumstances that are hardly the same in all the cases, which accounts for the substantial differences. The tendency is to assume that non-pecuniary damages, given the same human rights violation, should be approximately the same. In an argument that was not challenged by the State in question or by the Court, the Commission stated that the non-pecuniary damage of a victim cannot be in direct relation with his social position or economic situation[233] but that the amount must depend on the pain and suffering that the human rights violation has caused. It is precisely here where there is a greater range in the Court's jurisprudence. While in the first cases against Honduras non-pecuniary damages amounted to $80,000, in the Aloeboetoe *et al*. Case this figure was lowered to $29,070, except for one victim who was given $38,755 and lessened further in the Neira Alegría *et al*., Caballero Delgado and Santana and El Amparo Cases, where the amount was set at $20,000, except with respect to María del Carmen Santana, whose non-pecuniary damage was only $10,000. Since the end of 1998, with the judgments in the Garrido and Baigorria, Castillo Páez and Loayza Tamayo Cases, more in line with the importance of human rights and the commitment to respect and ensure those rights assumed by the States the amount for non-pecuniary damages has begun to rise, set at $75,000 in the case of the mother of Adolfo Garrido and $6,000 for each of his siblings, a total of $111,000, in the Castillo Paéz Case the total amount set for those damages reached $160,000 and $108,000 in the Loayza Tamayo Case. In two recent cases, Ivcher Bronstein and Baena Ricardo *et al*., which are certainly not comparable to those mentioned, the Court set the compensation at $20,000 for non-pecuniary damages in the first case[234] and $3,000 for each victim in the latter.[235]

233. *El Amparo Case. Reparations, supra* note 6, para. 31.
234. *Ivcher Bronstein Case, supra* note 107, para. 184.
235. *Baena Ricardo et al. Case, supra* note 58, para. 207.

Even accepting that appraising these damages is not susceptible to a precise amount, it is difficult to understand the Court's criterion in establishing such different compensations in the latter two cases.

***d) The form of compensation***

The elements relating to the manner of execution of the compensation are just as important since they may have an effect on its justice or equity. This is what we refer to when we indicate that the compensation should be *prompt* and *effective*.

In order that it be *fair*, the compensation awarded should be paid within a reasonable time so that it does not become illusory. To be effective, it should be paid in cash or in an asset easily convertible to cash that would permit the beneficiary to use, enjoy and dispose of it however he chooses. In spite of the fact that a State may sometimes offer other material assets as compensation, it has generally opted for pecuniary compensation. In addition, the Court has held that with respect to violations of the right to life, given the nature of the right violated, reparation requires fundamentally a pecuniary indemnification.[236]

In the first cases against Honduras, the Court ordered that the compensation be paid in full within ninety days following notification of the judgment or in six equal monthly installments (the first of which was to be paid ninety days after notification of the judgment) with the interest obtaining at the moment.[237] In the Aloeboetoe *et al*. Case, the Court ordered that the compensation be paid before April 1, 1994,[238] which was a little more than six months from the date of the adoption of the judgment, and in the Gangaram Panday Case the Court established a period of six months from the date of the judgment for the payment of the compensation.[239] As a general rule, other more recent cases have repeated this criterion, indicating a period of six months for the payment of the compensation.[240]

236. *Aloeboetoe et al. Case. Reparations, supra* note 7, para. 46.

237. *Velásquez Rodríguez Case. Compensatory damages, supra* note 42, para. 57 and *Godínez Cruz Case. Compensatory damages, supra* note 42, para. 52.

238. *Aloeboetoe et al. Case. Reparations, supra* note 7, para. 116.1.

239. *Gangaram Panday Case, supra* note 33, operative para. 4.

240. *Loayza Tamayo Case. Reparations, supra* note 28, para. 185 and *Castillo Páez Case. Reparations, supra* note 57, para. 118.3.

In the Baena Ricardo *et al*. Case, however, the Court ordered the State to pay the amounts to the dismissed workers and to the heirs of the workers who had died and grant the other labor rights that the dismissed workers had under its legislation within a maximum period of twelve months.[241]

These two characteristics of compensation –that it be prompt and effective– are closely related since when one of them is lacking the other becomes illusory. In the Velásquez Rodríguez and Godínez Cruz Cases, because the State delayed in paying the compensation that was established in the local currency, which suffered a devaluation, an interpretation of the judgments requested that the unpaid sums be interpreted to include interest according to ordinary banking practice[242] and that the compensation be adjusted in view of the loss of the acquisitive value of the lempira vis-à-vis the US dollar.[243] The Court held that the State must pay interest on the sum owed and convert the respective sums into one of the so-called hard currencies because those amounts had been severely impaired by the loss of the lempira's value in the open exchange market.[244] The State claimed that this would more than double the nominal value of the original compensation since the Court's interpretation established that it must compensate the beneficiaries for the loss of the real value of the lempira vis-à-vis the dollar from the date in which the State should have made the payment and did not do so plus the ordinary bank interest that such capital would have received.[245] The President of the Court responded by stating that that same argument confirmed the reasoning in the Court's decision since a judgment, as any legal provision, must be interpreted in a way that it will produce an effect rather than the obverse. He added that it was obvious that if the State could pay without answering for the damages caused by the delay and the losses in the nominal value in about a year, paying the sum initially ordered would be purely symbolic and the effect

241. *Baena Ricardo et al. Case, supra* note 58, paras. 205, 212 and 214.6.

242. *Velásquez Rodríguez Case. Compensatory damages, supra* note 42, paras. 31, 34 and 40 and *Godínez Cruz Case. Compensatory damages, supra* note 42, paras. 31, 34 and 40.

243. *Ibid*., para. 42 in both judgments.

244. *Ibid*., paras. 37-42 in both judgments.

245. *See* the note of the Agent of the Government of Honduras, Ambassador Edgardo Sevilla Idiáquez of October 17, 1990 addressed to the Secretary of the Court, in ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1990, supra note 10, pp. 91-94.

of the judgment would be nullified.[246] In El Amparo Case, although the State argued that the compensation should be established in the national currency of Venezuela, which was the residence of the petitioners, the Court ordered that the State could comply with its obligation by paying in dollars or an equivalent sum in the local currency and that this equivalency be based on the exchange rate in the New York market the day before payment.[247] The determination of the amount of the compensation in dollars was also objected to by Peru in the Loayza Tamayo Case, in response to which the Court observed that one of the effects of the measure of reparation should be to conserve the true value of the amount ordered so that it might meet its compensatory purpose and that the Court's consistent practice had been to use the dollar to calculate the pecuniary compensation and that this practice assured the acquisitive value of the amounts ordered.[248]

It should be observed that, while in the first cases against Honduras the compensations were established in the official currency of that country,[249] to maintain the compensation's acquisitive value in the cases against Suriname it was set in the equivalent of dollars although it could be paid in Surinamese florins.[250] Since that case compensation has been established in dollars, although it may be paid in the local currency.

On the other hand, as a reflection that the compensation must be effective, the Court has ordered it must be exempt of taxes and other charges. Otherwise, it would allow the State to give with one hand and take away with the other, which would be incompatible with its duty to indemnify fully the consequences of the unlawful act.

246. *See* the communication of the President of the Court to the Agent of the Government of Honduras of November 12, 1990, in *ibid.*, pp. 95-96.

247. *El Amparo Case. Reparations*, *supra* note 6, paras. 44-45.

248. *Loayza Tamayo Case. Reparations*, *supra* note 28, para. 127.

249. *Velásquez Rodríguez Case. Compensatory damages*, *supra* note 42, para. 60.1 and *Godínez Cruz Case. Compensatory damages*, *supra* note 42, para. 55.1.

250. *Aloeboetoe et al. Case. Reparations*, *supra* note 7, para. 116.1 and 116.4 and *Gangaram Panday Case*, *supra* note 33, operative para. 4.

### *5. THE EVIDENCE ON DAMAGES*

As has been indicated, what the State has to remedy or indemnify are the damages that are the consequence of its unlawful act and that are duly proved. It is not enough to show that the State has violated a provision of the Convention, it is also necessary to prove the damages that the State is requested to indemnify. In principle, the existence of a violation of the Convention is not sufficient, *per se*, to establish a material damage. The Court has pointed out that it is not necessary to prove that non-pecuniary damage has been produced since the acknowledgement of international responsibility by the State is sufficient.[251] It is, however, necessary to note that even this type of damage requires proving, if not its existence, its seriousness and magnitude. In the Juan Humberto Sánchez Case, with respect to the amount of the expenses of the victim's next of kin for the damage caused to their health as a result of the case and for the cost of their move to another community due to the harassment to which they had been subjected because of the case, although such expenses were not duly accredited the Court set a sum, in equity, to indemnify or reimburse them.[252]

Pursuant to Article 43.1 of the Court's Rules, the evidence offered by the parties will only be admitted if it is offered in the application and in the reply. This provision does not exempt evidence on reparations. The Court has, however, held that, consistent with its practice, it is at the beginning of each procedural step that the parties must indicate in writing, at the first opportunity that they are given, the evidence that they will offer.[253]

In the Caballero Delgado and Santana Case, the Court indicated that "as regards the compensation for material damage occasioned by the death of María del Carmen Santana, about whom the Commission admits in its petition to 'ha(ving) very little information' and considering that no evidence of her real identity, age or kinship was produced for determining the amount of the damages, or her potential beneficiaries, this Tribunal is not in a position to order the payment of compensation under that

251. *Case of Trujillo Oroza. Reparations*, *supra* note 49, para. 85.
252. *Case of Juan Humberto Sánchez*, *supra* note 49, para. 166.c and 166.d.
253. *Case of Bulacio*, *supra* note 15, para. 41.

heading."[254] Similarly, in the Mayagna Community Case, the Court observed that the Commission did not prove that there were non-pecuniary damages to the members of the Community.[255] The Commission, however, did present a brief on reparations, costs and expenses twelve days after the deadline had elapsed. As there was no showing of the existence of exceptional circumstances that would have justified this delay, the Court rejected the brief for having been submitted out of time and did not rule on the matter.[256]

At the reparations stage, the Court's point of reference is the facts that were proved at the previous stages to establish State responsibility and the other evidence that is furnished during this stage to show the existence of complementary facts that might be relevant in determining the measures of reparation.[257] While the Court has accepted that compensation for material and moral damages is appropriate, it has also emphasized the necessity that they be duly proved.[258] An important aspect, therefore, concerns the type of evidence that is required to show the nature of the damages, as an essential element to set the amount of compensation.[259] It is also necessary to establish when this evidence should be presented.

According to the evidence available in the Garrido and Baigorria Case, the Court observed that the claimants had not presented any credible evidence to show what businesses the victims worked for, when they did so, what salaries they received or in what way they economically aided some of the claimants. The only proof that existed of their life styles was their police records, which showed that they did not exercise any regular productive activity with any continuity and, therefore, it could be concluded that their disappearance did not cause any economic damage to their next of kin who had not been deprived of economic support since there was no

254. *Caballero Delgado and Santana Case. Reparations*, *supra* note 57, para. 45.

255. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 85, para. 165.

256. *Ibid*., para. 159.

257. *Loayza Tamayo Case. Reparations*, *supra* note 28, para. 106 and *Castillo Páez Case. Reparations*, *supra* note 57, para. 68.

258. *See, e.g.*, *Aloeboetoe et al. Case. Reparations*, *supra* note 7, para. 75.

259. *See, e.g.*, the Order of the Court of September 21, 1995 in *El Amparo Case (Reparations)*, *supra* note 6, operative para. 3.a, which grants the Commission a period to present a brief and the evidence that it had in order to determine the reparations and indemnification in the case.

evidence that the victims had ever given it.[260] In contrast, in the Juan Humberto Sánchez Case, as there had been a request for compensation for the loss of income of the victim based on the salary that he received as a radio operator for *Radio Venceremos*, a clandestine radio station located in El Salvador, the Court recognized that it was not possible to establish with certainty what would have been the victim's occupation and income at the moment of his eventual incorporation into the labor market in his country (Honduras) and, therefore, in view of the lack of credible evidence on the possible income that the victim might have earned, the Court decided to set, in equity, the amount of $25,000 as compensation for the loss of income.[261]

As has been pointed out, another no less relevant aspect is when the evidence on damages must be presented. In the Velásquez Rodríguez and Godínez Cruz Cases, the Court held hearings to receive the views of the parties on compensation[262] and in the Aloeboetoe *et al.* Case it established a period for the parties to offer and present their evidence on reparations[263] and costs and convoked the parties to a hearing on the matter.[264] Although it appeared that this practice had been firmly established, more recently the Court has opted to issue a ruling on reparations in the judgment on the merits. In its first cases, the Court not only received the evidence offered by the parties, such as clinical reports or reports of psychiatrists to determine the extent of the moral damages, but it also received *amicus curiae* briefs,[265] requested information directly from the State in question,[266] requested the services of experts[267] and sent a staff member to obtain information *in situ* on the economic, financial and banking situation in the country, as well as

260. *Garrido and Baigorria Case. Reparations, supra* note 39, paras. 59-61.

261. *Case of Juan Humberto Sánchez, supra* note 49, para. 163.

262. *Velásquez Rodríguez Case. Compensatory damages, supra* note 42, para. 12 and *Godínez Cruz Case. Compensatory damages, supra* note 42, para. 11.

263. In this context, this expression appears be employed in a broad sense, including both reparations as such and indemnification.

264. *See, e.g., Aloeboetoe et al. Case. Reparations, supra* note 7, para. 13.

265. *Velásquez Rodríguez Case. Compensatory damages, supra* note 42, para. 19; *Godínez Cruz Case. Compensatory damages, supra* note 42, para. 19 and *Aloeboetoe et al. Case. Reparations, supra* note 7, para. 38.

266. *Velásquez Rodríguez Case. Compensatory damages, supra* note 42, para. 13; *Godínez Cruz Case. Compensatory damages, supra* note 42, para. 12 and *Loayza Tamayo Case. Reparations, supra* note 28, para. 26.

267. *See, e.g., Aloeboetoe et al. Case. Reparations, supra* note 7, para. 39.

to visit the village where the victims lived to estimate the income that they would have obtained according to the economic activities that each of them carried out so that the judgment was adjusted to the reality of the country.[268] In the Garrido and Baigorria Case, the President of the Court asked the Commission and the State to furnish the victims' police records and information on the two putative children of one of them.[269] In the Loayza Tamayo Case, the victim presented to the Court, as evidence of the alleged damages, a videotape that had to be reproduced in order to be sent to the Commission and the State.[270] In the same case, and at that stage of proceedings, the Commission offered the victim as a witness.[271]

The importance of holding a hearing specifically to determine damages, whether in the proceedings on the merits or in another proceedings that would allow proving those damages, cannot be questioned. At the beginning of El Amparo Case, the absence of a hearing was felt because the Government of Venezuela informed the Court that it would not dispute the facts of the application and that it accepted its international responsibility. The Court ordered in its judgment on the merits that the reparations and the manner and amount of the compensation be set in an agreement between the State and the Commission.[272] Since the agreement was never finalized, the Court was obligated to render a judgment on reparations, for which it convoked a public hearing to hear the views of the parties on the reparations, compensation and costs.[273]

While the President of the Court sets the date for the hearings that may be necessary, that date is subject to change. In the Bulacio Case, the Commission, after consulting the State in January 2002, requested that the public hearing be postponed in view of the circumstances in Argentina, to which the President of the Court acceded.[274] The President, however, did not accept a later request by the State to suspend the public hearing

268. *Ibid*., paras. 40 and 88.
269. *Garrido and Baigorria Case. Reparations*, *supra* note 39, para. 29.
270. *Loayza Tamayo Case. Reparations*, *supra* note 28, para. 8.
271. *Ibid*., para. 16.
272. *El Amparo Case*, *supra* note 7, paras. 17 and 19 of the considerations and operative paras. 1 and 3.
273. *El Amparo Case. Reparations*, *supra* note 6, para. 9.
274. *Case of Bulacio*, *supra* note 15, para. 19.

that was programmed. The State had argued that the parties were holding talks to reach a friendly settlement, but the Commission did not consider it opportune to suspend the hearing.[275]

The lack of a proceeding solely to discuss reparations seems to have had an effect in the Castillo Petruzzi *et al.* Case, not so much on the nature of the reparations ordered by the Court but in the amount of the compensation. In the judgment on that case, there is a brief mention of Article 63.1 of the Convention and, notwithstanding the high conceptual level of the judgment and the excellent way that it deals with the matter, there remains the feeling that the topic of expenses and costs (or even a possible compensation) could have been treated differently.[276] This was, however, a very peculiar case, the judgment of which generated a very strong reaction from the Government of Peru which, through its President, publicly announced that it would not comply with it in flagrant violation of the commitments that it had freely assumed and that it had promised to honor. Aware of the importance of a separate procedural stage to consider reparations at which the alleged damages could be proved, in the Caballero Delgado and Santana Case, although without referring to a hearing, the Commission requested that the Court open a proceeding to determine the damages at which the victims' next of kin could participate.[277] With the aforementioned exception of the Castillo Petruzzi *et al*. Case, this was, until recently, the practice of the Court.[278]

As in the stage on the merits, the more recent practice of the Court requires that the victim, the Commission and the State indicate precisely the number of witnesses and experts that they will offer at the public hearing on reparations and the subject of their testimony or expertise. For reasons of procedural economy, the Court has requested that the parties give special

275. *Ibid*., paras. 21-22.

276. *Castillo Petruzzi et al. Case*, *supra* note 16, paras. 214-225.

277. *Caballero Delgado and Santana Case*, *supra* note 71, para. 23.5.

278. The Court's Rules do not contain a provision that expressly provides that the decision on reparations be made at a separate stage than that of the examination and ruling on the merits. In fact, Article 57.1 provides that "when no specific ruling on reparations has been made in the judgment on the merits, the Court shall set the time and determine the procedure for the deferred decision thereon." However, Article 23 of the previous Rules implicitly referred to the determination of reparations as a distinct stage in indicating that "at the stage of reparations the representatives of the victims or their next of kin may present their own arguments and evidence autonomously."

consideration to the possibility of presenting some testimony and expertise by means of sworn statements.[279] In the Bulacio Case the Court required that the expert testimony offered by Argentina be given in a written brief, the content and signature of which would be certified by a notary public.[280]

With respect to evaluating the evidence, although the case law of the International Court of Justice suggests that the sworn statements offered by any of the parties to resolve the question of the merits and to rule on State responsibility are admissible, the ICJ has underscored the necessity of stronger evidence to determine and quantify damages.[281] In a proceedings that has as its ultimate objective to remedy the consequences of a measure or a situation that has resulted in a breach of human rights, the evidence that is submitted to quantify damages should not be subject to such strict rules. In the inter-American system for the protection of human rights, the Court has held that the procedures that are followed before it are not subject to the same formalities as procedures before national courts and, therefore, some latitude is permissible in receiving evidence.[282] In the Loayza Tamayo Case the victim offered to testify and the Commission also offered her as a witness. Although the State objected to her testifying, the Court rejected this objection and decided to hear her testimony.[283] According to the Court, since Mrs. Loayza Tamayo was the victim in the case and had a direct interest in it, her testimony must be weighed with the full body of evidence. Recalling that the facts of the case had already been established during the merits stage, the Court observed that, at the stage of reparations, it had to determine the nature and amount of fair compensation and of the reimbursement of expenses that, in compliance with the judgment on the merits, the State was obligated to pay the victim and her family. In this context, the victim's testimony had a special value since she was in the best position to provide information on the consequences of the violations of which she was the victim.[284]

279. *Loayza Tamayo Case. Reparations, supra* note 28, para. 13.
280. *Case of Bulacio, supra* note 15, para. 27.4.
281. *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), supra* note 96, p. 3.
282. *Loayza Tamayo Case. Reparations, supra* note 28, para. 38.
283. *Ibid*., para. 70.
284. *Ibid*., paras. 72-73.

The amount of consequential damages may be proved with receipts of the expenses that have been properly incurred as a consequence of the human rights violation. In El Amparo Case, however, the Commission argued that the living conditions of the victims and their next of kin did not enable them to save the receipts, which made it necessary estimate the costs.[285] Under these circumstances, even though they did not present any evidence on the expenses, the Court considered it fair to give each of the next of kin of the dead victims and each of the survivors an amount of $2,000 for the expenses incurred in their efforts before the national authorities.[286] In this case, the word *fair* probably corresponds to a prudent weighing of the damages, from indicia or presumptions.

To determine the amount of compensation for lost earnings, the Court has stated that it cannot be held to rigid criteria, but that it must prudently evaluate the damages, taking into account the particular circumstances of each case.[287] Similarly, with respect to moral damages, the Court has held that the compensation must be adjusted to the principles of equity.[288] The Court, however, has been cautious in pointing out that neither "a prudent estimate of the damages" nor "principles of equity" may be interpreted to allow it to set in a discretionary fashion the amounts of compensation.[289] To determine the amount of compensation for actual damages, therefore, in the Aloeboetoe *et al*. Case, instead of indicating a global sum for that concept as it had done in the first cases against Honduras, the Court calculated the income that the victims would have received during their working lives had they not been killed.[290]

In determining the amount of lost earnings, the Court has taken more into account the true amount of the damages than what was alleged by the parties. In El Amparo Case, the Commission initially claimed $5,000 for each of the victims, what one of their representatives called a "conservative estimate," but the Commission, alleging a factual error in computing the

285. *El Amparo Case. Reparations*, *supra* note 6, para. 19.
286. *Ibid*., para. 21.
287. *Velásquez Rodríguez Case. Compensatory damages*, *supra* note 42, para. 48 and *Godínez Cruz Case. Compensatory damages*, *supra* note 42, para. 46.
288. *Ibid*., paras. 27 and 25, respectively.
289. *Aloeboetoe et al. Case. Reparations*, *supra* note 7, para. 87.
290. *Ibid*., para. 88.

lost earnings, requested sums that ranged from $67,000 to $197,000 for each of the dead victims and around $5,000 for each of the survivors. Although the State objected to these amounts and the procedures, alleging that it had in good faith accepted the amount initially requested, the Court did not respond to the State's objections and calculated the compensation on the basis of the victims' ages and their life expectancies or the time that the survivors remained unemployed, taking as a base salary an amount not less than the cost of the basic food basket, which was higher than the minimum rural wage, when the acts occurred and deducting from that amount 25% for personal expenses.[291]

The very nature of the right violated determines the urgency of the requirement for evidence of moral damages. In the Aloeboetoe *et al.* Case the Court indicated that this was evident since it is human nature that anyone subjected to aggressions and abuses, such as the victims in that case were subjected to, experiences a moral suffering. The Court, therefore, believed that it did not require evidence to reach this conclusion and that the State's acknowledgement of responsibility was sufficient.[292] This criterion has been maintained in later cases, particularly when the presumption has not been challenged by the State,[293] except perhaps in the Blake Case in which the Court, in view of the type of violation of human rights, did not use a presumption and held "the grave moral damage suffered by the four family members of Mr. Nicholas Blake is completely proved."[294] In the Garrido and Baigorria Case, in which Adolfo Garrido's brothers claimed compensation for moral damages, the Court pointed out that they had not offered any credible evidence of an affective relationship to show that the disappearance of their brother would have caused them grievous suffering. The Court noted that some of them lived more than 600 miles from the victim, there was no evidence that they frequently visited each other or that they took an interest in the life that their brother lived, when they could have done so, and there was only a record of sporadic

291. *El Amparo Case. Reparations, supra* note 6, paras. 24-28.
292. *Aloeboetoe et al. Case. Reparations, supra* note 7, para. 52.
293. *Loayza Tamayo Case. Reparations, supra* note 28, paras. 138, 140 and 142-143 and *Castillo Páez Case. Reparations, supra* note 57, paras. 86 and 88.
294. *Blake Case. Reparations, supra* note 196, para. 57.

visits by some of them when he was imprisoned. On the contrary, the Court was of the opinion that his brothers only showed serious concern when he disappeared.[295] In the case of Raúl Baigorria the Court considered that the victim's brothers had not furnished credible evidence that showed an affective relationship with the victim that went beyond simple blood ties. There was no evidence that they had visited him in jail or had showed any other concern for him until after he disappeared, at which time they took some steps to ascertain his whereabouts.[296] As to his children born out of wedlock, who had been impossible to locate, the Court held that they could not invoke a right to be indemnified for moral damages suffered for their father's disappearance because it was not shown that they even knew him or knew of him.[297]

The victim's heirs must also accredit their condition as such. In the Caballero Delgado and Santana Case the Court observed that in order to comply with the part of the judgment regarding the moral damage caused to María del Carmen Santana, about whom the Commission had "very little information," the question of her identity was a matter to be resolved under domestic law and the compensation was awarded "to her closest relative."[298]

The distinction between the heirs and third parties who have been harmed also has important evidentiary consequences. According to the criterion of the Court, while it may be presumed that the victim's death has caused material and moral damages to his heirs –it is for the defendant to prove that damages do not exist– claimants who allege to be third parties must furnish evidence to justify their right to be compensated.[299] With respect to the moral damages of the victims' parents who were not their heirs, in the Aloeboetoe *et al*. Case the Court held that it could presume that they had also suffered for the cruel death of their children since it is

295. *Garrido and Baigorria Case. Reparations, supra* note 39, para. 63.
296. *Ibid*., para. 64.
297. *Ibid*., para. 65. In any event, the Court admitted that, as heirs of their father, they also shared all the suffering during his life.
298. *Caballero Delgado and Santana Case. Reparations, supra* note 57, para. 45.
299. *Aloeboetoe et al. Case. Reparations, supra* note 7, paras. 54 and 71.

human nature that everyone suffers pain for the torments of their children,[300] a criterion that has been repeated in subsequent cases.[301]

### *6. THE INJURED PARTY AND THE BENEFICIARIES OF THE COMPENSATION*

Article 63.1 of the Convention provides that fair compensation be paid to *the injured party*, which is a concept that is defined in the Convention and may include both the direct victim of the human rights violation and an indirect victim.[302] It must also be borne in mind that a family member of a person who has been forcibly disappeared may be a direct victim –for the cruel and inhuman treatment to which he has been subjected by denying him any information on the whereabouts of his loved one– and an indirect victim as a consequence of feeling the pain of the other person. In our opinion, both have suffered an injury and both should be duly compensated, whether directly or through the heirs. While the finding of a human rights violation is, *per se*, a proof that injury has been caused, whoever alleges to have suffered indirect harm as a result of the violation must demonstrate it. This thesis was not initially shared by the Court, which held that only the direct victim of a human rights violation was an injured party. In its more recent jurisprudence the Court has reversed itself and held that the victim's next of kin may also be victims and it has presumed that the death of a person results in non-pecuniary damages to his closest family members, especially those who had a close affective relationship with him.[303] The Court has observed that the victim's next of kin may be entitled to reparations in two ways: as beneficiaries or successors of the reparations that the State must pay as a result of the human rights violation to the victim and as victims *per se*.[304]

300. *Ibid*., para. 76.

301. *Castillo Páez Case. Reparations, supra* note 57, paras. 86-89 and *Loayza Tamayo Case. Reparations, supra* note 28, paras. 140 and 142-143.

302. The first would be the person who was tortured or who was arbitrarily deprived of his freedom or who was arbitrarily deprived of his life. The second would be a family member of the direct victim who as a result of the deprivation of life or freedom of his kin has also suffered emotional or economic harm.

303. *Case of Trujillo Oroza. Reparations, supra* note 49, para. 57; *Case of Las Palmeras. Reparations, supra* note 49, paras. 54-55; *Case of Juan Humberto Sánchez, supra* note 49, paras. 101 and 156 and *Case of Bulacio, supra* note 15, para. 78.

304. *Case of Juan Humberto Sánchez, supra* note 49, para. 152.a.

This jurisprudential advance has coincided with the recent version of the Court's Rules, whose Article 2.15 states that the term *next of kin* refers to the immediate family, that is, "the direct ascendants and descendants, siblings, spouses or permanent companions, or those determined by the Court, if applicable." This provision complements what has been mentioned and expands the range of persons even beyond the ambit of the family as such as to who may be beneficiaries of the compensation ordered by the Court. For example, in the Juan Humberto Sánchez Case the Court found that the victim had a close emotional relationship with his step-father and that the latter had the right to be a beneficiary of the compensation, as if he were the biological father.[305] It is the Court's task to determine which of the reparations established in favor of the victim may be transmitted through inheritance to his next of kin and to whom.[306]

If the victim is alive, it is certainly he who should receive the compensation. In the Loayza Tamayo Case, in which the State was found responsible for the violation of the rights to personal freedom, personal integrity and judicial guarantees, the Court ordered the State to pay a fair compensation "to the victim and her next of kin."[307] In its judgment on reparations, the Court observed that it was obvious that Mrs. Loayza Tamayo was the victim since in the proceedings on the merits she testified that the State had violated to her detriment several rights enshrined in the Convention but that, in keeping with its judgment on the merits and with Article 63 of the Convention, the Court also had to determine which of the *next of kin* were the *injured parties.*[308] The Court held that the term "next of kin of the victim" should be interpreted broadly to include all persons related by close kinship and that, therefore, the victim's children, her parents and her siblings should be considered next of kin and have the right to receive compensation provided that they meet the requirements established by the Court's jurisprudence.[309] In the Cesti Hurtado Case, in which the

305. *Ibid*., para. 164.c.
306. *Ibid*., para. 155.
307. *Loayza Tamayo Case*, *supra* note 26, operative paras. 2-4 and 6.
308. *Loayza Tamayo Case. Reparations*, *supra* note 28, paras. 88-89.
309. *Ibid*., para. 92.

victim requested compensation for moral damages for his wife, children, mother-in-law and father for having been affected for more than three years because of the violations of his basic rights, the Court recognized that those violations would have produced different types of damages to the victim's household. The Court, therefore, considered that his nearest next of kin had the right to receive compensation provided that it was related to the violations that were found by the Court and provided that it met the requirements established by the Court's jurisprudence.[310] On the basis of these criteria, the Court ordered compensation for moral damages for his wife and children since it found that the violations could be presumed to have had a repercussion on them as they were not only separated from the victim and understood and shared his distress but also there were indications that they were harassed and threatened. The Court, therefore, ordered provisional measures in their favor.[311] With respect to the victim's father and mother-in-law, while it could be presumed that both might have suffered moral damage for the violations, in view of the specific circumstances of the case the Court considered that a judgment that met the claims of the victim was, *per se*, a form of satisfaction.[312] In the Juan Humberto Sánchez Case the Court found that the right to mental and moral integrity of the next of kin had been infringed as a result of a) the victim's unlawful and arbitrary detention, which took place in the home of his parents, in their presence and that of some of his younger siblings, b) the uncertainty regarding his whereabouts during more than a week, c) the signs of extreme violence on the victim's body when it was found, d) the unlawful and arbitrary detention and threats and harassment of his step-father by State agents, e) the illnesses of the mother and step-father and f) the failure to investigate and punish those responsible for the acts, all of which generated in his immediate family suffering, anguish, insecurity, frustration and a feeling of powerlessness before the State authorities and they, therefore, could be considered victims of cruel, inhuman and degrading treatment.[313] The Court held in this particular case there was an additional suffering for the victim's next of kin because of the treatment

310. *Cesti Hurtado Case*. Reparations, *supra* note 60, paras. 39-40.
311. *Ibid*., para. 54.
312. *Ibid*., para. 56.
313. *Case of Juan Humberto Sánchez*, *supra* note 49, para. 101.

of his mortal remains, which appeared in an advanced state of decay, with signs of great violence, wedged between two rocks in a river. The body was found by the local authorities who did not conduct a serious investigation, such as taking photographs or performing an autopsy due to a lack of economic resources in that part of the country. Moreover, due to the state of decay, the Justice of the Peace ordered that the victim be buried where he was found, without the consent of his family, who objected that he was buried "as if they had buried an animal" and "as if (he) had not been a Christian." According to the Court, this treatment of the victim's remains, which were sacred to his family and especially his mother, was for them a cruel and inhuman treatment.[314]

We must not confuse the person who has suffered the injury with the person who has a right to receive the compensation, which will certainly be different when the former has died and the latter takes as an heir. The Court must determine in each case the beneficiaries of the compensation. It is possible, of course, that the parties reach an agreement that indicates the victims and the beneficiaries of the compensation.[315] Otherwise, they must follow the ruling of the Court. In the *Caracazo* Case, the Court set certain criteria for the distribution among his next of kin of the compensation owed to the victim. According to these criteria, half was distributed, in equal parts, among the victim's children; a quarter was given to the victim's spouse or permanent companion and the other quarter was given to the victim's parents. If one or more of the children were not alive, that share would go to the other children. Similarly, if one of the parents were not alive, that part would go to the surviving parent.[316] The Court confirmed these criteria in the Juan Humberto Sánchez Case.[317]

According to the Court, the injuries suffered by the victims up to the time of their death give a right to compensation and that right is transmitted

314. *Ibid*., para. 102.

315. In this respect, the friendly settlement agreement that the parties reached in the Bulacio Case, in which the State recognized its responsibility and in which it implicitly ended the dispute as to who were the victims, who were the beneficiaries and who were the next of kin of the victim. *Case of Bulacio*, *supra* note 15, para. 79.

316. *Case of the Caracazo. Reparations*, *supra* note 49, para. 91.

317. *Case of Juan Humberto Sánchez*, *supra* note 49, para. 164.

to their heirs.[318] It is, therefore, necessary to determine who are the heirs or possible beneficiaries. The Court has resorted to the general principles of law in this area under which a person's successors are his children and spouse followed by the ascendants.[319] In its recent jurisprudence, the Court has developed new criteria, indicating that the successors for these effects are the victim's children, spouse or permanent companion and parents. If one of the parents has died, that part goes to the survivor. If the victim has neither children, spouse nor permanent companion, half of the compensation is given to the parents and the other half is distributed, in equal parts, to siblings. If there are no family members in any of these categories, what would have gone to the family members in that group is divided proportionally among the other categories.[320] When the existence of the heirs or successors has been established, the Court has held that the State has the duty to locate them. In the Garrido and Baigorria Case the Court first requested the collaboration of both parties to find the natural children of one of the victims and, when this request was not successful, it decided that Argentina had the legal obligation to continue the search, without using its federal structure or any other administrative reason as an excuse.[321]

Successors must, obviously, prove their identity and kinship to the victim. Identity is proved mainly through the pertinent documentation, although the Court has also allowed proof by other means, especially in cases of persons who live in the jungle and only speak their native language and in cases in which the State does not maintain in the region sufficient civil registries –not being able in many cases to register marriages and births or to include sufficient data to accredit fully the relationship of persons– or offered evidence that give the claimants a different identity from that which they claim.[322] It is interesting to observe that in the Aloeboetoe *et al.* Case, after proving that Surinamese law did not apply to the victims' tribe –whose members did not recognize it but rather were governed by their own rules– and since the State recognized the existence

318. *Aloeboetoe et al. Case. Reparations, supra* note 7, para. 54.
319. *Ibid*., para. 62.
320. *Case of the Caracazo. Reparations, supra* note 49, paras. 91 and 93.
321. *Garrido and Baigorria Case. Reparations, supra* note 39, paras. 57.
322. *Aloeboetoe et al. Case. Reparations, supra* note 7, paras. 63-64.

of Saramaca customary law during the proceedings, the Court not only accepted the proof of the civil status of the victims' widows but also accepted that –to the extent that polygamy was an accepted practice of the group– a victim could have left more than one widow.[323] The Court has stated that it is a common rule in most of the legislation that the successors of a person are his children and that it also generally accepted that the spouse participates in the patrimony acquired during the marriage, for which reason some laws give the spouse a successor right together with the children.[324] In El Amparo Case, however, the Court observed that one of the victims had both a wife and a companion with children by both and, therefore, it considered it to be fair to divide the compensation between them.[325]

To the extent that the compensation that must be paid for depriving someone of his life is a right of those who have been harmed, the Court, following the jurisprudence of national courts, has established a distinction between heirs and injured third parties.[326] In addition to the principles that make up the general rule regarding succession, the Court exceptionally extends the obligation to compensate to those who, without being the victim's heirs, had a relationship of dependency with him, such as economic support. In such cases and at the Court's discretion, compensation would only be appropriate in the following circumstances: a) the economic support to the person alleging a right to compensation was not sporadic, but in regular, periodic payments in cash, in kind or in services, b) the relationship between the victim and the third person was such as to provide some basis for assuming that the payments would have continued had not the victim been killed and c) the third person must have had an economic necessity that was regularly met by the victim.[327] In the Aloeboetoe *et al*. Case the Court rejected the request for compensation of those who alleged to be dependents of the victims, precisely because they had not met those conditions,[328] although not because it was inappropriate.

323. *Ibid*., paras. 58-59 and 62.
324. *El Amparo Case. Reparations, supra* note 6, para. 40.
325. *Ibid*.
326. *Aloeboetoe et al. Case. Reparations, supra* note 7, para. 54.
327. *Ibid*., paras. 67-70.
328. *Ibid*., paras. 71, 73 and 75.

Someone other than the victim's successors or third persons dependent on him could also request compensation. In the Aloeboetoe *et al*. Case the Commission requested compensation for moral damages for the Saramaca tribe to which the victims belonged since in that society a person is not only a member of his family group but also of the village community and tribal group and, therefore, the Commission considered that the harm caused to one of the members was also a harm to the community and should be compensated. The Court rejected this argument, observing that every individual, in addition to being a member of his family and a citizen of a State, generally belongs to intermediate communities and the obligation to pay compensation for moral damages does not extend to them or to the State, as these are redressed by enforcement of the system of laws.[329]

One last aspect with respect to the beneficiaries of the compensation has to do with the manner that it is distributed among them. The Court has sometimes indicated precisely the amounts that are assigned to each of the beneficiaries,[330] but in other cases it has simply indicated the manner in which the compensation is to be distributed among the successors of the victim.[331]

### *7. THE POINT IN THE PROCEEDINGS AT WHICH REPARATIONS ARE ORDERED*

Article 57.1 of the Court's Rules provides that when there has been no specific ruling on reparations in the judgment on the merits, the Court determines the date and procedure for that decision.

