AMICUS CURIAE APPEARANCE

To the Judges of the Honorable Inter-American Court of Human Rights:

Acting on my own behalf and in my capacity as a Colombian citizen, I respectfully submit this *amicus curiae* brief in connection with the Request for Advisory Opinion No. OC 21.

In response to the question put forward by the Government of the Argentine Republic, this analysis will be structured as follows:

a) Declaration on Admissibility and the Jurisdiction of the Honorable Inter-American Court of Human Rights
b) Analysis of the legal instruments and case law currently available in connection with the subject of *ad hoc* Judges and the impartiality of judges as a pillar of due process, to better illustrate the question put to the Court.

DECLARATION ON ADMISSIBILITY AND THE JURISDICTION OF THE HONORABLE INTER-AMERICAN COURT OF HUMAN RIGHTS:

By virtue of Article 64 of the Convention, the Court is vested with the broadest advisory role ever entrusted to an international tribunal thus far.[1] The organs of the Organization of American States listed in Chapter X of the Charter, and all member States -whether or not they are parties to the Convention-, may consult the Court. The subject-matter of such requests is not limited to the Convention but also covers other treaties concerning the protection of human rights in the American states, with no portion or aspect of such instruments standing, in principle, beyond the scope of the advisory role of the Court. Lastly, all OAS members are allowed to request opinions regarding the compatibility of any of their domestic laws with the aforesaid international instruments. Framed within the context of the system of protection of fundamental rights, the advisory role of the Inter-American Court is, however, as broad as required to safeguard those rights but subject nonetheless to the natural limitations set by the Convention itself, for the broad terms of Article 64 of the Convention do not entail a lack of boundaries for the Court's advisory role. As to the subject-matter of consultation and, particularly, the treaties that can be interpreted, general limitations exist that stem from the text of Article 64, in its context, and from the object and purpose of the treaty.

It is well and long established that neither in the context of its contentious jurisdiction nor in advisory matters is the Court required to take on a role intended to determine the scope of the international commitments – whatever their nature – undertaken by States which are not members of the Inter-American System, or to interpret the rules governing the structure or dynamics of international organs or organizations outside of said system. It may, however, engage in the interpretation of a treaty if and where the protection of human rights in a member State of the Inter-American System is directly involved.

The potential conflict between the purposes of the advisory jurisdiction and the contentious jurisdiction of international tribunals has often been the subject of controversy. In the context of general international law, it has usually been the States that expressed reservations and even opposition to the exercise of advisory jurisdiction in specific cases, finding in such advisory role a way to circumvent the principle that judicial proceedings involving a legal issue pending between States require the consent of the States involved.

[1] The broad terms of Article 64 of the Convention contrast with the provisions that govern other international tribunals. For instance, Article 96 of the *Charter of the United Nations* vests the International Court of Justice with the authority to issue advisory opinions on any legal question, restricting the standing to request such opinions to the General Assembly and the Security Council or, under certain conditions, to other organs and specialized agencies of the UN; it does not, however, allow Member States to request such opinions.

Such broad discernment cannot, however, be mistaken for a mere discretionary power to issue or not to issue the requested opinion. In order to refuse to issue the requested opinion, the Court must have decisive reasons relating to the fact that the request oversteps the limitations set to its advisory role in the Convention. Apart from that, and as required under Article 66 of the Convention, any decision of the Court that it should not entertain a request for an advisory opinion must be a reasoned decision.

The Court's advisory jurisdiction differs from its contentious jurisdiction in that in the advisory proceeding there are no “parties” involved and there is no pending litigation but rather a mere issue of interpretation of the American Convention on Human Rights or another treaty concerning the protection of human rights in the American states. That the advisory role of the Court may be prompted by all Member States of the OAS and the OAS' main organs, even if they are not parties to the Convention,[2] represents another difference between the advisory and contentious jurisdiction of the Court. The Court is thus aware that its advisory role under the American Convention is multilateral and not litigious in nature; this is accurately reflected in the Rules of the Court, Article 62(1) of which provides that copies of the request for an advisory opinion are to be transmitted to all Member States, and the latter may submit their comments on the request and participate in any public hearings held in connection with it. Furthermore, even though the Court's advisory opinions are not binding as are judgments rendered in contentious cases, such opinions do, however, produce legal effects that are undeniable. Accordingly, it is evident that the State or organ requesting an advisory opinion of the Court is not the only holder of a legitimate interest in the outcome of the proceeding.

It should also be noted that the Court's advisory jurisdiction was established by Article 64 of the American Convention as a service which the Inter-American Court of Human Rights is in a position to offer to all components of the Inter-American System, both States and organs, as the Court's proceedings cannot dissociate from the purposes of the American Convention on Human Rights; this is all intended to contribute to the fulfillment and effective application of their international human-rights commitments,[3] free from the formalities and the

[2] Article 64(1) of the Convention establishes the authority of the Inter-American Court of Human Rights to issue advisory opinions at the request of the member States and certain organs of the Organization of American States within the scope of their authority: the member States of the Organization may ask the Court for an opinion regarding the interpretation of said Convention or other treaties concerning the protection of human rights in the American States. Also, within their spheres of competence, such requests may be made by the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires.

[3] *See* 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. 39.

system of penalties that are a distinguishing feature of contentious proceedings.[4]

It is my view that the request filed by the Honorable Government of the Argentine Republic for this Advisory Opinion satisfies the formal requirements established in Article 51 of the Rules of Procedure, under which, in order for a request to be entertained by the Court, the question must be stated with precision, and the request must identify the provision to be interpreted, the considerations giving rise to the request, and the name and address of the agent.

Be that as it may, a request's conformity with the requirements laid down in Article 51 does not mean that the Court is under a duty to actually provide an opinion in response thereto. The Court has repeatedly held that its advisory jurisdiction is permissive in nature, and that it carries the power to determine whether the circumstances giving rise to the request are such that they justify a decision rejecting the request.[5] To conclude, in deciding whether or not to entertain a request for an advisory opinion, the Court must base its decision on considerations that extend beyond aspects of a purely formal nature.[6]

A decision on the *admissibility* of this request for an advisory opinion calls for a careful analysis of whether, in essence, the request seeks to help the members of the System,[7] its member States in particular, better comply with their international obligations in the realm of human rights. For such purpose, it must

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[4] *See* 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.

[5] *See* "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. 28.

[6] *Cf. Request for Advisory Opinion submitted by the State of Costa Rica.* Order of the Inter-American Court of Human Rights of May 10, 2005, considering clause no. 5; *Juridical Condition and Rights of the Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 50; *Juridical Condition and Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 19; and *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. 31.

[7] *Cf.* Request for Advisory Opinion submitted by the State of Costa Rica, *supra* footnote 1, considering clause no. 6; Juridical Condition and Rights of the Undocumented Migrants, *supra* footnote 1, para. 61; Juridical Condition and Human Rights of the Child, *supra* footnote 1, para. 31; and 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. 31.

be clearly understood that the Court's advisory jurisdiction may not be resorted to as an instrument for political debate that might affect the role of the Court under the American Convention. Likewise, requesting an advisory opinion with a view to covertly obtaining a solution to or ruling on[8] contentious matters not yet submitted to the Court[9] without allowing the victims an opportunity in the proceeding – which would distort[10] the system established by the Convention[11] – is forbidden.

Moreover, for such purposes the Court must consider the rules of interpretation it has applied in the past, in accordance with the relevant provisions of the *Vienna Convention on the Law of Treaties,* Article 31 of which provides that a treaty is to be interpreted in good faith in accordance with the meaning to be given to its terms in their context and in the light of its object and purpose. Since the protection of human rights is the object and purpose of the American Convention, when required to interpret it the Court must do so in a manner such that the human rights protection scheme is given its full *effet utile.*[12]

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[8] *Cf.* International Court of Justice, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Face, Advisory Opinion, I.C.J. Reports 1950; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951; 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; Western Sahara, Advisory Opinion, I.C.J. Reports 1975; Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989)

[9] The Court does not have the authority to examine cases that are pending before the Commission, because of the need to preserve a fair balance between the protection of human rights, which is the ultimate purpose of the system, and the legal certainty and procedural equity that will ensure the stability and reliability of the international protection. *See Case of Cayara, Preliminary Objections*, Judgment of February 3, 1993. Series C No. 14, para. 63.