In the Velásquez Rodríguez Case the Commission neither initially nor in the proceedings on the merits furnished information that could serve as a basis to define the amount and form of the compensation that it claimed and those aspects were not discussed at that stage of the procedure. The Court decided that the compensation should be agreed upon by the parties, maintaining the case open to establish the amount if the parties did not

329. *Ibid*., paras. 81 and 83.
330. *Loayza Tamayo Case. Reparations*, *supra* note 28, para. 192.4.
331. *El Amparo Case. Reparations*, *supra* note 6, para. 41.

reach an agreement.[332] Similarly, in the Godínez Cruz Case the Court left open the proceedings to establish the amount of the compensation unless in the interim the parties reached an agreement on the matter.[333] In its judgment on the merits in the Aloeboetoe *et al*. Case the Court took note of the acknowledgement of responsibility by the State, which ended the dispute on the facts that gave rise to the case, and left open the proceedings to establish the reparations and costs.[334] Similarly, in its judgment on the merits in the Caballero Delgado and Santana Case the Court reserved the determination of the form and amount of the compensation and the reimbursement of the expenses and left open the proceedings for this effect.[335] The Court's practice at its beginnings clearly distinguished between the merits stage that determined the State's international responsibility and a second stage that determined the reparations.[336] In contrast, in the Gangaram Panday,[337] Genie Lacayo,[338] Castillo Petruzzi *et al*.,[339] Ivcher Bronstein,[340] Constitutional Court,[341] Mayagna Community,[342] Hilaire, Constantine and Benjamin *et al*.,[343] Cantos,[344]

332. *Velásquez Rodríguez Case*, *supra* note 78, paras. 190-192 and 194.6.

333. *Godínez Cruz Case*, *supra* note 79, paras. 200-201 and 203.6.

334. *Aloeboetoe et al. Case*, *supra* note 7.

335. *Caballero Delgado and Santana Case*, *supra* note 71, para. 72.7.

336. *El Amparo Case. Reparations*, *supra* note 6; *Neira Alegría et al. Case. Reparations*, *supra* note 57; *Caballero Delgado and Santana Case. Reparations*, *supra* note 57; *Garrido and Baigorria Case. Reparations*, *supra* note 39; *Loayza Tamayo Case. Reparations*, *supra* note 28; *Castillo Páez Case. Reparations*, *supra* note 57; *Suárez Rosero Case. Reparations*, *supra* note 150; *Blake Case. Reparations*, *supra* note 196; *The "White Van" Case (Paniagua Morales et al.). Reparations*, *supra* note 45; *The "Street Children" Case (Villagrán Morales et al.). Reparations*, *supra* note 92; *Cesti Hurtado Case. Reparations*, *supra* note 60; I/A Court H.R., *Barrios Altos Case. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of November 30, 2001. Series C No. 87; *Cantoral Benavides Case. Reparations*, *supra* note 5; I/A Court H.R., *Durand and Ugarte Case. Reparations* (Art. 63 (1) American Convention on Human Rights). Judgment of December 3, 2001. Series C No. 89; *Case of Bámaca Velásquez. Reparations*, *supra* note 49; *Case of Trujillo Oroza. Reparations*, *supra* note 49; *Case of the Caracazo. Reparations*, *supra* note 49 and *Case of Las Palmeras. Reparations*, *supra* note 49.

337. *Gangaram Panday Case*, *supra* note 33, paras. 69-70 of the considerations and operative para. 4.

338. *Genie Lacayo Case*, *supra* note 69, paras. 95-96 and 97.4.

339. *Castillo Petruzzi et al. Case*, *supra* note 16, paras. 214-225 of the considerations and operative paragraph 226.15.

340. *Ivcher Bronstein Case*, *supra* note 107, paras. 171-189 and operative para. 191.7-10

341. *Constitutional Court Case*, *supra* note 48, paras. 114-128 and operative para. 130.4-6.

342. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 85, para. 158 *et seq*.

343. *Case of Hilaire, Constantine and Benjamin et al*., *supra* note 16, para. 201 *et seq.*

344. *Case of Cantos*, *supra* note 5, para. 66 *et seq*.

Bulacio,[345] Juan Humberto Sánchez,[346] Myrna Mack Chang[347] and Maritza Urrutia[348] Cases, the compensation was set in the judgment on the merits.[349] This tendency has not necessarily been consolidated, especially since the Court has been partially renovated with three new judges since January 1, 2004. It should be noted that in its last five judgments the Court has chosen that option by including its ruling on reparations in the judgment on the merits. Although the Convention does not have an express norm on the matter, the consistent practice of the Court until recently has been to postpone the ruling on reparations and compensation for a stage after the determination of State responsibility, if it is found that the State has violated the Convention. Except for the aforementioned exceptions, until very recently the Court appeared to have reserved the judgment on the merits primarily to establish the responsibility of the State,[350] postponing the determination of reparations and the amount of compensation for a later stage when it would be necessary to demonstrate and quantify the amount of the damages. Moreover, a resolution of the Court appears to confirm this practice by pointing out that the determination of reparations and compensation –as well as the supervision of compliance of the judgments– were new and distinct stages of the proceedings that take place after the judgment on the merits of the case.[351] In a dozen cases subsequent to that decision, the Court, however, once again set the reparations and compensation in the judgment on the merits.[352] In the Hilaire, Constantine and Benjamin *et al*. Case, the Secretariat of the Court following instructions of the President requested the Commission and the alleged victims'

345. *Case of Bulacio*, *supra* note 15, para. 39 *et seq*.

346. *Case of Juan Humberto Sánchez*, *supra* note 49, para. 147 *et seq*.

347. *Case of Myrna Mack Chang*, *supra* note 163, para. 234 *et seq*.

348. I/A Court H.R., *Case of Maritza Urrutia*. Judgment of November 27, 2003. Series C No. 103, para. 141 *et seq*.

349. *Gangaram Panday Case*, *supra* note 33, operative para. 4.

350. Except in the Aloeboetoe *et al*., El Amparo and Garrido and Baigorria Cases in which the Court simply did not do so but limited itself to taking note of the "recognition of responsibility" made by the respective States, without indicating which provisions of the Convention had been violated.

351. *See* the Order of the Court of September 19, 1995, para. 4 of the considerations.

352. *Castillo Petruzzi et al. Case*, *supra* note 16; *Ivcher Bronstein Case*, *supra* note 107; *Constitutional Court Case*, *supra* note 48; *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 85; *Case of Hilaire, Constantine and Benjamin et al*., *supra* note16; *Case of Cantos*, *supra* note 5; *Case of Bulacio*, *supra* note 15; *Case of Juan Humberto Sánchez*, *supra* note 49; *Case of Myrna Mack Chang*, *supra* note 163 and *Case of Maritza Urrutia*, *supra* note 348.

representatives to present their arguments on reparations, costs and expenses that would be taken into account if the Court found a violation of the Convention.[353] At the first stage of the proceedings in the Bulacio Case the Court, on the basis of the principle of procedural economy, requested the parties to present their arguments on possible reparations.[354] On the other hand, it cannot be ignored that, no matter what is resolved in the judgment on reparations, it is also possible that the judgment on the merits include some elements on reparations. For example, in the Bámaca Velásquez Case, without prejudice to ordering the opening of the stage of reparations, the Court decided that the State should "order an investigation to determine the persons responsible for the human rights violations referred to in this judgment, and also to publicly disseminate the results of such investigation and punish those responsible."[355]

Two separate proceedings, of course, negatively affect the length of the proceedings, delaying even longer a definitive solution of the case[356] and are not in keeping with Article 68.2 of the Convention, which refers to "that part of a judgment that stipulates compensatory damages" and assumes that there is only one judgment on the matter, one part of which refers to State responsibility and the other to *compensatory damages.* This division into separate proceedings also offers important procedural advantages in that it permits the Commission, the parties and the Court to concentrate on determining State responsibility at a first stage in which the victim or his representatives do not have an independent role and, if such responsibility is proved, the amount of damages to be determined at a second stage with the active participation of the victim or his representatives. It is in that sense that, after rendering its judgment on the merits in the Loayza Tamayo Case, the Court granted the Commission and the victim, her next of kin or her representatives the same period so that any of them might present a brief and whatever evidence they had to

353. *Case of Hilaire, Constantine and Benjamin et al., supra* note16, para. 42.
354. *Case of Bulacio, supra* note 15, para. 18.
355. *Case of Bámaca Velásquez. Reparations, supra* note 49, operative para. 230.8.
356. Taking into account this circumstance, under the European Convention on Human Rights and in order to accelerate the proceedings, the Court has changed its practice attempting, frequently successfully, to rule in the same judgment on the possible existence of a violation of the Convention and on the application of Article 50 with respect to any appropriate indemnification.

determine the compensation and expenses and set a period for the State to present its observations to those briefs.[357] The presentation of two distinct briefs on reparations, one by the Commission and the other by the victim, led the State to consult the Court as to which of these briefs should be considered the *official petition.* The Court noted that the Commission and the victim had presented their briefs independently of each other and, therefore, the State could respond to the different claims as it saw fit.[358]

## *8. THE PROCEEDINGS TO DETERMINE REPARATIONS*

In accordance with the Court's practice, reparations may be the object of a ruling in the judgment on the merits, may result from a procedural stage that is opened precisely for that effect or may be the consequence of an agreement between the parties that is accepted by the Court. A more controversial option, which curiously leaves in the hands of the State the determination of the amount of the pertinent compensation, was that used in the Cesti Hurtado and Ivcher Bronstein Cases. In the latter, the Court pointed out that the domestic law should be applied for the recovery of dividends and other receipts that would have corresponded to the victim as a majority shareholder and officer of the *Compañía Latinoamericana de Radiodifusión* and, therefore, the respective petitions should be submitted to the competent national authorities.[359]

### *a) The decision on reparations joined to the judgment on the merits*

Until recently, this manner of determining reparations and compensation seemed to have been the exception and not the rule. It was applied for the first time in the Gangaram Panday,[360] Genie Lacayo,[361] Castillo Petruzzi *et al*.[362] and Benavides Cevallos[363] Cases. In the latter

357. Order of the Court of November 11, 1997, the operative part of which is reproduced in *Loayza Tamayo Case. Reparations, supra* note 28, para. 5.

358. *Ibid*., para. 11.

359. *Ivcher Bronstein Case, supra* note 107, para. 81.

360. *Gangaram Panday Case, supra* note 33, paras. 69-70 of the considerations and operative para. 4.

361. *Genie Lacayo Case, supra* note 69, paras. 95-96 and 97.4.

362. *Castillo Petruzzi et al. Case, supra* note 16, paras. 214-225 of the considerations and operative para. 226.15.

363. I/A Court H.R., *Benavides Cevallos Case.* Judgment of June 19, 1998. Series C No. 38, paras. 44-56 of the considerations and operative paras. 3-4.

case, however, while the Court also ruled that the State should continue the investigations to punish those responsible for the human rights violations referred to in the judgment as if it were a measure of reparation, the Court was only confirming a settlement reached by the parties.[364]

For reasons of procedural economy, this was the most suitable procedure in the Bulacio Case in which the parties had reached an agreement on the facts and on the responsibility of the State for the violation of several provisions of the Convention, which substantively concluded the dispute on the merits, leaving the Court to determine the corresponding reparations.[365]

In the Mayagna Community Case, the Court also joined the reparations stage to that of the merits, but the Commission did not submit its brief on reparations, costs and expenses within the period established, so that there was no accreditation of the material damages caused to the members of the Community. The Court observed that the brief was received twelve days after the period had elapsed and held that the delay could not be considered reasonable under its jurisprudence as it could not be attributable to a simple error of computing the period. Moreover, the imperatives of legal certainty and procedural equality required that the periods be observed, except when there were exceptional circumstances, which did not occur in this case.[366] This decision, which only prejudiced the victims of the human rights violations declared by the Court, would not have occurred if the relevant damages and reparations had been determined at a separate stage.

### *b) The decision at the stage of reparations*

Article 57 of the Court's Rules provides that when there has been no specific ruling on reparations in the judgment on the merits, the Court determines the date and procedure for that decision. Except for the reference to the representation of the victim or his representatives, which is its most outstanding aspect, the Rules do not indicate how to proceed at this stage and thus it is entirely left to the Court's discretion.

364. *Ibid*., para. 48 of the considerations and operative para. 3.
365. *Case of Bulacio*, *supra* note 15, paras. 27 and 32.
366. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 85, paras. 159 and 165-167.

The Court's practice in proceedings on reparations, as that on the merits, includes the presentation of the written submissions of the Commission and of the victim or his representatives followed by the State's observations. There is then generally a public hearing at which the parties present their arguments and provide evidence on the damages caused. For example, in the Trujillo Oroza Case, once the written stage of the proceedings on reparations was finished, a public hearing was held to receive the arguments of the victim's next of kin or his representatives, the Commission and the State in order to determine the reparations.[367]

There is no provision for the presentation of briefs in the proceedings on reparations other than those already indicated. Under Article 43 of the previous Rules, evidence had to be offered by the parties with their original briefs at each stage of the proceedings.[368] In contrast, Article 44 of the current Rules states that the evidence offered by the parties may only be admitted if it is offered in the application and the reply and, when appropriate, in the brief setting out the preliminary objections and its reply. It does not refer to evidence of damages. According to that article, the Court may exceptionally admit evidence at another time if one of the parties alleges *force majeure*, a serious impediment or supervening events, provided that the opposing party is guaranteed the right of defense.

As a reflection of the independent role of the victim or his representatives at this stage of the proceedings, in the Loayza Tamayo Case the President of the Court convoked the victim and her family or representatives, the Commission and the State to a public hearing on reparations at the seat of the Court.[369] When the State requested that another public hearing be held to "elaborate upon the arguments given in support of its observations … concerning the reparations," the victim and the Commission opposed that request, which was rejected by the Court.[370]

367. *Case of Trujillo Oroza. Reparations*, *supra* note 49. Order of the President of June 19, 2001, paras. 1-2 of the considerations and the operative part.

368. *Loayza Tamayo Case. Reparations*, *supra* note 28, para. 15.a and 15.b.

369. *Ibid*., para. 10.

370. *Ibid*., para. 27.

### *c) Their determination through an agreement between the parties*

As in the case of reparations being decided in the judgment on the merits, an agreement by the parties that is then approved by the Court occurs in exceptional cases.

In the Velásquez Rodríguez Case and later in El Amparo, Neira Alegría *et al*. and Garrido and Baigorria Cases, the Court charged the Commission and the respective State with reaching an agreement within a determined period on the form and amount of the compensation, reserving the right to decide the matter if the parties did not arrive at an agreement.[371] While the Convention does not exclude this possibility, the method employed by the Court is peculiar since the Convention provides for a friendly settlement procedure before the case has been referred to the Court and not at a purely judicial stage of settlement. Moreover, such a procedure does not appear to be very appropriate in a case, such as Velásquez Rodríguez, in which the State completely denied its responsibility for the acts denounced. After the unfortunate experience in that case where the State did not show any interest in reaching an agreement with the Commission on the amount of compensation, in its judgment in the Godínez Cruz Case,[372] a twin of the former, the Court did not insist on this same procedure nor has it done so, at least on its own initiative, in later cases.

While it might have been appropriate to invite the parties to reach an agreement on the amount and form of the compensation in a case such as El Amparo in which the State had recognized its responsibility for the allegations in the application and had expressly requested "a non-contentious proceeding to determine in a friendly manner –under the supervision of the Court– the reparations that might be due,"[373] it is obvious that this type of proceeding is not appropriate to determine the nature of the measures of reparation that should be applied and cannot be waived by the Court even when the State has recognized its responsibility.

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371. *Velásquez Rodríguez Case, supra* note 78, operative para. 194.6; *El Amparo Case*, *supra* note 7, operative paras. 3-4; *Neira Alegría et al. Case. Reparations, supra* note 57, para. 91.4 and 91.5; *Garrido and Baigorria Case, supra* note 12, para. 31.3 and 31.4.

372. *Godínez Cruz Case, supra* note 79, para. 203.6.

373. Note of the Agent of Venezuela, Ildegar Pérez, of January 11, 1995, cited also in *El Amparo Case, supra* note 7, para. 19.

The situation raised in the Garrido and Baigorria Case, in which the State accepted the allegations in the application and their legal consequences, did not seem to be an apt case for negotiation between the parties to determine the appropriate reparations and compensation since the State could not identify the persons criminally responsible for the unlawful acts or clarify the whereabouts of the disappeared persons.[374] A State that does not admit to being responsible for such acts might be uncomfortable to participate in such a negotiation and might prefer simply to accept whatever the Court determines as appropriate, as appeared to be suggested in the reply to the application by the Government of Argentina. The Court subsequently noted that there was no agreement on reparations as stipulated in the operative part of the judgment on the merits and, therefore, it decided to open the stage on reparations and compensation.[375] In this case, the parties had signed an agreement that would create an arbitral tribunal that would issue its ruling on the compensation, which could be appealed if arbitrary, and an *ad hoc* commission to investigate the facts and make recommendations. Both bodies completed their tasks, but the representatives of the victims' next of kin challenged the tribunal's decision as arbitrary. Although the Commission agreed with that decision that defined the compensation for the next of kin under the points of the agreement and left to "the prudent jurisdiction of the Court to establish the presence of the invoked ground of arbitrariness," the Court held that it was not an arbitration appeals court and simply noted that the award had not been accepted unanimously and, therefore, decided to open the stage on reparations.[376] This decision contrasts with one of the Commission in the Guardatti Case, also concerning Argentina, which was negotiated at the same time and in the same way with the same objection by the victim's representatives as to the alleged arbitrariness of the tribunal that set the compensation, but in which the Commission held that it could not establish that arbitrariness and that the parties should accept the result, no matter how legitimate were their expectations of achieving a greater amount for the victims.[377]

374. *Garrido and Baigorria Case*, *supra* note 12, paras. 24-25.

375. *Garrido and Baigorria Case. Reparations*, *supra* note 39, paras. 23-25.

376. *Ibid*., paras. 18-32.

377. I/A Commission H.R., Report No. 31/97 Paulo C. Guardatti, Case No. 11.217 (Argentina), in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1997, General Secretariat of the Organization of American States, Washington, D.C., 1998, pp. 232-240, para. 38.

In the Barrios Altos Case, given the recognition of responsibility by Peru, the Court considered it appropriate that the reparations be determined by common agreement between the State, the Commission, the victims, their next of kin or their duly accredited representatives within three months from notification of the judgment on the merits. The Court also thought it relevant to point out that it would evaluate any agreement that the parties might reach, which had to be fully compatible with the pertinent provisions of the Convention. In the event that there was no agreement, the Court would determine the scope and amount of the reparations.[378]

There was also an agreement between the parties in the Benavides Cevallos Case but not as the result of a Court resolution but of negotiations between the parties while proceedings were pending before the Court. This agreement was transmitted to the Court by the Commission and was analyzed at a public hearing convoked for the case and was approved by the Court because it met the purposes of the Convention.[379] Although Article 53 of the Court's Rules then in effect stated that when the parties inform of the existence of a friendly settlement, compromise, or any other occurrence likely to lead to settlement of the dispute, the Court may strike the case from its list. In this case, however, in addition to deciding that the State's acceptance of the allegations in the application was appropriate and approving the agreement on reparations reached by the parties, the Court ordered the State to continue the investigations and to punish all those responsible for the human rights violations referred to in the judgment and reserved the power to supervise the compliance of the obligations set forth in the judgment.[380]

This is not the same procedure that the Court followed in the Aloeboetoe *et al*. Case in which, although the State had also recognized its responsibility for the acts denounced, the Court assumed the task of determining the nature of the reparations, set the amount of the compensation and indicated the manner in which it should be made effective.[381] This has been the prevailing practice, particularly after the judgments in the Loayza Tamayo, Castillo Páez and Blake Cases.

378. *Barrios Altos Case, supra* note 336, para. 50.
379. *Benavides Cevallos Case, supra* note 363, paras. 25-56 of the expository part and operative para. 3.
380. *Ibid*., operative paras. 1-5.
381. *Aloeboetoe et al. Case. Reparations, supra* note 7, operative part.

### *d) The determination of compensation by national tribunals*

Allowing national tribunals to determine the appropriate compensation would appear to be incompatible with the principle that one cannot be the judge of his own case. It would mean that the Court abdicates its position as the judicial organ of the inter-American system and renounces its function under Article 63.1 of the Convention. In delegating part of its attributes to the judicial bodies of a State, the Court is not only ignoring the fact that the case might come before it, whether as a result of a human rights violation directly imputable to the judicial branch or due to the lack of effective judicial remedies that might have protected the victim from the acts that violated his human rights. In the Cesti Hurtado Case, in view of its particularities and the nature of the reparations requested, the Court considered that the reparations for pecuniary damages, which included lost income and the consequential damages caused to his insurance company that required a substantial investment to recover the prestige and confidence that it had previously, should be determined by mechanisms established in the domestic law. It is important to observe that the Court did not only point out that this part of the compensation should be determined in accordance with the domestic law, but also stated that domestic courts or specialized national institutions have specific knowledge of the victim's branch of activity so that, taking into account the specificity of the reparations requested as well as the characteristics of commercial and corporate law, the Court believed that such determination was more appropriate for those national institutions than an international human rights tribunal. It, therefore, ordered the State to establish, following the relevant norms of its legislation, the amount of pecuniary damages.[382]

The Court has held that when an unlawful act is attributable to a State, its international responsibility for the violation of an international norm immediately follows with the resulting obligation to make reparation, all aspects of which are regulated by international law. The State cannot modify or fail to comply by invoking provisions of domestic law.[383]

382. *Cesti Hurtado Case. Reparations*, *supra* note 60, paras. 46-47.
383. *Ibid*., paras. 34-35.

However, according to the Court's judgment in the Cesti Hurtado Case, domestic tribunals must not only execute the decision of the Inter-American Court but must also complement that judgment by determining the amount of the appropriate compensation for pecuniary damages. In fact, the first operative paragraph of the judgment recognizes the possibility that the decision of the national tribunal may be that there is no compensation for pecuniary damages.[384] The doubts and uncertainty generated by this decision prompted a request for its interpretation, asking, *inter alia*, 1) whether it should be understood that Peru must indemnify for all the pecuniary damages caused in this case, leaving only their amount to be determined, 2) whether Peru, by virtue of the mandate of the judgment on reparations whose interpretation is being requested, is under the obligation to initiate *de oficio* the pertinent steps before the national bodies for the determination and payment of the compensation provided in the judgment or whether the victim must initiate them in order to collect the compensation owed to him, 3) whether the term "relevant national procedure" mentioned in the first operative paragraph of the judgment, as well as the reference to the "mechanisms established in the domestic legislation" referred to in paragraph 46 and the reference to the "relevant national laws" found in paragraph 47 of the judgment on reparations refer to: a) judicial procedures to determine the amount of compensation, therefore leaving the determination of that amount entirely and exclusively in the hands of the State tribunals or b) whether it was sufficient for the victim, as part of those "relevant procedures," to demonstrate with the same evidence introduced to the Inter-American Court, which had not been challenged, the expenses he had incurred and the amount of the damages caused to him and 4) whether, in the event that the compensation set by the State did not satisfy the victim, he could return to the Inter-American Court for it to determine as a last resort the definitive amount of the compensation. In response to this request of interpretation, the Court indicated that the judgment on reparations had already resolved that the State must provide

384. *See, ibid.*, the first operative paragraph that orders "the State of Peru to compensate Gustavo Adolfo Cesti Hurtado for the pecuniary damage he was caused by the violations declared in the judgment on merits of September 29, 1999, and that, following the pertinent national procedures, it is in order to establish the corresponding compensatory amounts, *so that he may receive them* within a reasonable period of time, *if there is cause for them.* (Emphasis added.)

the necessary conditions for the victim to take the steps conducive to obtaining the respective compensation for the violations referred to in the judgment on the merits within a reasonable period. The Court also stated that to comply with the reparation for material damages the respective petitions must be formulated by the interested party to the appropriate national authorities, since it was they who must resolve whatever was pertinent under the relevant Peruvian norms.[385] This does not appear to be in accord with the spirit of Article 63.1 of the Convention, which grants the Inter-American Court the function of ordering, if applicable, that the consequences of the measure or situation that constituted the violation of the rights protected by the Convention be remedied and that fair compensation be paid to the injured party. This determination must obviously be done pursuant to the law of the Convention, which is autonomous, and not the domestic law of the State in question. It would have been different if the Court had concluded that the damages that were alleged were not to an individual but rather to a company that, as such, could not request the protection of its rights before the inter-American system.

On the other hand, notwithstanding the invocation of the particularities and the nature of the reparations requested in the Cesti Hurtado Case, the Court ordered in the Baena Ricardo *et al*. Case, which had different characteristics, that with respect to those workers who could not be reinstated in their positions or for whom there were no alternative jobs with the same conditions, salaries and benefits that they had when they were dismissed, the State had to pay the indemnification that was appropriate to the circumstances of employment under domestic labor law, an obligation that extended to the heirs of the victims who had died. The State, therefore, had to pay the amounts corresponding to unpaid salaries and other labor rights to which, under its laws, the victims and, in the case of those who had died, their heirs were entitled and had to establish, according to the pertinent national procedures the amounts of compensation.[386] In our opinion, nothing prevents the domestic law of a

385. I/A Court H.R., *Cesti Hurtado Case. Interpretation of the Judgment of Reparations* (Art. 67 American Convention on Human Rights). Judgment of November 27, 2001. Series C No. 85, para. 32.a and 32.d and operative para. 3.

386. *Baena Ricardo et al. Case, supra* note 58, paras. 203 and 205.

State from serving as a parameter to determine the amount of compensation. Nevertheless, this is a function of the Inter-American Court and not the domestic courts. Otherwise, the determination of the amounts would be left in the hands of one of the parties and may lead to a new conflict that would require a ruling of the Court. In fact, the manner in which Panama pretended to execute this judgment –setting the monetary compensation without reference to the law, ignoring the applicable domestic legislation by resorting to arbitrary criteria and deducting taxes from the compensation– forced the Court to hand down three orders on compliance with the judgment. In the second, the Court ordered, *inter alia*, that the State must redetermine, in accordance with the applicable domestic legislation, the specific amount corresponding to unpaid salaries and the other labor rights of each of the 270 victims, observing the guarantees of due process and in keeping with the laws applicable to each victim so that they might present their arguments and evidence, and informing on the parameters and laws used for their calculations. The Court also pointed out that the acceptances signed by some of the victims or their heirs as a requirement to receive the payment for the amounts ordered in point six of the judgment, which were calculated by the State, were only valid as to the recognition that they had received the payment of the amount of money stipulated in the acceptance. Moreover, the Court indicated that the waivers made in signing the acceptances in which they expressed their satisfaction with the payment were not valid and that such waivers did not prevent the victims or their heirs from presenting claims and showing that the State should pay them a different amount for the unpaid salaries and the other labor rights that were due them.[387]

### *9. THE MEANS OF COMPLIANCE*

Regarding the manner of giving effect to a monetary compensation, the Court has provided for the possibility of one-time or graduated payments or the creation of trusts in favor of the beneficiaries. In the first cases against Honduras both solutions were used, ordering the total payment

387. Resolution on the compliance with the judgment. *Baena Ricardo et al. Case*, *supra* note 58, operative paras. 1 and 6.

within 90 days or in six equal monthly installments for the adults and ordering the creation of a trust for the minor beneficiaries.[388] In contrast, in the Aloeboetoe *et al*. Case in order to comply with the compensation established in its judgment, the Court ordered the creation of a trust in dollars -under the most favorable conditions consistent with banking practice– for the beneficiaries, who in case of their death would be replaced by their heirs.[389] The adults could make a one-time withdrawal of up to 25% of their share and could later make semi-annual withdrawals. The trust was to last at least three years but not more than seventeen.[390] To administer the trust and to give the beneficiaries the possibility of obtaining the best return for the amount received for reparations, the Court ordered the creation of a foundation for whose operations the Government of Suriname was to contribute $4,000 or its equivalent in local currency at the open market exchange rate at the time of making the payment.[391]

In El Amparo Case a trust was ordered in principle only for the minor beneficiaries, who were to receive the accrued interest and principal when they reached the age of majority or married.[392] The trust subsequently provided for adults who did not claim their compensation and whom the State had to make every effort to locate. If after ten years, the beneficiary or his heirs had not claimed their indemnity, it would be returned to the State and the judgment would be considered fulfilled with regard to that person.[393] In the Garrido and Baigorria Case, the Court did not follow this rule but ordered the State to deposit $40,000 for the minors in a savings account in a solvent and sound financial institution under the most favorable terms allowed by the banking laws and practice and if at the end of ten years the indemnity was not claimed the amount would be returned with interest to Argentina, which "shall not be interpreted to mean that the right to claim that the indemnity will lapse or is time-barred."[394] This additional

388. *Velásquez Rodríguez Case. Compensatory damages*, *supra* note 42, paras. 57-58 and *Godínez Cruz Case. Compensatory damages*, *supra* note 42, paras. 52-53.

389. *Aloeboetoe et al. Case. Reparations*, *supra* note 7, paras. 100-102.

390. *Ibid*., para. 102.

391. *Ibid*., paras. 103-108.

392. *El Amparo Case. Reparations*, *supra* note 6, para. 46.

393. *El Amparo Case. Reparations*, *supra* note 6, para. 47; *Loayza Tamayo Case. Reparations*, *supra* note 28, para. 187; *Castillo* Páez *Case. Reparations*, *supra* note 57, para. 115; *Case of Bulacio*, *supra* note 15, para. 159 and *Case of Juan Humberto Sánchez*, *supra* note 49, para. 198.

394. *Garrido and Baigorria Case. Reparations*, *supra* note 39, para. 86.

element, which prevents the indemnity from passing irreversibly to the victim's patrimony but is returned to the State responsible for the human rights violation was repeated in the Constitutional Court Case where the Court ordered that, if for any reason it was not possible that the beneficiaries of the compensation receive it within six months, the State had to deposit the amounts in their name in an account or certificate of deposit in a solvent financial institution under the most favorable terms and "if, after ten years, the compensation has not been claimed, the amount will be returned, to the State of Peru, with the interest earned."[395] Similarly, in the Mayagna Community Case the Court ordered that, if at the end of ten years the payment is not claimed, the sum would be returned with interest to Nicaragua.[396] The Court did not explain why, in a system designed for the protection of human rights, the compensation ordered by it be returned to the patrimony of the State responsible for the human rights violation. A more reasonable result was that used in the Juan Humberto Sánchez Case in which the Court ordered that if five years passed after the minors in whose benefit a trust has been established had reached majority the compensation was not claimed, the capital and interest would go to the other beneficiaries of the reparations *pro rata*.[397]

It is important to emphasize that in handing down its judgment on reparations the Court need not concern itself with the details of compliance. In the Suárez Rosero Case, in which both the Commission and the victim proposed mechanisms to avoid adverse tax consequences to the latter's lawyers, the Court considered that a ruling on compliance was irrelevant. According to the Court, the State must apply the appropriate means to ensure compliance of the judgment efficiently and promptly and under the terms and within the period established by the Court. The Court also held that it was the State's responsibility to adopt adequate measures to ensure that the legal deduction that the Ecuadorian financial institutions made to the monetary transactions did not curtail the beneficiaries' right to receive the full amount ordered in their favor.[398]

395. *Constitutional Court Case*, *supra* note 48, para. 128.
396. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 85, para. 171.
397. *Case of Juan Humberto Sánchez*, *supra* note 49, para. 199.
398. *Suárez Rosero Case. Interpretation of the Judgment of Reparations*, *supra* note 147, paras. 43 and 45.2.

The Court has consistently granted the States six months to comply with its judgments on reparations. If a State delays, it must pay interest on the principal that is equal to the charges that the banks make for such delays in that country.[399] In the Cesti Hurtado Case, however, the Court ordered the State to compensate the victim and to establish, in accordance with the relevant domestic norms, the amount due in order that the victim receive it within a reasonable period.[400] In the Baena Ricardo *et al.* Case, the Court ordered that to comply with its judgment the State had to set in accordance with the relevant national procedures and pay within a period of twelve months from notification the compensation established in favor of the victims, their heirs or duly accredited legal representatives, with the exception of moral damages, the reparation of which was to be made by payments within 90 days of the adoption of the judgment.[401]

The nature of the measures ordered by the Court in its judgments on reparations, which may include aspects that cannot be executed immediately, has led it to supervise compliance of its judgments. The Court does not conclude the proceedings until the State has fully complied with its orders.[402] In the Bulacio Case the Court ordered that, within six months after notification of its judgment, the State must report on the measures taken to comply.[403]

## E. THE RULING ON COSTS

Although access to the Commission or the Court is free of charge, the costs, which are the expenses that the parties incur in an international proceeding of this nature and which include lawyers' fees, may be considerable. For example, in the Constitutional Court Case, the Commission maintained that the victims had incurred expenses in contracting lawyers to defend them from the "political harassment, through

399. *Loayza Tamayo Case. Reparations, supra* note 28, paras. 183 and 190 and *The Mayagna (Sumo) Awas Tingni Community Case, supra* note 85, para. 171.

400. *Cesti Hurtado Case. Reparations, supra* note 60, paras. 47, 74 and 80.1.

401. *Baena Ricardo et al. Case, supra* note 58, paras. 212 and 214.6.

402. *Loayza Tamayo Case. Reparations, supra* note 28, para. 191 and 192.10 and *Case of Bulacio, supra* note 15, para. 161.

403. *Case of Bulacio, supra* note 15, para. 162.14.

judicial channels" to which they had been subjected (particularly one of the victims and his spouse), the expenses incurred during their exile, the hiring of persons to represent their companies and the administration of their property in Peru, the hiring of lawyers outside Peru, lodging outside Peru, air fares, secretarial services, office and meals.[404] Without detailing the elements on which it is based, the Court's jurisprudence has distinguished between costs and expenses, suggesting that the former are fundamentally the fees of lawyers and the latter are other outlays that have been incurred during the proceedings. For example, in the Hilaire, Constantine and Benjamin *et al*. Case, the representatives of the victims stated that they were only interested in reimbursement of expenses since they had taken on the case *pro bono*. The Court, on the basis of equity, prudently calculated the amount of those expenses, which included the actions of the victims' representatives before the Court,[405] but curiously did not include the cost of those expenses before the Commission.

Although the Convention does not expressly cover this question, it is a matter that has to be considered by the Court. Article 46 of the Court's Rules, while providing that "the party requesting the production of an item of evidence shall cover its cost," does not refer to the basic question of whether, once the controversy is resolved, the favored party has the right to be reimbursed for the expenses that it incurred as a result of the proceedings. In any event, Article 56.h of its Rules indicates that the Court's judgment should contain the decision on the costs, if any.

The Court's early judgments in the Aloeboetoe *et al.* and El Amparo Cases did not order the payment of costs as the Court rejected the appropriateness of the payment of costs at that time. In the former case the Court left open the proceedings to determine reparations and costs[406] and in the latter it reserved the power, if the parties did not reach an agreement on reparations and the form and amount of compensation, to determine that amount and also that of the costs.[407] The Court now accepts that the costs and expenses should be included in the concept of reparations

404. *Constitutional Court Case, supra* note 48, para. 115.
405. *Case of Hilaire, Constantine and Benjamin et al., supra* note16, para. 218.
406. *Aloeboetoe et al. Case, supra* note 12, operative para. 2.
407. *El Amparo Case, supra* note 7, operative para. 4.

under Article 63.1 of the Convention since the activity of the victim, his heirs or representatives in recurring to international justice implies economic outlays and commitments that should be reimbursed in a judgment that finds the State responsible.[408] What remains to be defined is what these costs include and who should receive them.

From what the Court stated, although only tangentially, in the Gangaram Panday Case, it may be concluded that the evidence that leads to finding the State responsible may also be relevant to rule on the appropriateness of awarding costs. The Court expressed the view that since the State responsibility was *inferred*, that is, derived from presumptions, it should reject the petition for costs.[409] It may be supposed that, with sufficiently solid evidence to find State responsibility beyond a reasonable doubt, the Court probably would have accepted the petition for costs. In the Ivcher Bronstein Case, at the request of the Court the Commission submitted arguments on the expenses and costs and furnished the evidentiary documents that in its opinion justified those outlays.[410] Despite this evidence, the Court recalled its practice of prudently evaluating the specific scope of the costs, taking into account not only their justification and the circumstances of the specific case but also the nature of the international jurisdiction for the protection of human rights and the characteristics of the respective proceedings, which have their own distinctive character that differs from that of other national or international proceedings, and observing the standards established by the Court in resolving other cases. Therefore, in a case in which almost nine million dollars were asked for expenses and costs, the Court considered it fair to reimburse the victim the sum of $50,000 for the costs and expenses generated in the domestic and international jurisdiction.[411] There is nothing to indicate why in the Castillo Páez or Caballero Delgado and Santana Cases those expenses were estimated *fairly* at $2,000 or why in a case as complex as Neira Alegría *et al.* this *fair* estimate of the expenses and costs was only $6,000. The judgment in that case does not precisely indicate

408. *Cesti Hurtado Case. Reparations*, *supra* note 60, para. 71.
409. *Gangaram Panday Case*, *supra* note 33, para. 71.
410. *Ivcher Bronstein Case*, *supra* note 107, paras. 47, 60 and 172.
411. *Ibid*., paras. 188-189.

the type of expenses that were considered a consequence of the human rights violation and that, therefore, should be reimbursed. In the Mayagna Community Case, the Court considered that it was fair to award through the Commission a total of $30,000 for expenses and costs that the Community's members and their representative incurred in the domestic proceedings and those before the Commission and the Court.[412] In the Bulacio Case, although neither the Commission nor the victim's representatives furnished receipts or vouchers to support their claims on costs, the Court considered it fair to order the payment of $40,000 for costs and expenses in the domestic and international proceedings.[413]

The States have not expressly objected to the proceedings on costs. In the Aloeboetoe *et al*. Case the Government of Suriname simply requested that it be exonerated from paying the costs because it maintained that it had not been proved that it was responsible for the killings that it had been accused of.[414]

### *1. THE COSTS OF THE COMMISSION*

In its early cases, the Court rejected the reimbursement of the costs and expenses that the parties might have incurred. In the Aloeboetoe *et al.* Case the Commission requested the Court to order the State to pay its costs.[415] In ruling on this petition, the Court observed that the Convention instituted a system for the protection of human rights in the hemisphere that assigned functions to the Commission and the Court, which are financed from the OAS budget. In that case, the Commission preferred to fulfill its functions by hiring professionals instead of using its own staff. This operational arrangement, according to the Court, was a matter of its internal organization and not subject to the Court's intervention. The Court pointed out that the Commission cannot demand that expenses incurred as a result of its internal work structure be reimbursed through the assessment of costs since the operation of the organs of the inter-American system of human rights is funded by the OAS member States through their annual

412. *The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 85, para. 169.
413. *Case of Bulacio*, *supra* note 15, paras. 151-152.
414. Aloeboetoe *et al*. Case, *supra* note 7, para. 21.3.
415. *Aloeboetoe et al. Case. Reparations*, *supra* note 7, para. 9.

contributions.[416] After this decision, in addition to its delegates, the Commission named *assistants* rather than *advisers*. Article 69 of the Commission's Rules refers in its title to "delegates and assistants" and in its paragraph 5 to "advisers" of the Commission.

Notwithstanding the judgment in the Aloeboetoe *et al*. Case, the Commission again raised the problem of its costs in the Caballero Delgado and Santana Case although in a more limited manner and without reference to professional fees, by requesting that the Government of Colombia be ordered to pay the costs that the Commission's advisors had incurred in assembling the witnesses.[417] As the Court did not rule on this point, it may be taken that it at least tacitly rejected the petition. In more recent cases, the Commission has avoided asking for the payment of costs, while asking that the State be ordered to pay the fees of the professionals who acted as the victims' representatives before the Commission and the Court[418] or has requested that the Court order the payment of expenses that a lawyer incurred in assuming a victim's defense before the domestic courts and before the organs of the system.[419]

At a second stage, the Court contemplated only the reimbursement of the expenses generated before the domestic courts.[420] The Commission, however, mildly insisted in the payment of the costs of the proceedings before the organs of the system including the professional fees of the Commission's legal advisors who had participated in the case.[421] The Commission even suggested a variation of the payment of costs, requesting simply that the State be ordered "to pay the costs incurred by the counsel of the Commission in assembling the witnesses,"[422] waiving the payment of the other no less significant expenses. The Court appears not to have noted this distinction and simply repeated that the Commission could not

416. *Ibid*., paras. 112-114.

417. *Caballero Delgado and Santana Case, supra* note 71, para. 23.6.

418. *Garrido and Baigorria Case. Reparations, supra* note 39, para. 75.

419. *Loayza Tamayo Case. Reparations, supra* note 28, para. 174.

420. *See, e.g*., *Caballero Delgado and Santana Case, supra* note 71, para. 72.6*; Loayza Tamayo Case, supra* note 26, operative para. 6 and I/A Court H.R., *Castillo Páez Case*. Judgment of November 3, 1997. Series C No. 34, operative para. 5.

421. *Neira Alegría et al. Case, supra* note 34, para. 58.2.c.

422. Final arguments of the Commission in the Caballero Delgado and Santana Case, cited by the Court in the *Caballero Delgado and Santana Case, supra* note 71, para. 23.6

demand reimbursement of expenses due to its internal work structure.[423] The Court did not understand that what the Commission was asking was not the value of the work that the Convention charged it with but the cost of gathering the necessary evidence to comply with its mission.

In the Cantos Case the Commission asked the Court to order Argentina to pay the costs of the international bodies, including both the expenses incurred in the proceedings before the Commission and well as those before the Court "and also the fees of the professionals who assist the Commission in processing this case." It also requested that at the proper time a special segment be opened in order that the Commission might detail the victim's expenses in processing the case and establish reasonable fees for the lawyers and accountants who intervened so that they could be duly reimbursed by Argentina.[424]

### *2. THE COSTS OF THE PETITIONER*

It is obvious that a petitioner who uses the system incurs rather large expenses, the amount of which depends on factors such as the length of the proceedings, attendance at the hearings at the seat of the Commission or the Court and gathering and submitting evidence. These expenses may include, *inter alia*, the cost of communicating with the Commission, travel to its seat, lodging expenses, cost of the travel of witnesses to the seat of the Commission, services of translators and advisors, and the expenses of the petitioner himself in cooperating with the Commission once the case has been submitted to the Court. In addition, the petitioner needs professional help both before national courts as well as before the Commission and the Court. It is for this reason that, as was pointed out in a public hearing, the payment of legal costs is so important that, if they are not recognized, the inter-American system could be used only by those who had economic resources.[425] In recognizing this circumstance, the Court has stated that costs and expenses should be understood to be included

423. *Ibid.*, para. 70.
424. I/A Court H.R., *Cantos Case. Preliminary Objections*. Judgment of September 7, 2001. Series C No. 85, para. 11.4.
425. *Castillo Páez Case. Reparations*, *supra* note 57, para. 109.

under the concept of reparations referred to in Article 63.1 of the Convention since the efforts of the victim, his heirs or his representatives to accede to international justice entails financial outlays or commitments that should be compensated in the judgment that finds the State responsible for a human rights violation.[426] That reference to "financial outlays or commitments" seems to be sufficiently broad to include both the expenses that the victim or his next of kin might have incurred but also the lawyers' fees that they had to pay. Moreover, in recent cases the Court has also considered future expenses that the victims or their next of kin might incur regarding the investigation of the facts and has ordered, in equity, a payment for those expenses.[427]

### *a) The costs*

In the Aloeboetoe *et al*. Case the Commission requested that the State be ordered to pay the costs incurred by "the victims."[428] Interpreting the intention of the Commission, the Court thought it relevant that the victim's "next of kin" be reimbursed their expenses in obtaining information on the victims after they were killed, in searching for their bodies and in taking up matters before the State authorities. The Court, however, rejected payment of the costs relating to negotiations before the Commission because the victim's next of kin did not have to pursue lengthy proceedings to submit the case to the Commission and because the Commission took it up immediately.[429] Thus, it could be concluded, *a contrario sensu*, that such a petition would have been looked upon favorably if the proceedings before the Commission had been long and complex. Until recently, the Court had not found any reason to resolve this issue differently and simply repeated its criterion of the Aloeboetoe *et al*. Case, recognizing only the reimbursement of expenses incurred before the national authorities.[430] The Court, however, now understands that the costs referred to in its Rules

426. *Garrido and Baigorria Case. Reparations, supra* note 39, para. 79; *Loayza Tamayo Case. Reparations, supra* note 28, para. 176 and *Cesti Hurtado Case. Reparations, supra* note 60, para. 71.

427. *Case of Bulacio, supra* note 15, para. 153.

428. *Aloeboetoe et al. Case. Reparations, supra* note 7, para. 9.

429. *Ibid.*, paras. 79, 94-95 and 110-112.

430. *See, e.g., Caballero Delgado and Santana Case, supra* note 71, para. 72.6*; Loayza Tamayo Case, supra* note 26, operative para. 6 and I/A Court H.R., *Castillo Páez Case*. Judgment of November 3, 1997. Series C No. 34, operative para. 5.

also include the necessary and reasonable expenses of the victims before the Commission and the Court, among which are fees for legal assistance.[431]

On the other hand, the Court has distinguished between *costs*, which should probably be understood to include lawyers' fees, and the *expenses* that the victim's next of kin might have incurred. The Court has been more flexible with respect to the latter, but until recently it had not given a precise indication of what might be included in either category. Curiously, although in the body of its judgment on the merits in the Aloeboetoe *et al.* Case the Court decided to reimburse the expenses incurred by the victim's families before the State authorities and even estimated the amount of those expenses, in the operative part it not only did not mention this matter but expressly decided that "the payment of costs shall not be ordered."[432]

Regarding the compensation and reimbursement of expenses incurred by the victim's next of kin in proceedings before the Colombian authorities, in the Caballero Delgado and Santana Case the Court held that those expenses should be charged to the State and that, as it lacked evidence to set the amount, it left open the proceedings for that effect.[433] At the reparations stage, however, after a detailed examination of the documents relating to the expenses for which reimbursement was requested, the Court observed that a substantial part was for travel and long-distance telephone calls, for newspaper articles and the posters and picket signs made by the Teachers Union of Santander and the Andean Commission of Jurists and not by the companion of Isidro Caballero. The Court held that they were not the reimbursable expenses mentioned in the judgment on the merits that only recognized the expenses related "to the relatives' representations to the Colombian authorities."[434] In contrast, in the Bulacio Case the Court distributed the amount that it ordered for costs and expenses between two of the lawyers who intervened in the proceedings before the Argentine courts and who had incurred expenses of telephone calls, photocopies, mail and travel to Washington and Costa Rica plus the fees of the lawyers of the Center for Legal and Social Studies, the Coordinator against Police

431. *Garrido and Baigorria Case. Reparations, supra* note 39, para. 80.
432. *Aloeboetoe et al. Case. Reparations, supra* note 7, operative para. 116.7.
433. *Caballero Delgado and Santana Case, supra* note 71, paras. 71 and 72.6 and 72.7.
434. *Caballero Delgado and Santana Case. Reparations, supra* note 57, para. 47.

and Institutional Repression and the Center for Justice and International Law.[435]

At the beginning the Court distinguished between expenses before national bodies and those before the Commission and the Court, accepting the former and rejecting the latter. In addition, leaving aside the necessary expenses before the national bodies, we should examine the payment of fees for professional services to the victim or his next of kin in the processing of the case either before the Commission or before the Court, as there have been fundamental changes.

***b) Lawyers' fees***

The payment of professional fees is an especially important element of a petitioner's expenses in actions before the Commission and the Court. Until the end of 1998, the payment of those fees had never been recognized. With the judgments in the Garrido and Baigorria and Loayza Tamayo Cases, there was an important reversal of the Court's jurisprudence in this area. In the Garrido and Baigorria Case the Court held that the "costs are one element to be considered under the concept of reparations to which Article 63.1 of the Convention refers since they are a natural consequence of the effort made by the victim, his or her beneficiaries, or representatives to obtain a court settlement recognizing the violation committed and establishing its legal consequences. In other words, the activity they undertake to accede to the courts, a recourse provided by the Convention, entails or may entail financial outlays or commitments for which the victim must be compensated when a guilty verdict is delivered."[436] In that same judgment, the Court held that the costs referred to in Article 55.1 of the Rules then in force included the different expenses that the victim had or committed to have to accede to the inter-American human rights system, among which are fees for legal assistance. According to the Court, the expenses must be necessary and reasonable according to the specifics of each case and the victim or his representatives must actually have paid or promised to pay them.[437] The Commission, however, has maintained that

435. *Case of Bulacio, supra* note 15, para. 152.
436. *Garrido and Baigorria Case. Reparations, supra* note 39, para. 79.
437. *Ibid*., para. 80.

the judgment should have some relationship to the criteria used to determine the amounts to be paid at the national level and that they must also have a realistic relationship to the contract negotiated between the lawyer and his client. In the opinion of the Commission, not recognizing that contract and ordering the payment of what the petitioner calls "symbolic fees" to the lawyer would restrict the cases presented to the inter-American system to private lawyers willing to work *pro bono* and to other professionals who work for their own interests and not for remuneration, which the Commission believes to be undesirable.[438]

In the Garrido and Baigorria Case the Court recalled that Article 23 of its former Rules allowed the victim's representatives or his next of kin to present autonomously their arguments and evidence at the reparations stage and that this recognition of their *locus standi* opened the possibility of incurring the expenses associated with such representation. In practice, the victim's legal assistance does not begin at the reparations stage but before the national courts and continues at each phase of the proceedings before the Commission and the Court except when the victim or his next of kin receive free legal assistance. Finally, the concept of costs includes those for recourse to the domestic courts and those for representation before the Commission and the Court.[439]

The Court has held that in the exercise of its jurisdictional powers in order to determine the amount of the costs it must prudently evaluate their extent, taking into account the receipts provided, the specific circumstances of the case, the nature of the jurisdiction for the protection of human rights and the characteristics of the respective proceedings, which are unique and different than those of other proceedings both at the national and international levels.[440] It may thus be concluded that the proof of an expense is not sufficient for it to be reimbursed. The Court has reserved the right to determine what it calls the "reasonable quantum" of the costs incurred by the victims' next of kin and their lawyers, whether before local courts or before the Commission and the Court, in equity, and taking into account the "sufficient connection" that must exist between those

438. *Cesti Hurtado Case. Interpretation of the Judgment of Reparations*, *supra* note 385, para. 22.
439. *Garrido and Baigorria Case. Reparations*, *supra* note 39, para. 81.
440. *Ibid*., para. 82.

costs and the results reached.[441] In keeping with the Court's holding, the Commission asked in the Ivcher Bronstein Case that the State be ordered, *inter alia*, to pay the "reasonable fees" of the alleged victim's representatives[442] and in the Constitutional Court Case it asked that the State be ordered to pay "the 'reasonable' expenses and costs incurred by the alleged victims and their lawyers when processing the case."[443] In any event, the Court opened an evidentiary phase separate from other aspects of the proceedings so that the Commission could present its evidence and arguments on its request for the payment of costs and expenses.[444]

In the Garrido and Baigorria Case the lawyers of the victims' next of kin requested 15% of the total compensation that was agreed upon, but the Court held that it was not appropriate that the costs be a percentage of the compensation. The Court believed that there were more important factors to evaluate the work of the lawyers in a proceeding before an international tribunal such as the evidence introduced to prove the allegations, the understanding of international jurisprudence and, in general, anything that would demonstrate the quality and relevance of the work performed.[445] Another element is the fact that the lawyers might have shared the representation of the victim or his next of kin with other lawyers before the local courts and international bodies.[446] It is interesting to note that the Court only ordered fees for the two lawyers who acted as exclusive representatives of the victims' next of kin at the reparations stage and that no consideration was given to the fees of the other lawyers who, with or without an express mandate of the victims or their next of kin, acted at previous stages of the proceedings, including that of reparations. It is possible, however, that the Court took into account the fact that the other lawyers belonged to non-profit non-governmental organizations.[447] This

441. *Ibid*.

442. *Ivcher Bronstein Case, supra* note 107, para. 4.

443. *Constitutional Court Case, supra* note 48, para. 2.

444. *Ivcher Bronstein Case*, *supra* note 107, para. 45 and *Constitutional Court Case*, *supra* note 48, para. 27.

445. *Ibid*., paras. 75 and 83.

446. *Ibid*. para. 84.

447. In this respect, a treatment similar to the Garrido and Baigorria Case may be seen by the Court in the Loayza Tamayo Case except for the payment of the fees of the lawyers of a non-governmental organization that also participated in the proceedings, including the reparations stage. *Loayza Tamayo Case. Reparations*, *supra* note 28, paras. 172-174.

circumstance does not reduce the amount of effort and work that was necessary to litigate against the State for its unlawful act, which should not benefit from the unpaid labor of non-governmental organizations. Moreover, the fact that these institutions are non-profit does not mean that they do not incur expenses for their intervention in a proceeding for a human rights violation that must be paid from their resources, which are then reduced to attend other cases. Similarly, in the Blake Case, in which the injured party pointed out that he had been represented by four lawyers and by the International Human Rights Law Group, who assisted the family *pro bono*, the Court held that, while those lawyers acted without having received compensation for their professional services, it understood that they must have had expenses to process the case before the inter-American system for which it considered it equitable to grant $10,000 for the expenses resulting from its actions before the system.[448] The Court did not itemize the expenses, but observed that they arose from travel to Guatemala to gather information related to the case before the Commission, travel of lawyers of the Blake family to appear before the Commission and the Court, including lodging and meals, and various expenses for translations, telephone calls, photocopies and correspondence in order to present the case before the organs of the inter-American system.[449] Precisely for these considerations, it is curious that in the Castillo Páez Case, decided the same day as the Loayza Tamayo Case, in spite of the fact that the judgment on the merits ordered the payment of non-quantified legal costs,[450] the Court limited itself to setting $2,000 as the costs for "judicial proceedings in Peru,"[451] ignoring the expenses that the victim's next of kin might have incurred before the Commission and the Court.

In view of the occasionally exorbitant amounts requested for fees, the Court has seen the need to provide more details on the manner in which it evaluates the amount that it is prepared to recognize as reasonable. In the Cesti Hurtado Case, the Court indicated that

448. *Blake Case. Reparations*, *supra* note 196, paras. 66 and 70.
449. *Ibid*., para. 69.
450. In view of its decision in the Garrido and Baigorria Case to determine the reasonable amount of the costs on an equitable basis, this omission should not have inhibited the Court from setting the fees. *Garrido and Baigorria Case. Reparations*, *supra* note 39, para. 82.
451. *Castillo Páez Case. Reparations*, *supra* note 57, paras. 109 and 112-113.

> With regard to professional fees, it is necessary to bear in mind the characteristics inherent in the international human rights proceeding, in which decisions are adopted on the violations of such rights, without examining all the extremes of the implications of these violations, which could involve questions of earnings related to the said fees, which are legitimate in themselves, but unrelated to the specific issue of the protection of human rights. Therefore, the Court must decide these claims with restraint. If the Court proceeded otherwise, international human rights litigation would be denatured. Consequently, the Court must apply criteria of equity in these cases.[452]

The Court deemed it equitable to award the victim the sum of $20,000 to reimburse expenses and costs of the domestic and international jurisdictions, which included professional fees and which were to be paid to Mr. Cesti.[453] Similarly, in the Baena Ricardo *et al*. Case, in which the Commission requested that one of the lawyers (but not all of them who participated in the proceedings) be paid $150,000 for her legal assistance in the preparation of briefs, compilation of documentation, participation in the hearings and lobbying before international bodies, the Court considered it equitable to award the sum of $100,000 "as reimbursement for the expenses incurred as a result of the steps taken by the victims and their representatives and to grant the sum of $20,000 as reimbursement for legal costs generated, in both cases, by the internal proceedings and by the international proceeding before the inter-American protective system," indicating also that the sums were to be paid through the Commission.[454] In the latter case, it is curious that the Court did not refer to fees but to the broader notion of costs nor did it specify that they were for the lawyers who were to receive part of them and that it ordered that the reimbursement of expenses and costs be done through the Commission, which would obviously pay the victims.

### *c) Future expenses*

In the Juan Humberto Sánchez Case, even without a request by the Commission or the victim's representatives but in view of the impunity in

452. *Cesti Hurtado Case. Reparations, supra* note 60, para. 72.
453. *Ibid*., paras. 73 and 75.
454. *Baena Ricardo et al. Case, supra* note 58, paras. 197, 209 and 214 and operative para. 9.

the case and its order that the judicial investigations to discover the truth of what happened to Mr. Sánchez continue and those responsible be punished, the Court observed that the victim's next of kin would have expenses on the domestic level for which it ordered the payment of $3,000, an amount that it deemed fair, to be distributed in equal parts between the victim's mother and step-father.[455] It must be noted that that, being a human rights case, this decision cannot be objected to and attacked as *ultra petita* because Article 63.1 of the Convention requires the Court to order in its judgment that the consequences of the situation that constituted the breach of the human rights be remedied and that fair compensation be paid to the injured party.

### *d) Taxes*

Another relevant aspect concerns taxing the professional fees ordered by the Court. In the Loayza Tamayo Case the State challenged the exemption from taxes of the fees. In a request for interpretation of the judgment on reparations, after indicating that the payment of fees ordered in the judgment "would appear" to be exempt from any existing or future taxes in Peru, the Court was asked to indicate the grounds for ordering that exemption and its authority to exonerate from the payment of taxes the fees that professionals receive for their services.[456] The Commission argued that it would be unfair for the State to benefit by withholding in the form of taxes a portion of the reparations when the payment was due to its unlawful conduct.[457] According to the Court, as part of the fair compensation referred to in Article 63.1 of the Convention, it was fair that the victim's lawyer, Carolina Loayza, receive the full amount because if the State deducted a percentage for taxes what the beneficiary received would not be the amount set by the Court and, therefore, the State would not be complying with the judgment on reparations. The Court repeated that the payment of professional fees and expenses ordered for Carolina Loayza could not be taxed in any way by the State, but added that once the beneficiary received the full payment of the amount corresponding to fees

455. *Case of Juan Humberto Sánchez*, *supra* note 49, para. 195.

456. I/A Court H.R., *Loayza Tamayo Case. Interpretation of the Judgment of Reparations* (Art. 67 American Convention on Human Rights). Judgment of June 3, 1999. Series C No. 53, para. 20.

457. *Ibid*., para. 21.

and expenses it would form part of her assets and its use, administration or allocation would thenceforth be subject to "the applicable provisions of Peruvian law."[458] In the opinion of the Court, this criterion followed its consistent jurisprudence and that of the European Court of Human Rights, which when it orders the payment of costs either requires that the State add to the costs the value of any taxes that might be applicable or makes the respective calculation and orders the State to pay the resulting amount.[459]

The exemption from taxes of the professional fees ordered by the Court was also challenged by the State in the Suárez Rosero Case. In its response to this objection, the Commission argued that the payment of fees, being a component of reparations, should receive the same tax treatment as the compensation and that any tax should be the responsibility of the State. For his part, the victim pointed out that if the State had not committed a human rights violation the time and efforts that his lawyers dedicated to his case would not have been necessary.[460] The Court observed that the State had not explained why it considered that its tax legislation was applicable to the costs ordered for two lawyers who, one totally and the other partially, had conducted their activities in the United States. The Court also indicated that the amount of the payment ordered for the victim's lawyers was fair and reasonable and that, pursuant to the terms of Article 63.1 of the Convention, it was fair and reasonable that the victim's lawyers receive such amounts in full and promptly. According to the Court, if the State deducted a percentage for taxes the amount received by the lawyers would not be the same as that ordered by the Court. In that case, the State would not be complying with the judgment on reparations. The Court, therefore, considered that the payment of the costs and expenses ordered for the victim's lawyers could not be subject to taxation by the State.[461]

458. *Ibid*., paras. 24 and 26-28.

459. *Ibid*., para. 25. The reference is to the judgments of the European Court of Human Rights in the *Balut v. Austria Case*, of February 22, 1996, REPORTS OF JUDGMENTS AND DECISIONS 1996-II, operative point 4 and the *Young, James and Webster Case*, of October 18, 1982, (article 50), series A No. 55, second operative point.

460. *Suárez Rosero Case. Interpretation of the Judgment of Reparations*, *supra* note 147, paras. 34-36.

461. *Ibid*., paras. 41-44.

### *3. THE STATE'S COSTS*

In its brief on preliminary objections in the Genie Lacayo Case, the State requested that the Court, *inter alia*, order the Commission to cover its costs and attorneys' fees.[462] Having considered and rejected the preliminary objections, the Court did not consider it appropriate to order the payment of costs.[463] The judgment does not give the grounds for that conclusion and the only evidence that the costs were rejected at this stage of the proceedings is that the Court had dismissed the preliminary objections and ruled that the costs could be considered in the judgment on the merits in the event that it was decided that there had been no violation of the Convention. Neither did the Court's judgment in the Cayara Case give an explanation on this issue since, although the State received a favorable judgment at the stage of preliminary objections, it had not requested the payment of costs. In the Baena Ricardo *et al*. Case, while the State requested that the petitioner pay its costs and expenses,[464] the Court did not have to rule on the matter as it ruled against the State.

In our opinion, reimbursement of the State's costs is not appropriate under any circumstances since they are a part of the cost assumed by the States parties to the Convention to safeguard respect for human rights through the mechanism of a collective guarantee.

## F. PUBLICATION OF THE JUDGMENT

Under Article 30 of its Rules, the Court orders the publication of its judgments and other decisions, including concurring and dissenting opinions when they meet the requirements of the Rules. The Court also publishes the documents from the case file (except those that are considered irrelevant or unsuitable for publication), records of the hearings and any other document that it deems pertinent.

The publication to which Article 30 refers is the official publication (Series C on resolutions and judgments) issued by the Secretariat of the

462. I/A Court H.R., *Genie Lacayo Case. Preliminary Objections*. Judgment of January 27, 1995. Series C No. 21, para. 6.

463. *Ibid*., para. 52 of the expository part and operative para. 4.

464. *Baena Ricardo et al. Case, supra* note 58, paras. 21 and 198.

Court. The Court has occasionally ordered, as a form of satisfaction, the publication of part of its judgments in the Official Gazette of the State in question, in a daily newspaper of national circulation or in the bulletin of the National Police and the Armed Forces.[465]

The judgments are published in the working languages of the case. The other documents are published in their original language.

Documents on cases already adjudicated are deposited in the Court's Secretariat and are accessible to the public, unless the Court decides otherwise.

## G. NOTIFICATION, COMPLIANCE AND EXECUTION OF THE JUDGMENT

The adopted judgment is notified to the parties by the Secretariat. Pursuant to Article 58.2 of the Court's Rules, the texts, legal arguments and votes remain secret until the judgment has been notified to the parties.

The Court's judgments are fully binding. Under Article 68.1 of the Convention, the States parties undertake to comply with the Court's judgment in any case to which they are parties. The part of the judgment that stipulates compensation may be executed in the respective country in accordance with the domestic procedure governing the execution of judgments against the State.[466] This may be illusory or insufficient in cases where the national courts have not offered adequate guarantees to prevent the initial violation of human rights. The Court has thus requested States in question to report periodically on the measures taken to comply with its judgments.[467]

With respect to the compliance of the Court's orders in the Velásquez Rodríguez and Godínez Cruz Cases, in notes of February 14 and April 8, 1991 the Government of Honduras informed the Court of its compliance

465. *Case of the Caracazo. Reparations, supra* note 49, para. 128; *Case of Las Palmeras. Reparations, supra* note 49, para. 75; *Case of Juan Humberto Sánchez, supra* note 49, para. 171 and *Case of Bulacio, supra* note 15, para. 145.

466. Article 68.2 of the Convention.

467. *The Mayagna (Sumo) Awas Tingni Community Case, supra* note 85, para. 173 and operative para. 8 and *Case of Juan Humberto Sánchez, supra* note 49, para. 201 and operative para. 19.

with the judgments on compensation but the notes did not refer to compliance with the decisions of August 17, 1990 on the interpretation of the judgments.[468] The State later reported that it had paid what remained of the compensation established in the Court's judgments and, therefore, the Commission and the State requested that both cases be definitively closed. The Court thus concluded that there had been compliance with its judgments and closed both cases.[469]

In the Gangaram Panday Case, on February 4, 1997 the Court exhorted the Government of Suriname to comply with its judgment of January 21, 1994 and to make every effort to locate the beneficiaries of the compensation or, if not possible, to deposit the amount in a banking trust. On April 15 the State informed the Court that it had deposited $10,000 in a special account in the name of the victim's next of kin and on July 16, in a note dated the previous day, the Commission informed the Court that it had received information that the representative of Mrs. Panday had entered into contact with the State. On that same date, the Commission also informed that Mrs. Panday had requested that the payment be made through the Embassy of Suriname in the Netherlands, where she resided. As the State had deposited the sum ordered in its judgment in an account in the name of the beneficiaries, the Court, by resolution of November 27, 1998, decided that the State had complied with its judgment and closed the case.[470]

In the Genie Lacayo Case, after the State informed the Court that it had given a notary public $20,000 in the name of Raymond Genie Pañalba, which he had refused in a letter to the Court, the latter decided to close the case as the State had complied with its judgment.[471]

In El Amparo Case, although the period to comply with the Court's judgment elapsed on March 20, 1997, there has only been a partial

468. I/A Court of H.R., ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1991, General Secretariat of the Organization of American States, Washington, D.C., 1992, p. 9.

469. *See* the Orders of the Court of September 10, 1996 in the Velásquez Rodríguez and Godínez Cruz Cases, in ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1996, General Secretariat Organization of American States, Washington, D.C., 1997, pp. 209-215.

470. *See* the Order of the Court of November 27, 1998, in ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1998, General Secretariat of the Organization of American States, Washington, D.C., 1999, pp. 531-534.

471. *See* the Order of the Court of August 29, 1998, in *ibid.*, pp. 355-357.

compliance by the State to date. The Court has received several briefs submitted by the State and by the victims' next of kin, which refer not only to the payment of compensation but also to the investigation of the acts and the punishment of those responsible.

The State in the Caballero Delgado and Santana Case presented a brief in which it manifested that, due to internal problems, it was not possible to create the trusts ordered by the Court and requested that the Court modify its judgment on reparations. On December 22, 1998, the Court asked the State to clarify certain expressions contained in its request.

In the Neira Alegría *et al*. Case, although on August 30, 1998 the representatives of the victim's next of kin reported that they had received the corresponding compensation, they indicated that the State's obligation to make every effort to locate and identify the remains of the victims and hand them over to their next of kin was still pending. On December 9, 1998, the Court requested the State to submit a report on its compliance with operative paragraph four of its judgment on reparations in which it ordered Peru to make every effort to locate and identify the remains of the victims and deliver them to their next of kin.[472]

In the Benavides Cevallos Case on June 12, 1998 Ecuador informed the Court that on that same day the President of the Republic had presented a check for one million dollars to the parents of Consuelo Benavides Cevallos. The Secretariat of the Court requested that the Commission present its observations on the document submitted by the State, as well as any other information on compliance with the judgment.

Notwithstanding the clear terms of Article 68 of the Convention, States occasionally do not comply with the Court's judgments. One of the first examples of open defiance was presented in the James *et al*. Case in which Trinidad and Tobago refused to comply with the provisional measures adopted by the Court. On June 14, 1998 the Court ratified an order of its President in which he had issued urgent measures at the Commission's request to preserve the life of five persons on death row since their execution would make illusory any decision that was taken in

472. *Ibid*., pp. 34-35.

relation with these cases that were before the Commission. The Commission later requested that the measures adopted in this case be extended to three persons who were in the same situation. Although the Court convoked the State and the Commission to a public hearing on August 28, 1998, Trinidad and Tobago informed the Court that it would not attend the hearing and stated that it would not accept any responsibility because of the Commission's lack of organization in its proceedings with respect to the cases of persons who were on death row in accordance with the domestic law of that State. In a communication to the Prime Minister of Trinidad and Tobago the President of the Court stated that the failure to appear by a State party at a duly convoked public hearing was without precedent in the history of the Court and that the Court was seriously concerned for the implications and effects of this decision and reiterated the importance of appearing before the Court to comply with its obligation as a State party to the Convention.[473] The hearing was held without the presence of the State and on August 29, 1998 the Court adopted an order ratifying the decisions taken by its President in the case and ordered the State to take all measures necessary to preserve the lives and physical integrity of the alleged victims so as to not impede the processing of their cases before the inter-American system. The Court also recalled that the States parties to the Convention must comply in good faith (*pacta sunt servanda*) with all its provisions, including those relating to the operation of the two organs of protection and those that ensure its purposes. To ensure the Convention's fundamental objective of guaranteeing the effective protection of human rights, States must not take any action that would frustrate the *restitutio in integrum* of the rights of the alleged victims.[474] The State responded that in the future it would not refer again to this matter with either the Court or the Commission. Pursuant to Article 65 of the Convention, the Court informed the OAS Assembly General that Trinidad and Tobago had not complied with its decisions in this case and requested that it urge the State to comply with the resolutions of the Court.

473. *See* the letter of August 19, 1998 of the President of the Court to the Prime Minister of Trinidad and Tobago, in *ibid*., p. 297 *et seq*.

474. Order of the Court of August 29, 1998, Provisional Measures requested by the Inter-American Commission on Human Rights with respect to the Republic of Trinidad and Tobago, James *et al*. Case, in *ibid*., pp. 337-347, para. 7 of the considerations and operative paras. 1-2.

The Court also observed that the denunciation of the Convention by Trinidad and Tobago, which was without precedent in the history of the inter-American system, had no effect on the compliance of the provisional measures since Article 78.2 of the Convention provides that a denunciation does not release the State party from its obligations under the Convention with respect to any act that may constitute a violation of those obligations and that has been taken by the State prior to the effective date of denunciation.[475] The General Assembly was informed of this grave situation in order that it, in the spirit of Article 65 of the Convention, as the supreme political organ of the inter-American system support the decisions of the Court and urge Trinidad and Tobago to comply with them. However, the General Assembly, held in Guatemala June 6-11, 1999, took no decision on the matter. Although it had been frequently asserted, even by the OAS Secretary General himself, that the protection of human rights is the OAS' most important function, both the OAS Committee on Legal and Political Affairs and its Permanent Council did not mention in the operative part of their recommendations the Court's very timid request to urge Trinidad and Tobago to comply with its decisions without implying any type of sanction. Given this situation, the Court sent two notes to the President of the Permanent Council noting its surprise at such omission and emphasizing the importance for the effectiveness of the inter-American system for the protection of human rights that the most important body of the Organization consider and back its decisions. In those communications it also noted that, pursuant to Article 65 of the Convention, the recommendations of the Court must be considered and decided by the General Assembly. The full Court signed a note to the Secretary General recalling that pursuant to Article 65 the General Assembly must consider and rule on the recommendations that the Court might make when a State has not complied with its judgments, emphasizing that what had occurred affected the very essence of the inter-American system for the protection of human rights, the maximum expression of which is the binding nature of the decisions issued by its jurisdictional organ. Unfortunately, the General Assembly preferred to ignore the transcendence that this case had

475. *Ibid*., pp. 35-37.

and took no action in the first case of non-compliance of a decision of the Court.

The most critical situation occurred when Peru, through different organs of the State, including the President of the Republic, the Supreme Court and the Supreme Council of Military Justice, declared "unenforceable" the judgments of the Inter-American Court in the Loayza Tamayo (Reparations) and Castillo Petruzzi *et al*. Cases. After the fall of the Fujimori regime, the new government rapidly adopted the necessary measures to comply with the Court's judgments.

In the Loayza Tamayo Case on October 20, 1997 Peru informed the Court that in compliance with the judgment on the merits it had released María Elena Loayza Tamayo. With respect to the judgment on reparations of November 27, 1998, however, a Chamber of the Supreme Court of Peru specializing in the "illegal trafficking of drugs" rendered a decision on June 14, 1999 in which it assumed the right to review the judgments of the Inter-American Court and reopened a debate on preliminary objections, which had been resolved on January 31, 1996 and which Peru had implicitly accepted by implementing the judgment on the merits and by requesting an interpretation of the judgment that was rejected on March 8, 1998. By its nature, a request of interpretation does not question the validity of the judgment; its only purpose is the clarification of the Court's decision. The Supreme Court Chamber held itself to be qualified to reopen the debate on the alleged failure to exhaust internal legal remedies[476] and the admissibility of the original petition before the Commission. It also questioned the facts established in the judgment on the merits that had been accepted by the State and it held that the American Convention was subordinated to the Constitution of Peru, which conferred on it "the status of a law," and confused a treaty in force and validly ratified with a judgment of an international tribunal on the basis of that treaty. The Supreme Court Chamber held that, since according to the Constitution a treaty that affects constitutional provisions must be adopted by the same procedure that is used to amend the Constitution, a judicial decision adopted in the context

476. Means of defense of the State that, in its opinion, "was inexplicably declared out of order…violating the principles of legality and due process of law set forth in Articles 139 and 205 of the Constitution of Peru."

of the implementation of an inter-American human rights treaty is subject to the constitutional order of the signatory States if their Constitutions provide supremacy over human rights treaties or conventions. Finally, the Chamber stated that supervision of the compliance of the Inter-American Court's decision as ordered in the judgment is a competence that has not been assigned to that Court by the instruments of which Peru is a signatory and, therefore, is "unenforceable." As of November 27, 2003, Peru had not fully complied with that judgment.

At the same time, in the Castillo Petruzzi *et al*. Case the Supreme Council of Military Justice of Peru, by means of a resolution of its Plenary Chamber composed of judges who were not lawyers also assumed the function of reviewing the Inter-American Court's judgments.[477] The Supreme Council held that, according to Peruvian law, military justice is autonomous and independent. It also debated the facts that were proved in the proceedings before the Inter-American Court, considered as "improper" the qualification that had been attributed to certain facts and pointed out that the Court had overstepped its competence in declaring the incompatibility of Peruvian laws with the Convention, a matter that could only be done under its advisory jurisdiction at the request of the State. The resolution discusses the arguments of the Inter-American Court, affirms that the Convention is subordinated to the Constitution of Peru and objects that in its interpretation of the Convention, the Court pretends to subject the Constitution to the Convention. It also characterized the judgment of the Court as "arbitrary, wrong and anti-Constitutional, which harms the interest of the Peruvian people." The Supreme Council gave its own interpretation to numerous provisions of the Convention as well as to the Commission's Statute and Rules. In addition, it maintained that the Court had ruled on questions that were not denounced to the Commission or requested of the Court and, therefore, its ruling was *extra petita* and invalidated the judgment. Curiously, in pointing out that the Inter-American Court in ordering a new trial for the accused did not take into consideration that the conclusions would be the same with the serious inconvenience that the passage of time would make justice ineffective, a position that is

477. *See*, the Resolution in *El Peruano* of Saturday, June 12, 1999, in the section on Legal Norms, pp. 174138-174141.

difficult to understand since the accused were under preventive detention. Another passage of the resolution points out the risk that "other terrorists guilty of treason by military justice would take advantage of the judgment to recur to the inter-American jurisdiction." According to the Supreme Council it would be clearly shown "that the judgment of the Inter-American Court of Human Rights lacks impartiality and violates the Political Constitution of the State, thus making impossible execution" and decided to declare "unenforceable" its judgment in that case.

Peru's claim in declaring "unenforceable" the Court's judgments in the Loayza Tamayo and Castillo Petruzzi *et al*. Cases was without precedent in the history of the inter-American system for the protection of human rights and cannot be compared to the refusal of Trinidad and Tobago to comply with the provisional measures ordered by the Court in the James *et al*. Case. Moreover, by attributing to itself the function of "reviewing" the Court's judgments, the Peruvian tribunals attempted to subordinate its validly acquired international commitments to its Constitution, which certainly does not correspond to the nature of international law and would make the inter-American system for the protection of human rights completely ineffective. Peru ignored that, under Article 33 of the Convention, the only organs of supervision of the system are the Commission and the Court and that, pursuant to Article 68 of the Convention, States have undertaken to comply with the Court's decision in any case to which they are parties. Similarly, Article 26 of the Vienna Convention on the Law of Treaties provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith.