[10] Because human rights treaties are aimed at more than balancing the interests of the States, thus guaranteeing the enjoyment of the rights and freedoms of human beings, there is reason for the fears that the advisory jurisdiction may weaken the contentious jurisdiction or, even worse, that it may end up distorting its purposes or altering the operation of the protection system established by the Convention to the detriment of the victim. In this regard, concern has been raised over the possibility that, to the detriment of the proper operation of the mechanisms established in the Pact of San Jose and the interest of the victim, the advisory functions may be resorted to with a view to deliberately disrupting the processing of a case that is pending before the Commission, without accepting the contentious jurisdiction of the Court and assuming the relevant obligation, namely the obligation to comply with the Court's decision.

[11] In this regard, the Court has held as follows: "*the inadmissibility of any request for an advisory opinion which is likely to undermine the Court's contentious jurisdiction or, in general, to weaken or alter the system established by the Convention, in a manner that would impair the rights of potential victims of human rights violations"* ("Other treaties," *supra* 14, para. 31. *See also,* Restrictions to the death penalty, *supra* 20, para. 36-37).

[12] *Cf.* "Other treaties" subject to the advisory jurisdiction of the Court, *supra* 24, para. 43 et seq.; 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;

It is precisely to fill in the gaps of the applicable legal instruments that the Inter-American Court performs its important role of interpreting the letter and spirit of the American Convention on Human Rights. Rather than the parties' perceptions as to the scope of their own powers, the Court's basic concern cannot, in my opinion, be anything other than the preservation of its full impartiality and independence in order that it may effectively contribute to the materialization of the ultimate object and purpose of the American Convention on Human Rights.

Even though, in principle, the answer to the question put to the Court by the Honorable Government of the Argentine Republic can be inferred from the integral interpretation and analysis of the Court's *corpus juris* – as established in the Statute and the Rules of Procedure of the Commission, as well as the constant case law and procedural practice of the Inter-American Court – I find no reason supporting the *in limine* rejection of this request for an advisory opinion, as I am convinced that the Court's opinion on this subject will provide guidance to both the Commission and the parties appearing before it on important procedural aspects of the Convention without impairing the necessary balance between legal certainty and the protection of human rights.

ANALYSIS OF THE LEGAL INSTRUMENTS AND CASE LAW IN CONNECTION WITH THE SUBJECT OF AD HOC JUDGES, EQUALITY OF ARMS AND THE IMPARTIALITY OF JUDGES AS A PILLAR OF DUE PROCESS.

Having addressed the jurisdiction over and admissibility of this request, I will now address the merit arguments which, I believe, should guide the answer of the Honorable Inter-American Court of Human Rights.

One of the most important goals pursued by International Law over the past few decades, which has caused it to undergo a significant transformation, is the protection of human rights; there still lies a long road ahead for the achievement or materialization of such goal. The human person, endowed with its unique dignity, is the natural starting point for the construction of the human rights theory; *res sacra homo:* man is sacred. Therefore, the State and the law must protect human beings at all times and guarantee their fundamental rights.

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para. 19 et seq.; 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. 47 et seq.; Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 20 et seq.; 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. 29 et seq.; 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. 13 et seq.; Case of Velásquez-Rodríguez, Preliminary Objections, Judgment of June 26, 1987. Series C No. 1, para. 30; Case of Fairen-Garbi and Solís-Corrales, Preliminary Objections, Judgment of June 26, 1987. Series C No. 2, para. 35; Case of Godínez-Cruz, Preliminary Objections, Judgment of June 26, 1987. Series C No. 3, para. 33; Case of Paniagua-Morales et al., Preliminary Objections, Judgment of January 25, 1996. Series C No. 23, para. 40(30).

Over these early years of the 21st century the needs of and demands for the protection of human beings have increased, while the sources of violations of their rights have diversified. International case law, including decisions of both the Inter-American Court and other monitoring organs established under human rights treaties, has addressed contemporary situations. In a constitutional democracy Rule of Law, no instance of arbitrariness can go unpunished; any accusation aimed at enforcing the responsibility of the State's organs must be duly founded, processed and ruled on subject to a pre-defined, fair procedure. Justice is the substance and prime purpose of any system of enacted laws.

Nowadays, the Inter-American system of protection of human rights is recognized a great deal of legitimacy across the entire hemisphere; such legitimacy extends beyond its organs and radiates an aura of prestige over this Organization. The degree of legitimacy thus achieved has increasingly caused men and women in the Americas to resort to the Inter-American System to have their claims for the protection of their fundamental rights satisfied, thereby causing a considerable increase in workload of the Court and the Commission.

Indeed, human rights appear as an individually recognized aspect that guarantees a public subjective right to their holders, while simultaneously presenting an objective or institutional side that is reflected by the democratic principle of the institutions underlying a political system. From this standpoint, the international guarantees – *i.e.* those laid down in the International Covenant on Civil and Political Rights and the American Convention on Human Rights – guide the interpretation of domestic legislation in aspects as important as equality before the courts, defense, access to justice, judicial impartiality, the right to recourse, restrictions on the right of freedom, a reasonable period of time and the right to reparation.

In any event, the most advanced mechanisms are those which are, strictly speaking, judicial in nature, such as the ones created by the European Convention on Human Rights and the successive protocols thereto, and the American Convention on Human Rights. These are judicial proceedings because the parties (the State, on one side, and the victim of a human rights violation, on the other) engage in a dispute over the facts and the law subject to very well defined procedural rules and with "equality of arms," and because the organ which, in short, will adjudicate the matter is basically an international tribunal, for the purpose of the most adequate response to the needs for protection, a review of the regional human rights systems in the inter-American and European contexts is in order, which will show the variety of possible models as far as the institution of judges is concerned.[13]

As is well known, at an early moment in history, at the stage of the *travaux préparatoires* for the European Convention on Human Rights (which the drafters of the American Convention on Human Rights would take as a model years later), the initial drafts of the European Convention – the Hague Declaration of the European Congress (of May 1948) and the European

[13] For a description of these systems, *see* Krsticevic, V. and Rodriguez Rescia, V., *op. cit*.

Movement's Draft (of July 1949) – already embraced the idea of the petitioning individual's right to file an application directly with the European Court; it was not until the final stage of said *travaux préparatoires* that such possibility was ruled out, citing as reasons state sovereignty, the risk of abusive accusations and the risk that the future European Court would be flooded with applications, which would cause inevitable delays in the proceedings.

Hence the creation of the European Commission of Human Rights to screen applications and decide which ones would be actually referred to the Court. However, because of the very own functional needs of both organs it would soon become evident that such scheme was artificial and the role of the Commission, ambiguous. The matter was again placed on the agenda of the Council of Europe in the early 1970s (Recommendation 683 (1972) of the Parliamentary Assembly).

At this second moment in history, in 1974 both the European Commission and the European Court issued their respective Opinions (the Commission on July 19, and the Court on September 4) on the position of individuals within the mechanism of protection under the European Convention. Both organs agreed that it was necessary to guarantee not only the *locus standi* but also the *jus standi* of individuals to appear directly before the Court as true applicants, as the historical reasons that had caused individuals to be excluded were "somewhat out-dated." The Court's opinion highlighted the imperative need to guarantee *the parties' equality* (required of the domestic mechanisms themselves) under the European Convention, whereas the Commission's opinion expressed the need to put an end to the ambiguous nature of its own role, explaining that individuals themselves should be allowed direct access to the Court.

Fourteen years prior to the adoption of Protocol No. 9 to the European Convention (in 1990), the Council of Europe's Committee of Experts on Human Rights was aware, much earlier, of the insufficiency of reforms that concerned the rules of procedure exclusively, and the need for a Protocol of Amendments to the European Convention in order to give individuals the standing of a true applicant *party* in proceedings before the Court. The main arguments that led to the adoption of said Protocol No. 9 to the European Convention on November 6, 1990 – whereby, in addition to a State Party and the Commission, the individual applicant was allowed to bring a case before the Court – were as follows: (a) such was the logical evolution of the Convention's control system; (b) it would avoid unequal treatment of individuals and States; (c) it would allow individuals to decide whether or not to bring their case before the Court; (d) it would perfect the existing structure (which so far had been out of balance due to its failure to guarantee the legal-procedural standing of individuals); (e) it would guarantee equality of arms *(égalité des armes)* between the parties; (f) it would guarantee individuals' access to the international court of human rights.