While the Convention does not provide for a coercive mechanism to force compliance of the Court's judgments, it does provide for the intervention of a political organ in the event of non-compliance. Pursuant to Article 65 of the Convention, the Court's Annual Report to the OAS General Assembly indicates, in particular, the cases in which a State has not complied with its judgments and makes the pertinent recommendations. Although Article 65 refers to the report that the Court presents "to each regular session" of the General Assembly, this does not mean that the failure to comply with a judgment could not be raised at a special session

of the General Assembly, at the initiative of a State, or that the Court could not call to the attention of the OAS Permanent Council, when the General Assembly is not in session, cases that might require the urgent adoption of the appropriate measures, especially in situations concerning the failure to comply with provisional measures ordered by the Court.[478]

In any event, there is no provision for the type of measures that the General Assembly could adopt or for the coercive mechanisms that it could use to achieve compliance of the judgment. In certain cases, however, the mere possibility that the matter might be debated before an international body could, *per se*, dissuade a State from not complying with the Court's judgment. Since the protection of human rights is the most important function of the OAS, in extreme cases there is always the possibility that, taking into account that under Article 3 of the OAS Charter international law is the standard of conduct of States in their reciprocal relations, that good faith must govern relations among States and that the American States proclaim the fundamental rights of the person and whose Article 17 states that "respect for and the faithful observance of treaties constitute standards for the development of peaceful relations among States," it be determined that the current Government of Peru or of Trinidad and Tobago or of Venezuela, by their very acts, have placed themselves outside the inter-American system, as was done to the Government of Cuba in 1962.[479]

The Court's judgment must be notified to the parties to the case and transmitted to the States parties to the Convention. The proceedings are terminated when the judgment has been duly notified.

From the beginning, the Court has reserved the right to supervise compliance of its judgments, leaving the cases open until its judgments are fully implemented. In the exercise of this power, the Court has requested the States in question that they inform periodically on the measures taken to comply with a judgment.[480] It has also requested the Commission to

478. *See*, in this respect, Thomas Buergenthal, *The Inter-American Court of Human Rights*, in THE AMERICAN JOURNAL OF INTERNATIONAL LAW, vol. 76, No. 2, 1982, p. 241.

479. *See*, Resolution VI of January 1962 of the Organ of Consultation of the Organization of American States.

480. *See, e.g.*,*The Mayagna (Sumo) Awas Tingni Community Case*, *supra* note 85, para. 173, operative para. 8 and the *Case of Juan Humberto Sánchez*, *supra* note 49, para. 201, operative para. 19.

present its observations on the reports of the States as well as any other information on compliance with its judgment.[481] Neither the Convention nor the Court's Rules indicate the procedure to be followed to monitor compliance of the Court's judgments. The Court has carried out this monitoring using written proceedings in which the State presents the reports that are requested by the Court and the Commission and the victims or their representatives make observations to those reports. The Court has also adopted the practice of issuing orders or sending communications to the State in question in order to, *inter alia*, express its concern on the points of the judgment pending compliance, urge the State to comply with its decisions, request the State to furnish detailed information on the steps taken to comply with the measures of reparations and provide instructions for compliance as well as to clarify aspects about which there is a disagreement between the parties on the execution or implementation of the reparations.[482] As of February 2004, the Court had not convoked a public hearing at the stage of supervision of the compliance of a judgment, but it has held that it may do so, if considered convenient and necessary.[483]

In monitoring compliance of its judgments, the Court has occasionally modified what it had ordered. In the Caballero Delgado and Santana Case the Court authorized the payment of compensation to the minor beneficiaries in certificates of deposit instead of creating the trust ordered in the decision on reparations because the investment in certificates was more favorable to the beneficiaries. The Court also required the State to take the measures necessary so that the interests of the minors were not negatively affected by inflation.[484] In the Barrios Altos Case, in response to a consultation by the State on compliance with the decision on reparations as to whether the administrative and financial expenses of the trusts for the minors could be deducted to the detriment of the principal and against the interests of the beneficiaries, the Court responded that such expenses

481. ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1998, supra note 470, pp. 32-33.

482. I/A Court H.R., *Case of Baena Ricardo et al. Competence*. Judgment of November 28, 2003. Series C No. 104, para. 105.

483. *Ibid*., para. 106.

484. *Caballero Delgado and Santana Case. Reparations, supra* note 57, para. 61 and *Caballero Delgado and Santana Case. Compliance with the Judgment*. Order of the Court of December 4, 2001, para. 3 of the expository part and the Note CDH-10.319/643, of January 20, 1999.

should be borne by the State, which could not deduct any percentage of the reparations due the minors to the detriment of the principal deposited in the trust.[485] Similarly, in the Durand and Ugarte Case in which the State consulted the Court on whether the closing of the investigation of the allegations relieved the State of its responsibility as established in the judgment, the Court resolved that the State must continue to investigate the acts and prosecute and punish those responsible, reopening the respective judicial proceedings.[486] In the Baena Ricardo *et al*. Case the Court issued a second order on compliance with the judgment in which it provided general guidelines to resolve issues relating to the implementation of the measures of reparation ordered in the judgment with respect to which there existed a controversy between the parties. Among those general guidelines, the Court referred to what the State had to do to comply with the operative part of its judgment regarding the determination of the amount of the unpaid salaries and other labor rights of the petitioners and reinstatement to their former positions, which had to be done observing the guarantees of due process of law and according to the legislation applicable to each victim, as the judgment had ordered.[487] The Court held that it has the inherent power to issue, at the request of a party or *motu proprio,* instructions for the compliance or implementation of the measures of reparation that it had ordered so as to comply effectively with the function of overseeing the faithful compliance of its decisions. The decisions issued by the Court in monitoring compliance relate directly to the reparations that it ordered and, therefore, do not modify its judgments but clarify their scope in the light of the conduct of the State and have as their purpose that compliance and implementation of the reparations are carried out as indicated in that decision and in the way that best protects human rights.[488]

The Court's authority to supervise compliance of its decisions was challenged for the first time in the Loayza Tamayo Case when the Chamber

485. *Barrios Altos Case. Reparations, supra* note 336, para. 35 and *Barrios Altos Case, Compliance with the Judgment.* Order of the Court of November 28, 2003, para. 15 of the expository part, paras. 7-13 of the considerations and operative para. 2.

486. *Durand and Ugarte Case. Compliance with the Judgment,* Order of the Court of June 13, 2002, para. 4 of the expository part and operative para. 2.

487. *Baena Ricardo et al. Case. Compliance with the Judgment,* Order of the Court of November 22, 2002, paras. 6-7 and 9 of the considerations and operative paras. 1-2.

488. *Case of Baena Ricardo et al. Competence, supra* note 482, para. 132.

of the Supreme Court of Peru, specializing in the "illegal trafficking of drugs," rendered a decision on June 14, 1999 in which, *inter alia*, it stated that supervision of the compliance of the Inter-American Court's decision as ordered in its judgment is a competence that has not been assigned to that Court by the instruments of which Peru is a signatory and, therefore, is "unenforceable."

The most serious objection was presented in the Baena Ricardo *et al*. Case in which the State paid the compensation for non-pecuniary damages past the deadline, set the monetary compensation arbitrarily without legal justification or support, ignoring its own legislation, and deducted from it taxes on the income. After having presented various briefs on compliance with the judgment and after two Court orders on compliance that requested the State to present a detailed report on the matter, in a brief presented more than two years after the adoption of the judgment on the merits and reparations the State argued that the stage of monitoring compliance with the judgment was a post-judgment stage that was not included in the norms governing the Court's jurisdiction and proceedings and that by means of the order of November 22, 2002 the Court had interpreted its own judgment.[489] On June 6, 2003 the Court adopted a third order on compliance with the judgment to which the State responded on July 30 pointing out, *inter alia*, that it considered that, with its order on compliance with the judgment, the Court had interpreted its own judgment and that the monitoring stage of compliance was a post-judgment stage that was not within the judicial sphere of the Court, but was strictly political and, therefore, it was not provided for in the norms governing the jurisdiction and procedures of international courts.[490] Among other arguments, Panama claimed that a) Article 65 of the Convention clearly establishes that only the OAS General Assembly has the function of monitoring compliance with the Court's judgments, b) that provision does not grant the Court competence to monitor compliance with its judgments, c) it is not possible for the Court, through its constant practice, to extend unilaterally its jurisdictional attributes to create a monitoring

489. *Ibid*., paras. 4, 12, 21 and 26.
490. *Ibid*., paras. 37, 41 and 54.

function with regard to its judgments, counter to the provisions of the Convention and its Statute, d) the Court cannot create such a function from its competence to define its own jurisdiction, e) in line with its interpretation of Article 65 of the Convention, Panama cited Article 94.2 of the UN Charter, which expressly recognizes that the function of monitoring the decisions of the International Court of Justice is for the Security Council and not the International Court of Justice, which has never attempted to monitor compliance of its decisions because it recognizes that this function is the exclusive competence of the Security Council, f) similarly, the European Convention on Human Rights grants the function of monitoring compliance with the decisions of the European Court of Human Rights to the Committee of Ministers of the Council of Europe, g) it is not possible to consider as jurisprudential practice one as recent as that of the Inter-American Court, which has only had fourteen years' experience in this matter, h) although the Court may invite the parties to the case to provide, on a voluntary basis, the information that it considers necessary for the drafting of the Annual Report that it is to submit to the OAS General Assembly, the monitoring function of its decisions that the Court has assumed has no juridical basis, i) the orders of November 22, 2002 and June 6, 2003 regarding supervision of the compliance of judgment were issued beyond its competence (in *excès de pouvoir*) since through them the Court interpreted its own judgment unsupported by Article 67 of the Convention (and without having been asked by any of the parties to the case), issuing new decisions on aspects related to the merits and reparations that had already been considered in its judgment of February 2, 2001, j) the affirmation that all bodies with jurisdictional functions have the inherent authority to determine the scope of their orders and judgments has no grounds in general international law or in the Convention, k) the competence of an international tribunal to determine its own jurisdiction refers to its jurisdictional power to decide the matter in dispute and not to issue subsequent decisions that directly counteract the *res judicata* effect of the judgment on the merits, l) Article 68 of the Convention obligates compliance with the judgments but not of the Court's orders or other rulings, m) with respect to the proceedings for monitoring compliance of the judgment, it is not possible to consider that a dispute exists over the simple reception of reports and comments without the formalities of any

proceeding and in accordance with a proceeding that is not contemplated in the Convention or the Court's Statute and n) neither the Convention nor the Statute provides for the possibility of a dispute with regard to the implementation of measures of reparation, but disputes should arise from matters related to the specific norms of the Convention.[491]

Panama's objection to the Court's authority to monitor compliance with its decisions led the Court, after receiving the observations of the parties, to deliver a judgment on this aspect of its competence.[492] The objection is, however, curious since in its judgment on the merits the Court decided that it would monitor compliance of that decision and the State even presented several briefs in which it informed the Court on the steps that it had taken to implement the judgment. Moreover, the State did not question the Court's competence to monitor compliance and presented, without protest, the report that was requested of it.[493] The Court observed that this was the first time a State party to a case had questioned that competence,[494] a function it carried out in all of its cases and which was invariably respected by the States. The Court recalled the States' obligation to comply with the decisions in the cases to which they are parties and referred to its competence to monitor compliance with its decisions and issue instructions and orders to ensure implementation of the appropriate measures. The Court pointed out that, pursuant to Article 67 of the Convention, its judgments must be complied with fully and promptly by the States and that under Article 68.1 the States parties undertake to comply with the judgment of the Court in all cases to which they are parties.[495] The Court has held that, with respect to implementation in the area of domestic law, the reparations ordered by the Court are governed in all aspects by international law and States may not modify them or fail to comply with them by invoking provisions of domestic law. In addition, Article 63.1 of the Convention confers on the Court a wide margin of judicial discretion to determine the measures to repair the consequences

491. *Ibid*., para. 54.
492. *Ibid*.
493. *Ibid*., paras. 117-118.
494. In fact, as has been indicated, in the Loayza Tamayo Case a Peruvian court had already challenged this attribute of the Inter-American Court, although this was not officially notified by the State.
495. *Case of Baena Ricardo et al. Competence, supra* note 482, paras. 59-60.

of a violation.[496] The States parties to the Convention must ensure compliance with the provisions of the Convention and their effects (*effet utile*) at the level of their respective domestic laws, a principle that applies not only in relation to the substantive norms of human rights treaties but also with respect to procedural norms such as those that refer to compliance with the Court's decisions.[497] The Court held that, as any body with jurisdictional functions, it has the inherent authority to determine the scope of its own competence. There is an assumption that the deposit of the instrument recognizing the Court's obligatory jurisdiction means that the State accepts the Court's right to resolve any controversy regarding its jurisdiction, such as the function to monitor compliance of its decisions. An objection or any other action by the State intended to affect the Court's competence is of no consequence, because under all circumstances the Court retains jurisdiction to determine its own competence *(compétence de la compétence)*, as it is the master of its own jurisdiction.[498] In the opinion of the Court, it cannot abdicate this prerogative that is also a duty imposed on it by Article 62.3 of the Convention, which provides that the Court has competence to hear all cases on the interpretation and application of the provisions of the Convention that are submitted to it, provided that the States parties to the case have recognized or recognize such jurisdiction, whether by special declaration or by special agreement. The recognition of the Court's contentious jurisdiction is a binding clause that does not admit limitations that are not expressly included in Article 62.1 and 62.2 of the Convention and that, given its fundamental importance, cannot be subject to unanticipated limitations that are invoked by the States Parties for reasons of domestic policy.[499]

The Court has held that its jurisdiction includes the authority to administer justice, which is not restricted to stating the law but also includes monitoring compliance of what it has decided. It is, therefore, necessary to establish and implement mechanisms or procedures for monitoring compliance with the judicial decisions, an activity that is inherent in the

496. *Ibid*., paras. 61-64.
497. *Ibid*., para. 66.
498. *Ibid*., paras. 68, 128 and 131.
499. *Ibid*., paras. 70-71.

jurisdictional function. Thus, monitoring compliance of its decisions is one of the elements making up its jurisdiction. To maintain otherwise would be to affirm that the Court's judgments are merely declaratory and without effect.[500] In this respect, it cites the jurisprudence of the European Court of Human Rights, which holds that the execution of the decisions of tribunals must be regarded as an integral part of the process since otherwise the right to resort to a tribunal would be illusory if the State's domestic legal order allowed a final and binding judicial decision to remain inoperative to the detriment of one of the parties.[501] According to the Inter-American Court, compliance of its judgments is strongly related to the right of access to justice, which is enshrined in Articles 8 and 25 of the Convention. The Court, however, has established that formal existence of the remedies is not sufficient. They must be effective and provide results or responses to violations of the human rights guaranteed by the Convention. The safeguarding of the individual in the face of the arbitrary exercise of public power is the primary purpose of the international protection of human rights, which must be genuine and effective.[502] The Court believes that to comply with the right of access to justice it is not sufficient that a final decision be issued in the respective appeal, declaring rights and duties or providing protection to persons; it is also necessary that there are effective mechanisms to execute those decisions or judgments so that the declared rights are effectively protected. The execution of such decisions or judgments should, therefore, be considered an integral part of the right of access to justice, understood in its broadest sense as also including full compliance with the respective decision. Otherwise, it would mean the denial of that right.[503] In its judgments, the Court decides whether a State is internationally responsible and, if so, orders the adoption of a series of measures of reparation to make the consequences of the violation cease, ensure the rights infringed and make reparation of the pecuniary and non-pecuniary damages produced by such infractions. Therefore, if

500. *Ibid*., para. 72.

501. *Ibid*., para. 81. The jurisprudence cited of the European Court of Human Rights is *Hornsby v. Greece*, judgment of March 19, 1997, para. 40, *Antonetto v. Italy*, Judgment of July 20, 2000 and *Immobiliare Saffi v. Italy*, Judgment of July 28, 1999, para. 63.

502. *Ibid*., paras. 74-78.

503. *Ibid*., paras. 82 and 129.

the State responsible does not execute domestically the measures of reparation ordered by the Court, it is denying the right of access to international justice.[504]

With respect to the juridical basis of its competence to monitor compliance of its decisions, the Court has stated that it is based on Articles 33, 62.1, 62.3 and 65 of the Convention as well as what is stipulated in Article 29.a, which concerns the interpretation of the Convention. The provisions of Article 30 of the Court's Statute and of Article 31.1 of the Vienna Convention on the Law of Treaties must also be borne in mind.[505] In addition, Article 33 of the Convention specifically provides that the Court is competent to hear the matters related to the fulfillment of the commitments made by the States parties to the Convention and pursuant to Article 62.3 of the Convention the Court is competent to hear all cases concerning the interpretation and application of the provisions of the Convention that are submitted to it, provided that the States parties to the case have recognized or recognize such jurisdiction, either by special declaration or by special agreement. It seems evident that among the matters related to the application of the Convention are all those regarding the monitoring of the Court's decisions. Unlike the inter-American system, Article 46.2 of the European Convention on Human Rights provides that the final judgment of the European Court be transmitted to the Committee of Ministers of the Council of Europe, which supervises its execution. In this respect, the Council of Europe has adopted norms that clearly establish the procedure that must be followed to monitor compliance with the decisions of the European Court. In spite of having followed the European model in many aspects, the American Convention does not establish a specific organ that is charged with supervising compliance with the Court's judgments. On the contrary, during the preparatory work of the American Convention it was preferred to give the Court a broad competence that would allow it to be an effective instrument for the jurisdictional protection of human rights.[506] Article 65 of the Convention provides that the Court

504. *Ibid*., para. 83.
505. *Ibid*., para. 84.
506. REPORT ON THE ORGANS OF PROTECTION AND GENERAL PROVISIONS, OEA/Ser.K/XVI/1.1, doc. 21 of November 1969, p. 5.

submit to the consideration of each regular session of the OAS General Assembly a report on its work during the previous year, indicating the cases in which a State has not complied with its judgments. The Court has held that, in adopting this provision, the intention of the States was to grant to the Court the authority to monitor compliance of its decisions and that it was the Court's responsibility to inform the General Assembly of the cases of non-compliance because it was not possible to apply Article 65 of the Convention unless the Court could monitor compliance with its decisions.[507]

On the other hand, Article 29.a of the Convention establishes that no provision of the Convention may be interpreted as "permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for" by the Convention. According to the Court, an interpretation of the Convention that did not allow an organ to monitor compliance of its judgments would run counter to the object and purpose of the treaty, which is the effective protection of human rights, and would deprive the beneficiaries of the Convention of the guarantee of the protection of such rights by the actions of its jurisdictional organ and the consequent execution of its decisions. To allow the States to comply with the reparations ordered in the judgments without adequate supervision would be the equivalent of leaving to their free will the implementation of what the Court had ordered.[508] The Court has interpreted Articles 33, 62.1, 62.3 and 65 of the Convention, as well as Article 30 of its Statute, in accordance with the object and purpose of the treaty, which is the protection of human rights, and pursuant to the principle of *effet utile*. These provisions are the legal grounds of the Court's authority to monitor compliance with its decisions. Moreover, to guarantee that a State complies with its duty to ensure enshrined in Article 63.1 of the Convention the Court has held that it must monitor the full compliance with its decisions. Otherwise, they would be illusory.[509]

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507 . *Case of Baena Ricardo et al. Competence, supra* note 482, para. 90.
508. *Ibid*., para. 95.
509. *Ibid*., para. 100.

To support its authority to monitor compliance of its judgments, the Court has also resorted to its constant and uniform practice and in the resulting *opinio juris communis* of the States parties to the Convention with respect to which the Court has issued various orders on compliance with its judgments. That *opinio juris communis* has been revealed because those States have shown a general and repeated attitude of accepting the Court's monitoring function, which is clearly and amply demonstrated by their presentation of the reports requested by the Commission as well as the observance of the Court's decisions when giving them instructions or clarifying aspects on which there is a dispute between the parties on compliance with reparations.[510] This is reinforced by the consent of the OAS General Assembly, which from the first cases has been informed by the Court of the proceedings in monitoring compliance with its judgments without that political organ arguing that such monitoring is a matter of the General Assembly's exclusive competence.[511] Very much to the contrary, in 1995 with respect to the Court's report, in supporting this practice the OAS General Assembly adopted a resolution urging the Government of Suriname that it inform the Court on its compliance with the decisions in the Aloeboetoe *et al*. and Gangaram Panday Cases.[512] In the Baena Ricardo *et al*. Case the Court observed that the consistent conduct of State itself, which did not object to the operative part of the judgment in which the Court pointed out that it would monitor compliance with the judgment, which presented numerous reports on compliance with the judgment and which did not object to the first resolution on compliance with the judgments, implied a recognition of the Court's authority to monitor compliance with the judgment on the merits and reparations. In addition, the Court observed that, in spite of questioning its monitoring function, the State continued to inform on the steps it had taken to comply with the judgment, which revealed its recognition of the Court's jurisdiction in this area.[513]

510. *Ibid*., para. 102.
511. *Ibid*., para. 110.
512. AG/RES.1330 (XXV-0/95) of June 9, 1995.
513. *Case of Baena Ricardo et al. Competence, supra* note 482, paras. 126-127.

# Chapter XVI

## THE AVAILABLE REMEDIES

Pursuant to Article 67 of the Convention, the Court's judgment is final and not subject to appeal. In a case in which a State requested an extension of the six months established in the judgment to negotiate the relevant reparations and compensation, a request that the Commission did not oppose, the Court repeated that its judgments are definitive and not subject to appeal and held that the request to extend the period established in its judgment was inappropriate.[1]

The fact that the judgment is final and not subject to appeal does not mean that a party cannot request that the meaning or scope of the judgment be clarified. Moreover, the remedy of revision before the same Court may be appropriate.

While the Court's judgment is definitive and not subject to appeal, it should be emphasized that, according to the terms of Article 29.2 of the Court's Rules, the decisions adopted by the President that are not purely procedural may be appealed to the full Court. In addition, Article 29.3 of its Rules provides that the Court's judgments and orders may not be contested in any way.

### A. INTERPRETATION OF THE JUDGMENT

In the event of a disagreement as to the judgment's meaning or scope, Article 67 provides that any of the parties may request that it be interpreted, provided that the request is presented within ninety days following its notification. The purpose of this remedy is to eliminate any doubt that may exist on the meaning or scope of a judgment.

1. I/A Court H.R., *El Amparo Case. Competence*, Order of September 21, 1995, paras. 4-5 of the expository part, para. 4 of the considerations and operative para. 2. The Court's order accepted that the parties could continue their conversations to reach an agreement and that, if an agreement was reached before the Court rendered its judgment on reparations and indemnifications, it would be reviewed by the Court in view of its responsibility to protect human rights.

### *1. WHO MAY REQUEST THE INTERPRETATION*

This is a matter that is available to all the parties to the controversy. There is no provision, however, for the Court, *motu proprio*, to modify its judgment. Panama alleged that the Court had done so in the Baena Ricardo *et al*. Case with respect to the Court's Order on the Compliance with the Judgment. Panama claimed that the Court had interpreted its own judgment,[2] an allegation that was obviously rejected by the Court.

The Commission has not been the only party to take advantage of this remedy.[3]

The State in question[4] has done so as has the victim of the violation who, according to the Court in the Cesti Hurtado Case, has standing to appear before the Court because Article 67 of the Convention and the Court's Rules allow the possibility of the Court interpreting its judgment at the request of any of the parties and, thus, Mr. Cesti could present his request autonomously during the proceedings.[5]

Under Article 23 of the former Rules of the Court,[6] the victim's representatives or his next of kin could only intervene autonomously at the stage of reparations and, therefore, could only request an interpretation

2. I/A Court H.R., *Case of Baena Ricardo et al*. *Competence*. Judgment of November 28, 2003. Series C No. 104, paras. 41 and 54.m and 54.n.

3. *See, e.g.*, I/A Court H.R., *Velásquez Rodrídguez Case. Interpretation of the Compensatory Damages Judgement* (Art. 67 American Convention on Human Rights). Judgment of August 17, 1990. Series C No. 9, para. 1; *Godínez Cruz Case*. *Interpretation of the Compensatory Damages Judgment* (Art. 67 American Convention on Human Rights). Judgment of August 17, 1990. Series C No. 10, para. 1 and *Barrios Altos Case. Interpretation of the Judgment on the Merits* (Art. 67 American Convention on Human Rights). Judgment of September 3, 2001. Series C No. 83.

4. *See, e.g.*, I/A Court H.R., *Loayza Tamayo Case. Interpretation of the Judgment of Reparations* (Art. 67 American Convention on Human Rights). Judgment of June 3, 1999. Series C No. 53, para. 2; *Blake Case. Interpretation of the Judgment of Reparations* (Art. 67 American Convention on Human Rights). Judgment of October 1, 1999. Series C No. 57, para. 2 and *Cesti Hurtado Case, Interpretation of the Judgment on the Merits* (Art. 67 American Convention on Human Rights). Judgment of January 29, 2000. Series C No. 65, para. 2.

5. *See, e.g.*, I/A Court H.R., *Cesti Hurtado Case. Interpretation of the Judgment of Reparations* (Art. 67 American Convention on Human Rights). Judgment of November 27, 2001. Series C No. 86, paras. 2 and 11.

6. Adopted by the Court at its XXXIV Regular Session, held September 9-20, 1996 and in force until May 31, 2001.

of a judgment on reparations. With the reform of the Rules,[7] Article 2.23 changed the definition of "parties of the case" to indicate that they are "the victim or the alleged victim, the State and, only procedurally, the Commission." In addition, Article 23.1 provides that, after the application is admitted, the alleged victims, their next of kin or their duly accredited representatives may present their requests, arguments and evidence autonomously at every stage of the proceedings. The representatives of the victims or their next of kin, therefore, may now request the interpretation of any judgment of the Court in cases that concern them.

The State is represented before the organs of the inter-American human rights system by the agent accredited as such or by whoever represents it in its international affairs, that is, the Head of State, the Head of Government or the Minister of Foreign Affairs. Although this representation is extended, in a limited way, to the diplomatic agent accredited to a State or to an international organization for the sole effect of relations with that State or organization, this is not applicable with respect to the Inter-American Court, which is not an organ of the OAS. Curiously, in the Suárez Rosero Case, the request for interpretation was made by the Attorney General of the State, who claimed to be the "only judicial representative of Ecuador" authorized to present such a request.[8] Following the instructions of the President of the Court, the Secretariat requested the accredited agent in the case to clarify whether, given the statement of the Attorney General, he should be considered as the agent for the proceedings on the interpretation of the judgment. The agent simply responded that, "except for the direct sending of the request by the Attorney General of Ecuador," the power conferred on the agent still existed.[9] It is not possible to conclude from the foregoing that the agent of the State had explicitly and unequivocally accepted as his the request for interpretation made by a public official who, regardless of his rank, does not represent the State in the international arena and who had not been accredited as the agent in the case. The Court, nevertheless, accepted the request for interpretation.

7. Adopted by the Court at its XLIX Regular Session, held November 16-25, 2000 and in force since June 1, 2001.

8. I/A Court H.R., *Suárez Rosero Case. Interpretation of the Judgment of Reparations* (Art. 67 American Convention on Human Rights). Judgment of May 29, 1999. Series C No. 51, para. 2.

9. *Ibid*., paras. 3 and 4.

## *2. THE APPROPRIATENESS OF THE INTERPRETATION*

The remedy has a very precise purpose and cannot be used to distort the purpose for which it has been conceived. Its admissibility is, therefore, conditioned to its purpose and to the nature of the judgments with respect to which an interpretation is requested.

### *a) The purpose of the interpretation*

According to the Court, a request for the interpretation of a judgment must not be used as a means of challenging the judgment but it must have the sole objective of unraveling the meaning of a judgment when one of the parties argues that the text of its operative paragraphs or considerations are unclear or imprecise, provided that those considerations affect the operative paragraphs. It cannot be used to request the modification or nullification of the judgment.[10]

Under Article 59 of the Court's Rules, requests for interpretation must precisely indicate the questions on the meaning or scope of the judgment to be interpreted. A former version of the Rules indicated, in its Article 48.1, that requests for interpretation had to indicate precisely the aspects of the operative paragraphs of the judgment that were requested to be interpreted. In the opinion of the Court, the operative paragraphs cannot be interpreted without reference to the considerations on which they are based, which means that isolated facts or descriptions or motives of the case that are not related to the operative paragraphs are not to be interpreted.[11] It is, therefore, not surprising that the Court did not admit the request for interpretation that the Commission presented collaterally to other requests that related to how the period to make the request was to be counted, which did not fully comply with the requirements of Article 59 because it did not indicate the aspects of the judgment to be clarified.[12]

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10. I/A Court H.R., *Ivcher Bronstein Case. Interpretation of the Judgment on the Merits* (Art. 67 American Convention on Human Rights). Judgment of September 4, 2001. Series C No. 84, para. 19; *Suárez Rosero Case. Interpretation of the Judgment of Reparations, supra* note 8, para. 20 and *Loayza Tamayo Case. Request for the Interpretation of the Judgment of September 17, 1997*. Order of the Court of March 8, 1998, para. 16.

11. I/A Court H.R., *Neira Alegría et al. Case. Requests of Review and Interpretation of the Judgment on Preliminary Objections of December 11, 1991.* Order of July 3, 1992, para. 25.

12. *El Amparo Case. Reparations*. Order of the Court of September 21, 1995, *supra* note 1, para. 1 of the considerations and operative para. 1.

Notwithstanding its meaning and purpose, it is possible that the remedy of interpretation may be abused for the sole purpose of obstructing and delaying the orderly and timely compliance of the Court's judgment.[13] It must be underscored that a request for interpretation is only appropriate when there is doubt on the meaning or scope of the judgment. The Court has stated that an interpretation of a judgment has as its purpose to make precise or clarify a judicial decision and it is not a recourse against what has been decided but a means to clarify issues already resolved.[14] In its opinion, the operative paragraphs of a judgment may not be interpreted without reference to the considerations on which they are based but this does not mean that isolated facts or descriptions or motives of the matter that are not related to the operative paragraphs should be interpreted, which is what the parties are definitively interested in. The Court has, therefore, rejected as inappropriate a request for interpretation in which the purpose was not the clarification of operative paragraphs of the judgment or the considerations that are directly related to them.[15] This remedy does not exist so that the parties may state their disagreement with what has been decided in the judgment,[16] but rather to clarify or make precise the meaning of what was decided.

In the Velásquez Rodríguez Case, the Government of Honduras opposed the Commission's request for interpretation arguing that the Court's judgment on compensation was perfectly clear and precise and did not require interpretation or clarification since it established in unequivocal terms the amount in lempiras of the trust to be set up and the annual interest rate on the principal. The State maintained that the Court chose the monetary unit of the country in which the judgment was to be executed without taking into consideration or conditioning the judgment

13. *See*, in this respect, the concurring opinion of Judge Buergenthal in the *Neira Alegría et al. Case. Requests of Review and Interpretation of the Judgment on Preliminary Objections of December 11, 1991*, *supra* note 11.

14. *Neira Alegría et al. Case. Requests of Review and Interpretation of the Judgment on Preliminary Objections of December 11, 1991, supra* note 11, para. 23.

15. *Ibid*., paras. 25 and 26.

16. Curiously, in the Baena Ricardo *et al*. Case, the Court incorrectly stated that "although it had the authority to request an interpretation of the judgment, owing to disagreement on the meaning and scope of the provisions relating to the Court's competence to monitor compliance with the judgment, the State did not use the procedural measures established in Article 67 of the Convention." *Case of Baena Ricardo et al. Competence, supra* note 2, para. 126.

on any possible decrease in the purchasing power of the currency nor did it set any other guideline as an adjustment index to maintain that purchasing power. In the State's opinion, the Commission was not requesting a clarification but rather a modification of the judgment by introducing elements that were not provided for in the judgment.[17] In rejecting the arguments of the State, the Court held that an interpretation of a judgment involves not only a clarification of the operative paragraphs of the judgment but also the determination of its scope, meaning and purpose, based on the considerations of the judgment.[18] The Court did not accept the Commission's petition that the State be obligated to pay additional sums to the compensation previously assigned to maintain constant the value of the original assets while the trust remained in effect because it considered that this would impose on the government an obligation that was not provided for in the judgment and, therefore, would exceed the scope of a mere interpretation.[19] The Court noted that, under the terms of Article 67 of the Convention, it is empowered to interpret its judgments whenever there is a disagreement as to their meaning or scope or when there are aspects whose meaning or scope is in doubt or controversial, which was not the case here because the petition referred to the non-compliance of the terms stipulated in the judgment.[20] However, since the Court in its judgment had reserved supervision of the payment of the compensation and had indicated it would close the case only after full payment was made, it concluded that it retained jurisdiction over the case and was empowered to rule on the consequences of the State's delay in paying the damages.[21]

17. *Velásquez Rodrídguez Case. Interpretation of the Compensatory Damages Judgment*, *supra* note 3, para. 21. Also, with respect to the challenge to the amplification of the request for clarification, para. 24.

18. *Ibid*., para. 26.

19. *Ibid*., para. 33.

20. *Ibid*., para. 36.

21. *Ibid*., para. 37. By means of Note of October 17, 1990 the Government of Honduras stated its willingness to comply with the judgments on damages of July 21, 1989 without the extra charge of the additional compensation stipulated in the decisions of August 17, 1990, paying only the damages originally determined by the Court. The President of the Court responded that if the fiduciary agent is not capable of carrying out his functions in the most favorable conditions according to the practice in Honduras, the Court, in the exercise of the powers that it reserved and maintained to supervise compliance of its judgments, would have to study the matter. ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1990, General Secretariat of the Organization of American States, 1994, Appendices X and XI, pp. 91-96.

This question was more evident in the Loayza Tamayo Case in which the State requested an interpretation of various aspects of the judgment on reparations. The request asked the Court to clarify the concept and extent of the nuclear family that the Court used in determining the beneficiaries of the measures of reparation. The State also referred to the difficulties in reincorporating Mrs. Loayza Tamayo, as ordered by paragraph 192.1 of the judgment on reparations, into teaching in public institutions since at that moment she resided in Chile. In addition, Peru referred to the supposed differences in the criteria adopted by the Court in determining the "amount of the reparations" with respect to previous cases.[22] The Commission objected to the relevance of this request because it considered that it was not so much a request for interpretation but an attempt to have the judgment reversed and because such a request consisted "more like an interrogation of the Court, as its comments and questions go to the motives and grounds for the judgment, but not about its operative paragraphs."[23] The Court recalled that the jurisprudence of the European Court of Human Rights established that an interpretation of a judgment may not alter those issues that are obligatory and held that an examination of the request presented by Peru showed that there was no ambiguity about the meaning or scope of the judgment on those three aspects, since in its request the State only submitted to the Court questions of fact that had already been raised during the proceedings and on which the Court had already adopted a decision. The Court considered that, with respect to those points, it was neither useful nor necessary to examine the State's questions since the meaning and scope of the provisions on which the interpretation was asked were clear from a reading of the first and fourth operative paragraphs of the judgment on reparations and also because those points were clearly explained in paragraphs 92, 102-105 and 139-143 of the judgment.[24] In this same request for interpretation, after indicating that the payment of fees ordered in the judgment "would appear" to be exempt from any existing or future taxes in Peru, the Court was asked to indicate the grounds or reasons for ordering such an exemption and its authority to exonerate from

22. *Loayza Tamayo Case. Interpretation of the Judgment of Reparations*, *supra* note 4, para. 5.
23. *Ibid*., para. 11.
24. *Ibid*., paras. 14-16.

the payment of taxes the amounts received by professionals for their services.[25] The Court decided that it was not necessary to issue a ruling on each of the questions formulated by the State in this regard, since they did not raise doubts on the interpretation of the judgment but on the Court's motives in delivering the judgment.[26]

Similarly, in the Suárez Rosero Case the State requested an interpretation stating, *inter alia*, its disagreement with the part of the judgment that exempted the costs and expenses from the payment of taxes in Ecuador. The Court observed that the request did not refer to aspects of the meaning or scope that were doubtful or obscure but that the State was raising its disagreement with the part of the judgment that established that such payment was exempt of taxes. However, the Court, not following its own jurisprudence, held that, even though the scope of the decision was clear as written, it was useful to clarify the point raised by the State on the reasons that led to ordering the exemption of taxes on the costs and expenses.[27]

There is always the possibility that the result of the request is a judgment as confusing and contradictory as that on which the interpretation was requested. In the Cesti Hurtado Case the Court was asked to clarify whether its judgment on reparations had ordered that Mr. Cesti be paid a certain amount, which should be established according to the procedures of domestic law, or whether the matter had been remanded to the national courts for a determination, according to the procedures of domestic law, whether such compensation was appropriate. In the second place, the Court was asked whether the State was under the obligation to initiate the relevant procedures domestically for payment of the indemnification or whether the victim must initiate them in order to collect the compensation due to him. In its judgment on the interpretation, the Court stated that in accordance with its judgment on reparations "the State must set the indemnification due to Gustavo Adolfo Cesti Hurtado for material damages caused, for which purpose it must facilitate, in good faith, access by Mr.

25. *Ibid*., para. 20.
26. *Ibid*., para. 26.
27. *Suárez Rosero Case. Interpretation of the Judgment of Reparations*, *supra* note 8, paras. 11, 18 and 20-21.

Cesti to the appropriate domestic legal procedures for the victim to obtain the aforementioned indemnification, if it were in order, within a reasonable time."[28]

### *b. The judgments for which the remedy is appropriate*

In principle, Article 67 of the Convention may be interpreted broadly by allowing this remedy for any judgment, whether it be on preliminary objections, the merits, reparations or any other matter that has been the object of a Court ruling, such as would be the case of an order on provisional measures or the execution of a judgment. That interpretation, which was once plausible, is no longer so after the reform of the Court's Rules, unless the Court decides otherwise. Pursuant to Article 59.1 of the current Rules, this remedy is only appropriate with respect to judgments on the merits or on reparations.

The current provision is in line with the position of Judge Piza Escalante, who believed that the remedy of interpretation was only appropriate with respect to the judgment, that is, the final judgment that decides the merits of the case. This opinion was shared by the Commission, which, in opposing a request for interpretation by Peru with respect to a decision on preliminary objections, argued that, under Article 67 of the Convention, a request for interpretation must refer specifically to final judgments and not to orders that do not decide the merits and that only the operative paragraphs of the judgment may be interpreted.[29] On the other hand, Piza's distinction between final and interlocutory judgments does not appear to have a very practical importance because, in his opinion, while the kind of interpretation referred to in Article 67 does not directly refer to the latter, they are "always subject to others that, whether by means of remedies or simply through adversary jurisdiction, interpret, complement, clarify or add to or even modify or revoke them."[30]

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28. *Cesti Hurtado Case. Interpretation of the Judgment of Reparations, supra* note 5, operative para. 34.3.

29. *Neira Alegría et al. Case. Requests of Review and Interpretation of the Judgment on Preliminary Objections of December 11, 1991, supra* note 11, para. 12.

30. *See* the separate opinion of Judge Piza Escalante in the *Velásquez Rodríquez Case. Interpretation of the Compensatory Damages Judgment, supra* note 3.

### *3. WHEN TO PRESENT IT*

The Court has ruled, in passing, on the peremptory nature of the period established in Article 67 of the Convention, which provides that the request must be presented within 90 days following notification of the judgment.[31] In El Amparo Case in which the Court ordered that the reparations and the form and amount of the indemnification be set by common agreement between the Commission and Venezuela within six months of notification of the judgment, the Commission requested that the Court allow, due to the nature of its decision, the possibility that the parties request an interpretation be maintained past the 90-day term provided for in Article 67 and that this period should not begin from the date of notification but from the moment in which, if applicable, the parties did not arrive at a settlement.[32] Since the period granted to the parties to establish the reparations and the form and amount of the indemnification was still pending, the Court did not rule on the Commission's requests, leaving it implicit that they were not absolutely inappropriate.[33]

### *4. THE APPLICABLE PROCEDURE*

Article 59 of the Court's Rules governs the procedure to be followed for requests for interpretation. They must be filed with the Secretariat and must precisely state the issues relating to the meaning and scope of the judgment whose interpretation is requested. The Secretariat informs the parties to the case[34] and invites them to submit their written comments within a period established by the President. The former version of the Rules required that the States parties to the case be notified and, if applicable, the Commission.

A request for interpretation is considered, whenever possible, by the same judges who delivered the respective judgment. However, in the

31. *Velásquez Rodríguez Case. Interpretation of the Compensatory Damages Judgment*, *supra* note 3, para. 15.

32. *See* the brief of April 18, 1995 of the Commission in El Amparo Case and cited by the Court in its Order of May 17, 1995, para. 2.a and b.

33. El Amparo Case, Order of May 17, 1995, para. 5 of the considerations and operative paras. 1-2.

34. As has been indicated, pursuant to Article 2.23 of the current Rules of the Court, "parties to the case" are understood to be the victim or the alleged victim, the State and, only procedurally, the Commission.

event of death, resignation, impediment, excuse or disqualification, the judge in question is replaced pursuant to Article 16 of the Rules.

A request for interpretation does not suspend implementation of the judgment. The Court determines the procedure to be followed and renders its decision in the form of a judgment.

The Court has held that the period granted to the parties to submit their written comments on the request is not peremptory and has implicitly admitted that it may be extended. In the Suárez Rosero Case, the Secretariat of the Court on May 4, 1999 transmitted a copy of the request for interpretation to the victim and, by order of the President, invited him to present the written comments that he deemed relevant no later than May 14, 1999. The victim, however, presented his comments on May 21, stating that he had not received the invitation until May 13 and, therefore, was not able to answer within the period set by the President.[35] The Court verified that the note of the Secretariat was transmitted by fax on May 5 to one of the victim's representatives and, therefore, it did not accept the reason given. Nevertheless, considering that the brief was submitted within a reasonable period after the deadline, that the proceedings were not delayed pending its receipt and that the proceedings on interpretation have their own characteristics that make useful for the Court to hear the views of all interested parties, the Court deemed it appropriate to consider the victim's comments.[36]

One of these characteristics is that the Court's President establishes the period for the parties to the case to submit their comments. This period, which is not stipulated in the Rules and is at the discretion of the President, may be extended in the event that one of the parties so requests.[37] It is also possible for the parties to submit additional or complementary briefs[38] or that they request a hearing in order to receive the arguments of the parties.[39]

35. *Suárez Rosero Case. Interpretation of the Judgment of Reparations*, *supra* note 8, paras. 5-6.
36. *Ibid*., para 15.
37. *See, e.g., Cesti Hurtado Case. Interpretation of the Judgment of Reparations, supra* note 5, para. 5.
38. *Ibid*., para. 6.
39. *Ibid*., para. 8.

Although a former version of the Rules (Article 50.5) provided that a request for interpretation be resolved through a judgment, in the Neira Alegría *et al*. Case, the Court curiously decided this request through the adoption of a mere order.[40] The current Rules do not refer to the matter.

### *5. AMPLIFICATION OF THE ORIGINAL REQUEST*

An aspect that is not sufficiently regulated refers to the possibility of amplifying the scope of the judgment that is requested to be interpreted, after the request has been made.

In the Velásquez Rodríguez Case the Commission requested the Court to clarify its judgment on compensatory damages in order to protect the purchasing power of the amount ordered. Before this was decided, the Commission asked for an amplification of the request for clarification that referred to the material consequences stemming from the State's failure to pay the damages stipulated in the judgment on time, which gave rise to a new situation that "required, authorized and justified" the request for amplification.[41] Although the Court did not consider it necessary to rule on the possibility of amplifying the request for interpretation, it seems to have suggested that such a request should have been submitted within the period stipulated by Article 67 of the Convention, which had already elapsed when the new petition was presented.[42]

## B. THE REQUEST FOR REVISION

Although Article 67 of the Convention appears to be sufficiently clear that the Court's judgment is final and not subject to appeal, the Government of Peru presented a request for revision of the judgment on preliminary exceptions that the Court had adopted in the Neira Alegría *et al*. Case, arguing, *inter alia*, the Commission's lack of jurisdiction and that the Court had not correctly evaluated its note to the Commission and

40. *Neira Alegría et al. Case. Requests of Review and Interpretation of the Judgment on Preliminary Objections of December 11, 1991, supra* note 11.

41. *Velásquez Rodríguez Case. Interpretation of the Compensatory Damages Judgment*, *supra* note 3, paras. 1, 3 and 6.

42. *Ibid*., para. 15.

had not taken into account other facts.[43] Although the President decided to forward this request to the Commission and grant it two months to present its observations,[44] just prior to the hearing to receive those observations and on the request for interpretation, the State's agent expressly withdrew the request for revision.[45] While the Court did not object to the withdrawal of the request minutes before the opening of the hearing, it reserved the right to consider some issues, holding that the time and resources that had been devoted to these proceedings by the Commission and by the Court should be taken into account in determining the costs that might be established for the parties to the case.[46]

In that same case the Commission requested that the Court reject the request for revision since, *inter alia*, it was not provided for in the Convention or in the Court's Statute and Rules.[47] The fact that this remedy is not mentioned in those texts does not necessarily and under all circumstances mean that it does not exist or that it can be absolutely discounted. More precisely, the Commission maintained that the general principles governing this remedy do not favor its admission, since a request for revision is only for exceptional cases, is eminently restrictive and only appropriate when there is a change in circumstances or when the judgment has been obtained by fraudulent means.[48] The Commission rejected the doctrine alluded to by the State in favor of the appropriateness of the request for revision, since the recourse is for final and not interlocutory judgments, adding that there were no precedents that authorized requesting this remedy for interlocutory rulings.[49]

However, in a case in which subsequent to the judgment new facts were uncovered that were unknown to the victim, the Commission or even the State in question, permitting the judgment to be revised does not appear to be incompatible with the spirit of the Convention. This is especially

43. *Neira Alegría et al. Case. Requests of Review and Interpretation of the Judgment on Preliminary Objections of December 11, 1991, supra* note 11, paras. 1-6.
44. *Ibid*., para. 7.
45. *Ibid*., para. 13.
46. *Ibid*., para. 15.
47. *Ibid*., para. 8.d.
48. *Ibid*., para. 8.e.
49. *Ibid*., para. 8.a and c.

true given that the State is in a privileged position with respect to access to the evidence and, therefore, is in a position to hide facts that could be unknown to the victim or the Commission. In any event, it is not just any new fact that justifies a revision of a judgment. Moreover, the request must be presented within a reasonable period, not only in relation to the moment in which the new fact is discovered but also in relation to the time that has elapsed since the judgment.

It is important to observe that a request for revision is expressly provided for in the Statute of the International Court of Justice, whose Article 61 provides that the revision may only be requested when it is based on the discovery of a fact of such a nature as to be decisive and that at the time of the judgment was unknown to the Court and to the party requesting the revision, provided that such ignorance is not due to negligence. In such case, the Court delivers a judgment in which it expressly notes the existence of the new fact, recognizing that this fact, by its nature, justifies the revision and declaring admissible the revision. However, before beginning the proceedings of revision the Court may require compliance with the terms of the judgment. The request must be made within the six months following the discovery of the new fact and cannot be requested after ten years have elapsed since the judgment.

## C. THE REQUEST FOR NULLIFICATION

In conformity with the spirit and letter of the Convention, the Court's decisions are final and not subject to appeal and cannot be challenged before it or before any other body. The only exception might be found in Article 25.2 of the Court's Statute, which provides that the rulings or decisions issued by the Court's President or its committees that are not purely procedural may be appealed to the full Court. This suggests that, *a contrario sensu*, all of the Court's judgments and orders are not subject to appeal and cannot be challenged for defects of form or procedure that could affect their validity. In effect, Article 29.3 of the Court's Rules provides that there is no appeal against the Court's judgments and orders.

In the Castillo Páez Case, Peru presented a request for the nullification of the judgment on the preliminary objections that it had

submitted. While most of the State's arguments referred to the merits of the controversy, alleging errors in the application of law and in evaluating the facts, and it was more like an appeal than a request for nullification, Peru invoked the separate vote of Judge Piza Escalante in the decisions on the interpretation of the judgment of compensatory indemnification in the Velásquez Rodríguez[50] and Godínez Cruz[51] Cases that appears to permit the request for nullification with respect to certain judgments or orders of the Court. According to Piza Escalante the orders other than the judgment, that is, the final judgment that decides the merits of the matter, "are interlocutory and always subject to others that, whether by means of remedies or simply through adversary jurisdiction, interpret, complement, clarify or add to or even modify or revoke them," although the latter would be subject to the respect due to the principle of estoppel and good faith. In his opinion, the Court could only modify the result of such orders or judgments other than the final judgment when the familiar procedural justifications (such as, for example, nullities or a fundamental change in circumstances) were given to remove the principle of estoppel.[52]

The Court rejected the State's request, holding that the objection was to the grounds of the merits of the judgment and, pursuant to Articles 25.2 of the Court's Statute and 45 of its Rules then in effect, only the decisions of the Court's President or its committees could be appealed to the full Court but all others, among them the orders to decide preliminary objections, could not be challenged. The Court held that this was because proceedings under the Convention for the protection of human rights should be as brief as possible and not subjected to the excessive formalities of domestic proceedings, which are governed by a complex system of instruments of appeal with rules and terms to submit them.[53]

In addition to rejecting as inappropriate the request for nullification in the Castillo Páez Case, the Court held that notoriously inappropriate

50. *Velásquez Rodríguez Case. Interpretation of the Compensatory Damages Judgment*, *supra* note 3, separate opinion of Judge Piza Escalante.

51. *Godínez Cruz Case. Interpretation of the Compensatory Damages Judgment*, *supra* note 3, separate opinion of Judge Piza Escalante.

52. *Ibid*.

53. I/A Court H.R., *Castillo Páez Case*. Order of September 10, 1996, paras. 4 and 7 of the considerations and operative para. 1.

requests are an obstacle to the promptness that should characterize the imparting of justice in the area of human rights. The Court, therefore, considered that the parties to these proceedings should refrain from presenting this type of appeal.[54]

54. *Ibid*., para. 9 of the considerations.

## Chapter XVII

## THE ADVISORY JURISDICTION OF THE COURT

As part of the inter-American human rights system, the Court's contentious and advisory jurisdictions are mutually complementary and each should contribute to the formulation of a correct and coherent interpretation of the Convention.

With the advisory function, the Convention has created, in the opinion of the Court itself, a parallel system to its contentious jurisdiction and offers an alternate judicial method that is designed to aid States and OAS organs to comply with and apply human rights treaties without subjecting them to the formalities and sanctions that characterize contentious proceedings.[1] According to the Court, its advisory jurisdiction enhances the Organization's capacity to resolve questions about the application of the Convention since it enables the OAS organs to consult the Court when there are doubts regarding its interpretation.[2] This circumstance explains why, during the Convention's first 16 years, from its entry into force in July 1978 until the end of 1994, the Court's advisory jurisdiction had been used more than its contentious jurisdiction.[3]

The utility and importance of this function permit a global control over the manner in which the States as a whole, and independently of any dispute, interpret and apply the Convention and to correct any possible deviation. Advisory proceedings also allow avoiding the contentious jurisdiction and a confrontation with a State party that would be exposed to a condemnatory judgment. In the exercise of this jurisdiction, the Court has been able to define the scope of the obligations assumed by the States

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1. I/A Court H.R., *Restrictions to the Death Penalty* (Arts. 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 43.

2. I/A Court H.R., Annual Report of the Inter-American Court of Human Rights 1994, General Secretariat of the Organization of American States, Washington, D. C., 1995, p. 8.

3. As of December 9, 1994, the Court had received 14 requests for an advisory opinion but only 11 contentious cases had been referred to the Court. These statistics have since been inverted. As of January 2004, there had been 19 requests for advisory opinions (the last one by Venezuela on November 12, 2003) and 49 contentious cases had been referred, of which 43 had been the subject of a ruling by the Court.

under the Convention. At the same time, it has contributed to the development and strengthening of the law of human rights. This attribute has also enabled the Court to examine the competences of the organs established by the Convention (the Commission and the Court) and how they are distributed within the inter-American system.

The Court has underscored that its advisory jurisdiction differs from its contentious jurisdiction in that there are no *parties* involved in advisory proceedings nor is there a dispute to be resolved. The purpose of the advisory function is the interpretation of the Convention and of other treaties concerning the protection of human rights in the American States. The fact that it may be invoked by all the OAS member States and its principal organs is another distinction between the Court's advisory and contentious jurisdictions.[4]

Nonetheless, it must be emphasized that, in exercising its advisory jurisdiction, the Court is also acting as a jurisdictional organ and not merely advising on human rights questions, as is mistakenly suggested by the frequent qualification of the results of the exercise of this function as advisory *opinions*. In this respect, the Court itself has indicated the jurisdictional nature of its advisory jurisdiction by referring to it as "an alternate judicial method of a consultative nature."[5]

While the issues presented in requests for advisory opinions are more abstract than those submitted to its contentious proceedings, the requests that have been presented to the Court to date are less conflictive than those under its contentious jurisdiction. In fact, these requests are the result of controversies arising from the application of the American Convention or other human rights treaties, whether by the States parties to the Convention or by an OAS member State. These requests may also be the result of a controversy between a State and the Commission because of the manner in which the latter has interpreted the Convention.

As part of these reflections on the Court's advisory jurisdiction, it is necessary to examine whether, in effect, what the Court's produces in the

4. I/A Court H.R., *Reports of the Inter-American Commission on Human Rights* (Art. 51 American Convention on Human Rights). Advisory Opinion OC-15/97 of November 14, 1997 (hereinafter cited as *Reports of the Commission*). Series A No. 15, para. 24.

5. *Restrictions to the Death Penalty*, *supra* note 1, para. 43.

exercise of this jurisdiction is simply an *opinion*, as the Court calls it, or is something different.

## A. THE SCOPE OF THE ADVISORY JURISDICTION

Unlike the contentious jurisdiction, which requires a special declaration by the States accepting the jurisdiction of the Court, the advisory jurisdiction is automatic and, therefore, its exercise does not require the express acceptance of any State.

The scope of the Court's advisory jurisdiction must be examined from a dual perspective: the matters that may be covered and the bodies that have standing to initiate the exercise of the advisory function.

### *1. JURISDICTION RATIONE MATERIAE*

The terms in which the Convention has conferred advisory jurisdiction on the Court are found in Article 64 and are broader than that of any other tribunal with similar competences. Unlike its contentious jurisdiction, which is limited to the interpretation and application of the Convention, the advisory jurisdiction extends to the interpretation of the Convention or any other treaty concerning the protection of human rights in the American States and to the study of the compatibility of the domestic legislation of a member State of the inter-American system with the aforementioned international instruments. It must be underscored, however, that what is expected of the Court in each of these cases is different and that the product that results from these consultations will also be different.

#### *a) The interpretation of the American Convention or other treaties*

Article 64.1 of the Convention confers on the Court a very broad jurisdiction to give a non-binding interpretation of the Convention itself or any other treaty concerning the protection of human rights in the American States. In its request concerning the human rights of the child, the Commission initially requested a legal interpretation of certain precepts of the American Convention and later broadened its request to include the

interpretation of other treaties, mainly the Convention on the Rights of the Child, insofar as these latter might contribute to specify the scope of the American Convention.[6] Notwithstanding the very broad way in which this jurisdiction is conceived, it must be observed that it refers exclusively to the interpretation of the Convention or other treaties and, therefore, may not be distorted for purposes other than the interpretation of those texts.

**i. *The interpretation of the Convention*.** In principle, the Court's authority to interpret the Convention's provisions does not appear to present any difficulty. The Court has, however, emphasized that it has competence to issue authoritative interpretations of all the Convention's provisions, including those relating to its entry into force.[7]

Article 60 of the Court's Rules provides that requests for an advisory opinion pursuant to Article 64.1 of the Convention must be formulated with the specific questions on which the Court's opinion is being sought. The same provision also provides that requests for advisory opinions by a member State or the Commission must identify, *inter alia*, the provisions to be interpreted and the considerations that gave rise to the request.

In a request formulated by the Government of Venezuela, the State made its request in the following terms:

> Regarding the interpretation of this Convention and the other international instruments that comprise the inter-American system of human rights, we ask whether there is an organ within that system that has the necessary competence to exercise control over the legality of the actions of the Inter-American Commission on Human Rights to which the States parties to the Convention may recur to defend the legality. If such an organ exists, the Government would like to know which organ and what are its attributes for the ends that we have pointed out.[8]

6. I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 20.

7. I/A Court H.R., *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Arts. 74 and 75). Advisory Opinion OC-2/82 of September 24, 1982 (hereinafter cited as *The Effect of Reservations*). Series A No. 2, para. 13.

8. Request of the Bolivarian Republic of Venezuela. Order of the President of the Court of December 19, 2003, para. 1 of the expository part.

The Secretariat, following the Court's instructions, asked the State to refine the presentation of its request in view of the requirements established in the Court's Rules. The State was asked specifically with respect to the grounds of the request: a) to formulate with precision the specific questions on which it wished to obtain a ruling of the Court, b) to indicate the provisions whose interpretation was requested and c) to furnish the considerations that originated the request.[9] In its response of December 12, 2003, the State indicated the specific questions of which it hoped to obtain an answer from the Court, as follows;

> 1. Whether an organ exists within the inter-American system of human rights that has the necessary competence to exercise control over the legality of the actions of the Inter-American Commission on Human Rights to which the States parties of the American Convention on Human Rights might recur to defend the legality.
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> 2. If such an organ exists, the Government of Venezuela would like to know: Which is the organ and what are its attributes?[10]

The State did not indicate the provisions on which it was requesting an interpretation but rather indicated that a response to such questions "requires a full interpretation of the American Convention on Human Rights and the other international instruments that form part of the inter-American system of human rights." As to the considerations that had originated the request, the government indicated that they were "that the States parties to the American Convention on Human Rights until now appear to be defenseless before any action of the Inter-American Commission on Human Rights that was not in accordance with the international legal regime that it had to follow."[11] The request did not specifically indicate which provisions of the Convention or other treaties concerning the protection of human rights were to be interpreted. In fact, the tenor of the questions formulated to the Court does not suggest the existence of any conventional norm whose meaning and scope is uncertain and should be defined, but instead poses a problem regarding knowledge of the inter-American human

9. *Ibid*., para. 2 of the expository part.
10. *Ibid*., para. 3.a of the expository part.
11. *Ibid*., para. 3 of the expository part.

rights system. At the moment of writing these lines, the Court had still not heard the arguments and issued its opinion. Independently of the pedagogical effect of the Court's opinions, it is obvious that its advisory function is not designed for this purpose but rather to interpret authoritatively the provisions of the Convention or of other human rights treaties. In this case, the Court is being asked to serve as legal advisor to the State in its dispute with the Commission, which is not the purpose of the advisory jurisdiction. Moreover, the considerations that the State contends justify the request do not mention any provision of the Convention or of other instruments that have supposedly been violated by the Commission in the exercise of its functions.

To the extent that Article 64.1 confers jurisdiction on the Court to interpret "other treaties concerning the protection of human rights," the Court could eventually determine the scope, in this context, of the expression *human rights* as an element that defines the material content of the provisions to be interpreted. In this respect, the fact that the American Convention considers human rights as not only those of a civil and political nature but also economic, social and cultural rights, plus the very broad terms of its Article 29, particularly its clauses b) and d), which do not permit interpretations that suppress the enjoyment or exercise of any right or freedom recognized in the Convention or other treaties or that attempts to exclude or limit the effect that treaties such as the American Declaration may have, begins to respond to this concern.

In any event, the interrelationship that exists between the Convention and other human rights treaties makes it essential that, in interpreting the Convention under either its contentious or advisory jurisdiction, the Court may have to examine other treaties. In this respect, the Court has observed, in the "Street Children" Case in which Article 19 of the Convention was applied, that it looked to Article 1 of the Convention on the Rights of the Child as an instrument to define the scope of the concept of *child*. The Court also emphasized the existence of a very comprehensive international *corpus iuris* for the protection of the rights of the child (which the Convention on the Rights of the Child and the American Convention are part of), which could be utilized as a source of law by the Court to establish the content and scope of the obligations that the State has assumed by

means of Article 19 of the American Convention, especially in defining the measures of protection referred to in the aforementioned precept.[12]

**ii. *The interpretation of other treaties.*** Regarding the interpretation of other human rights treaties in the American States, as well as that of the American Convention, Article 61.1 of the Court's Rules provides that such request must identify the treaty involved and the parties to it, indicating the specific questions on which the Court's opinion is being sought and the considerations that gave rise to the request. If an OAS organ submits the request, pursuant to Article 61.2 of the Rules it must indicate how the request refers to its sphere of competence.

The competence to interpret other treaties has posed numerous questions and even led to the first request for an advisory opinion.[13] The expression *other treaties* is obviously too broad and in the context of the Convention may refer to a) only human rights treaties drafted under the auspices of the inter-American system, b) human rights treaties among the American States, c) universal human rights treaties in which American States are parties and d) bilateral or multilateral treaties whose principal object may not be the protection of human rights. Faced with this variety of options, the Court has interpreted the term "other treaties" in the broadest possible sense, holding that it refers to any provision concerning the protection of human rights, set forth in any international treaty applicable in the American States, regardless of whether it is bilateral or multilateral, of its principal object or whether States outside the inter-American system are or may be parties.[14] According to the Court, no part or aspect of those instruments is, in principle, excluded from the scope of its advisory jurisdiction.[15] Similarly, to the extent to which reservations are an integral part of the treaties in whose context they have been formulated, the Court has held that the request may refer either to the treaty itself or to the contents of a reservation.[16]

12. *Juridical Condition and Human Rights of the Child*, *supra* note 6, para. 45.
13. I/A Court H.R., *"Other Treaties" Subject to the Advisory Jurisdiction of the Court* (Art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982 (hereinafter cited as *"Other Treaties*"). Series A No. 1.
14. *Ibid*., para. 52.
15. *Ibid*., para. 14.
16. *Restrictions to the Death Penalty*, *supra* note 1, para. 45.

In its advisory opinion regarding consular assistance, which involved the interpretation of Article 36 of the Vienna Convention on the Law of Treaties, the Court indicated that it must determine whether that treaty concerned the protection of human rights in the 33 American States that are parties to it. The Court observed that Mexico had not requested an interpretation on whether the principal object of that treaty was the protection of human rights but rather whether one provision of it concerned such protection, which would be relevant in the light of the Court's jurisprudence that had already held that a treaty may concern the protection of human rights, regardless of whether that was its principal purpose.[17]

The American Declaration, although it is not technically a treaty may also be the object of the Court's advisory jurisdiction because of its indirect incorporation into the OAS Charter through the Protocol of Buenos Aires, whose conventional nature cannot be denied. The Convention itself, in its Article 29.d, also refers to the American Declaration. On this matter, the Court has already ruled that the term *other treaties* allowed it to extend its advisory jurisdiction to "interpreting the American Declaration of the Rights and Duties of Man, provided that in doing so the Court is acting within the scope and framework of its jurisdiction in relation to the Charter (of the OAS) and Convention or other treaties concerning the protection of human rights in the American States."[18] In any event, it must be observed that, in the opinion of Thomas Buergenthal, there is no question that the Court's authority to interpret the Declaration independently is the same that it has to interpret the OAS Charter.[19]

The Court's advisory jurisdiction, in spite of its very broad terms, is not without limits nor may it be used under any circumstances. In applying Article 64.1 of the Convention to a case in which the State denounced has not accepted the Court's jurisdiction and in which there is a dispute between that State and the Commission on the interpretation of the Convention,

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17. I/A Court H.R., *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 (hereinafter cited as *The Right to Information*). Series A No. 16, paras. 72 and 76.

18. I/A Court H.R., *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, para. 48.

19. Thomas Buergenthal, *The Inter-American Court of Human Rights*, in THE AMERICAN JOURNAL OF INTERNATIONAL LAW, vol. 76, No. 2, p. 243.

Buergenthal questions whether the Commission could resort to the Court's advisory function even against the will of that State since Article 64 does not place any limit to the consultations that may be made to the Court unless they are outside the sphere of competence of the organ that has requested them.[20] In our opinion, the Court's authority to interpret the Convention or other human rights treaties in the American States cannot be employed, in a slippery or underhanded way, to resolve pending disputes with respect to a State that has not accepted the Court's jurisdiction.[21] Nor would it be legitimate for a State to use this method to avoid contentious proceedings[22] or as an excuse not to fulfill its obligations under the Convention.[23]

In its request to the Court, Venezuela "requested an integral interpretation of the American Convention on Human Rights and the other international instruments that comprise the inter-American system of human rights."[24] It did not, however, indicate any specific treaty or the provisions on which an interpretation was being sought. Clearly, it was not asking the Court to interpret a specific provision of the Convention, but rather searching for a provision that would subject the actions of the Inter-American Commission to the control of a superior body. This is not the purpose of the Court's advisory jurisdiction. The entity that formulates the request must indicate the precise norm whose interpretation is being sought.

The Court has furnished some parameters to guide its interpreting activities. In the first place, it has maintained that such interpretation must

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20. Thomas Buergenthal, *El sistema interamericano para la protección de los derechos humanos*, in ANUARIO JURÍDICO INTERAMERICANO 1981, General Secretariat of the Organization of American States, Washington,D. C., 1982, p. 146.

21. *See* the advisory opinion of the International Court of Justice in the case of Namibia. *Legal Consequences for States of the Continued Presence of South Africa in Namibia South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16. *See*, also, the advisory opinion of the Permanent Court of International Justice in the case of Eastern Carelia, *Status of Eastern Carelia*, reply to the request for advisory opinion, July 23, 1923, in Manley O. Hudson (editor), WORLD COURT REPORTS, vol. I, 1922-1926, Oceana Publications, Inc., Dobbs Ferry, New York, 1969, p. 190.

22. *See*, in this respect, I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985 (hereinafter cited as *Compulsory Membership*). Series A No. 5, para. 22.

23. *See*, Order of the President of December 19, 2003, *supra* note 8, para. 1 of the expository part.

24. Ibid., para. 3.b of the expository part.

be in accordance with the norms of the Vienna Convention on the Law of Treaties, especially with respect to the principle of good faith in order to ensure the harmony of a norm with the object and purpose of the treaty. In the second place, it has pointed out that the interpretation of other treaties may not be used to restrict the enjoyment and exercise of a right enshrined in the Convention, but must contribute to the most favorable application of the provision that is sought to be interpreted.[25]

***b. The compatibility of domestic legislation with the Convention***

With reference to opinions that may be requested by OAS member States with respect to the compatibility of their *domestic legislation* with the Convention and other human rights treaties, the Court has interpreted this term in its broadest sense, understanding that "the reference must be deemed to be all national legislation and legal norms of whatsoever nature, including provisions of the national constitution."[26]

Pursuant to Article 62 of the Court's Rules a request formulated under Article 64.2 of the Convention must indicate, *inter alia*, the provisions of domestic law, as well as those of the Convention or of other human rights treaties, to which the request relates and the specific questions on which the Court's opinion is being sought. The request must also be accompanied by a copy of the domestic laws to which the request refers.

The most controversial criterion adopted by the Court concerned a broad interpretation of the term *domestic laws* that goes beyond its literal meaning, in which it did not find any reason to refrain from responding to requests regarding *proposals* of legislative or constitutional reform.[27] To reach this conclusion, the Court recalled that its advisory jurisdiction was established as a service that it could provide to all the members of the inter-American system in order to assist them in fulfilling their international human rights obligations.[28] The Court also observed that an interpretation

25. *Juridical Condition and Human Rights of the Child*, *supra* note 6, para. 21.

26. I/A Court H.R., *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984 (hereinafter cited *as Proposed Amendments*). Series A No. 4, para. 14.

27. *Ibid*., paras. 26 and 28. *See*, also, I/A Court H.R., *Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights*. Advisory Opinon OC-12/91 of December 6, 1991 (hereinafter cited as *Compatibility of Draft Legislation*). Series A No. 12, paras. 20-22.

28. *Proposed Amendments*, *supra* note 26, para. 19. The reference is to "*Other Treaties*," *supra* note 13, para. 39.

of Article 64.2 of the Convention that would limit it to refer to laws in force would compel States to complete all proceedings under its internal laws for the enactment of legislation before being able to consult the Court on a law's compatibility with the Convention or other treaties.[29] It also held that to refrain from answering a request of a government because it concerned *legislative proposals* and not laws in force would be the equivalent of forcing the government to violate the Convention by the formal adoption and possibly even the application of the legislative measure before being able to appeal to the Court through its advisory jurisdiction.[30] On the other hand, the Court has insinuated that this might simply be a problem of drafting since, pursuant to Article 64.1 of the Convention, it would be competent to respond to a request formulated by an OAS member State on the interpretation of the Convention that would involve the problem of the compatibility between a pending draft law and the Convention, although obviously the request would have to be formulated in a different manner.[31]

Regarding the compatibility of a draft law with Article 8 of the Convention, on the grounds of the Court's opinion on the word "laws" in Article 30 of the Convention[32] the Government of Uruguay objected to the Court's competence to respond to a request for an advisory opinion on a draft law since it could not be considered a domestic law within the meaning of Article 64.2 of the Convention and because, following the Court's most recent jurisprudence, only legal norms that had been adopted by the legislature and promulgated by the executive are the proper subjects of a request.[33] The Court recalled that the opinion on the definition of the word "laws" referred only to its meaning in the context of Article 30 of the Convention and that it could not be applied, without more, to Article 64.2.[34] The Court, therefore, rejected the objection and ratified the criterion in its advisory opinion on the proposed modification of the Constitution of Costa Rica, recalling that at that time it had maintained that the ordinary meaning

29. *Ibid*., para. 18.
30. *Ibid*., para. 26.
31. *Ibid*., para. 16.
32. I/A Court H.R., *The Word "Laws" in Article 30 of the American Convention on Human Rights*. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6.
33. *Compatibility of Draft Legislation*, *supra* note 26, paras. 8 and 15.
34. *Ibid*., paras. 17-18.

of the terms of a treaty cannot in and of itself become the sole rule, but they must always be considered within their context and, in particular, in the light of the object and purpose of the treaty.[35] However, on this occasion, the Court adopted a position less absolute than that sustained in its opinion on the proposed modification of the Constitution of Costa Rica, since it had held that, *in certain circumstances*, and pursuant to its powers under Article 64.2 of the Convention, the Court could answer requests on the compatibility of draft legislation with the Convention.[36]

A greater use by the States of their power to consult the Court regarding the compatibility of their domestic legislation with their human rights obligations would undoubtedly contribute notably to a uniform application of the Convention in the States parties, replacing multiple national conceptions of human rights with a universal vision. Similarly, and specifically with respect to the relation to the Court's competence *ratione materiae*, an aspect worthy of mention is the Court's lack of jurisdiction to make preliminary decisions. In effect, although judicial decisions in the area of human rights frequently pose interesting legal problems as to the domestic interpretation and application of the Convention, it does not provide for appealing to the Court, through its advisory jurisdiction, for a preliminary decision on the correct interpretation of the Convention.[37]

Notwithstanding its importance, States have made very little use of this power. To date, of the 19 requests for advisory opinions (the latest requested by Venezuela in December of 2003) only three have been related to the exercise of the attributes under Article 64.2 of the Convention[38] and one has concerned elements found in both Article 64.1 and 64.2.[39] Of course, it is perfectly possible that a request of an OAS member State coexists with the elements of Article 64.1 regarding the interpretation of the Convention or other treaties and those of Article 64.2 concerning the

35. *Ibid*., para. 21. The Court's reference is to *Proposed Amendments*, *supra* note 26, para. 23.

36. *Ibid*., para. 22.

37. Neither was this possibility contemplated in the Statute of the International Court of Justice, but it was in the Court of the European Union. *See* Article 177 of the Organizing Treaty of the European Economic Community.

38. *Proposed Amendments*, *supra* note 26; *Compulsory Membership*, *supra* note 22 and *Compatibility of Draft Legislation*, *supra* note 27.

39. *Compulsory Membership*, *supra* note 22.

compatibility of domestic legislation with those international instruments without there being any legal reason that would prevent its examination under both provisions.[40] However, the bodies with standing to consult the Court are not the same in each case, which means that these elements have more than a merely theoretical importance and may be grounds for objection to the Court's competence to hear the request.[41] It may thus be appreciated that in the Commission's request regarding the international responsibility for laws that violate the Convention, it based its request on Article 64.1 but the Governments of Peru and Costa Rica maintained that because it referred to the compatibility of the domestic laws of the member States, especially Peru, with norms of Convention, the request fell under Article 64.2.[42]

### *2. JURISDICTION RATIONE PERSONAE*

The Court has formal jurisdiction to respond to requests for advisory opinions by any OAS member State (whether or not a State party to the Convention) and, within their spheres of competence, by the organs listed in Chapter VIII of the OAS Charter, which pursuant to its Article 53 are a) the General Assembly, b) the Meeting of Consultation of Ministers of Foreign Affairs, c) the Councils,[43] d) the Inter-American Juridical Committee, e) the Inter-American Commission on Human Rights, f) the General Secretariat, g) the Specialized Conferences[44] and h) the Specialized

40. *Ibid*., para. 16.

41. I/A Court H.R., *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (Arts. 1 and 2 American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994 (hereinafter cited as *International Responsibility*). Series A No. 14, para. 12.

42. *Ibid*., paras. 16 and 18-19.

43. Pursuant to Article 68 of the Charter, these are the Permanent Council, the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture, all of which depend directly on the General Assembly.

44. The Specialized Conferences lack a permanent organic structure and consist of meetings that are convened sporadically to deal with specific matters. One of them was the Specialized Inter-American Conference on Human Rights, convened by the OAS Council and held between November 7 and 22, 1969 in San José, Costa Rica. On November 22 the Conference adopted the text of the American Convention on Human Rights. According to Article 122 of the OAS Charter "the Specialized Conferences are intergovernmental meetings (convoked) to deal with special technical matters or to develop specific aspects of inter-American cooperation. They shall be held when either the General Assembly or the Meeting of Consultation of Ministers of Foreign Affairs so decides, on its own initiative or at the request of one of the Councils or Specialized Organizations. "

Organizations.[45] Among the latter are the Pan-American Health Organization,[46] the Inter-American Children's Institute,[47] the Inter-American Commission of Women,[48] the Pan-American Institute of Geography and History,[49] the Inter-American Indian Institute[50] and the Inter-American Institute of Agricultural Sciences,[51] four of which deal with human rights.

As may be appreciated, the entities with standing to recur to its advisory jurisdiction have converted the Court into a jurisdictional body of the OAS, which has implicitly been accepted by its General Assembly when it adopted the Court's Statute.

It is noteworthy that only the Inter-American Commission on Human Rights has made use of this possibility.[52] However, considering the very broad competences in the area of human rights of some specialized bodies, particularly the Inter-American Children's Institute, the Inter-American Commission on Women, the Inter-American Indian Institute and the Pan-American Health Organization, one cannot discount the possibility that, in the near future, these institutions will also make use of the Court's advisory jurisdiction.

Although only tangentially, the Court has ruled on the lack of standing of individuals to recur to it through the advisory jurisdiction. In effect, the Court observed that the Government of Costa Rica agreed to present a request on the obligatory licensing of journalists because the Inter-American Press Association did not have standing to do so.[53]

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45. According to the definition found in Article 124 of the OAS Charter, "Inter-American Specialized Organizations are the inter-governmental bodies established by multilateral agreements and having specific functions with respect to technical matters of common interest to the American States."

46. Created at the First Inter-American Sanitary Conference of 1901-1902 and has its headquarters in Washington, D.C.

47. Established in 1924 and has its headquarters in Montevideo, Uruguay.

48. Created in 1928 and has its headquarters in Washington, D.C.

49. Founded in 1928 and has its headquarters in Mexico City.

50. Founded in 1940 and has its headquarters in Pátzcuaro, Mexico.

51. Founded in 1944 and has its headquarters in Costa Rica.

52. In fact, as of January 2004 of the 19 requests for an advisory opinion, 13 have been by States and six by the Commission.