Today's European Court of Human Rights opened its doors on November 1, 1998, when *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms* came into force. A mixed system (a Court and a Commission) was already in place under the Convention. That year, on

October 31, the old Court ceased to exist. However, pursuant to Protocol No. 11, the Commission continued to operate for one more year (through October 31, 1999) to process all the cases it had declared admissible prior to the Protocol coming into full force and effect. However, the institution of a new European Court as the only jurisdictional supervisory organ of the European Convention made Protocol No. 9 obsolete, remaining of interest only for historical purposes in the context of the European system of protection. Since Protocol No. 11 came into force, individuals have had *direct access,* on their own initiative, to an international tribunal *(jus standi),* as true subjects – endowed with full legal capacity – of the International Law of Human Rights.

This Court is made up of a number of Judges equal to the number of High Contracting Parties – 46 at present. In this regard, we will now examine how the ECHR's scheme is structured as far as judges are concerned:

SECTION II.
European Court of Human Rights.

Article 20. Number of judges.

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

Article 21. Criteria for office.

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence.

2. The judges shall sit on the Court in their individual capacity.

3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

[…]

Article 24. Dismissal.

No judge may be dismissed from his office unless the other judges decide by a majority of two-thirds that he has ceased to fulfill the required conditions.

[…]

As is evident, it took the European system almost half a century to materialize this reality by unequivocally acknowledging that Human Rights must be internationally protected by a permanent judicial organ to which individuals have direct access irrespective of the acceptance of an optional clause by the respective States.

On the other hand, the *American Convention on Human Rights* is intended for the international protection of the fundamental rights of man; furthermore, to achieve such purpose, it sets up a system that represents the limits and conditions subject to which the States Parties have consented to taking international responsibility for the violations of which they are accused. Accordingly, it is the Court's duty to guarantee the international protection enshrined in the Convention within the whole system agreed upon by the States. Balance in the interpretation is thus achieved by steering such interpretation in the direction that is most favorable to the beneficiary of the international protection, provided, however, that this does not entail altering the system.

In addition, two fundamental elements can be identified which flow from the role of the Inter-American Court and evidence the importance of the international systems for the protection of human rights in the validity of the constitutional Rule of law and the consolidation of democracy; without question, these are mechanisms based on instruments that make up a true *"supranational bill of rights,"* in this case the American Convention on Human Rights and other instruments making up the Inter-American System.

The international protection of human rights is intended to guarantee the fundamental dignity of human beings via the system established by the Convention. Accordingly, both the Court and the Commission must preserve for the benefit of the victims of human rights violations all resources allowed for their protection under the Convention.

Moreover, the decisions delivered by the Inter-American Court in its capacity as the organ in charge of enforcing and interpreting the American Convention are binding on those States which have accepted its jurisdiction, via the incorporation of the criteria thereby established into the relevant aspects of their domestic jurisdiction, as established in Article 2 of the American Convention itself, under which the States Parties must adopt such measures as may be necessary to give effect to the rights enshrined in the Convention.

The possibility of establishing a transnational dimension in constitutional procedural law becomes stronger as the States increasingly opened up to accepting true jurisdictional organs in the international context. The recognition of the universal nature of rights has caused a rethinking not only of the

traditional conception of the nation-State model and the notion of sovereignty but also of the eminently *pro homine* character[14] that the application of the rules must present.

The institution of the Inter-American Court in September 1979, following the entry into force of the American Convention on Human Rights of 1969, represents a basic step in the judicial defense of the victims' rights in our continent. The work of the Inter-American Court of Human Rights has been the spinal chord of human rights protection in our continent, and it is also a material element in the development of the political or jurisdictional institutions involved in the defense and protection of human rights in the Americas.

Also, it is particularly important in the development of the regional system of protection of human rights and its binding nature as far as the States Parties to the Convention are concerned. Firstly, the subject of the *parties* in the Inter-American System of human rights is considered a key issue. Even though the American Convention provides that only State Parties and the Commission may bring a case before the Court, it does nonetheless make reference to "the injured party" rather than the Commission when addressing the subject of reparations, and this is viewed as a contribution to the "jurisdictionalization" of the protection mechanism. Because human rights are State obligations towards the persons who are subject to their jurisdiction and the public international community, from the standpoint of public international law the authority to bring a complaint against a State before international organs created for such purpose appears as a mechanism for monitoring compliance with international instruments, along with other mechanisms such as the submission of reports and inter-State petitions.

When the Commission makes the decision to bring a case before the Court, it is required to submit an application stating (a) the claims on merits, reparations and costs; (b) the parties to the case; (c) a statement of the facts; (d) the orders on the opening of the proceeding and the admissibility of the petition; (e) the particulars of the witnesses and expert witnesses and the subject of their statements; (f) the legal arguments and the pertinent conclusions; (g) available data of the original petitioner, the alleged victims, their next of kin or duly accredited representatives; the names of the delegates; and (i) the report referred to in Article 50 of the Convention.

However, in contrast to proceedings before the Inter-American Commission, where the parties are the petitioners (individuals or groups of persons, whether or not they are victims or next of kin of the victims) and the respondent Member State(s), in proceedings before the Court the victims have not always had a direct role; rather, it has been the changes brought about by the system's evolution and experience – in practice and procedure – that have

[14] Article 29(a) of the American Convention provides 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 herein."*

allowed the victims currently to have the required *locus standi* in cases submitted to the Inter-American Court, which contributes to guaranteeing their autonomy from the other parties to the proceeding. At that moment, the Convention, the Court's Statute and the Rules of Procedure provided for various stages in the proceeding before the Court, with each case consisting of a preliminary objections, a merits and a reparations stage.

As per the case law that has defined the scope of the regulatory reform that finally came to ensure a greater role for the victims, the victims' representatives were not allowed to assert new facts different from those stated in the IACHR's application, even though they were indeed allowed to further specify, clarify or refute some of them, even involving or asserting new rights, *i.e.* the victims' representatives have *in judicio* standing to assert new rights, but not new facts, which created significant room for the actual and effective participation of the victim. However, the current role of the victim, the victim's next of kin and the victim's representatives in the proceeding before the Inter-American Court is the result of the needs that arose in practice before both the Commission and the Court, and the resulting development of the Inter-American System. The current structure of the Inter-American System, which includes two supervisory organs with distinct and supplementary functions, powers and roles, has allowed our region to step up to multiple, complex challenges in the area of human rights.

Both the Commission and the Court have since approved amendments to their rules of procedure within the scope of their respective autonomy. Thus, on the understanding that guaranteeing individuals' access to the Court on completion of the proceeding before the Inter-American Commission made it possible to extend the scope of the international protection of human rights afforded under the Inter-American System, the Commission approved new Rules of Procedure in December 2000.

The new Rules of Procedure of the Commission provide for the following measures with a view to extending the victim's participation in proceedings before the Court: asking the petitioner and the victim to present their position on whether the case should be submitted to the Court (Article 43(3)), giving consideration to the position of the petitioner in deciding whether to refer the case to the Court, and the presumption that all cases – if appropriate – will be submitted to the Court (Article 44), notifying the decision to refer the case to the Court (Article 71) and the possibility of including the petitioner as a delegate of the Commission before the Court (Article 69(2)).

Also, the fourth and latest Rules of Procedure of the Court came into force in June 2001; this marks a turning point insofar as the victim's role before the Court is concerned, as said Rules give the victims, their next of kin or their representatives *locus standi* throughout the entire proceeding before the Court. Today, once the Commission's application to the Court has been allowed,[15] the alleged victims, their next of kin or their representatives are allowed to act before the Court (*locus standi*) and, accordingly, to appear as parties.