53. *Compulsory Membership, supra* note 22, para. 14.

***a) The OAS member States***

OAS member States enjoy a broad right to consult under the two possibilities offered by Article 64 of the Convention, that is, they have standing to consult the Court either on the interpretation of the Convention or other human rights treaties or on the compatibility of their legislation with those instruments.

A State that makes a request must do so through its government and, more specifically, through the person who represents it in its international affairs. A request cannot, therefore, be presented by legislative, judicial or other State authorities. In a case in which the request emanated from a commission of the Legislative Assembly of Costa Rica, the Court did not process it until that defect was cured by means of its formalization by the Government of Costa Rica.[54]

It should be underscored that, in not allowing the national courts to consult the Court directly, the importance of the advisory opinion as an appropriate mechanism to achieve the uniform application of the Convention could be diminished. In this sense, Buergenthal has suggested that the States should establish internal procedures to facilitate the transmission of requests from its courts and that they regulate the manner of the presentation of those consultations to the Court.[55]

On the other hand, with regard to the possibility of consulting the Court on the compatibility of its domestic legislation with the Convention or other human rights treaties, it is obvious that a State may formulate these consultations only with respect its own legislation.

***b) The OAS organs***

In the first place, it must be noted that the OAS organs have a procedural capacity only under Article 64.1 of the Convention, that is, referring to the interpretation of the Convention or other treaties concerning the protection of human rights in the American States.

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54. *Proposed Amendments, supra* note 26, paras. 1, 3 and 11.

55. *The Inter-American Court of Human Rights, supra* note 19, p. 244. According to Buergenthal, another way of resolving the problem would be through agreements between the Court and the States Parties -which are contemplated in the Court's Statute- authorizing national courts to directly consult the Court.

The Court has observed that, while the OAS member States have the absolute right to request advisory opinions, OAS organs may only do so within the limits of their competence, so that the right of the latter is restricted to matters in which they have a legitimate institutional interest.[56] Although initially each organ decides whether the request falls within its sphere of competence, this is a question that in the long run must be resolved by the Court, taking into account the OAS Charter and the constitutive instruments and practice of the organ.[57] However, the procedural capacity of the specialized organizations must also be examined in relation to the international agreements that they have signed.

The competence of each OAS organ is perfectly defined in the OAS Charter and other pertinent provisions. In the case of the Commission, it includes promoting the observance and protection of human rights,[58] making recommendations to the governments of the member States to adopt progressive measures in favor of human rights[59] and preparing the studies and reports that it considers advisable in the performance of its functions.[60] In view of the broad powers that Article 106 of the OAS Charter confers on the Commission regarding the promotion and observance of human rights, the Court has observed that, unlike some other OAS organs, it has an absolute right to request advisory opinions within the framework of Article 64.1 of the Convention.[61] It may also be assumed that the very broad competences that Article 54 of the OAS Charter assigns to the General Assembly suggests, in principle, that it would be treated in the same way by the Court, In fact, the reference in Article 64.1 in the sense that the OAS organs may consult the Court only *within their spheres of competence* does not affect the capability of the Commission or the General Assembly to request advisory opinions under Article 64.1.

56. *The Effect of Reservations, supra* note 7, para. 14.
57. *Ibid*.
58. Article 106 of the OAS Charter.
59. Article 41.b of the Convention.
60. Article 41.c of the Convention.
61. *The Effect of Reservations, supra* note 7, para. 16.

### *c) Withdrawal of the request*

The Court may only act in response to a request that emanates from one of the aforementioned bodies and cannot exercise its advisory jurisdiction *motu propio*. However, once the advisory proceedings have been activated, they cannot be stopped. In the case of Advisory Opinion No. 15, although the requesting State withdrew it, the Court decided to continue its examination and convoked public hearings on the admissibility and merits of the request.[62] The Commission also requested that the advisory proceedings be terminated and that the matter be stricken because of the withdrawal of the request, that the Court was incompetent to issue an advisory opinion as there was no longer an express request and that it could not issue an opinion *motu propio*.[63] At the hearing, the State defended its right to request and to withdraw a request for an advisory opinion and the Commission repeated its position that the Court did not have competence to issue such an opinion since the request that gave rise to the proceedings had been withdrawn.[64]

The withdrawal of a request by Chile posed in this case a substantive question with respect to the scope and nature of the Court's advisory jurisdiction, which must be related to the aims of the Convention and has as a purpose assisting in the fulfillment of the international human rights obligations and functions that in this area are attributes of the different OAS organs.[65]

In view of the withdrawal of the request, the Court observed that its advisory jurisdiction differs from its contentious jurisdiction in that in advisory proceedings there are no parties or a dispute to resolve or rules on evidence. Its sole purpose is the interpretation of the Convention. The fact that all the OAS member States and principal organs may avail themselves of it is another difference between the advisory and contentious jurisdictions. Moreover, the exercise of the advisory function under the Convention is multi-lateral and non-litigious, which is faithfully reflected in the Court's Rules. Article 62.1 of those Rules establishes that a request

62. *Reports of the Commission*, *supra* note 4, paras. 13-16.
63. *Ibid*., para. 17.a.
64. *Ibid*., para. 22.a and 22.c.
65. *Ibid*., para. 24.

for an advisory opinion be notified to all OAS member States, which may present their observations on the request and participate in the relevant public hearings.[66] It is important to underscore that, at the moment that Chile manifested its desire to withdraw the request, two other States –Guatemala and Costa Rica– had already presented their observations and attended the hearing on November 10, 1997. In addition, the Court had received *amicus curiae* briefs from Human Rights Watch/Americas and the Center for Justice and International Law.[67] The foregoing showed the high degree of interest in the issues posed in the request, confirming the Court's holding that the requesting State or organ is not the only body with a legitimate interest in the result of the proceedings.[68]

In his concurring opinion, Judge Cançado Trindade observed that, once the advisory proceedings were set in motion, the request notified to all the OAS member States and principal organs and the petition already seized by the Court, the Court could not be deprived of its competence even by the withdrawal of the original request. The Court has the inherent power to determine the scope of its competence and, therefore, a withdrawal has no effect on this already established competence. When the subject matter of the petition has already been seized by the Court, it is the master of its jurisdiction and even if the request is withdrawn, "the prevalence of the advisory jurisdiction of the Court ought … to prevail."[69] Judge Cançado Trindade also cited the practice of the International Court of Justice regarding advisory opinions, which emphasizes that the consent of the State concerned is a precondition only for the contentious and not the advisory jurisdiction and, therefore, a State may not prevent that Court from deciding to issue an advisory opinion that has been requested of it.[70]

### *3. THE RELATIONSHIP BETWEEN THE JURISDICTIONS RATIONE MATERIAE AND RATIONE PERSONAE*

It may be concluded from the foregoing that it is not possible to divorce absolutely the *ratione materiae* and *ratione personae*

66. *Ibid*., paras. 25-26.
67. *Ibid*., paras. 10, 13, 18 and 21.
68. *Ibid*., para. 26.
69. *Ibid*., paras. 5, 7 and 9 of his concurring opinion.
70. *Ibid*., para. 12 of his concurring opinion.

jurisdictions of the Court in the advisory area. In fact, each complements the other.

The close relationship between these two areas of the advisory jurisdiction was left clear in the Commission's request on the international responsibility for laws that violate the Convention.[71] Although there was no objection to the Court's jurisdiction *ratione materiae* to rule on the compatibility of the domestic legislation of a State with the provisions of the Convention, it was observed that the Commission lacked standing to submit such a request.[72] After noting that Article 64.1 of the Convention grants it a broad power to undertake the interpretation of the Convention and other human rights treaties that the American States have ratified, the Court ruled that its competence to examine the compatibility of domestic laws of the States with such instruments derives from Article 64.2.[73] Although under Article 64.1 the Court's advisory jurisdiction may be requested by any OAS member State or by an organ listed in Chapter VIII of the OAS Charter, Article 64.2 limits the consultations to OAS member States and only with reference to their own laws.[74]

## B. THE FORMAL REQUIREMENTS OF THE REQUEST

When the Court is consulted on the interpretation of the Convention, the request must be formulated with precision on the specific questions on which the Court's opinion is being sought. Moreover, the requests presented by an OAS member State or by the Commission must indicate the provisions to be interpreted, the considerations that gave rise to the request and the name and address of the agent or delegates designated to represent the State or the Commission before the Court. If the request emanates from an OAS organ other than the Commission, it must also specify how it refers to the sphere of competence of that organ.[75] Until recently, the title of the Court's opinions parenthetically included the provisions whose

71. *International Responsibility, supra* note 41.
72. *Ibid*., paras. 12 and 18-19.
73. *Ibid.*, para. 21.
74. *Ibid*., para. 22.
75. Article 51 of the Rules of Procedure of the Court.

interpretation was being sought but this practice seems to have been abandoned as of the opinion regarding consular assistance.[76]

If the request refers to the interpretation of other treaties concerning the protection of human rights in the American States, it must identify the treaty and the parties to it, indicate the specific questions on which the Court's opinion is being sought and the considerations that gave rise to the request.[77] According to the Court, the requirement of a description of the considerations that gave rise to the request is designed to facilitate an understanding of the factual and legal context that prompted the request, which is often essential in order to be able to respond in a meaningful way.[78]

The Court has held that this requirement must be interpreted in the sense that requests that present purely academic questions are not admissible because they do not meet the objectives of the Court's advisory function.[79] This, obviously, does not mean that disguised contentious cases may be presented or that the Court must analyze and resolve the considerations that gave rise to the request, but it must evaluate whether the issues raised are related to the aims of the Convention.[80]

When an OAS member State consults the Court on the compatibility of its domestic legislation with the Convention or other human rights treaties, the request must indicate: a) the provisions of the domestic legislation and those of the Convention or other treaties that are the object of the request, b) the specific questions on which a ruling of the Court is being sought and c) the name and address of the agent designated to represent the requesting State before the Court. The request must also be accompanied by a copy of the provisions of the domestic law to which the request refers.[81]

With respect to the manner in which the request has been drafted, the Court has held that, in exercising its functions under Article 64 of the

76. *The Right to Information, supra* note 17.
77. Article 52 of the Rules of Procedure of the Court.
78. *Restrictions to the Death Penalty, supra* note 1, para. 44.
79. *International Responsibility, supra* note 41, para. 27.
80. *Ibid*.
81. Article 53 of the Rules of Procedure of the Court.

Convention, it may have to specify, clarify or sometimes reformulate the questions that have been presented in order to ascertain precisely what is being asked.[82] What the Court may not do is to formulate a question entirely different than that which was submitted or to attribute to the State or the organ that formulated the question something that it has not presented.

## C. THE ADMISSIBILITY OF THE REQUEST

As in contentious proceedings, after establishing its jurisdiction the Court must rule on the admissibility of the request. In effect, in view of the nature of the requests that are formulated under Article 64 of the Convention and invoking the authority of the International Court of Justice, the Court has held that, even though it may be competent to hear a request, it is not obligated to issue an opinion that has been requested and may even recuse itself from responding.

According to the Court, its advisory jurisdiction is permissive and includes the power to evaluate whether the circumstances on which the petition is based are such as to justify not giving an opinion.[83] If, after analyzing the specific case, for compelling reasons it concludes that it would not be possible to issue the opinion requested lest it exceed the limitations of its jurisdiction and distort its advisory function, the Court should refrain from issuing an opinion.[84] According to the Court, fulfillment of the requirements of the norms for requesting an advisory opinion does not mean that the Court is obligated to respond to it, since it must also take into account considerations that transcend merely formal aspects and that are reflected in the generic limits that the Court has recognized in exercising its advisory function.[85] For example, since its advisory jurisdiction was first invoked, the Court has held that it must determine whether granting a request would lead to altering or weakening the system established by the Convention to the detriment of the individual human being.[86] The Court has continued to be aware of this consideration

82. I/A Court H.R., *Enforceability of the Right to Reply or Correction* (Arts. 14(1), 1(1) and 2 American Convention on Human Rights). Advisory Opinion OC-7/86 of August 29, 1986. Series A No. 7, para. 12.
83. *"Other Treaties," supra* note 13, para. 28.
84. *Ibid*., para. 31.
85. *Juridical Condition and Human Rights of the Child*, *supra* note 6, para. 19.
86. *"Other Treaties," supra* note 13, operative para. 2.

in its later jurisprudence.[87] Another element to be taken into account is that, by requesting an advisory opinion, a State could inappropriately obtain the determination of an issue that might eventually be submitted to the Court as a contentious case.[88]

In any event, the Court has held that this broad power to evaluate cannot be confused with a simple discretionary power to grant or deny the request, but a decision not to grant the request must include the grounds for the denial.[89] In deciding whether to grant the request, the Court must base its decision on considerations that transcend merely formal aspects and should grant the request if it finds that its ruling on the matter will provide guidance, both to the Commission as well as to the parties that appear before it, on important aspects relating to the interpretation of the Convention without jeopardizing the balance that must exist between legal certainty and the protection of human rights.[90]

### *1. THE NATURE OF THE REQUEST*

Before ruling on the merits of the issues raised in the request, the Court must determine the nature of the request and decide whether it has been presented within the framework of Article 64.1 or 64.2 of the Convention, since that determination will permit a ruling on the standing of the body to submit a request,[91] which is decisive to granting or denying the request.

In its opinion regarding the international responsibility for laws that violate the Convention, the Court observed that, while the Commission's request for an interpretation of the Convention referred to a recent reform of the Constitution of Peru that expanded the number of cases for which the death penalty could be applied, it was evident that the Commission was not requesting a ruling on the compatibility of that provision with Article 4 of the Convention since its questions did not refer

87. *See, e.g., The Right to Information, supra* note 17, para. 43; *Juridical Condition and Human Rights of the Child, supra* note 6, para. 31 and I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 61.

88. *See, e.g., The Right to Information, supra* note 17, para. 45.

89. *"Other Treaties," supra* note 13, para. 30.

90. *Reports of the Commission, supra* note 4, paras. 31 and 41.

91. *International Responsibility, supra* note 41, para. 20.

to that provision but were general in nature and concerned the obligations and responsibilities of the States or individuals who promulgate and enforce a law manifestly contrary to the Convention. Therefore, the Court's response would be applicable not only to Article 4 but also to all other articles of the Convention that proclaim rights and freedoms.[92] The Court did not, therefore, hold that the Commission lacked standing to present that request based on Article 64.1 of the Convention since it did not seek or request an express declaration of the compatibility of a domestic law of a State with the norms of the Convention.[93] Rather, since, in exercising its mandate under Article 41 of the Convention, the Commission may, *inter alia*, "make recommendations to the governments of the Member States, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions," the Court ruled that, under such circumstances, its advisory jurisdiction could and should constitute a valuable support for the fulfillment of the Commission's functions.[94]

### *2. REQUESTS ON PENDING CONTENTIOUS CASES*

The Court has not hidden its concern that, to the detriment of the full functioning of the mechanisms offered by the Convention and the interest of the victim, its advisory jurisdiction might be deliberately used to distort the processing of a contentious case before the Commission.[95] The Court has held that any request for an advisory opinion that would lead to such distortion or to a weakening or altering of the system established by the Convention in a way that might curtail the rights of victims of human rights violations would be inadmissible.[96] For this reason, in a request on the compatibility of a draft law with Article 8 of the Convention, after ascertaining that the Commission had under consideration various petitions against the requesting State regarding violations of that provision and that the Commission had postponed referral of one of those

92. *Ibid*., para. 24.
93. *Ibid*., para. 25.
94. *Ibid*.
95. *Ibid*., para. 24.
96. *Ibid*., para. 31.

cases to the Court and suspended the processing of the others pending the fate of the draft legislation in Costa Rica, the Court concluded that a response to that request could produce, under the guise of an advisory opinion, the determination of contentious matters not yet submitted to the Court without providing the victims with the opportunity to participate in the proceedings, thus distorting the system of the Convention.[97] In the opinion of the Court, contentious proceedings provide, by definition, a venue where matters can be debated and confronted in a much more direct way than in advisory proceedings and this opportunity cannot be denied to individuals who, represented by the Commission, participate in the former because in advisory proceedings the interests of the Commission may be different.[98] Therefore, the Court held that, while the draft legislation subject of the request might correct in the future the problems that gave rise to several petitions pending before the Commission, it was faced with one of those cases where it should refrain from responding to the request because otherwise it might undermine its contentious jurisdiction and curtail the human rights of the claimants before the Commission.[99]

In the request regarding consular assistance, the Commission informed the Court that it was examining a complaint that involved an alleged failure to comply with Article 36 of the Vienna Convention on Consular Relations. However, since they were two completely different procedures, the Court indicated that the interpretation that it might make of Article 36 of the Vienna Convention on Consular Relations could not be considered as a ruling on the facts of the complaint pending before the Commission. The Court, therefore, did not find reasons to suppose that the issuance of an advisory opinion would affect the interests of the petitioner in the case pending before the Commission.[100] The Court also analyzed the effect that the contentious cases before the International Court of Justice (the Breard and LaGrand Cases) that also referred to an alleged violation of the aforementioned article of the Vienna Convention by an OAS member State could have on its advisory jurisdiction. The Court

97. *Compatibility of Draft Legislation, supra* note 27, paras. 27-28.
98. *Ibid*.
99. *Ibid*., paras. 29-30.
100. *The Right to Information, supra* note 17, paras. 51-52.

reiterated that it is an autonomous judicial institution and that the exercise of its advisory function cannot be restrained because of contentious cases filed with the International Court of Justice. It recalled what it had stated in another advisory opinion where it indicated that it was rather normal that, between different courts that do not have a hierarchical relationship, there could be conflicting interpretations of the same norm.[101] In any event, to affirm its competence on the subject matter of the request, the Court observed that it referred to a situation related to the protection of human rights in the American States with respect to which there existed a general interest in the Court's ruling, as was demonstrated by the unprecedented participation in the proceedings by eight member States, the Commission and 22 institutions and individuals as *amici curiae*. Moreover, according to the Court, the legitimate interests of a member State in the outcome of an advisory proceeding were protected by the opportunity that it had to participate fully in those proceedings and to make known to the Court its views on the legal norms to be interpreted.[102]

In exercising its contentious jurisdiction, the Court interprets the law in the context of a specific case. With its advisory jurisdiction, the Court interprets the law in the abstract. But it would be foolish to deny that the advisory opinion has a practical purpose and that it responds to the need to resolve pending or future conflicts, although in a less belligerent manner than in contentious proceedings. It is also probable that the request is due to the lack of willingness of the parties to submit the case to the Court through its contentious jurisdiction[103] or the fact that the State whose conduct gave rise to the request is an OAS member State but not a State party to the Convention. It is evident that the opinion regarding consular assistance[104] and that on the rights of migrant workers[105] are the result of tensions generated by Mexican citizens sentenced to death in the United States and for the treatment that Mexican migrant workers receive in the United States. It is not mere happenstance that both requests were made

101. *Ibid.*, paras. 54-61. The reference to its jurisprudence is to *"Other Treaties," supra* note 13, para. 50.
102. *Ibid*., paras. 61-63.
103. *See, e.g.*, the background information leading to the request of *Compulsory Membership, supra* note 22.
104. *The Right to Information, supra* note 17.
105. *The Juridical Condition and Rights of the Undocumented Migrants, supra* note 87.

by Mexico. However, in exercising its advisory function, the Court is not called upon to resolve questions of fact but rather to determine the meaning and purpose of the international human rights norms that it has been asked to interpret.[106] In this respect, the Court has warned that, in exercising its advisory jurisdiction, it cannot rule on charges or evidence against a State because to do so would be at variance with the nature of its advisory function and would deny the respective State the opportunity to defend itself that it has in contentious proceedings.[107] While the use of examples serves the purpose of referring to a specific context, illustrating the different interpretations on the legal issue raised in the request and demonstrating that its advisory opinions are not mere academic speculation, it is not necessary that the Court rules on those examples.[108]

Although its advisory jurisdiction is not conceived to resolve a current conflict, the Court has considered that a dispute between the Commission and a State party (even if it has not accepted its contentious jurisdiction) on the subject matter of the request is not sufficient grounds for the Court to refrain from exercising its advisory jurisdiction. According to the Court, the right of OAS organs to request advisory opinions "within their spheres of competence" suggests that this attribute was conferred to assist with the resolution of disputed legal aspects arising in the context of the activities of an organ, be it the Inter-American Commission or any other.[109] Therefore, the fact that, at a given moment, there is a difference of interpretation between a State and the Commission is not an obstacle to resorting to the Court's advisory function because in exercising its attributes, the Commission must apply the Convention or other human rights treaties and in order to discharge fully its obligations it may find it necessary or appropriate to consult the Court on the meaning of certain provisions.[110]

One of the reasons given by the Commission to oppose the request of Chile regarding its power to amend its Article 51 Reports was that it

106. *Ibid*., para. 63.
107. *The Right to Information*, *supra* note 17.
108. *Ibid*., para. 49.
109. *Restrictions to the Death Penalty*, *supra* note 1, para. 39.
110. *Ibid*., para. 38.

was a disguised contentious case with which it pretended to distort both the advisory and the contentious systems.[111] The Court held, in the first place, but not necessarily in this order of importance, that in exercising its advisory jurisdiction on matters that have a specific case as precedent it must be especially careful to avoid a situation in which a response to the questions could produce, under the guise of an advisory opinion, a determination of contentious matters not yet submitted to the Court without providing the victims with the opportunity to participate in the proceedings, which would distort the system of the Convention. The Court observed that, as the case that might have given rise to this request had already been resolved, any determination that it made with respect to the merits of the questions that were submitted would not affect the rights of the parties involved.[112] In the second place, the Court reiterated that the fact that the request cited as precedent a specific case, in which the Commission had specifically applied the criteria on which the State requested a response, was an argument in favor of the Court exercising its advisory jurisdiction since it was not a question of purely academic speculation without a foreseeable application to concrete situations that would justify the need to issue the opinion. The Court also held that it was not empowered to examine a case under consideration by the Commission and that this particular case could not be brought before the Court because it had terminated with the publication of an Article 51 Report.[113]

An obvious problem of a request's admissibility concerns a conflict pending before the Commission on the same matter and the conflict is essentially on legal issues. These situations include the following possibilities: a) the State concerned has not accepted the Court's jurisdiction and the Commission requests an advisory opinion, b) the State concerned has not accepted the Court's jurisdiction but the request comes from a third State that is not a party to the proceedings before the Commission, c) it is a dispute between States, one of which has not accepted the Court's jurisdiction and one of them (or the Commission) requests an advisory opinion, d) although the State concerned has accepted the Court's jurisdiction, neither the Commission nor the State refers the case to the

111. *Reports of the Commission, supra* note 4, para. 22.c.
112. *Ibid*., paras. 37-38.
113. *Ibid*., paras. 32-33.

Court, but the Commission presents it as a request for an advisory opinion and e) that same situation but the request is made by the State concerned.

A first objection, common to all of the above possibilities, concerns the inappropriateness of using advisory proceedings to resolve legal controversies that are the object of contentious proceedings. This concern is even more important when the State concerned has not accepted the Court's contentious jurisdiction, since the presentation of a case as a request for an advisory opinion suggests the use of a subterfuge to invoke the Court's authority, thus evading the State's lack of consent. This situation was posed in the request regarding the death penalty, which arose from a dispute between the Commission and the Government of Guatemala regarding the interpretation of Article 4 of the Convention and of a reservation made by Guatemala.[114] Although the State requested the Court to refuse to render the advisory opinion because it had not accepted the Court's jurisdiction,[115] the Court did not disqualify itself from hearing the matter. According to the Court, the Commission could find it necessary and appropriate to consult it on the meaning of the provisions that it is called upon to apply, whether or not there was a difference of interpretation between a State and the Commission, which would justify the request for an advisory opinion. The Court expressed the view that if the Commission was prevented from making a request simply because one or more governments were involved in a dispute with it regarding the interpretation of a provision, it would seldom be able to avail itself of the Court's advisory jurisdiction.[116]

The Court has held that its response to a request may affect the interests of a State, either weakening or strengthening its legal position in a current or future controversy. At the same time, it believes that the legitimate interests of the State are adequately protected by the opportunity that Article 52 of the Rules gives it to participate in the advisory proceedings, to make known its views on the norms that are to be interpreted

114. *Restrictions to the Death Penalty*, *supra* note 1, para. 10.

115. *Ibid*., para. 11.

116. *Ibid*., para. 38. According to the Court, this is not limited to the Commission since the OAS General Assembly may also find itself in a similar situation if it were to request an advisory opinion while it was considering a draft resolution that urged a member State to comply with its international human rights obligations.

and on any jurisdictional objection that it might have.[117] The Court has also underscored that, when a request is formulated by an OAS organ, its response has the purpose of aiding and guiding that organ in fulfilling its mission within the inter-American system and, quoting Eduardo Jiménez de Aréchaga,[118] recalled that a request for an advisory opinion normally means a postponement of a decision on the merits by the requesting organ until it receives the answer.[119]

A situation like this, involving the compulsory licensing of journalists in Costa Rica, was presented in a request by a State party to the controversy even though there was no longer an opportunity to submit the case to the Court's contentious jurisdiction. In its request the State (agreeing to a petition of the Inter-American Press Association, which lacked standing to present it) noted its agreement with the Commission's resolution in Case No. 9178 that held that the law under which Stephen Schmidt had been sentenced to three months imprisonment for the illegal exercise of the profession of journalism was not incompatible with Article 13 of the Convention.[120] The Court considered whether this request, which referred to the compatibility of a domestic law with the Convention, was inadmissible because the matter had already been considered in proceedings before the Commission.[121] The Court concluded that the request and the Schmidt Case were two entirely distinct legal procedures, even though the latter dealt with some issues submitted to the Court in the request.[122] The Court realized that a State that had been denounced to the Commission might prefer that the complaint not be resolved by the Court under its contentious jurisdiction to avoid the binding, final and enforceable effect of its judgment and confronted with an unfavorable finding of the Commission would request an advisory opinion to challenge the legal soundness of the Commission's conclusions without risking the consequences of a judgment. While the Court admitted that such a strategy would curtail the rights of the potential victims of human rights violations

117. *Ibid*., para. 24.
118. Eduardo Jiménez de Aréchaga,*The Amendments to the Rules of Procedure of the International Court of Justice*, in THE AMERICAN JOURNAL OF INTERNATIONAL LAW, vol. 67, 1973. p. 9.
119. *Restrictions to the Death Penalty*, *supra* note 1, para. 25.
120. *Compulsory Membership*, *supra* note 22, paras. 1 and 13-15.
121. *Ibid*., para. 17.
122. *Ibid*., para. 18.

and would undermine its contentious jurisdiction, it underscored that in the Schmidt Case the State did not gain any legal advantage from the request since in the proceedings before the Commission it had already obtained a favorable decision. According to the Court, making a request after having won the case before the Commission enhanced the moral position of the State and, therefore, there was not any reason to decline the request for an advisory jurisdiction.[123] The Court concluded that the fact that Costa Rica would not have referred the Schmidt Case under its contentious jurisdiction did not make the request inadmissible.[124]

On the other hand, it appears to us that if the Commission had made the request the conclusion would not be the same and that both the system designed by the Convention and its purposes, directed to protect human rights, suggest that, in the case of doubt, the Commission cannot evade the contentious route and has the duty to refer the case to the Court. While the Court held that the Commission's determination to refer a matter that the Commission itself has resolved in favor of the State is the only way that all the means of protection that the Convention establishes function fully and that when the Commission does not refer a case to the Court the delicate balance of the protective system established by the Convention is affected, it maintained that it could not refrain from considering the matter if it were submitted in the form of an advisory opinion.[125]

### *3. THE ADMISSIBILITY OF ADVISORY OPINIONS ON OTHER TREATIES*

The Court's criteria regarding admissibility are not sufficient to indicate the precise circumstances in which it should refuse to respond to a request when it involves the interpretation of a treaty other than the American Convention. In the opinion of Buergenthal, the response to this question depends on the purpose for which the interpretation is requested and the consequences that it might have for the States or organs outside

123. *Ibid*., paras. 22-23.
124. *Ibid*., para. 24.
125. *Ibid*., para. 26.

the inter-American system. One should expect the Court to be more hesitant to respond to requests that seek the interpretation of treaties celebrated within the framework of the United Nations, especially those that have their own supervisory machinery, than for a request to interpret a human rights treaty celebrated under the auspices of the OAS.[126] However, in a case in which an interpretation was requested of a treaty signed within the framework of the UN or another universal treaty, especially if it is considered that its opinion might aid an American State or an OAS organ to fulfill its obligations or responsibilities in the area of human rights, it is clear that the Court would be competent to hear it and could not reasonably refuse to respond to the request.[127]

### *4. REQUESTS CONCERNING DRAFT LEGISLATION*

In admitting the possibility of examining the compatibility of *draft legislation* with the Convention or other human rights treaties through an advisory opinion, the Court has shown its concern that, through this manner, its advisory function might be used for ends other than those stipulated in the Convention. The Court has, therefore, expressed the view that this possibility should not be understood in the sense that it is obligated to exercise its competence to examine any draft law or legislative proposal. It only means that the mere fact of dealing with a draft law is not enough to deprive the Court of jurisdiction to consider the request.[128]

In accordance with this criterion, in ruling on the admissibility of a request on legislative proposals and not on existing laws, the Court must carefully analyze the request to determine, *inter alia*, whether its purpose is to assist the requesting State to fulfill better its international human rights obligations. To that end, the Court must act carefully to ensure that its advisory jurisdiction is not used in those cases as an instrument of political debate with the purpose of affecting the outcome of the internal

126. Thomas Buergenthal, *The advisory practice of the Inter-American Human Rights Court*, in LA CORTE INTERAMERICANA DE DERECHOS HUMANOS: ESTUDIOS Y DOCUMENTOS, Inter-American Institute of Human Rights, San José, Costa Rica, 1986, p. 28.

127. *Ibid*.

128. *Proposed Amendments*, *supra* note 26, para. 29.

legislative process, involving the Court in domestic political disputes that could affect the role that the Convention assigns it.[129]

It is interesting to observe that the only time to date the Court has admitted a request relating to a draft law,[130] that request originated in the unanimous agreement of a legislative commission, so that in principle it would not appear that there was that risk and, therefore, the Court did not find any reason to refuse to respond.[131]

## D. THE PROCEEDINGS

By their very nature, advisory proceedings present important differences than those that the Court must follow in the contentious matters that are referred to it. Of course, while they might involve actors with distinct views, not to say antagonistic interests, in advisory proceedings there are no *parties*, strictly speaking. According to the Court, in advisory proceedings "there are no parties in the sense that are no complainants and respondents; no State is required to defend itself against formal charges for the proceeding does not contemplate formal charges; and no judicial sanction is envisaged and none can be decreed."[132] It is also important to emphasize that, as the requests that are submitted to it must deal exclusively with questions of law and not disputes on factual questions, this proceeding is characterized by not requiring that an evidentiary period be opened, since its sole purpose is to decide the scope of a specific juridical norm.[133] In ruling on its competence to hear the request that was submitted to it on restrictions to the death penalty contemplated in the Convention, the Court noted that it was not asked to rule on any factual dispute and that the objection of Guatemala to the Court's jurisdiction to hear the request did not involve questions of fact but turned exclusively on the interpretation of the Convention.[134]

Pursuant to Article 64 of its Rules the Court processes advisory opinions according to the provisions of Title II of those Rules that deal

129. *Ibid*., para. 30.
130. *Ibid*.
131. *Ibid*., para. 30.
132. *Restrictions to the Death Penalty*, *supra* note 1, para. 22.
133. *Ibid*., para. 32.
134. Ibid., para. 27.

with proceedings in contentious cases to the extent that they are compatible. It is interesting to observe that Article 102.2 of the Rules of the International Court of Justice contains a similar provision that applies the contentious proceedings by analogy but that indicates that it should above all consider whether the request relates to a legal question that is pending between two or more States. Unlike the proceedings in the inter-American system, Article 103 of the Rules of the International Court of Justice contemplates a summary procedure for a case in which the body that makes the request requires an urgent response, or if the ICJ itself considers that a prompt response is desirable. In such a case, it adopts the measures necessary to accelerate the procedure and convokes, as soon as possible, a hearing to deliberate on the request.

### *1. NOTIFICATION OF THE REQUEST*

Once a request for an advisory opinion is received,[135] the Secretary of the Court transmits a copy to all OAS member States, the Commission, the OAS Secretary General and, if applicable, the OAS organs whose sphere of competence refers to the topic of the request.

### *2. WRITTEN OBSERVATIONS*

Once the corresponding notifications are made, the President of the Court sets a date for those interested to submit their written observations, either on the appropriateness of the request or on its merits. Except in the case of the first request when a period of almost three months was set,[136] compared with the periods established for parties in contentious proceedings the President has generally set very reasonable periods, which could even be considered brief, for the presentation of the written observations.[137]

135. We are employing this word in the broad sense given it in the Court's Rules, comprising both the requests on the interpretation of the Convention or a human rights treaty as well as the requests of the States that ask for the *opinion* of the Court on the compatibility of their domestic laws with the Convention or with other treaties concerning the protection of human rights.

136. *"Other Treaties," supra* note 13, paras. 2-3.

137. As examples, *The Effect of Reservations, supra* note 7, para. 3 and *International Responsibility, supra* note 41, para. 6.

Both the Commission and the States have made a broad use of this right, formulating observations on the subject and form of the requests. Non-governmental organizations and even individuals have also had the opportunity to formulate their observations on the subject matter of the request.

***a) Objections to the admissibility of the request***

A particular problem concerns the procedure to follow in the case of objections to the Court's jurisdiction to rule on the request or to admit the request. In fact, this situation was presented in the request on the restrictions to the death penalty in which the State objected to its appropriateness and requested the Court to decline to issue the advisory opinion.[138]

A first incident in this matter arose as a result of the decision of the President, after having consulted the Permanent Commission, ordering that the Commission's request and the arguments of the State regarding the Court's jurisdiction be transmitted to all the OAS member States and organs, inviting them to submit their views on the relevant issues. Guatemala objected to this decision by arguing that the Permanent Commission should have ruled the request inadmissible or, at the very least, that it should have separated the proceedings relating to the jurisdictional objections from consideration of the merits and that the former should have been resolved as a preliminary question.[139] The Court accepted that the issue of whether an objection to the exercise of its jurisdiction should be joined with the merits or considered separately, as a preliminary question, could come up in the context of contentious cases or advisory opinions.[140] The Court, however, recalled that while in contentious cases the exercise of its jurisdiction ordinarily depends upon a preliminary and basic question, such as the State's acceptance of its jurisdiction, this consideration is not present in advisory proceedings since the exercise of this jurisdiction is subject to its own prerequisites that refer to the identity and legal capacity of the bodies with standing to request an opinion, that is, the OAS member States and OAS organs within their spheres of

138. *Restrictions to the Death Penalty*, *supra* note 1, para. 11.
139. *Ibid*., paras. 12-13.
140. *Ibid*., para. 20.

competence.[141] Therefore, the Court indicated that "none of the considerations, which would require the Court in contentious cases to hear the jurisdictional objections in separate proceedings, is present, as a general rule, when the Court is asked to render an advisory opinion."[142]

***b) The intervention of amici curiae***

Article 63.3 of the Court's Rules has introduced an innovative and revolutionary element into international law by empowering the President of the Court to invite or authorize any interested person to present his written opinion on the issues covered by the request. In this way, the institution of *amicus curiae* has been incorporated into the proceedings of the Court's advisory jurisdiction (which has already been commented on in the chapter on the Court's contentious jurisdiction). However, if the request concerns the compatibility of the domestic legislation of the requesting State with the Convention or other human rights treaties, the President may only authorize the intervention of the *amicus curiae* after consulting the State's agent. In any event, the fact that this consultation is obligatory for the President does not mean that the State's opinion is binding on the President, who may admit the intervention of a third person if he deems it prudent to consider the views before issuing the opinion of the Court.

In advisory proceedings, for a long time the Court only received written briefs presented as *amici curiae* and acknowledged their reception without ruling on their appropriateness and without commenting on their contents. However, the request on the international responsibility for laws that violate the Convention produced a notable development when the Court's President invited a group of non-governmental organizations, two of which had already offered their views as *amici curiae*, to participate in the hearings convoked on the request.[143] Several non-governmental organizations and individuals who had previously presented *amicus* briefs have also participated in the public hearings convoked in later requests, although without intervening in them. In some cases, the *amici curiae* also have presented their final written observations. Prior to the request

141. *Ibid*., paras. 21-23.
142. *Ibid*., para. 23.
143. *International Responsibility, supra* note 41, paras. 10 and 11.

regarding consular assistance,[144] the Court had always summarized the arguments of the States or the Commission in its opinions but had never done so with the arguments of the *amici curiae*. Until that time none of the Court's opinions had noted the arguments made by the *amici* nor the importance or weight that the Court had given them, whether to accept or reject them. While it is the Court that knows the law, it would not be very serious if, in accordance with the Rules adopted by the Court itself, the briefs of academic institutions, law professors, non-governmental organizations that work in the area of human rights and human rights activists were received and were not duly considered. The opinion regarding consular assistance produced a significant step in which the Court noted the arguments of the *amici curiae* and in which it begins to take them into consideration.[145]

### *3. THE PUBLIC HEARING*

Unlike contentious proceedings in which the oral phase is mandatory, in the advisory area the Court decides whether it is appropriate to hold an oral stage, in which case it sets the date and hour of the hearing. However, in requests for advisory opinions relating to the compatibility of domestic laws with the Convention or other human rights treaties, that decision is not absolutely discretionary and must be adopted after consulting the agent of the State that has made the request.[146]

In practice, in order to learn the views of both the requesting body and other bodies, the Court has regularly convoked public hearings on the requests that are submitted to it. In the opinion on the international responsibility of laws that violate the Convention, however, the public hearing had a particularity that, because of its transcendence, should be emphasized. On that occasion, as has been mentioned, the President of the Court authorized four non-governmental organizations, two of which had presented *amicus* briefs, to participate, which they did.[147] From that moment, the organizations and individuals that have presented *amicus*

144. *The Right to Information, supra* note 17.
145. *Ibid*., para. 15.
146. *See* Article 54 of the Rules of Procedure of the Court.
147. *International Responsibility, supra* note 41, paras. 8-10.

briefs have appeared at the hearings convoked by the Court and have presented oral arguments. The Commission has, of course, always been represented by its delegates in these hearings.