The fact is that, along with the recognition of rights both domestically and internationally, there must come the recognition of the procedural standing to vindicate or exercise such rights. Human rights protection must always carry the alleged victims' (or their legal representatives') *locus standi in judicio,* which contributes to the better processing of the case and to guaranteeing the right of the alleged victims to freely express themselves as a component element of due process, domestically and internationally. From the recognition of such *locus standi,* evolution moves in the direction of the future recognition of the individual's right of direct access to the Court *(jus standi)* to bring a specific case before it. In the Inter-American System of protection, the right to file an individual petition will fully mature when it can actually be exercised by petitioners directly before the Inter-American Court of Human Rights.

The point is then to try not just to secure the direct representation of the victims or their next of kin *(locus standi)* at all stages of the proceeding before the Inter-American Court anymore – as such representation is already guaranteed under the Court's new Rules of Procedure (of 2000) – in cases submitted to the Court by the IACHR, but to seek direct access to the Court itself by individuals *(jus standi)* to bring a case directly before it; the Commission would nonetheless retain other functions, such as preparing reports and carrying out *in loco* missions. This would thus create an institutional structure different from that of the European system of protection, fit to satisfy the real needs of protection that exist in our continent.

Still, the system would share with the European system the goal of overcoming duplications, delays and procedural imbalances inherent in the protection mechanisms in place under the American Convention, which mechanisms need to be perfected. Above all, this leap in quality would reflect a justice imperative. The individuals' unrestricted *jus standi* – no longer their mere *locus standi in judicio* – before the Inter-American Court represents the logical consequence of the conception and formulation of rights to be protected internationally under the American Convention, which must necessarily be accompanied by the petitioning individuals' full legal standing to vindicate such rights.

Currently, the adversary interaction between the victims of the violations and the respondent States lies at the very essence of international contentious

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[15] It should be noted that the injured party's *locus standi in judicio* before the Court (in cases already referred to it by the Commission) is different from the right to submit a specific case to the decision of the Court, which right is reserved under Article 61(1) of the American Convention to the Commission and the States Parties to the Convention only.

human rights proceedings. From the procedural standpoint, such *locus standi* is a logical consequence of a system of protection that enshrines individual rights in the international sphere, since establishing rights without the procedural capacity to vindicate such rights is not reasonable. The right of direct access to international justice must go hand in hand with the guarantee of procedural equality of the parties – in the proceeding before the judicial organ –, an essential element of any jurisdictional mechanism of protection of human rights without which any such mechanism will be irreparably undermined and in obvious procedural imbalance.

This has made it possible to clearly appreciate that, more than ever before, the Commission may now better perform its role of promoting and protecting human rights, with arguments not restricted to matters that are purely connected to the compensation due to the victims, but focusing on more general aspects that are indeed a part of its institutional nature, such as addressing issues related to other forms of reparation, including an investigation of the facts and the punishment of those responsible therefor, the failure to adjust the laws or acts that amounted to the violation of the rights defined in connection with the American Convention, the non-repetition of facts and, generally, anything that relates to a fair reparation that is in line with the object and purpose of the Convention. In contrast, the victim or the victim's next of kin are the ones called upon to prove the compensation-related issues, as all the data and evidence which may be required for such purpose are available to them. Such segregation of functions was quite clearly applied in the *Reparations* stage of the *Case of Castillo-Páez v. Peru*.

As far as the Inter-American Court is concerned, the coming into force of the Rules of Procedure has, in particular, brought about a strong increase in the costs of case processing as a result of the alleged victims or their next of kin and their representatives being granted *locus standi in judicio* as true applicants along with the participation of the IACHR and the respondent State. Accordingly, the Court is required to hear and process the arguments of all three parties (petitioners, IACHR and State), and this has necessarily entailed greater costs. Moreover, there is also the inevitable increase in the number of cases submitted to the Court as a result of the reforms to the Commission's Rules of Procedure. Likewise, due to the changes introduced to the Rules of Procedure[16/] of the I/A Court H.R., the victims now have direct participation in proceedings before the Court and, even though they cannot file an application, as under the Convention this power lies solely with the IACHR, they may submit a *brief containing pleadings, motions and evidence*.

Article 23 of the fourth Rules of Procedure provides as follows:

Participation of the Alleged Victims

1. When the application has been admitted, the alleged victims, their next of kin or their duly accredited representatives may submit their

[16]. The Rules of Procedure of the Inter-American Court of Human Rights established *locus standi* in Article 23.

pleadings, motions and evidence, autonomously, throughout the proceedings.

2. When there are several alleged victims, next of kin or duly accredited representatives, they shall designate a common intervenor who shall be the only person authorized to present pleadings, motions and evidence during the proceedings, including the public hearings.

3. In case of disagreement, the Court shall make the appropriate ruling.

In November 2003, the Court approved an amendment to the Rules which came into force in January 2004, whereby it extended the rules on the participation of the victims, their next of kin and their representatives. Such amendment left the text of Article 23 (on the participation of the alleged victims) unchanged, but incorporated an express reference to the brief containing pleadings, motions and evidence in Article 26, adding the current text of Article 36, which provides as follows:

Article 36. Written brief containing pleadings, motions and evidence

1. When the application has been notified to the alleged victim, his next of kin or his duly accredited representatives, they shall have a period of 2 months, which may not be extended, to present autonomously to the Court their pleadings, motions and evidence.

Moreover, Article 38 of the fourth Rules of Procedure of the Court provides as follows:

Article 38. Answer to the application

1. The respondent shall answer the application in writing within a period of 4 months of the notification, which may not be extended. The requirements indicated in Article 33 of these Rules shall apply. The Secretary shall communicate the said answer to the persons referred to in Article 35(1) above. Within this same period, the respondent shall present its comments on the written brief containing pleadings, motions and evidence. These observations may be included within the answer to the application or within a separate brief.

Lastly, it is worth mentioning that, through a 2003 amendment to Article 33 of its Rules of Procedure, the Inter-American Court established that "the Commission shall act on behalf of [the alleged victims and their next of kin] in its capacity as guarantor of the public interest under the American Convention on Human Rights to ensure that they have the benefit of legal representation". So is provided in conformity with Article 57 of the American Convention, under which "[t]he Commission shall appear in all cases before the Court."

Also, the latest amendment to the Rules of Procedure of the Court explicitly added aspects in connection with which the representatives of the beneficiaries are allowed to act independently of the Inter-American Commission.

Article 25 of the Rules of Procedure of the Court (on Provisional Measures) provides:

> *1. At any stage of the proceedings involving cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court may, at the request of a party or on its own motion, order such provisional measures as it deems pertinent, pursuant to Article 63(2) of the Convention.*
>
> *2. With respect to matters not yet submitted to it, the Court may act at the request of the Commission.*
>
> *3. In contentious cases already submitted to the Court, the victims or alleged victims, their next of kin, or their duly accredited representatives may present a request for provisional measures directly to the Court.*
>
> *[…]*
>
> *6. The beneficiaries of provisional measures or urgent measures ordered by the president may address their comments on the report made by the State directly to the Court. The Inter-American Commission on Human Rights shall present observations to the State's report and to the observations of the beneficiaries or their representatives.*
>
> *[…]*

To sum up, the current role of the victim, the victim's next of kin and the victim's representatives in proceedings before the Inter-American Court is the result of the material changes caused in the operation of the Inter-American System by the significant progress made towards the full incorporation of the victim's voice, which progress has made it possible to strengthen the role the victims play in the judicial determination of their rights, directly and autonomously.

Such change in victim participation is also reflected by new and greater needs arising in the Inter-American System. As to the Commission and the Court, in addition to the increase in the number of cases, actors and specific needs, the number of users, the insufficiencies and the progress made in the system call for greater collaboration by the States in supporting and funding the System.

A transcription of Professor Cançado Trindade's reflections on the need to fully recognize the victims' right to file petitions with the Inter-American Court as a guarantee of the rights recognized in the Convention is in order:

"It is only via the locus standi in judicio *of the alleged victims before International Human Rights Tribunals that the consolidation of the human person's international personality and full legal capacity (in the regional systems of protection) to enforce their rights when domestic organs appear incapable of guaranteeing that justice will be served can be achieved. The perfecting of the mechanism in place under our regional system of protection must be the subject of considerations that are basically legal-humanitarian in nature, even as an additional guarantee for the parties in contentious human-rights cases […] The necessary recognition of the* locus standi in judicio *of the alleged victims (or their legal representatives) before the Inter-American Court is one of the most important developments but it is not, however, the final stage of perfection of the Inter-American System, at least as we conceive such perfection. From such* locus standi*, the system's evolution moves towards the future recognition of the individual's right of direct access to the Court* (jus standi) *to bring a specific case before it […]."*

However, there is still much to be done at both the domestic-law and international-law levels. Among other things, this calls for the ratification of the American Convention by all States in the region, the acceptance of the contentious jurisdiction of the Court by all States Parties, the adoption of the necessary domestic measures for the implementation of the convention and to guarantee the enforceability of the Court's decisions, thus finally ensuring individuals' direct access to the jurisdiction of the Court. In addition to the above-listed changes, in the future it might become necessary to take a step forward to evolve from the *locus standi in judicio* to the *jus standi* of individuals before the Court.

As far as our Inter-American System of protection is concerned, it is currently showing developments similar to those that took place in the European System back in the 1980s. The necessary recognition of the *locus standi in judicio* of the alleged victims or their next of kin and legal representatives at all stages of the proceedings before the Inter-American Court represents one of the most important developments but not necessarily the final stage of perfection of the Inter-American System.

We need to understand that it is the current structure of two organs vested with distinct powers that allows each and every one of the OAS member States to be subject to a minimum level of control by the Commission and allows all persons living in this hemisphere to have an organ they can actually resort to. Were the Commission and the Court to be merged into a single permanent organ at this point, the population of 10 countries in the Americas, including Cuba, the United States, Canada, and Trinidad and Tobago, would be left entirely unprotected, as their respective governments have yet to ratify the Convention. The population of another four countries, namely Barbados, Dominica, Grenada and Jamaica, would also be left without protection, as even though their governments have ratified the Convention they have not yet accepted the jurisdiction of the Court.

Even though it is our view that various European experiences might turn out to be of use in this hemisphere, we believe that we need to be very careful in importing ideas and mechanisms into a different context. Any parallel to the European System will turn out to be clearly inappropriate unless these specific features are accounted for. Even though the European system and the Inter-American System share the same goals – the protection of human rights –, the American context differs from the European one in material respects. With no intention of providing an exhaustive list, we can say that the European system did not have to deal with mass, systematic violations or with frequent states of exception; the domestic court systems of the European countries generally operate effectively. Lastly, European countries boast an extremely high rate of compliance with the decisions of the Court.

Even if the decision were made to copy the European Model created by Protocol 11, *i.e.* a single court to which the victims have direct access, it is necessary to take into consideration the degree of development the system presented at the time it was reformed, as well as other variants that were adopted. The transformation of the European system took place at a time when the European Court had been operational for more than 35 years, with the adjudication of more than 700 cases under its belt, with direct access by individuals for several years and with all member states of the Council of Europe having accepted the contentious jurisdiction of the Court. Also, we cannot disregard the fact that the nature of the European Commission was different from that of its Inter-American counterpart, as it did not have the power to promote human rights, prepare reports or carry out visits.

Moreover, when Protocol 11 was adopted, and bearing in mind the elimination of the European Commission, there had been created a Committee of Independent Experts and a Governmental Committee to analyze the reports prepared by the member states and monitor compliance with the European Social Charter; a European Committee for the Prevention of Torture empowered to carry out visits to the various member states and prepare reports on such visits as a mechanism to monitor compliance with the obligations undertaken under the European Convention for the Prevention on Torture; and, lastly, a European Commission against Racism and Intolerance, to examine the measures taken by the European countries and assess their effectiveness in the fight against racism, intolerance and xenophobia. The elimination of the European Commission did not leave the European court operating as the only and exclusive human rights supervisory organ. On the contrary, there were other organs that maintained or assumed extremely important powers as making visits *in loco,* preparing country reports or making recommendations to the States. This European trend might perhaps show that the multiplicity of functions assigned to the Inter-American Commission is an example to be followed rather than eliminated.

On the other hand, the States also need to go over their practice insofar as the possibility of referring cases to the Court is concerned. Only Costa Rica did submit just one single case to the jurisdiction of the Court (the well-known *Matter of Viviana Gallardo et al*). All other States, in spite of having been repeatedly declared to be in violation of the Convention and having expressed their disagreement on the findings of the Commission, have yet to submit a single case to the jurisdiction of the Court.

Meanwhile, the separation between the judge and the prosecution or defense causes the proceeding to be viewed as a *triad,* with the prosecution on one side, the defense on the other and the judge standing at the apex, above the parties. The parties must subject themselves to the decision of an impartial third party who will rule on the dispute, in a proceeding in which they must have equality of arms in order that the adversary principle will not be merely illusory. Accordingly, the separation safeguard is, first and foremost, the basis for the judge’s impartiality. At the same time, access to a pre-established, independent and impartial jurisdictional organ that will hear and determine the case on the basis of the Law, via a proceeding that will conform to the applicable procedural guarantees, is a basic principle of the protection of due process.

The basic right to effective jurisdictional protection is that right recognized to any person “that is served justice,” *i.e.* any person who has a claim and is heard by a jurisdictional organ in a proceeding that carries a set of threshold safeguards. As such, it is, so to speak, a “generic” right that breaks down into a number of specific rights. Among others, these rights include, most importantly, the right to an independent and impartial judge. As stated by the *Human Rights Committee* in *General Comment No. 32,* Article 14 of the *International Covenant on Civil and Political Rights* is particularly complex in nature, combining various guarantees with different scopes of application: (a) equality before courts and tribunals; (b) the right to be publicly heard by a competent, independent and impartial tribunal established by law, subject to the required guarantees; (c) procedural guarantees; (d) right to compensation in cases of miscarriage of justice; and (e) the right to remain free from being tried or punished again for an offence for which an individual has already been tried (*non bis in idem*). The first three guarantees are particularly relevant in the context of access to justice.

Frequently enough, court or tribunal decisions in Spanish use the term “impartial” as synonymous with “fair” or “with due guarantees.” Such use is misleading, as the tribunal’s impartiality is a distinct requirement expressly laid down in the international instruments. However, judicial independence and impartiality are not only principles and guarantees underlying the administration of justice but also a guarantee for those who come before the jurisdictional organs for justice. It should be borne in mind that, even though *prima facie* impartiality and independence as guarantees are inherent in and necessary for the proper administration of justice, they also need to be viewed as guarantees for the defendants (the guarantee of the right to be heard by an independent and impartial tribunal), which their two-fold nature. This is in line with the provisions of Article 8(1) of the American Convention on Human Rights. However, the principles of judicial independence and impartiality and the principle of the competent tribunal previously established by law require that the judge have no connection with any system of power or with the interests of the parties, and for their authority to pre-date the facts of the case. It is for this reason that they also require a judiciary that stands separately from the political branches of government. It is evident that judicial independence and impartiality must be not only formal but also an expression of the judge's moral character and intellectual probity.

The Human Rights Committee confirmed this interpretation in the case of *Bahamonde*, holding that *"a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal within the meaning of article 14, paragraph 1, of the Covenant."*[17]

The Committee's decision in *González del Río* stresses the importance of the subjective side of independence. In its decision, the Committee "recalls that the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception."[18]

On the other hand there is the *right to be equal before the courts and tribunals,* enshrined in general terms in Article 14, paragraph 1 of the Covenant. Access must be guaranteed to all persons irrespective of their nationality or administrative status to guarantee the right to demand justice. This guarantee also forbids any sort of distinction made for the purposes of access to the courts and tribunals made on any basis other than the Law and which cannot be justified by objective and reasonable arguments; accordingly, any restriction based on race, gender, language, religion, opinion, national or social origin, economic position, birth or any other condition is prohibited.[19]

Access to justice must be free and effective. Free access has to do with the prohibition against discrimination and coercion, and with a favorable disposition

[17] Human Rights Committee, case of Bahamonde v. Equatorial Guinea, para. 9.4 (1994).

[18] Human Rights Committee, case of González del Río v. Peru, para. 5.2 (1992).