When the hearings have concluded, the Court deliberates in private in order to render its advisory opinion.

### *4. THE ADVISORY OPINION OF THE COURT*

From a formal point of view, except with reference to its enforceability, the Court's ruling does not differ substantially from a judgment and, as in the latter, a judge who does not share in whole or in part the decision of the Court may attach his concurring or dissenting opinion.[148] In fact, the Court's decision does not always faithfully reflect the opinion of all the judges, who have written separate opinions or declarations in which they define some issues of the Court's opinion[149] or in the most extreme situations present dissenting votes.[150]

Once the opinion has been issued, it is read in a public hearing, which concludes the proceedings.

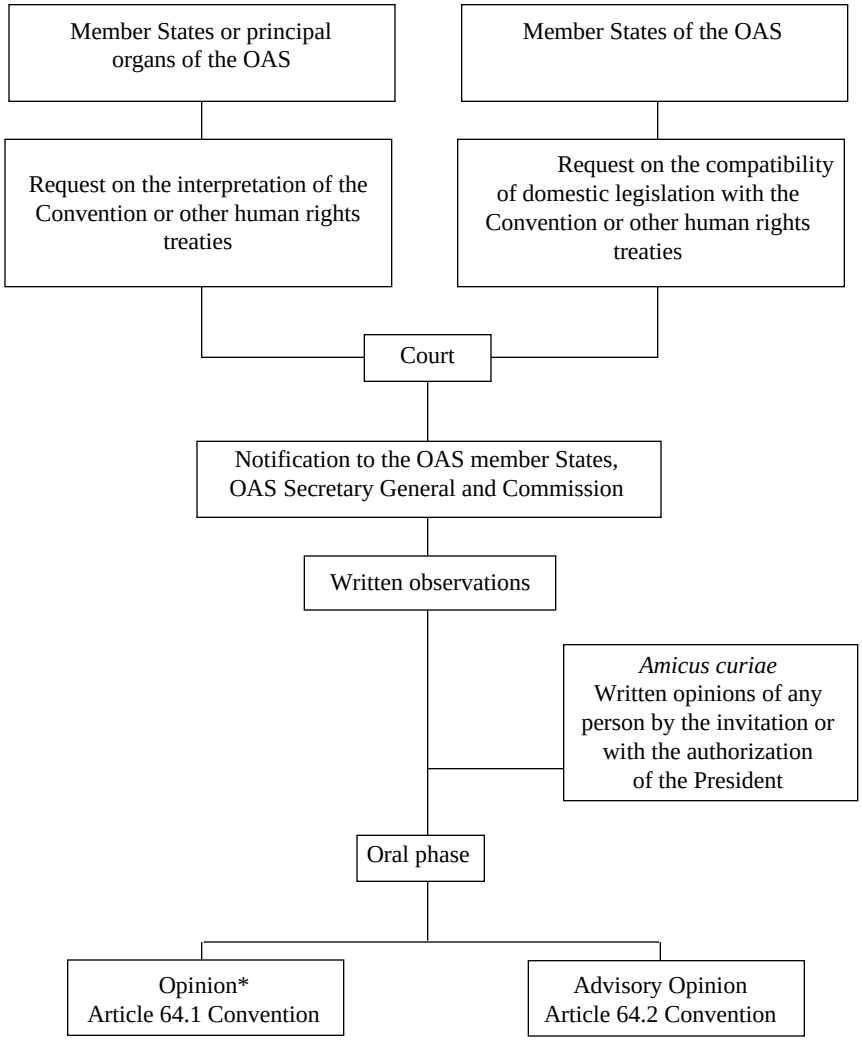
The diagram that follows shows very schematically the advisory procedure under the Convention.

148. *See* the separate opinions of Judges Reina and Piza Escalante in *Restrictions to the Death Penalty, supra* note 1; the separate opinion of Judge Piza in *Proposed Amendments, supra* note 26; the separate opinions of Judges Nieto Navia and Piza in *Compulsory Membership, supra* note 22; the separate opinions of Judges Gros Espiell and Piza in *Enforceability of the Right to Reply or Correction, supra* note 82 and the concurring opinon of Judge Cançado Trindade in *Reports of the Commission, supra* note 4.

149. *See* the declarations of Judges Cisneros and Nikken in *Compulsory Membership, supra* note 22.

150. *See* the dissenting opinion of Judge Buergenthal in *Proposed Amendments, supra* note 26; the dissenting opinion of Judges Nieto and Nikken in *Enforceability of the Right to Reply or Correction, supra* note 82; the concurring and dissenting opinion of Judge Buergenthal in *Enforceability of the Right to Reply or Correction, supra* note 82 and the dissenting opinion of Judge Pacheco in *Reports of the Commission, supra* note 4.

**Diagram No. 3**
**Procedure of the Inter-American Court of Human Rights in advisory matters**




* In its practice, the Court has not distinguished between these two possibilities under Article 64 and all of its decisions have been called advisory opinions.

## E. THE LEGAL EFFECT OF THE MISNAMED ADVISORY OPINIONS

Calling the product issued by the Court *advisory opinions*, whether in the exercise of the competences conferred upon it by Article 64.1 or 64.2, is an area that has not been sufficiently studied. This term has been incorrectly taken from the United Nations Charter and the Statute of the International Court of Justice[151] without understanding that, unlike what occurs with those instruments, it is not mentioned in any article of the Convention and has been incorrectly included in Title III of the Court's Rules. In this sense, it is interesting that, in the case of the request regarding the compulsory licensing of journalists, in holding that it is not inappropriate to invoke in the same request its competences under Article 64.1 and 64.2, the Court did not observe any difference in the legal effects deriving from the exercise of these attributes,[152] notwithstanding that the only provision that refers to consulting the *opinion* of the Court is the latter.

In ruling on the legal nature of its misnamed *advisory opinions*, in addition to expressing that these do not have the same binding character of contentious cases[153] the Court has not been very careful in maintaining that in this area it fulfills a merely *advisory function*.[154] More recently, however, without completely denying its previous position, the Court has indicated that they have *undeniable legal effects*.[155] Similarly, in referring to the advantages of the advisory over the contentious jurisdiction and after emphasizing that the former does not require the acceptance of the Court's jurisdiction, Thomas Buergenthal has stated that those advantages rest on the notion that advisory opinions lack binding force and that, nonetheless, they cannot be easily ignored by States, which would find it easier to comply with an opinion that does not stigmatize them as a violator of human rights.[156] While Buergenthal might be correct from a practical

151. *See* Article 96 of the UN Charter and Articles 65-67 of the Statute of the International Court of Justice. Chapter IV of that Statute is entitled precisely *Advisory Opinions* and its Article 65.1 states that the Court may render *advisory opinions* in the cases that are required, which marks a fundamental difference with the text of the American Convention, which does not use this term.

152. *Compulsory Membership, supra* note 22, paras. 16 and 85.

153. *"Other Treaties," supra* note 13, para. 51.

154. *Restrictions to the Death Penalty, supra* note 1, para. 32.

155. *Reports of the Commission, supra* note 4, para. 26.

156. *The Inter-American Court of Human Rights, supra* note 19, p. 244 *et seq*.

point of view, to maintain that a holding of the Court in an advisory opinion is not binding is not something that corresponds clearly and precisely to Article 64 of the Convention.

In fact, the aforementioned provision implies that between the two organs charged with hearing matters relating to the fulfillment of the commitments made by the States parties under the Convention,[157] the Court has been chosen to give the authorized interpretation of the Convention. It would be absurd that each States party could interpret the Convention arbitrarily or as it wished, absolutely without any control. It is for this reason that in the case of doubt as to the meaning and scope of its provisions, the Convention has indicated the organ that is charged to give the correct interpretation. That interpretation is, of course, binding on the States and is not a mere *opinion*. We, therefore, do not share the position that would lessen the value of the Court's opinions and that would appear to be contrary to the definition that the Court itself has given to its advisory jurisdiction when it indicated that it is "an alternate judicial method of a consultative nature."[158] Beyond the appropriateness and practical utility of its advisory jurisdiction, we believe that a correct interpretation of the Convention requires making in this area some preliminary distinctions, whose importance the Court seems not to have perceived.

In the first place, it should be indicated that Article 64 of the Convention distinguishes between matters with respect to which the Court may be *consulted*, which include the interpretation of the Convention or other treaties concerning the protection of human rights in the American States, and matters on which it may issue *opinions*, which include the examination of the compatibility of a State's domestic legislation with the Convention or other human rights treaties. From a literal reading of the aforementioned provision and without referring to the purposes of the Convention, the legal consequences that derive from the exercise of one or another of these competences do not appear to be the same.

While Article 64.1 of the Convention confers on the Court jurisdiction to issue authorized *interpretations* of the Convention and of other human

157. Article 33 of the Convention.
158. *Restrictions to the Death Penalty*, *supra* note 1, para. 43.

rights treaties, which do not correspond to mere *advice* but to a decision that combines the characteristics of certainty and finality, Article 64.2 authorizes the Court to render its *opinion* on the compatibility of domestic laws with those treaties, an opinion that in any case, coming from such an organ, cannot be considered as mere *advice* that lacks binding force on a State party or on an OAS member State that is considering ratifying the Convention. In the latter case, the *opinion* deals with domestic legislation but the ruling on the compatibility or incompatibility of that legislation with the State's obligations under the Convention has a definitive and conclusive character that the State cannot ignore. In fact, it is noteworthy that the States themselves have taken these decisions rather seriously. For example, Guatemala adapted its behavior to what the Court ruled in the advisory opinion on the restrictions to the death penalty (issued at the request of the Commission and not precisely about Guatemala)[159] and Costa Rica rapidly adjusted its legislation to the Court's opinion in the area of freedom of expression and the compulsory licensing of journalists,[160] to which Colombia later joined, notwithstanding the fact that the request was made by Costa Rica and not Colombia.

In exercising this jurisdiction, the Court operates as a type of constitutional court, charged with interpreting the Convention or other human rights treaties and, at the request of the States, with ruling on the extent to which their domestic legislation conforms to the States' international human rights obligations. It is well to recall that the Convention has conferred an advisory function on the Commission and not on the Court,[161] which is the purely judicial organ of the system.

Admitting that they do not possess the same characteristics as its contentious judgments, in my opinion the misnamed advisory *opinions* of the Court not only have the authority of the organ from which they emanate but also have a binding legal effect derived from the Convention and that, in particular, cannot be avoided by the States parties to the Convention. In that sense, their value is comparable to the decisions of the Court of Justice

159. *Ibid*.
160. *Compulsory Membership*, *supra* note 22.
161. Article 41.e of the Convention.

of the European Communities and differs from the legal effect of the advisory opinions as such of the International Court of Justice. In our opinion, when it is consulted on the interpretation of the Convention or other human rights treaty, the Court renders a *decision* with binding force since it emanates from the judicial organ that has been charged with the authorized interpretation of the Convention. On this point, it should be recalled that Article 1 of the Court's Statute defines it as "an autonomous judicial institution whose purpose is the application and *interpretation* of the American Convention on Human Rights."

Only when the Court is consulted on the compatibility of a State's domestic legislation with the Convention or other human rights treaties does the Court render an *advisory opinion* as such. However, even in that situation the Court's *opinion* has a notable legal effect that the State cannot ignore. In effect, if a State party formulates the petition, the ensuing opinion would be binding for that State since pursuant to Article 33 of the Convention it has accepted the Court's jurisdiction to oversee the fulfillment of the commitments made under the Convention and to define their scope through its authorized interpretation of the Convention. There is also the obligation of those States to comply in good faith with the obligations contracted under the treaty.[162] In the second place, if the opinion is requested by an OAS member State that has not ratified the Convention, by virtue of the same principle and the terms of Article 2 of the Convention, the moment in which that State decides to ratify the Convention it would be obligated to conform its legislation to the terms of the Court's opinion.

In summary, if, as the Court has expressed, the advisory function cannot be disassociated from the purposes of the Convention and if that function has the purpose of assisting the American States in fulfilling their international obligations,[163] the Court cannot fulfill a merely *advisory* function,[164] charged with the moral or scientific authority of the organ called upon to exercise it but shorn of all legal force and, therefore, lacking practical consequences. Such an interpretation would deprive the

162. Article 26 of the Vienna Convention on the Law of Treaties.
163. *"Other Treaties," supra* note 13, para. 25.
164. *Restrictions to the Death Penalty, supra* note 1, para. 32.

Convention of all its *effet utile*.[165] The Court has held, in response to a request, that "the object and purpose of the American Convention is the protection of human rights, so that whenever the Court is called upon to interpret it, it must do so in such a manner as to give full effect to the system of human rights protection."[166] The Court's decisions in response to the requests that are submitted to it, while they are binding on all the States parties to the Convention, cannot be implemented internally in the same manner under the Convention as its judgments. That, however, does not lessen their legal force nor exempt the States from observing the Convention in the terms in which it has been interpreted by the Court.

The paradox is that it has not been the States parties to the Convention but the Court itself that has lessened the value of its decisions under its advisory jurisdiction. Although only for reasons of academic interest, we should ask ourselves what is the value of an interpretation of the Convention that, although coming from the organ authorized to make it, is manifestly contrary to the spirit and letter of the Convention. Above all, it should be asked if this erroneous interpretation of the Convention might affect the capacity of the Court that in the future, with a different composition, might maintain a different position, better adjusted to the text of the Convention. We must remember that, in this case, it does not concern a decision of the Court resolving a specific controversy but rather a ruling on the correct interpretation of the Convention that, as such, should have general and permanent effects, in addition to enjoying a greater stability and not be subject to the comings and goings and changes of opinion of the organ called upon to interpret this treaty. To put it another way, to what point is the Court bound by a previous interpretation of the Convention? In the second place, what is the effect when this ruling manifestly contradicts the text of the Convention? In the third place, can a decision of an international court modify, by its practical application, the text of a treaty? Finally, does the fact that it is a human rights treaty have any relevance

165. *See*, in this respect, I/A Court H.R., *Velásquez Rodríguez Case. Preliminary Objections.* Judgment of June 26, 1987. Series C No. 1, para. 30; *Fairén Garbi and Solís Corrales Case*. *Preliminary Objections.* Judgment of June 26, 1987. Series C No. 2, para. 35 and *Godínez Cruz Case*. *Preliminary Objections.* Judgment of June 26, 1987. Series C No. 3, para. 33.

166. *Reports of the Commission, supra* note 4, para. 29.

and that, as a result of this erroneous interpretation, it does not fully fulfill the object and purpose of the treaty regarding the protection of those rights? Those are some of the questions suggested by the practice of the Court in qualifying its advisory decisions as mere *opinions*, depriving them of the *effet utile* that the Convention gives them and presenting them as a mere speculative exercise lacking legal force. As part of this answer, although referring to another matter, Judge Cançado Trindade has observed that not all practice is converted into custom so as to become part of general international law since this practice may not be in conformity with law (*ex injuria jus non oritur*) and that it is not the function of the jurists simply to take note of the practice of States, but rather to say what the law is.[167]

167. *See* the separate opinions of Judge Cançado Trindade in the judgments against Trinidad and Tobago in I/A Court H.R., *Hilaire Case. Preliminary Objections.* Judgment of September 1, 2001. Series C No. 80; *Constantine et al. Case. Preliminary Objections.* Judgment of September 1, 2001. Series C No. 82 and *Benjamin et al. Case. Preliminary Objections.* Judgment of September 1, 2001. Series C No. 81, para. 26.

## Conclusion

## TAKING STOCK AND PERSPECTIVES

We have attempted to describe not only what theoretically establishes the American Convention on Human Rights as the foundation of a legal system that is above the State but also to indicate how its institutions operate in practice. At the same time, we have hoped to open a debate on the system's effectiveness and on the areas in which it needs strengthening or reform. As we have tried to indicate, notwithstanding its more intensive use, the effectiveness of the inter-American system for the protection of human rights is limited and there are many aspects in which a review would not be very favorable.

The progress made by the Commission and the Court has not been identical but neither are their resources and work load. In any event, the transparency of their proceedings, their capacity to resolve in a timely fashion the cases that are submitted to them and a greater volume of work will be a proof of the solidity of the system.

### A. THE IMPACT WITHIN THE SYSTEM

On a national level, in addition to the American Convention's impact on constitutional law, courts have begun to apply and cite the Convention in their decisions, although sometimes only to discredit it or to pretend to subject it to domestic law or to an outdated idea of sovereignty.[1] It is still necessary, however, to define the effect of the system on the daily work of courts, parliaments and administrative authorities. Above all, the manner in which this law of human rights has influenced the mentality of bureaucrats, the police and the military remains to be defined.

Sufficient attention has not been devoted to the system's subsidiary nature and to the States parties' obligation to provide the appropriate

1. *See*, in this respect, judgment 1942 of July 15, 2003 of the Constitutional Chamber of the Supreme Court of Venezuela.

resources on a local level to protect persons against acts that violate their human rights. The efficacy of the Convention on the national plane must also be seen in function of the existence of those resources and their effectiveness so that problems can be promptly resolved and their referral to an international body avoided.

While there is no guarantee that the Convention has been given priority over the rest of the internal legal system, this is the only way in which it can be effective without compromising the international responsibility of the State. Unfortunately, the system has not shown that it is capable of producing changes in domestic legislation and State practice.

## B. POLITICAL PROMOTION AND JUDICIAL PROTECTION

The purpose of the Convention is to provide institutional mechanisms that respond to human rights violations in the region. For that, an inter-American court for human rights, the principal judicial organ of the system, was created along with a Commission, whose function is, *inter alia*, "to promote the observance and defense of human rights"[2] and to act on the petitions and communications that are submitted to it pursuant to the procedures of the Convention,[3] the objective of which is to reach a settlement based on the law.[4] It is no longer a question of whether human rights are a matter reserved to the States or whether, on the contrary, they are a legitimate international concern governed by international law. As Edmundo Vargas Carreño has correctly observed, as the dictatorial regimes have been replaced by a new wave of democracy in the hemisphere "the current debate is more about the relationship of the powers of the Inter-

2. Article 41 of the Convention.
3. Article 41.f of the Convention.
4. In this respect, we should remember that this idea is latent throughout the Convention and requires that the State adopt "such legislative or other measures as may be necessary to give effect" to human rights (Article 2), including, pursuant to Article 25, the right of every person "to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties." It would be absurd to assume that, notwithstanding that the Convention imposes on the States legal obligations and grants legal recourses to individuals, the mechanisms of the Convention itself to make effective those rights are merely political.

American Commission and Court vis-à-vis the States, the relations of the Commission with the Court and the distribution of functions between both organs of protection."[5]

While the Commission's tasks of promoting and protecting human rights are not incompatible and are mutually complementary, the distinction between one and the other has occasionally been a pretext for the political rather than judicial handling of petitions. After the Convention entered into force the Commission sometimes assumed a decisive role in which it attempted to relegate the Court to a lower level, ignoring the latter's important role in the protection of human rights, and thus became a brake on the system's development. This characterization would be apt for the period from the mid-1980s until the first years of the following decade. Fortunately, since 1994 there has been a greater activism and professionalism by the Commission as it became more sensitive to the numerous criticisms that had been made of the politicized and select handling of the petitions submitted to it. This change of attitude coincided with a partial renovation of the Commission's members, which seemed to have marked a new orientation for the Commission and which it is hoped will definitively strengthen its political independence from the member States of the system by assuming fully its function to oversee the defense of human rights in the hemisphere.

## C. THE COMPARISON WITH THE EUROPEAN SYSTEM

It is interesting that, notwithstanding the many similarities that exist between the European and inter-American systems for the protection of human rights, since the latter is modeled on the former, their results are not similar in volume or in content. In evaluating the product of the activity of the organs of the American Convention, it is especially useful to examine that of the organs of the European Convention.[6] The former European Commission always assumed the functions entrusted to it by its Convention

5. See his Foreword to Monica Pinto, LA DENUNCIA ANTE LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, Editores del Puerto S.R.L., Buenos Aires, 1993, p. 18.

6. That is to say, the Commission, the Committee of Ministers and the European Court of Human Rights.

without hindering the work of the Court and without politicizing the application of the Convention. Although the system governs a continent that since the end of the Second World War has been characterized by the rule of law, representative democracy[7] and respect for human rights, individuals have made very intense use of the organs of the European Convention, submitting thousands of petitions each year formerly to the Commission and now to the Court. The Inter-American Commission does not have precise statistics on the number of petitions that it receives annually or on their fate. The most reliable data indicate that from 1997 to 2002 the Commission received 7,701 complaints, as compared to the more than 10,000 that it had received from its creation until the end of 1992.[8] These numbers only serve as a point of reference since, unlike the European Commission, the Inter-American Commission does not publish annual statistics with the number of complaints received, classified by the countries denounced or by the Convention's provisions that are alleged to have been violated. This is an area where, without much effort, important changes could be made to give a more exact idea of the use of the system and to permit a better evaluation of the Commission's work.

Something similar may be said about the work of the two Courts. Although initially, like the American Convention, only States and the Commission could refer cases to the European Court, between 1959 and the end of 1994 the European Court delivered judgments in 498 cases,[9] with 72 in 1991, 81 in 1992, 60 in 1993 and 50 in 1994, which is an average of 65 annual judgments for those four years.[10] In 1997 the number of judgments of the European Court rose to 197 and in 2003 the different chambers of the Court delivered a total of 703 judgments. Many of these judgments found that the States denounced had violated their obligations under the European Convention and forced the States to repeal laws or abandon prohibited practices. It is noteworthy that these decisions did not

7. Except for short interruptions of democracy in Greece and Turkey.

8. *See*, in this respect, Antonio Cançado Trindade, *La Protección Internacional de los Derechos Humanos en América Latina y el Caribe* (preliminary version), UN document A/Conf.157/PC/63/Add.3 of March 18, 1993, p. 19.

9. European Court of Human Rights, SURVEY: THIRTY-FIVE YEARS OF ACTIVITY, 1959-1994, Council of Europe, Strasbourg, 1995, p. 35.

10. *Ibid*., p. 19.

create insoluble problems for the States concerned. On the other hand, since the American Convention entered into force on July 18, 1978 in a continent characterized by violence and repression the Commission has referred (as of January 2004) only 49 cases to the Court, which is an average of about two cases a year, and more than half of them have been submitted since 1995. These modest numbers are even more striking when it is taken into account that many of these cases concern small States (Honduras, Suriname, Nicaragua, Guatemala and Ecuador) that do not have power and influence and are not always popular in the international community. Until the mid-1990s the Court had not examined any case against a medium or large size country, notwithstanding the serious human rights violations that had been reported in the press in those countries. The Commission has not explained the selectivity, depending on the country denounced, in the treatment of similarly serious cases.

## D. THE GUARANTEES OF INDEPENDENCE OF THE ORGANS OF PROTECTION OF THE SYSTEM

Pursuant to the terms of the Convention, the members of the Commission are elected in a personal capacity and are independent of the States. Not all of them, however, have behaved as such and some of them, fortunately only a few, particularly during the 1980s and the early 1990s confused their function with that of political activists and appeared to be defense lawyers for the States that had proposed them for the Commission. It must be underscored that the Commission's behavior has not only been due to the lack of the functional or political independence of some of its members with respect to the States of which they are nationals but also to a resistance to accept that, after so many years as the only regional organ with competence in the area of human rights, the Commission now had to share that task with the Court, which in jurisdictional matters occupies the principal place in the system.

The very complacent attitude of the Commission and the Court, in permitting the dual function of Commission member or judge of the Court and that of Ambassador, Senator or judge of a national court, does not offer sufficient guarantees of independence and impartiality due to a less

than strict application of the Convention in the area of incompatibilities. This practice, which is not in keeping with the spirit and the express text of the Convention, has denatured the system, undermined its credibility and allowed the implication that, at least in this area, the organs of the Convention operate as a circle of good friends or a family business and not as a true court.

Moreover, the possibility of appointing *ad hoc* judges when it is manifestly inappropriate places in doubt the Court's impartiality and does not speak very well of its interpretation of the Convention.

We must hope that in the near future, either as the result of changes in the composition of the Commission and the Court or of a stricter application of the law, we shall see significant changes in these two areas. We have the right to aspire that the actions of the system's organs be known for their absolute rectitude and transparency.

## E. THE PROCEDURAL LIMITATIONS

An aspect that is closely associated to the foregoing is the individual's lack of influence when his case is completed before the Commission and is referred to the Court. While this decision is, *per se*, a guarantee for individual rights, its implementation may be plagued by errors that are the sole fault of the Commission but that may negatively affect the victim of the violation. This is not a mere theoretical possibility, but has unfortunately occurred in several cases. For example, in the Cayara Case the Court sustained the State's preliminary objections because of the Commission's incompetent handling of the case for which the petitioner was not to blame. Similarly, in the Chunimá Case the provisional measures decreed by the Court elapsed due solely to the Commission's negligence, unnecessarily endangering the victims. Fortunately, its new Rules ensure the petitioner's participation at all stages of proceedings before the Court. What the Rules do not include is a provision whereby in cases not under its consideration the Court may entertain a direct request by an individual for provisional measures.

For such situations, unfortunately there are no procedures that would enable an individual to enforce his rights when he is prejudiced by the

negligence or ineptitude of one of the organs that the system has established for the protection of human rights. Specifically, there are no provisions to ensure that, in the final analysis, the purposes of the Convention prevail nor have any been contemplated for procedural errors that are not imputable to the petitioner that would put the process back at a stage at which he can obtain a ruling on the merits of his complaint. Consideration could be given to the adoption of an additional protocol that would permit an individual to refer his case directly to the Court after proceedings before the Commission have been completed.

There is also a procedural imbalance in favor of the State regarding the question of admissibility. In effect, a decision of the Commission that declares a petition inadmissible is not subject to appeal. Moreover, a petition that has been admitted or with respect to which there has not been an express ruling on admissibility may be rejected as inadmissible at any stage of the proceedings without the petitioner having the right to request reconsideration.

These circumstances become more relevant because, unlike the European system and unlike the judicial guarantees set forth in the Convention itself, there is no provision for legal assistance for the petitioner, the lack of which may negatively affect the exercise of his rights.

Either because the independence of the Commission and the Court depend on it or because of the way that the inter-American system is designed, the international organs of supervision are not supervised by anyone and, therefore, their work is not subject to a strict control. Thus, the high moral character and professional background of those who aspire to the Commission and the Court are so important. In truth, the only judge of their work is public opinion. It would be absurd to pretend otherwise.

In spite of its apparent amplitude, the Court's advisory jurisdiction is not so broad as to permit local courts to submit to it prejudicial questions. The Court's responses might contribute to a better interpretation and application of the Convention by the national courts and to a greater uniformity in the determination of the applicable law. Consideration should be given to a protocol on this matter.

## F. THE PATIENCE OF THE USERS OF THE SYSTEM

The duration of the system's proceedings do not meet the requirements of procedural promptness for States parties contained in Articles 8 and 25 of the Convention, which the Commission and the Court have the responsibility to supervise. Since the length of these proceedings is not a trivial problem, it would be highly convenient to improve the system's effectiveness and promptness. If justice delayed is justice denied and if the Convention ensures the right of every person to be heard within a reasonable period, the organs of the system have not distinguished themselves by their agility and rapidity. An example is the Velásquez Rodríguez Case, which was submitted to the Commission on October 7, 1981, was referred to the Court four and a half years later on April 24, 1986, the judgment of compensatory indemnification was delivered on July 21, 1989 and the Court delivered an interpretation of the latter on August 17, 1990: a total of eight years and ten months to process the case. Similarly, the Durand and Ugarte Case began with a complaint that was introduced in the Commission on April 27, 1987 and ended with a judgment on reparations on December 3, 2001, that is, a total of 14 and a half years.[11] In the latter case, the greatest delay occurred in the procedure before the Commission and was not due to the petitioners. Although its Rules authorize the Commission to presume the truth of the acts denounced if a State fails to respond, it waited more than two years for the State to provide the pertinent information and its observations on the petition and it referred the case to the Court more than nine years after the petition was introduced.[12] While it is true that there are some exceptions that justify the rule, which also suggest a curiously selective criterion,[13] this lack of a prompt resolution of the matter has continued until very recently as shown by one of the most recent cases resolved by the Court. The Juan Humberto

11. I/A Court H.R., *Durand and Ugarte Case. Reparations.* (Art. 63(1) American Convention on Human Rights). Judgment of December 3, 2001. Series C No. 89.

12. I/A Court H.R., *Durand and Ugarte Case. Preliminary Objections*. Judgment of May 28, 1999. Series C No. 50, paras. 3-5 and 9.

13. For example, in the Cesti Hurtado Case, the claimant petitioned the Commission on March 7, 1997 and 10 months later the case was referred to the Court, which one year later on January 26, 1999 handed down its judgment on the preliminary objections, on September 29 of the same year it rendered its judgment on the merits and on May 31, 2001 its judgment on reparations.

Sánchez Case was denounced before the Commission on October 19, 1992, but the application was not referred to the Court until September 8, 2001 and the case was not decided until June 7, 2003.[14] Although the Aloeboetoe *et al*. Case had more luck and the entire proceedings before the Commission and the Court took only four years and nine months, this is an area in which the inter-American system appears to be two-faced with respect to the idea of justice because, while an unjustified procedural delay is certainly a denial of justice and a violation of human rights, it is valid only regarding the States' obligations and does not appear to be relevant with respect to the work of the Commission and the Court, the organs charged with overseeing respect for human rights.

The absence of organs that function permanently plus the duration of the proceedings are more of a concern with respect to provisional measures because, although these imply the existence of a situation of extreme gravity and urgency, they are not always resolved with the promptness and diligence that that urgency requires. In the Reggiardo Tolosa Case, on August 19, 1993 the petitioners asked the Commission to request that the Court order provisional measures, a request that the Commission accepted two months later on October 20, 1993 and submitted to the Court by fax only on November 8. Of course, the delay in handling this petition suggests that the Commission had not seriously considered its urgency. Therefore, a more prompt handling by the Court could not be expected, as its President ordered urgent measures on November 19, 1993 and the Court adopted a definitive order on January 19, 1994. A total of five months elapsed from the time that the petitioners requested of the Commission a Court ruling on provisional measures until the Court adopted the relevant order. This time frame does not appear to correspond to a case that both the Commission and the President of the Court qualified as of extreme gravity and urgency.

The inter-American human rights system cannot consist simply of international bodies that grant indemnification as appeared to be the case until a few years ago, but rather of bodies that order the adoption of effective measures that would ensure administrative, legislative or other types of changes that are designed to avoid the repetition of the same acts. In its

14. I/A Court H.R., *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003. Series C No. 99.

more recent judgments, the Court has begun to pay greater attention to Article 63.1 of the Convention, which refers to the reparation of the consequences of the measures or situations that constituted the breach of human rights, as something distinct from what is owed to the injured party as indemnification and includes the obligation to conform the domestic legislation to the State's commitments under the Convention. This is a positive step.

## G. THE INSUFFICIENT POLITICAL WILL OF THE STATES

There is agreement that at this stage the political will of the States has also played an important role. As long as the States do not take seriously the necessity that the members of the Commission and the Court are persons who enjoy absolute independence and they no longer consider these positions as a treasure to be distributed through *agreements of reciprocal support* and accept that the members be elected in the framework of an absolutely transparent process, the system will be defective with little credibility.

The same States that have designed this sophisticated system for the protection of human rights have not proved to be very disposed to pay the costs implied in the preservation of the values of a democratic society. In order that the proclamation of human rights not be a pronouncement of mere ideals or a joke in bad taste, it is necessary that the necessary means are available to monitor the fulfillment of the States' obligations. It is unacceptable to create a system for the protection of human rights and not give it the adequate means to achieve its purposes. The Organization of American States has obviously not provided the Commission and its Secretariat with the human and material resources necessary for such an important task as the protection of human rights.[15] While there was a time that some States could allege the Commission's relative ineffectiveness as a pretext not to give it greater resources, it must be observed that neither has the Court been given the essential means to carry out its functions.

15. Statistics on the budget and staff of the Commission may be found in THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS: A PROMISE UNFULFILLED. Report of the Human Rights Committee of the Bar Association of the City of New York, 1993, pp. 26-31.

While recognizing the importance of international cooperation in the area of human rights, it is uncomfortable, not to say embarrassing, that the latest judgments and advisory opinions of the Court were published thanks to funds from the European Union.

The increasingly intense use that is being made of the inter-American human rights system requires that its organs function on a permanent basis and that the judges and members of the Commission be full-time. Otherwise, the system may collapse as a consequence of the increased number of users. A system for the protection of human rights cannot function only on a sporadic basis, depending on the resources or the availability of those who comprise its organs.

When the Commission and the Court have sufficient financial resources and a qualified staff that permit them to fulfill their functions promptly and effectively, when the members of the Commission are able to consolidate and strengthen their independence, as appears they are doing, when all of the cases that require the Court's ruling are referred to it, when the Court strictly applies the provisions of the Convention (in the areas of *ad hoc* judges, the regime of incompatibilities, the effect of its decisions in its advisory jurisdiction, etc.) and, above all, when the States take seriously the recommendations of the Commission and the judgments of the Court, then we can say that the inter-American system for the protection of human rights has reached its full maturity.

## H. THE EVOLUTION OF THE JURISPRUDENCE

The recent jurisprudence of the Court has undoubtedly taken an important leap, overcoming difficulties and opening new paths for the more effective protection of human rights. In the first place, there is the evolution of the jurisprudence in the area of provisional measures, which are still not understood as a means of guaranteeing the effective exercise of the Court's jurisdictional functions but as an autonomous and effective mechanism to protect human rights in the most diverse circumstances, including their extension to the protection of unnamed groups although it may be necessary to present elements that would permit the individualization of the beneficiaries.

In the second place, the recognition of the concept of damage to the life plan as an aspect to be taken into account in determining the pertinent reparations, although it has not yet materialized into specific indemnifications, points out a new path that could be translated in the future into decisions that provide appropriate remedies for the damage caused by human rights violations.

A third notable advance is the amending of the Court's Rules to permit the participation of the victim or his representatives at all stages of the proceedings. This circumstance, which is an innovation of transcendental importance in the inter-American system for the protection of human rights, has already had an effect on the handling of the cases referred to the Court.

Finally, we still hold out hope that the Court's Rules will be modified to eliminate the repeated practice, incompatible with the text of the Convention, of inviting a State to appoint an *ad hoc* judge when there is not a national of that State among the judges of the Court.

## I. AN ENCOURAGING PICTURE

From its creation in 1959 until the beginning of the 1980s, the Inter-American Commission was heavily involved in the defense of human rights. During most of that period, the American Convention did not exist or had not entered into force and dictatorial regimes predominated in the region. It was a very difficult moment in the hemisphere and the Commission had only political tools, which it adeptly used to seek political and diplomatic solutions to the grave human rights violations in the region. Until recently, however, the members of the Commission refused to accept that the situation had changed, that there were now solid legal instruments for the protection of human rights and that its role under the Convention is not exclusively political but basically legal. For some reason, the Commission had confused its function of promoting the respect and observance of human rights with its role to protect human rights and had refused to accept that, with respect to the latter, the solutions under the Convention are legal and involve the intervention of the Court. This stage appears to have been overcome, but we cannot expose ourselves to a repetition of history.

It is also necessary to point out that the supervisory function of the Commission has not always been rigorously exercised or has been selective. It is symptomatic that the popular protests that occurred in Caracas and other cities in Venezuela between February 27, 1989 and the first week of March, which resulted in the death of hundreds of persons and led to the suspension of constitutional guarantees, were not mentioned in the Commission's Annual Report nor was there an examination of whether the suspension had complied with the requirements of Article 27 of the Convention. Neither did the Commission's Annual Report mention the suspension of guarantees of February and November of 1992, the result of two uprisings in Venezuela.

It is not surprising that since the Convention entered into force it has been claimed that the Commission's practice has not been as innovative as when the Commission's legal basis was precarious and that the entry into force has not had an effect on the Commission's activity with respect to its new powers, many of which are hardly exercised.[16] For example, it mostly continues to process individual petitions in the same way, not taking into account that these processes are not exhausted in the Commission when they concern States that have recognized the Court's binding jurisdiction.[17] Fortunately, new winds appear to have begun to blow in the Commission.

On the other hand, the system's effectiveness must also be evaluated in qualitative terms with regard to the content of the decisions and the type of cases that are being considered. In this aspect, it must be borne in mind that human rights violations in Western Europe are not comparable to those committed in the Americas. While we consider the problems that are debated in Europe to be trivial, in the Americas the Commission refuses to refer to the Court vital matters that involve extra-legal executions, torture, arbitrary deprivation of personal liberty and arbitrary restrictions to freedom of expression. It was not until the 1990s in the Genie Lacayo, Maqueda, Loayza Tamayo and Suárez Rosero Cases that matters were referred to

16. Thomas Buergenthal, Claudio Grossman and Pedro Nikken, MANUAL INTERNACIONAL DE DERECHOS HUMANOS, Inter-American Institute of Human Rights/Editorial Jurídica Venezolana, Caracas/San José, 1990, p. 94.

17. *Ibid*.

the Court that concerned the violation of judicial guarantees and that, at least in the case of the latter two, did not involve the right to life, which appeared to be a constant in the cases previously referred to the Court. Recently, the Baena Ricardo *et al*, Mayagna Community, Olmedo Bustos *et al.*, Cantos, Ivcher Bronstein Cases presented for the first time problems regarding the rights of assembly and association, freedom of conscience, religion and expression and the right to property. While the Court has done commendable work reflected in its 18 advisory opinions, in the adoption of precautionary measures even in cases not before it and in the few judgments that it has had the occasion to adopt because of the initial attitude of the Commission, until recently it had not been given the opportunity to hear a greater number of cases and rule on some of the most severe problems of the region, which would have resulted in clearly legal solutions and would have contributed to the development of the law of human rights and to the strengthening of democratic institutions.