[19] Human Rights Committee, Communication No. 202/1986, *Alto del Avellanal v. Peru*, para. 10.2 (where the husband was granted the right to represent matrimonial property before the courts, thus denying the standing of married women to sue). *See also* Human Rights Committee, General Comment No. 18, Non-Discrimination, para. 7.

towards the admissibility of the petition. Effective access means that the procedural avenues must be adequate to allow accurate legal counseling, and that the available remedies can truly serve their intended purpose. In addition to guaranteeing access to judicial proceedings, such equality in access must guide the entire proceeding. The Human Rights Committee has held that a situation in which an individual's attempts to seize the competent jurisdictions of his/her grievances are systematically frustrated – *de jure* or *de facto* - runs counter to the guarantees of article 14, paragraph 1.[20]

Along with the principle of independence, the principle of impartiality is one of the guiding principles of the administration of justice and provides the foundation for all rules on incompatibilities. To avoid conflicts of interest and safeguard public interest in the exercise of public powers, lawmakers have devised a number of rules of ethics that must be observed by the officers of the judiciary. Accordingly, the responsibility held by judicial officers is essential, as a judge's behavior as director of the proceeding must be irreproachable and impartial, since this is the greatest source of credibility for users of the administration of justice and all citizens in general. ESCALADA LÓPEZ further explains the foundation of this guarantee, reflecting that: *"It appears evident that if the notion of the judge pre-established by law appears as the institutional guarantee and the fundamental right that directly protect judicial independence and impartiality and indirectly protect the established constitutional equality, its violation and, therefore, the violation of the rights underlying it must entail the most absolute, radical and complete annulment of the proceeding."* Spanish author *JESÚS GONZÁLEZ PÉREZ* agrees, even if in a different tone, when describing the right to a pre-established tribunal as one of the constitutional guarantees of due process for rendering jurisdictional protection effective, since the presence of an impartial judge is one of the preconditions for rendering judgment.

To preserve a judge's independence and impartiality it is a *sine qua non* requirement that the judge not be subject to external influence or pressure, which calls for institutional means to guarantee both requirements.[21]

[20] Human Rights Committee, Communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea*, para. 9.4.

[21] Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August

Accordingly, it is not sufficient for the judge or tribunal hearing a case to have jurisdiction, *i.e.* to have knowledge of the law and have been appointed pursuant to the charter of the relevant country's judiciary; it is essential to guarantee their independence and impartiality as regards both other branches of government and all parties to the proceedings.

Taking up the *Basic Principles on the Independence of the Judiciary,*[22] the Committee states that any situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal.[23]

A judge's independence and impartiality are interrelated notions and, unquestionably, constitutional principles in a democratic political regime. Independence means that the judge's decisions are based solely on legal provisions and rules, and impartiality means that, in ruling on the case, the judge will not be guided by any interest other than the correct application of the law and the fair determination of the case. Moreover, a perceived lack of independence and impartiality will adversely affect the exercise of the right to access justice. In addition to creating distrust and even fear, it drives people not to resort to the justice system. This situation can bring with it structural obstacles that are even greater in countries with high rates of corruption.

The IACHR has stated that "Impartiality presumes that the court or judge do not have preconceived opinions about the case *sub judice* and, in particular, do not presume the accused to be guilty."[24]

On another occasion, the IACHR explained that "the decisive point is not the subjective fear of the interested party regarding the impartiality of the court that is to hear the case, but rather whether the circumstances indicate that his fears can be objectively justified."[25]

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to 6 September 1985, endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. *See,* in particular, principles 2, 3 and 5.

[22] *Basic Principles on the Independence of the Judiciary*, *op. cit.*, principles 1, 3 and 4 in particular.

[23] Human Rights Committee, Communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea*, para. 9.4.

[24] IACHR, case of Martín de Mejía v. Peru, p. 209 (1996).

[25] IACHR, case of Gómez-López v. Venezuela, para. 22 (1997); Vila-Masot v. Venezuela, para. 19 (1997).

It has also been held that "His [the judge's] subjective impartiality in the specific case is presumed as long as there is no evidence to the contrary."[26]

On the other hand, it is worth repeating the words of the European Court of Human Rights:

Resolution on Judicial Ethics
Adopted by the Plenary Court on 23 June 2008

I. Independence
In the exercise of their judicial functions, judges shall be independent of all external authority or influence. They shall refrain from any activity or membership of an association, and avoid any situation, that may affect confidence in their independence.
II. Impartiality
Judges shall exercise their function impartially and ensure the appearance of impartiality. They shall take care to avoid conflicts of interest as well as situations that may be reasonably perceived as giving rise to a conflict of interest.
(...)
VIII. Favours and advantages
Judges shall not accept any gift, favour or advantage that could call their independence or impartiality into question.
(...)

The ***DECLARACIÓN DE PRINCIPIOS MÍNIMOS SOBRE LA INDEPENDENCIA DE LOS PODERES JUDICIALES Y DE LOS JUECES EN AMÉRICA LATINA*** [DECLARATION OF THRESHOLD PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY AND JUDGES IN LATIN AMERICA] (Campeche Declaration), of April 2008, contains statements to the same effect:

"[…] An affirmation of human rights protection must carry with it the possibility of having such protection enforced by the justice system. Ownership of a right is not complete and the right itself fails fully to serve its promised purpose if there is no claiming for its enforcement in the face of its violation by third parties or the States themselves. This is why judicial action lies at the core of each right; without it such rights do not exist, they are crippled precisely where the promise is supposed to come true.

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[26] IACHR, case of Martín de Mejía v. Peru, p. 209 (1996). *See also* Malary v. Haití, para. 75 (2002).

I- GENERAL PRINCIPLES

1.- *The fundamental rights and freedoms of individuals carry, as a further safeguard, the right to effective judicial protection by independent and impartial judges who are members of equally independent judiciaries that meet the requirements to ensure that the magistrates have the objective conditions necessary to exercise their jurisdiction in a manner such that such qualities are present. All Signatory States shall guarantee the permanent support of the political branches of Government to the consolidation of the independence of the judiciary and the judges, avoiding any action or decision that might politically, economically, socially or functionally restrict the independence of the judiciary as a branch of Government, or that of the judges. Said States shall also make such decisions and take such action as may best contribute to the achievement of the aforementioned goals, ensuring favorable conditions for the better exercise of an independent and impartial judicial function subject only to the Constitution and the laws, in strict observance of the order of supremacy of laws, and free of any pressure, restriction or undue external influence.*

2.- *Because the independence and impartiality of a given judge are essential for the exercise of the jurisdictional function, such qualities must be preserved within the Judiciaries, so that they are not directly or indirectly affected by way of disciplinary measures, impeachment or governance of the judiciary itself. Judges must be guaranteed that they will not be rewarded or punished on account of their activity, such decisions being subject only to review by the higher courts, as provided for in the relevant domestic laws.*
[…]

II- THRESHOLD CONDITIONS FOR THE PROTECTION OF THE JUDICIARY'S INDEPENDENCE

5.- To better safeguard the general goals, the signatory states shall ensure:

a) That the judges sitting in the highest courts are selected based on criteria that safeguard their full independence, particularly from the other branches of Government and political forces. The preferred and main selection standard shall be proven knowledge of the law in the exercise of judicial functions, the practice of the legal profession, the teaching of the law or a similar activity, and a commitment to guaranteeing fundamental rights and *judicial guarantees.*

[…]

7. GUARANTEES AND INCOMPATIBILITIES.-

With a view to consolidating independence and impartiality, the following are specified as guarantees and incompatibilities:

A judge's impartiality, as an indispensable requirement for the exercise of jurisdictional functions, must be real, effective and apparent to citizens.