In practical terms, the effectiveness of the system as a whole is not easy to evaluate. It is true that provisional measures have achieved the desired effect and that the judgment in the Chunimá Case may have led to the prosecution and conviction of those responsible for the acts denounced and the end of attacks against the defenders of human right in the zone. Similarly, the decisions in the Bustíos-Rojas Case led to a renewed investigation and dissuaded new threats against the claimants and the witnesses to the acts denounced. On the other hand, until recently two of the judgments against Honduras (Velásquez Rodríguez and Godínez Cruz Cases) had only been complied with partially, since the stipulations of the judgments of interpretation of August 17, 1990 had not been satisfied. Moreover, it cannot be forgotten that compliance of the decisions of the organs of the system depends on the national political bodies, which are not always willing to comply with their mission. In this sense, we regret that the inter-American system does not have a more effective mechanism to ensure compliance with the judgments of the Court and that the OAS General Assembly has not assumed an active role in this area by applying very costly political sanctions that would allow achieving the desired effect.

## A FINAL WORD

The Commission's experience and the Court's jurisprudence have put in relief the practical and theoretical limitations of the system. Because States have been reluctant to accept an effective and reliable judicial human rights mechanism, the tangible results to date have been less than the theoretical possibilities offered by the Convention. A notable lack of political will, the product of a combination of lack of confidence and resistance on the part of the States, has resulted in the progress being slower than what is desired. In spite of the obstacles and the difficulties, there is no room for pessimism or for abandoning efforts to strengthen the institutions and proceedings that have been established for the protection of human rights. We must not ignore the effect that the system has had in generating a climate of respect for human dignity, establishing a base for an environment of tolerance and pluralism without nationalistic and ethnocentric attitudes.

The system designed by the Convention is undoubtedly very far from being perfect. Most of its defects, however, are due to the practices of its organs, many of which are contrary to the spirit and letter of the Convention. If the political will existed, they could be easily corrected.

Another no less important aspect has to do with the impact that the inter-American human rights system has had on the domestic law of the States and, above all, on the practice of national courts. It is to be regretted, however, that lawyers do not invoke the Convention before local judges and that, except in rare cases, the latter do not apply it either because they are not familiar with it or because they believe that international law only governs the behavior of States and that, on the local level, it is not directly applicable to individuals. This is an area in which there is hope for important progress.

In a hemisphere that has not been particularly known for tolerance and that still resorts to violence to resolve conflicts, the inter-American system undoubtedly offers immense possibilities for the defense of human rights notwithstanding all of its limitations. Until recently, many of its possibilities were unthinkable and, therefore, its progress is absolutely surprising. There is no doubt that the inter-American human rights system has been recently converted into an obligatory point of reference and has

been used in an increasingly more intense way. The text of the Convention, the Commission's practice and, to a great extent, the Court's jurisprudence have notably contributed to the political culture and strengthening of democracy in the hemisphere.

It may be that many of our proposals to perfect the inter-American system for the protection of human rights are too theoretical, but sometimes theory offers the most practical solution. The current challenge is doubly difficult: making the system thus designed function effectively and improving it internally without amending the Convention. To employ a frequently used expression in the European Community Law, we must maintain the *acquis conventional* without this conferring a divine and immutable nature to the former jurisprudence that would prevent its evolution. What is at stake is maintaining the highest level of human rights protection attained by that jurisprudence and not diminishing it. The achievements of the system must be maintained but its evolution must also be facilitated and the danger of diluting its immense possibilities avoided.

The people of the hemisphere have become conscious of their rights under the Convention. It is now a matter of making these rights a reality. One challenge is to use the system creatively to accomplish the purposes for which it was designed as an instrument that allows the creation of a climate of respect for human dignity. Another challenge is to ensure that its efficacy serves as a stimulus for those who dream of a more just society where freedom, tolerance and above all the recognition of the intrinsic dignity of every human being prevail.

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# Appendix

## *STATUS OF THE RATIFICATIONS ON THE AMERICAN CONVENTION ON HUMAN RIGHTS*
## *(As of March 31, 2004)*

| MEMBER STATES OF THE OAS | DATE OF RATIFICATION OR ADHESION | RESERVATIONS | INTERPRETIVE DECLARATION | ACCEPTANCE JURISDICTION COURT (Art. 62) | ACCEPTANCE STATE COMMUNICATIONS (Art. 45) | CONTENTIONS CASES |
|---|---|---|---|---|---|---|
| Antigua and Barbuda * | | | | | | |
| Argentina | 9/5/84 | Art. 21 | Arts. 5.3, 7.7, and 10 | 9/5/84 | 9/5/84 | 4 |
| Bahamas * | | | | | | |
| Barbados | 11/27/82 | Arts. 4.4, 4.5 and 8.2 (e) | | 6/4/00 | | |
| Belize * | | | | | | |
| Bolivia | 7/19/79 | | | 7/27/93 | | 1 |
| Brazil | 9/25/92 | | Arts. 43 and 48 d) | 12/10/98 | | |
| Canada * | | | | | | |
| Chile | 8/21/90 | | | 8/21/90 | 8/21/90 | 1 |
| Colombia | 7/31/73 | | | 6/21/85 | 6/21/85 | 4 |
| Costa Rica | 4/8/70 | | | 7/2/80 | 7/2/80 | 1**** |
| Cuba * | | | | | | |
| Dominican Republic | 6/3/93 | Arts. 5, 4,4, 8.2 (e), 21.2 and 27.1 | | | | |
| Ecuador | 12/28/77 | | | 7/24/84 | 8/13/84 | 4 |
| El Salvador | 6/23/78 | General Reservation | General Declaration | 6/6/95 | | 1 |
| Grenada | 7/18/78 | | | | | |
| Guatemala | 5/25/78 | Art. 4.4 *** | | 3/9/87 | | 8 |
| Guyana * | | | | | | |
| Haiti | 9/27/77 | | | 3/20/98 | | |
| Honduras | 9/8/77 | | | 9/9/81 | | 5 |
| Jamaica | 8/7/78 | | | | 8/7/78 | |

| MEMBER STATES OF THE OAS | DATE OF RATIFICATION OR ADHESION | RESERVATIONS | INTERPRETIVE DECLARATION | ACCEPTANCE JURISDICTION COURT (Art. 62) | ACCEPTANCE STATE COMMUNICATIONS (Art. 45) | CONTENTIONS CASES |
|---|---|---|---|---|---|---|
| Mexico | 3/24/81 | Art. 23.2 | Arts. 4.1 and 12.3 | 12/16/98 | | 1 |
| Nicaragua | 9/25/79 | | | 2/12/91 | | 3 |
| Panama | 6/22/78 | | | 5/9/90 | | 1 |
| Paraguay | 8/24/89 | | | 3/26/93 | | 3 |
| Peru | 7/28/78 | | | 1/21/81 | 1/21/81 | 16 |
| Saint Kitts and Nevis * | | | | | | |
| St. Lucia * | | | | | | |
| St. Vincent and the Grenadines * | | | | | | |
| Suriname | 11/12/87 | | | 11/12/87 | | 3 |
| Trinidad and Tobago | 28/05/1991 ** | Arts. 4.5 and 62 | | 5/28/91 | | 4 |
| United States | | | | | | |
| Uruguay | 4/19/85 | Art. 23.2 | | 4/19/85 | 4/19/85 | |
| Venezuela | 8/9/77 | Art. 8.1 | | 6/24/81 | 8/9/77 | 2 |

* Countries that have not signed the Convention
** Denounced 05/26/1998
*** Withdrawn 05/20/86
**** Does not include *In the Matter of Viviana Gallardo et al.*, which was rejected out of hand by the Court and which was never considerated a case

## *CONTENTIOUS CASES SUBMITTED TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS*
## (As of March 31, 2004)

| No. | Case | Respondent State | Submitted to the Court | Alleged Violation | Preliminary objections | Decision on the merits | Reparation and Indemnification | Other procedural actions |
|---|---|---|---|---|---|---|---|---|
| 1 | **Velásquez Rodriguez** | Honduras | 4/24/86 | Arts. 4, 5, and 7 of the Convention | Judgment of 26/06/87. Rejected, except that relating to the exhaustion of domestic remedies, which was joined to the merits. | Judgment of 29/07/88. Rejected pending preliminary objection. Violation Arts. 1.1, 4, 5 and 7 of the Convention. | Judgment of 21/07/89 | Judgment of interpretation 17/08/90. |
| 2 | **Fairén Garbi and Solís Corrales** | Honduras | 4/24/86 | Arts. 4, 5, and 7 of the Convention | Judgment of 26/06/87. Rejected, except that relating to the exhaustion of domestic remedies, which was joined to the merits. | Judgment of 15/03/89. Rejected pending preliminary objection. Violation of the Convention not proved. | /-/-/-/-/ | /-/-/-/-/ |
| 3 | **Godínez Cruz** | Honduras | 4/24/86 | Arts. 4, 5, and 7 of the Convention | Judgment of 26/06/87. Rejected, except that relating to the exhaustion of domestic remedies, which was joined to the merits. | Judgment of 29/07/88. Rejected pending preliminary objection. Violation Arts. 1.1, 4, 5 and 7 of the Convention. | Judgment of 21/07/89 | Judgment of interpretation 17/08/90. |
| 4 | **Aloeboetoe et al.** | Suriname | 8/27/90 | Arts. 2, 4.1, 5.1, 5.2, 7.1, 7.2, 7.3, 25.1 and 25.2 of the Convention | Judgment of 02/12/91. The State withdrew its objections. | Judgment of 04/12/91. Note taken of the responsibility of the State. Violation of the Convention understood, but no indication as to which rights were violated. | Judgment of 10/09/93 | /-/-/-/-/ |

| No. | Case | Respondent State | Submitted to the Court | Alleged Violation | Preliminary objections | Decision on the merits | Reparation and Indemnification | Other procedural actions |
|---|---|---|---|---|---|---|---|---|
| 5 | **Gangaram Panday** | Suriname | 8/27/90 | Arts. 1, 2, 4, 5, 7 and 25 of the Convention | Judgment of 04/12/91. Rejected. | Judgment of 21/01/94. Violation Arts. 1.1 and 7.2 of the Convention. | Included in Judgment on this merits 21/01/94 | /-/-/-/-/ |
| 6 | **Nerira Alegría et al.** | Peru | 10/10/90 | Arts. 1, 4, 5, 7, 8, 21 y 25 of the Convention | Judgment of 11/12/91. Rejected. Request for revision and interpretation, rejected in judgment of 03/07/92. | Judgment of 19/01/95. Violation Arts. 1.1, 4.1, 7.6 and 27.2of the Convention. | Judgement of 19/09/96 | Request of Interpretation of judgment on reparations, rejected for being out time 11/02/97 |
| 7 | **Cayara** | Peru | 2/14/92 | Arts. 1.1, 4, 5, 7, 8, 21 y 25 of the Convention | Judgment of 03/02/93. Accepted. | /-/-/-/-/ | /-/-/-/-/ | /-/-/-/-/ |
| 8 | **Caballero Delgado and Santana** | Colombia | 12/24/92 | Arts. 1.1, 2, 4, 5, 7, 8, 25, 44 and 51.2 of the Convention | Judgment of 21/01/94. Rejected. | Judgment of 08/12/95. Violation Arts. 1.1, 4 and 7 of the Convention. | Judgment of 29/01/97 | /-/-/-/-/ |
| 9 | **Genie Lacayo** | Nicaragua | 1/6/94 | Arts. 1.1, 2, 8, 24, 25 and 51.2 of the Convention | Judgment of 27/01/95. Rejected, except that relating to the exhaustion of domestic remedies that was joined to the merits. | Judgment of 29/01/97. Rejected pending preliminary objection. Violation Arts. 1.1 and 8.1 of the Convention. | Included in Judgment on this merits 29/01/97 | Request for Revision. Declare not appropriate on 13/09/97 |
| 10 | **El Amparo** | Venezuela | 1/14/94 | Arts. 1.1, 2, 4, 5, 8.1, 24 and 25 of the Convention | None. | Judgment of 18/01/95. Note taken of the responsibility of the State. Violation of the Convention understood, but no indication as to which rights were violated. | Judgement of 14/09/96 | Interpretation of the judgment on the Merits. Decision of 16/04/97. |

| No. | Case | Respondent State | Submitted to the Court | Alleged Violation | Preliminary objections | Decision on the merits | Reparation and Indemnification | Other procedural actions |
|---|---|---|---|---|---|---|---|---|
| 11 | **Maqueda** | Argentina | 5/25/94 | Arts. 1.1, 2, 8.1, 8.2 and 25 of the Convention | None. Order of 17/01/95, accepting the withdrawal of the application. | /-/-/-/-/ | /-/-/-/-/ | /-/-/-/-/ |
| 12 | **Castillo Paéz** | Peru | 1/12/95 | Arts. 1, 4,5,7,8 and 25 of the Convention | Judgment of 30/01/96. Rejected. | Judgment of 03/11/97. Violation Arts. 4, 5, 7 and 25 of the Convention. | Judgment of 27/11/98 | /-/-/-/-/ |
| 13 | **Loayza Tamayo** | Peru | 1/12/95 | Arts. 1, 5, 7, 8, 25 and 51.2 of the Convention | Judgment of 31/10/96. Rejected. Request of nullification, rejected 27/06/96. | Judgment of 17/09/97. Violation Arts. 1.1, 5, 7, 8.1, 8.2 and 8.4 of the Convention. | Judgment of 27/11/98 | Interpretation of Judgment on the merits rejected as inappropriate 08/03/98. Interpretation of Judgment on Reparations 03/06/99. Order on Compliance with Judgment 17/11/99 |
| 14 | **Paniagua Morales et al.** | Guatemala | 1/19/95 | Arts. 1.1, 4, 5, 7, 8 y 25 of the American Convention and 8 of the Inter-American Convention to Prevent and Punish Torture | Judgment of 25/01/96. Rejected. | Judgment of 08/03/98. Arts. 1.1, 4.1, 5.1, 5.2, 7, 8 and 25 of the American Convention and 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture. | Judgment of 25/05/2001 | /-/-/-/-/ |

| No. | Case | Respondent State | Submitted to the Court | Alleged Violation | Preliminary objections | Decision on the merits | Reparation and Indemnification | Other procedural actions |
|---|---|---|---|---|---|---|---|---|
| 15 | **Garrido and Baigorria** | Argentina | 5/29/95 | Arts. 1.1, 4, 5, 7, 8, and 25 of the Convention | None. Argentina accepted the allegations in the application. | Judgment of 02/02/96. Note taken of the recognition of responsibility by the State. No indication as to which rights were violated. Six-month period granted to reach an agreement on reparations. | Judgment of 27/08/98 | /-/-/-/-/ |
| 16 | **Blake** | Guatemala | 8/3/95 | Arts. 1.1, 4, 7, 8, 13, 22 and 25 of the Convention | Judgment of 02/07/96. Most rejected, one partially accepted. The Court continued its examination of the case. | Judgment of 24/01/98. Violation Arts. 5 and 8.1 of the Convention. | Judgment of 22/01/99 | Interpretation of the Judgment on Reparations 01/10/99 |
| 17 | **Suárez Rosero** | Ecuador | 12/22/95 | Arts. 1.1, 2, 5, 7, 8 and 25 of the Convention | None. | Judgment of 12/11/97. Violation Arts. 1.1, 5, 7, 8 and 25 of the Convention. | Judgment of 20/01/99 | Interpretation of the Judgment on Reparations 29/05/99 |
| 18 | **Benavides Cevallos** | Ecuador | 3/21/96 | Arts. 1.1, 3, 4, 5, 7, 8 and 25 of the Convention | None. Recognition of responsibility by the State. | Judgment of 19/06/98. Violation Arts. 1.1, 3, 4, 5, 7,8 and 25 of the Convention. | Included in Judgment on this merits 09/06/98. | /-/-/-/-/ |
| 19 | **Cantoral Benavides** | Peru | 8/8/96 | Arts. 1, 2, 5, 7, 8 and 25 of the American Convention and, 2 and 8 of the Inter-American Convention to Prevent and Punish Torture | Judgment of 03/09/98. Rejected. | Judgment of 18/08/00. Violation Arts. 5.1-2, 7.1-5, 8.1, 8.2.c-d and f-g, 8.3 and 8.5 of the Convention. | Judgment of 03/12/2001 | /-/-/-/-/ |

| No. | Case | Respondent State | Submitted to the Court | Alleged Violation | Preliminary objections | Decision on the merits | Reparation and Indemnification | Other procedural actions |
|---|---|---|---|---|---|---|---|---|
| 20 | **Durand and Ugarte** | Peru | 8/8/96 | Arts. 1.1, 4, 7, 8, 25, and 27 of the Convention | Judgment of 28/05/99. Rejected. | Judgment of 16/08/01. Violation Arts. 1.1, 2. 4.1, 5.2, 7.1, 7.5-6, 8.1 and 25.1 of the Convention | Judgment of 03/12/2001 | /-/-/-/-/ |
| 21 | **Bámaca Velásquez** | Guatemala | 8/30/96 | Arts. 1, 3, 4, 5, 7.8, and 25 of the Convention | Withdrawn. | Judgment of 25/11/00. Violation Arts. 1.1, 3, 4, 5.1, 8 and 25 of the American Convention and 1, 2, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture. | Judgment of 22/02/2002 | /-/-/-/-/ |
| 22 | **"Street children" (Villagrán Morales et al.** | Guatemala | 1/30/97 | Arts. 1, 4, 5, 7, 8, and 25 of the Convention | Judgment of 11/09/97. Rejected. | Judgment of 19/11/99. Violation Arts. 1.1, 4, 5.1-2, 8.1, 19 and 25 of the American Convention and 1, 6 and 8 of Inter-American Convention to Prevent and Punish Torture. | Judgment of 26/05/2001 | /-/-/-/-/ |
| 23 | **Castillo Petruzzi et al.** | Peru | 7/22/97 | Arts. 1.1, 2, 5, 8, 20, 29, and 51.2 of the Convention | Judgment of 04/09/98. Rejected, except one referring to only one part of the application. | Judgment of 30/05/99. Violation Arts. 1.1, 2, 5, 7.5-6, 8.1, 8.2. b-d, f and h, 8.5, 9, 20 and 25 of the Convention. | Included in Judgment on this merits 30/05/99 | Order on the Compliance of the Judgment 19/11/1999 |
| 24 | **Cesti Hurtado** | Peru | 1/9/98 | Arts. 1, 2, 5, 7, 8, 11, 17, 21, 25, and 51.2 of the Convention | Judgment of 26/01/99. Rejected. | Judgment of 20/09/99. Violation Arts. 1.1, 2, 7.1-3, 7.6 and 8.1 of the Convention. | Judgment of 31/05/2001 | Interpretation of the judgment on the merits. 29/01/2000. Interpretation of the Judgment on Reparations 27/11/2001 |

| No. | Case | Respondent State | Submitted to the Court | Alleged Violation | Preliminary objections | Decision on the merits | Reparation and Indemnification | Other procedural actions |
|---|---|---|---|---|---|---|---|---|
| 25 | **Baena Ricardo et al.** | Panama | 1/16/98 | Arts. 1, 2, 8, 9, 10, 15, 16, 25, 33, and 52.2 of the Convention | Judgment of 18/11/99. Rejected. | Judgment of 02/02/01. Violation Arts. 1.1, 2, 8.1-2, 9, 16 and 25 of the Convention. | Judgment on this merits 02/02/2001. | Judgment on the Competence of the Court to monitor Compliance of its Judgment 28/11/2003 |
| 26 | **Community Mayagna (Sumo) Awas Tigni** | Nicaragua | 6/4/98 | Arts. 1, 2, 21, and 25 of the Convention | Judgment of 01/02/00. Rejected. | Judgment of 31/08/01. Violation Arts. 1.1, 2, 21 and 25 of the Convention. | Judgment on this merits 31/08/2001 | /-/-/-/-/ |
| 27 | **Las Palmeras** | Colombia | 7/6/98 | Arts. 1.1, 4, 8, and 25 of the American Convention and art. 3 de los Convenios de Ginebra de 1949. | Judgment of 04/02/00. Some rejected and others admitted, which did not impede continuing examination of the case. | Judgment of 06/12/01. Violation Arts. 4, 8.1 and 25.1 of the Convention. | Judgment of 26/11/2002. | /-/-/-/-/ |
| 28 | **"The Last Temptation of Christ" (Olmedo Bustos et al.)** | Chile | 1/15/99 | Arts. 1.1, 2, 12, and 13 of the Convention | None. | Judgment of 05/02/01. Violation Arts. 1.1, 2 and 13 of the Convention. | Judgment on this merits 05/02/2001 | /-/-/-/-/ |
| 29 | **Cantos** | Argentina | 3/10/99 | Arts. 1.1, 2, 8, 21, 25, and 50.3 of the Convention | Judgment of 07/09/01. One rejected and another partially admitted, which did not impede continuing examination of the case. | Judgment of 28/11/02. Violation Arts. 8.1 and 25 of the Convention. | Judgment on this merits 28/11/2002 | /-/-/-/-/ |

| No. | Case | Respondent State | Submitted to the Court | Alleged Violation | Preliminary objections | Decision on the merits | Reparation and Indemnification | Other procedural actions |
|---|---|---|---|---|---|---|---|---|
| 30 | **Ivcher Bronstein** | Peru | 3/31/99 | Arts. 1.1, 8, 13, 20, 21, and 25 of the Convention | None. The State rejected the competence of the Court to examine this case. Judgment on its competence of 24/09/99. | Judgment of 06/02/01. Violation Arts. 1.1, 8.1-2, 13.1, 13.3, 20.1, 20.3, 21.1-2 and 25.1 of the Convention. | Included in Judgment on this merits 06/02/2001 | Interpretation of the judgment on the merits of 04/09/2001. |
| 31 | **Hilaire** | Trinidad and Tobago | 5/25/99 | Arts. 1.1, 2, 4, 5, 7, and 25 of the Convention | Judgment of 01/09/01. Rejected. | Case joined with the Constantine et al. and Benjamin et al. Cases. Judgment of 21/06/02. Violation Arts. 1.1, 2, 4.1-2, 4.6, 5.1-2, 7.5, 8.1 and 25 of the Convention. | | |
| 32 | **El Caracazo** | Venezuela | 6/7/99 | Arts. 1.1, 2, 4, 5, 7, 8.1, 25.1, 25.2, and 27.3 of the Convention | None. The State admitted the acts denounced in the application. | Judgment of 11/11/99. Violation Arts. 1.1, 2, 4.1, 5, 7, 8.1, 25.2.a and 27.3 of the Convention. | Judgment of 29/08/2002 | /-/-/-/-/ |
| 33 | **Trujillo Oroza** | Bolivia | 6/9/99 | Arts. 1.1, 3, 4, 5.1, 5.2, 8.1, and 25 of the Convention | Presented on 08/09/99 and withdrawn on 21/01/00. The State admitted the acts denounced in the application. | Judgment of 26/01/00. Violation Arts. 1.1, 3, 4, 5.1-2, 7, 8.1 and 25 of the Convention. | Judgment of 27/02/2002 | |
| 34 | **Constitutional Court** | Peru | 7/2/99 | Arts. 1.1, 2, 8.1, 8.2.c, 23.1.c, and 25 of the Convention | None. The State rejected the competence of the Court to examine this case. Judgment on its competence of 24/09/99. | Judgment of 06/02/01. Violation Arts. 1.1, 8, and 25 of the Convention. | Included in Judgment on this merits 31/01/2001 | |
| 35 | **Constantine et al.** | Trinidad and Tobago | 2/22/00 | Arts. 1, 2, 4, 5, 7, 8, and 25 of the Convention | Judgment of 01/09/01. Rejected. | Case joined with the Hilaire and Benjamin et al. Cases. Judgment of 21/06/02. Violation Arts. 1.1, 2, 4.1-2, 4.6, 5.1-2, 7.5, 8 and 25 of the Convention. | | |

| Nº | Case | Respondent State | Submitted to the Court | Alleged Violation | Preliminary objections | Decision on the merits | Reparation and Indemnification | Other procedural actions |
|---|---|---|---|---|---|---|---|---|
| 36 | **Barrios Altos** | Peru | 6/8/00 | Arts. 1, 2, 4, 5, 7, 8, 13, and 25 of the Convention | None. The State initially rejected the competence of the Court and then recognized its international responsibility in the case. | Judgment of 14/03/01. Violation Arts. 1.1, 2, 4, 5, 8 and 25 of the Convention. | Judgment of 30/11/2001 | Interpretation of the judgment on the merits of 03/09/2001 |
| 37 | **Benjamin et al.** | Trinidad and Tobago | 10/5/00 | Arts. 1, 2, 4, 5, 7, 8, and 25 of the Convention | Judgment of 01/09/01. Rejected. | Case joined with the Hilaire and Constantine et al. Cases. Judgment of 21/06/02. Violation Arts. 1.1, 2, 4.1-2, 4.6, 5.1-2, 7.5, 8 and 25 of the Convention. | | |
| 38 | **"19 Merchants"** | Colombia | 1/24/01 | Arts. 1.1, 4, 5, 7, 8.1, and 25 of the Convention | Judgment of 12/06/02. Rejected. | | | |
| 39 | **Bulacio** | Argentina | 1/24/01 | Arts. 1.1, 4, 5, 7, 8, 19, and 25 of the Convention | None. Friendly settlement agreement in which the State recognized its international responsibility in the case. | Judgment of 18/09/03. Violation Arts. 1.1, 2, 4, 5, 7, 19 and 25 of the Convention. | Included in Judgment on this merits 18/09/2003 | |
| 40 | **Mack Chang** | Guatemala | 6/19/01 | Arts. 1.1, 4, 8, and 25 of the Convention. | The State presented a brief on preliminary objections that it later withdrew. | Judgment of 25/11/03. Violation Arts. 1.1, 4.1, 5.1, 8 and 25 of the Convention. | Included in Judgment on this merits 25/11/2003 | |
| 41 | **Juan Humberto Sánchez** | Honduras | 9/8/01 | Arts. 1.1, 4, 5, 7, 8, y 25 of the Convention | Rejected in the judgment on the merits. Judgment of 07/06/03. | Judgment of 07/06/03. Violation Arts. 1.1, 4.1, 5, 7.1-6, 8 and 25 of the Convention. | Included in Judgment on this merits 07/06/2003 | Interpretation of the Judgment on the Preliminary objections, merits and reparations of 26/11/2003 |

| No. | Case | Respondent State | Submitted to the Court | Alleged Violation | Preliminary objections | Decision on the merits | Reparation and Indemnification | Other procedural actions |
|---|---|---|---|---|---|---|---|---|
| 42 | **"Five pensioners** | Peru | 12/4/01 | Arts. 1.1, 2, 21, 25, and 26 of the Convention | None. | Judgment of 28/02/03. Violation Arts. 1.1, 2, 21 and 25 of the Convention. | Judgment of interpretation 28/02/2003 | |
| 43 | **Maritza Urrutia** | Guatemala | 1/9/02 | Arts. 1.1, 5, 7, 8, 13, and 25 American Convention, and 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture | None. The State accepted its *institutional responsibility* in this case. | Judgment of 27/11/03. Violation Arts. 1.1, 5, 7, 8 and 25 of the American Convention and 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture. | Judgment of interpretation 27/11/2003 | |
| 44 | **Gómez Paquiyauri** | Peru | 2/5/02 | Arts. 1.1, 4, 5, 7, 8, 19, and 25 Convención Americana, y 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture | | | | |
| 45 | **Juvenile Re-Education Institute** | Paraguay | 5/20/02 | Arts. 1.1, 5, 7, 8, 19, and 25 of the Convention | | | | |

| No. | Case | Respondent State | Submitted to the Court | Alleged Violation | Preliminary objections | Decision on the merits | Reparation and Indemnification | Other procedural actions |
|---|---|---|---|---|---|---|---|---|
| 46 | **Ricardo Canese** | Paraguay | 6/12/02 | Arts. 1.1, 8, 9, 13, and 22 of the Convention | | | | |
| 47 | **Lori Berenson** | Peru | 7/19/02 | Arts. 1.1, 5, 8, and 9 of the Convention | | | | |
| 48 | **"Plan of the Sánchez Massacre"** | Guatemala | 7/31/02 | Arts. 1.1, 5, 8, 12, 21, 24, and 25 of the American Convention | | | | |
| 49 | **Community Moiwana** | Suriname | 12/20/02 | Arts. 1.1, 8, and 25 of the Convention | | | | |
| 50 | **"Herrera Ulloa"** | Costa Rica | 1/28/03 | Arts. 1.1, 2, and 13 of the Convention | | | | |
| 51 | **Martín del Campo Dodd** | Mexico | 1/30/03 | Arts. 1.1, 5, 7, 8, and 25 of the American Convention, y arts. 6, 8, y 10 of the Inter-American Convention to Prevent and Punish Torture | | | | |

| No. | Case | Respondent State | Submitted to the Court | Alleged Violation | Preliminary objections | Decision on the merits | Reparation and Indemnification | Other procedural actions |
|---|---|---|---|---|---|---|---|---|
| 52 | **Winston Caesar** | Trinidad and Tobago | 2/26/03 | Arts. 1.1, 2, 5.1, 5.2, 8.1, and 25 of the Convention | | | | |
| 53 | **Indigenous Community Yakye Axa** | Paraguay | 3/17/03 | Arts. 1.1, 2, 4, 8, 21, and 25 of the Convention | | | | |
| 54 | **María Teresa de la Cruz** | Peru | 6/11/03 | Arts. 1.1, 2, 7, 8, 9, and 24 of the Convention | | | | |
| 55 | **Erlinda and Ernestina Serrano Cruz** | El Salvador | 6/14/03 | Arts. 1.1, 4, 5, 7, 8, 17, 18, 19, and 25 of the Convention | | | | |
| 56 | **Yatama** | Nicaragua | 6/16/03 | Arts. 1.1, 2, 8, 23, and 25 of the Convention | | | | |
| 57 | **Daniel David Tibi** | Ecuador | 6/25/03 | Arts. 1.1, 2, 5.2, 7.2, 7.3, 7.4, 7.5, 8.1, 8.2, 8.2.b, 8.2.d, 8.2.e, 8.2.g, 8.3, 21.1, 21.2, and 25 of the Convention | | | | |
| 58 | **Rigoberto Acosta Calderón** | Ecuador | 6/25/03 | Arts. 1.1, 2, 7.3, 7.5, 8.1, 8.2, 8.2.d, 8.2.e, 24, and 25 of the Convention | | | | |

| No. | Case | Respondent State | Submitted to the Court | Alleged Violation | Preliminary objections | Decision on the merits | Reparation and Indemnification | Other procedural actions |
|---|---|---|---|---|---|---|---|---|
| 59 | **Acevedo Jaramillo et al.** | Peru | 6/25/03 | Arts. 1.1, and 25 of the Convention | | | | |
| 60 | **Molina Theissen** | Guatemala | 7/3/03 | Arts. 1.1, 4, 5, 7, 8, 19, and 25 of the Convention | | | | |
| 61 | **Alfredo López Álvarez** | Honduras | 7/7/03 | Arts. 1.1, 2, 5, 7, 8, 24, and 25 of the Convention | | | | |
| 62 | **Dilcia Yean and Violeta Bosico** | Dominican Republic | 7/11/03 | Arts. 1, 2, 3, 8, 19, 20, 24, and 25 of the Convention | | | | |
| 63 | **Mapiripán Massacre** | Colombia | 9/5/03 | Arts. 1.1, 4, 5, 7, 8.1, and 25 of the Convention | | | | |

***REQUESTS TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS UNDER ARTICLE 64***
(As of March 31, 2004)

| REQUEST | DATE | REQUEST BY | SUBJECT MATTER | LEGAL BASIS | | DECISION OF THE COURT |
|---|---|---|---|---|---|---|
| OC - 1 | 4/28/82 | Peru | ***"Other Treaties" Subject to the Advisory Jurisdiction of the Court*** (Art. 64 American Convention on Human Rights) | Art. 64.1 | | 9/24/82 |
| OC - 2 | 6/28/82 | Inter-American Commission on Human Rights | ***The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*** (Arts. 74 and 75) | Art. 64.1 | | 9/24/82 |
| OC - 3 | 4/25/83 | Inter-American Commission on Human Rights | ***Restrictions to the Death Penalty*** (Arts. 4(2) and 4(4) American Convention on Human Rights) | Art. 64.1 | | 9/8/83 |
| OC - 4 | 7/22/83 | Costa Rica | ***Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica***[1] | | Art. 64.2 | 1/19/84 |
| OC - 5 | 7/8/85 | Costa Rica | ***Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*** (Arts. 13 and 29 American Convention on Human Rights) | Arts. 64.1 and 64.2 | | 11/13/85 |

| REQUEST | DATE | REQUEST BY | SUBJECT MATTER | LEGAL BASIS | | DECISION OF THE COURT |
|---|---|---|---|---|---|---|
| OC - 6 | 8/14/85 | Uruguay | ***The Word "Laws" in Article 30 of the American Convention on Human Rights*** | Art. 64.1 | | 5/9/86 |
| OC - 7 | 10/1/85 | Costa Rica | ***Enforceability of the Right to Reply or Correction*** (Arts. 14(1), 1(1) and 2 American Convention on Human Rights) | Art. 64.1 | | 8/29/86 |
| OC - 8 | 10/10/86 | Inter-American Commission on Human Rights | ***Habeas Corpus in Emergency Situations*** (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights) | Art. 64.1 | | 1/30/87 |
| OC - 9 | 9/17/86 | Uruguay | ***Judicial Guarantees in States of Emergency*** (Arts. 27(2), 25 and 8 American Convention on Human Rights) | Art. 64.1 | | 10/6/87 |
| OC - 10 | 2/17/88 | Colombia | ***Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*** | Art. 64.1 | | 7/14/84 |

| REQUEST | DATE | REQUEST BY | SUBJECT MATTER | LEGAL BASIS | | DECISION OF THE COURT |
|---|---|---|---|---|---|---|
| OC - 11 | 1/31/84 | Inter-American Commission on Human Rights | ***Exceptions to the Exhaustion of Domestic Remedies*** (Arts. 46(1), 46(2)(b) American Convention on Human Rights) | Art. 64.1 | | 8/10/90 |
| OC- 12 | 2/22/91 | Costa Rica | ***Compatibility of Draft Legislation with Article 8(2)(b) of the American Convention on Human Rights***[2] | | Art. 64.2 | 12/6/91 |
| OC - 13 | 5/7/92 | Argentina and Uruguay | ***Certain Attributes of the Inter-American Commission on Human Rights*** (Arts. 41, 42, 44, 46, 47, 50 and 51 American Convention on Human Rights) | Art. 64.1 | | 7/16/93 |
| OC - 14 | 11/8/93 | Inter-American Commission on Human Rights | ***International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*** (Arts. 1 and 2 American Convention on Human Rights) | Art. 64.1 | | 12/9/94 |

| REQUEST | DATE | REQUEST BY | SUBJECT MATTER | LEGAL BASIS | | DECISION OF THE COURT |
|---|---|---|---|---|---|---|
| OC - 15 | 11/13/96 | Chile | ***Reports of the Inter-American Commission on Human Rights*** (Art. 51 American Convention on Human Rights) | Art. 64.1 | | 11/14/97 |
| OC - 16 | 12/10/97 | Mexico | ***The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law***[3] | Art. 64.1 | | 10/1/99 |
| OC - 17 | 3/30/01 | Inter-American Commission on Human Rights | ***Juridical Condition and Human Rights of the Child***[4] | Art. 64.1 | | 8/28/02 |
| OC - 18 | 5/10/02 | Mexico | ***Juridical Condition and Rights of the Undocumented Migrants***[5] | Art. 64.1 | | 9/17/03 |
| OC-19 | 11/21/03 | Venezuela | ***Control of Legality in the Exercise of the Attributes of the Inter-American Commission on Human Rights***[6] (Arts. 41 and 44 American Convention on Human Rights) | Art. 64.1 | | |

1. The request referred to the compatibility of the proposed reform with Articles 17, 20 and 24 of the Convention.

2. The Court decided not to respond to the request of Costa Rica because it considered that, to do so, would distort its contentious jurisdiction and diminish the human rights of those who presented petitions, which were being processed by the Commission.

3. An interpretation was particularly sought on Article 36 of the Vienna Convention on Consular Relations, Articles 2, 6, 14 and 50 of the International Covenant on Civil and Political Rights, Article 3.1 of the OAS Charter and Articles I, II and XXVI of the American Declaration of the Rights and Duties of Man.

4. An interpretation was initially sought on Articles 8 and 25 of the Convention in relation to its Article 19. Subsequently, the Commission broadened its request to include the interpretation of other treaties, especially the Convention on the Rights of the Child, with respect to how they could contribute to defining the reach of the provisions of the American Convention on Human Rights.

5. In the light of the provisions of Articles 3.1 and 17 of the OAS Charter, II of the American Declaration of the Rights and Duties of Man, 1, 2.1 and 7 of the Universal Declaration of Human Rights, 2.1, 2.2, 5.2, and 26 of the International Covenant on Civil and Political Rights and 1.1, 2 and 24 of the American Convention, the request concerned the deprivation of the enjoyment and exercise of certain labor rights of migrant workers and the compatibility of this practice with the obligation of the American States to ensure the principles of legal equality, non-discrimination and the equal and effective protection of the norms embodied in the international instruments for the protection of human rights; and also the subordination or conditioning of the observance of the obligations imposed by international human rights law, including those of an *erga omnes* nature, with a view to attaining certain domestic policy objectives of an American State.

6. In response to a note of the Secretariat of the Court asking that it indicate the provisions whose interpretation was being requested, the State answered that "it required an integral interpretation of the American Convention on Human Rights and the other international instruments that make up the inter-American system of human rights."

5/14/08, 9:28 AM
983
Faúndez Anexos Ingles

5/14/08, 9:28 AM

985

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