[…]

15.- JUDICIAL ETHICS.
In exercising their jurisdictional powers, judges are required to seek to serve justice in conditions of efficiency, quality, accessibility and transparency, respecting the dignity of the individuals resorting to it, and affirming the independence and impartiality of their actions at all times.
[…]

As stated by the European Court, underlying a judge's independence is the assumption of a proper appointment procedure, the established duration of tenure and a guarantee against external pressures. In *Karttunen*, the Human Rights Committee defined impartiality as follows: *"[…] The impartiality of the court and the publicity of proceedings are important aspects of the right to a fair trial within the meaning of article 14, paragraph 1. "Impartiality" of the court implies that judges must not harbour preconceptions about the matter put before them and that they must not act in ways that promote the interests of one of the parties […]"*[27]

As per its case law, the European Court of Human Rights also views the *principle of equality of arms* as a guarantee of due process, repeatedly holding, in connection with the adversary nature of civil proceedings, that it calls for a fair balance between the parties, even where one of such parties is the State itself. In this regard, the ECHR has held that *"everyone who is a party to such proceedings shall have a reasonable opportunity of presenting his case to the court under conditions which do not place him at substantial disadvantage vis-a-vis his opponent."*[28] The ECHR also stated that the possibility of submitting arguments and replies to arguments must be equally recognized to both parties to the proceedings. In this vein, in *Ruiz Mateos v. Spain,* the ECHR held that "the principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that proceedings should be adversarial." Later on, the Court added: "[…] within the context of proceedings on a civil right to which persons belonging to that circle are a party, those persons must as a rule be guaranteed free access to the observations of the

[27] Human Rights Committee, case of Karttunen v. Finland, para. 7.2

[28] ECHR, case of *Kaufman v. Belgium*, No. 5362/72, 42 CD 145 (1972) and *Bendenoun v. France*, A 284, para. 52 (1994).

other participants in these proceedings and a genuine opportunity to comment on those observations."[29]

Following this line of thought, identifying the principle of equality of arms as an integral part of due process, the ISHR has started to define standards intended to ensure that such principle is observed and guaranteed. The parties' procedural equality in a proceeding is a component of what legal scholars and tribunals refer to as due process of law or effective judicial protection. In this vein, the notion of *equality of arms* has been developed basically in the context of the law of criminal procedure, generally as one of the implications of the right to defense. In this context, Maier calls it "*equality of positions*" and, even if holding that it is impossible to match the power of the State in criminal prosecution — as it has means available which are legally hard to match –, he views it as an ideal –"perhaps a utopia but plausible nonetheless"– that allows to come as close as possible to a proceeding where the defendant has powers equal to those of the organs of prosecution.[30] As explained by Bovino, every trial entails a conflict, antagonistic claims or different interests that oppose each other.[31]

The parties are the holders of such interests, and the judge takes action to verify that the proceeding in which the applicable legal reason is constructed is conducted in a regular fashion. The distinguishing feature of the trial is its adversary nature: the dispute between two parties is subjected to a neutral third party to force them to abide by the rules of the game. The fact that State and petitioner are facing each other in a situation of formal equality before an impartial third party carries direct consequences that are extremely important for the relationship between that Government and its citizens, in its various manifestations. In this regard, Cox argues that "the greatest value of the Inter-American system of human rights is instrumental in nature: it serves as an equalizer of forces, allowing the opinions of those who are not a part of the local government to be heard and have their interests seriously taken into consideration." [32] The fact is that *equality* also extends to the rights that relate to procedural rights and the procedural remedies available to the parties throughout the entire proceeding, unless the law establishes distinctions based

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[29] *Cf*. ECHR, case of *Ruiz Mateos v. Spain*, judgment of June 23, 1993, whereas paragraphs 15, 61, 63 and 65. Also, *cf*. ECHR, case of *Foucher v. France*, judgment of March 18, 1998, whereas paragraph 34.

[30] Maier, J., *Derecho procesal penal*, Vol. I-Fundamentos, Editores del Puerto, Buenos Aires, 1996, p. 577.

[31] Bovino, A., *Problemas del derecho procesal penal contemporáneo*, Editores del Puerto, Buenos Aires, 1998, p. 242.

[32] Cox, F., "¿La ropa sucia se lava en casa?", in *Los derechos fundamentales*, Editores del Puerto, Buenos Aires, 2003, p. 291

on objective and reasonable grounds which do not entail an effective disadvantage for either party.[33] To sum up, it is widely recognized that a side of the principle of equality is that it considers the existence of a necessary equality of procedure, or procedural equality, which entails the application of the same procedure to all individuals falling within a given situation regulated by Law, of the same pre-established and impartial rules for the resolution of disputes, to arrive at the formation of the competent legal operators' disposition to rule, irrespectively of the persons or interests that may be at stake in each particular case.

A very interesting analysis in this regard is the one developed by Gómez, who, after stressing that the principles of due process recognized in Article 8 of the ACHR are also to be applied to proceedings before the Commission, goes on to criticize some established practices in such procedure on account of the fact that they impair equality, showing that equality of arms is also *an ideal that has not yet been achieved,*[34] or, in other words, that equality of arms between petitioner and State is a *fiction* in the procedure before the Commission.[35]

Equality of arms is, however, a principle which, on being recognized in the ACHR as one of mandatory application as far as the States are concerned, must be guaranteed not only internationally but domestically as well. This notwithstanding, because equality of arms is an ideal that has not yet be achieved by the States internally, proceedings before the Inter-American system operate as a subsidiary mechanism in the event that the domestic protection of due process has failed. If it is generally maintained that international protection protects rights when these are disregarded by the States, it can also be maintained that it brings balance to the relationship between a State and its subjects, by giving them equality of arms to come face to face before an international organization when no such equality has been available at the domestic level.

Currently, the effective universalization of human rights is largely dependent on the capacity of the various countries that make up the system. Even though it is evident that the Inter-American Court has been performing a role of titanic proportions in the protection of human rights, we cannot avoid a review of the

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[33] Human Rights Committee, Communication No. 1347/2005, *Dudko v. Australia*, para. 7.4; Communication No. 846/1999, *Jansen-Gielen v. the Netherlands*, para. 8.2; Communication No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*, para. 7.4.

[34] Gómez, V., "Seguridad Jurídica e Igualdad Procesal ante los Órganos," in *El Futuro...*, *op. cit.*, p. 213 et seq.

[35] Abregu, M., comments on Kathryn Sikkink's work "La dimensión transnacional de los movimientos sociales," in *La sociedad civil frente a las nuevas formas de institucionalidad democrática* (Abregú, M. y Ramos, S., editores), Foro de la Sociedad Civil de las Américas-CEDES-CELS, Buenos Aires, 2000, p. 71.

Inter-American System of Human Rights, as there is no denying that such system is faced with new political and social realities where human rights still instill fear amidst certain political classes; as put by Thomas Buergenthal, the system's failures start at what should be the first line of defense, *i.e.* the States.

The Inter-American Court has held that the real inequality existing between the parties to a proceeding creates the State's duty to adopt such measures as may be necessary to mitigate those factors that prevent the effective safeguarding of a person's own interests. The Inter-American Commission has also noted that the specific circumstances of a given case can create a need for guarantees in addition to those explicitly prescribed in the human rights instruments, so as to ensure a fair trial. According to the IACHR, this includes identifying and correcting any real disadvantage which the parties to a proceeding may have to deal with, thus safeguarding the principle of equality before the law and the prohibition against discrimination.

In turn, the separate opinion of Judge Sergio García-Ramírez to advisory opinion *OC-18/03* also stresses the role that the principle of equality of arms plays in any proceeding, with a view to mitigating the real inequality factors that may hinder the effective enjoyment and exercise of the rights of the parties.

Following this line of reasoning, in his vote he stated that: *"Due process […] entails, on the one hand, the greatest equality – balance, "equality of weapons" – between the litigants, and this is particularly important when on one side of the dispute is the vulnerable migrant worker and on the other the employer endowed with ample and effective rights, an equality that is only obtained – in most cases that reflect the true dimension of the collective problem – when the public authorities incorporate the elements of compensation or correction that I have mentioned above, through laws and criteria for interpretation and implementation; and, on the other hand, clear and flexible compliance with the State's obligation to provide a service of justice without distinction, much less discrimination, which would entail the defeat of the weaker party at the very outset […]"*[36]

[36] *Cf*. Reasoned Concurring Opinion of Judge Sergio García-Ramírez in relation to Advisory Opinion OC-18/03, of September 17, 2003, "Juridical Condition and Rights of the Undocumented Migrants," para. 38.

In principle, the appointment of an *ad hoc* judge by a State that is brought to court for alleged violations of the human rights of its citizens may be viewed as a situation of *imbalance* between the parties, as the victims of the State's abuses who have suffered the State's refusal to reinstate their impaired rights have to deal, at the regional level, with a special judge appointed by the State to defend its initial position.

In this regard, the Inter-American Court sticks to the model of the Hague's International Court of Justice, and both make provision for *ad hoc* Judges which the States can appoint in cases in which they hold an interest and where no judge of their own nationality is sitting on the bench (Convention, Article 55(2)). The goal is to make sure that, when ruling on a case, the Court necessarily have a member of the State involved on the bench, or where a member of the Court is a national of the State and such member cannot attend, the Court requests the State involved to appoint an *ad hoc* Judge to sit in the specific case. This presents an advantage, since the resolution of the case will involve a judge who is familiar with the legal system of the State involved in the matter submitted for resolution; however, there is clearly a *risk* that such judge may influence any judicial decision therein adopted for the benefit of their national State.

However, the judges of the Inter-American Court act in a personal capacity and on their own responsibility. This means that they act on their own personal behalf, *i.e.* that they do not represent the States or have loyalties other than their loyalty to the administration of justice and the Court. Sitting in the Court is incompatible with any activity that might impair the judge's independence and impartiality as such. In an attempt to implement this principle, the Statute of the Court lays down three incompatibilities that the judges may not disregard under any circumstance:

- Being a high-ranking member of a State's government, except for those who are not under the control of the executive branch and those diplomatic agents who are not chiefs of missions to the OAS or to any of its members States.
- Officials of international organizations.
- Any other function or activity that might prevent the judge from discharging their duties, or that might affect their independence or impartiality, or the dignity and prestige of the office of judge of the Inter-American Court.

The Court has had *ad hoc* Judges in several cases, with different experiences.[37] The American system has certain regulations in place for the disqualification of judges. Under one of them, no Judge may take part in a matter in which they have a personal interest or in which they have previously taken part as an agent, counsel or advocate of any party, or as a member of a national tribunal that heard the case, or as a member of the national or international committee that investigated the case. In such situations, the Judge must step down from the case.

Because of the fact that the Court is eventual in nature and that, accordingly, the judges' task is not permanent, the Court does not keep judges from practicing their profession, other than in activities that are intrinsic to the Court.

Article 18 of the *Statute of the Court* specifies the cases that are incompatible with the position of judge of the Court, as follows:

a.- Members or high-ranking officials of the executive branch of government, except for those who hold positions that do not place them under the direct control of the executive branch and those of diplomatic agents who are not Chiefs of Missions to the OAS or to any of its member states.

b.- Officials of international organizations.

c.- Any others that might prevent the judges from discharging their duties, or that might affect their independence or impartiality, or the dignity and prestige of the office.

Paragraph (c) is broad enough to guarantee the Court's independence. In case of doubt, the power to make a decision lies with the Court. However, it is

[37] Considering the current list consisting of 188 contentious judgments, in 83 of such judgments there was an *ad hoc* judge on the bench; in three an *ad hoc* judge waived their appointment; also in three of them the *ad hoc* judge did not take part in the decision but agreed on it; in three of them the *ad hoc* judge was disqualified from hearing the case; in two *ad hoc* judges were appointed but had no part in the decision and did not express their agreement or disagreement on it; in five of them the appointment was held to have been made in an untimely fashion; in one the *ad hoc* judge resigned, and in two the State considered the possibility of appointing an *ad hoc* judge but refrained from actually doing so. No appointment at all was made in the remaining cases. As regards the cases in which Argentina was involved (Argentina being the State that requested this Advisory Opinion), an *ad hoc* judge was involved in two judgments; Argentina did not exercise its right to appoint an *ad hoc* judge in seven cases, and in one case the *ad hoc* judge was appointed but did not act. In cases in which Colombia was involved, *ad hoc* judges were appointed and participated in twelve cases; no appointment was made in four cases, and the appointed *ad hoc* judge did not participate in one case. See ANNEX (author's note).

obvious that in order to avoid tension and confrontation, it is the States that must bear these incompatibilities in mind in nominating candidates.

The Statute only makes reference to the executive branch, probably on the understanding that there is a separation of powers that does not always actually exist. For instance, it does not seem that members of Congress should be members of the Court. As regards the Judiciary, it is clearer that, notably, there is no incompatibility.

As regards the incompatibilities, these arise from a judge's previous involvement or their interest in a case. Excuses are submitted to the President, and the President has the authority to rule; however, if there is a disagreement, the power to decide lies with the Court. The President (but not the other Judges) may raise the issue and the matter will, basically, be settled by the Court (Article 19 of the Statute). On the other hand, the judges and staff of the Court, as is natural and evident, are required to "conduct themselves in a manner that is in keeping with the[ir] office" (Article 20 of the Statute), and are answerable to the Court for their conduct as well as for any act of negligence or omission committed in the exercise of their functions, the Court being empowered to request that the OAS General Assembly apply its disciplinary authority.

It should be noted that, pursuant to the Statute, such authority lies with the OAS Assembly, not the States Parties.

In turn, the Rules of Procedure of the Court provide as follows:

RULES OF PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS
Approved by the Court during its XLIX Ordinary Period of Sessions, held from November 16 to 25, 2000

Article 18. Judges Ad Hoc
1. In a case 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, shall inform the States referred to in those provisions of their right to appoint a Judge ad hoc within 30 days of notification of the application.

2. When it appears that two or more States have a common interest, the President shall inform them that they may jointly appoint one Judge ad hoc,

pursuant to Article 10 of the Statute. If those States have not communicated their agreement to the Court within 30 days of the last notification of the application, each State may propose its candidate within 15 days. Thereafter, and if more than one candidate has been nominated, the President shall choose a common Judge ad hoc by lot, and shall communicate the result to the interested parties.
3. Should the interested States fail to exercise their right within the time limits established in the preceding paragraphs, they shall be deemed to have waived that right.
4. The Secretary shall communicate the appointment of Judges ad hoc to the other parties to the case.
5. The Judge ad hoc shall take an oath at the first meeting devoted to the consideration of the case for which he has been appointed.
6. Judges ad hoc shall receive honoraria on the same terms as Titular Judges.

Moreover, according to the case law of the Inter-American Court,[38]

(…)

1. I have signed the order of the Court, with which I am in full agreement. As is clearly evident from the American Convention on Human Rights itself (Article 55(4), in conformity with Article 52) and the Statute of the Inter-American Court of Human Rights (Articles 10(5) and 15 to 20), an ad hoc *judge is not an agent of the Government but is, however, a Judge for the specific case at hand. So much so that in the history of the Inter-American Court there are cases involving* ad hoc *Judges who voted in agreement with the titular or permanent judges, against the respondent State.*

2. Thus, after being sworn in and made a part of the Court, an ad hoc *judge cannot be unilaterally removed from the Court by one of the parties, namely the respondent State. Hardly could any understanding to the contrary find reasonable support for maintaining the position of* ad hoc *judge in the*

[38] *I/A Court H.R., Case of Paniagua-Morales et al., Order of September 11, 1995, considering clauses 1-4 and operative section.*

international legal proceeding, even more so in an area such as the international protection of human rights, which has its widely-recognized own specificity.

To sum up, there are many issues that should be analyzed by the OAS Member States and the States Parties to the American Convention on Human Rights to strengthen the Inter-American System of protection of human rights, the analysis of which is beyond the scope of this document. Among others, such aspects include the increase in the number of *ad hoc* judges –twice as many as titular judges, with the possibility of becoming three or four times as many as titular judges in a short period of time –, which in monetary terms means that the Court is almost constantly comprised of 8 judges, the only difference being that titular judges take only one round trip during the Court's session, whereas an *ad hoc* judge will be arriving at and leaving the court every 2 or 3 days throughout the session. Currently, the Court has several *ad hoc* Judges who, as a result of the recent changes introduced to the Rules of Procedure of the Commission and the Court and the increased number of cases, may create, in two years' time, a serious situation that would be logistically and financially impossible for the Court to handle using the financial resources currently available to it. Likewise, it is also clear that, in order to achieve its goals, there must be a legal system that will shelter *ad hoc* judges from the influences and compliments, pressures or warnings, or even worse, accusations – particularly those of a political nature – that may come their way. To be perfectly honest, such maneuvers seek to have the *ad hoc* judge removed or, at the very least, to undermine the integrity with which their office is performed.

There being no other reasons behind this document, and in my determination to continue to collaborate with the scholarly work and case-law development of the Honorable Inter-American Court of Human Rights, I, the undersigned Colombian citizen, respectfully conclude my presentation.

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