

Advisory Opinion Requested by Panama on 28 April 2014 Observations

Never Stand Still

Law

Sydney, 30 January 2015

To: Judge Humberto Antonio Sierra Porto
President
Inter-American Court of Human Rights
Avenida 10, Calles 45 y 47, Los Yoses, San Pedro, San José, Costa Rica

Re: Observations with respect to the Advisory Opinion Requested by Panama

Dear Judge Sierra Porto,

We hereby submit observations with respect to the Advisory Opinion requested by Panama on 28 April 2014. More specifically, we make observations with respect to questions 1, 2, 5, 6, 7 and 8.

We hope you find these observations somewhat useful in the work the Court has ahead of itself. Should you wish to discuss any of those points further, please do not hesitate to contact us.

Sincerely,

Dr Lucas Lixinski

Sumer Dayal

Ashna Taneja

Senior Lecturer

Project Director

Australian Human Rights Centre

Faculty of Law

UNSW Australia

UNSW Sydney 2052 NSW

Australia

[*enclosed*]

Observations to the Inter-American Court of Human Rights on the Advisory Opinion Requested by Panama on 28 April 2014

The main purpose of the advisory opinion requested by Panama is to consolidate the understanding of the Inter-American Court of Human Rights (“the Court” or “IACtHR”) with respect to the definition of “person”, and whether juridical persons can fall under that category and claim rights under the American Convention on Human Rights (“the American Convention” or “ACHR”). In this respect, eight different questions were posed to the Court, as follows:

1. Does the second paragraph of Article 1 of the American Convention on Human Rights restrict the inter-American protection of human rights to natural persons and exclude legal entities from the Convention’s sphere of protection?
2. Can Article 1(2) of the Convention also protect the rights of legal entities such as cooperatives, trade unions, associations and companies, inasmuch as they are composed of natural persons associated in these entities?
3. Are legal entities able to have recourse to the proceedings of the domestic jurisdiction and exhaust the remedies of the domestic jurisdiction in defense of the rights of the natural persons who are members of those legal entities?
4. Which human rights can be recognized to legal or collective (non-governmental) entities under the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights and its Protocols, and complementary international instruments?
5. Under the American Convention, in addition to natural persons, do legal entities composed of human beings have the rights to freedom of association of Article 16, to privacy of Article 11, to freedom of expression of Article 13, to property of Article 21, to judicial guarantees, due process, and the protection of their rights of Articles 8 and 25, and to equality and non-discrimination of Articles 1 and 24, all of the American Convention?
6. Is a corporation or private company, a cooperative, a civil society organization or commercial company, a trade union (legal entity), a communications medium (legal entity), or an indigenous organization (legal entity), in defense of its rights and/or of its members, able to

exhaust the remedies of the domestic jurisdiction and have recourse to the Inter-American Commission on Human Rights on behalf of its members (natural persons associated in, or owners of, the entity or corporation), or must each member or shareholder do so in his or her capacity as a natural person?

7. If a legal entity, in defense of its rights and of the rights of its members (natural persons associated in, or shareholders of, the entity), has recourse to the domestic jurisdiction and exhausts its jurisdictional proceedings, are its members or shareholders able to resort directly to the international jurisdiction of the Inter-American Commission in defense of their rights as natural persons that have been infringed?

8. Under the American Convention on Human Rights, must natural persons exhaust the remedies of the domestic jurisdiction themselves in order to have recourse to the Inter-American Commission on Human Rights in defense of their human rights, or can the legal entities in which they participate do on their behalf?

We will make observations below with respect to questions 1, 2, 5, 6, 7 and 8. We will use the questions, and their original numbering, as the headings of this submission. For that reason, the numbering of the headings is not necessarily consecutive.

Question 1

Does the second paragraph of Article 1 of the American Convention on Human Rights restrict the inter-American protection of human rights to natural persons and exclude legal entities from the Convention's sphere of protection?

Question 2

Can Article 1(2) of the Convention also protect the rights of legal entities such as cooperatives, trade unions, associations and companies, inasmuch as they are composed of natural persons associated in these entities?

These two questions raise related issues, and will therefore be answered jointly.

The answer to these questions lies, we suggest, in the drafting history of the American Convention. While the drafting history is only a supplementary means of interpretation of treaties, as per article 32 of the Vienna Convention on the Law of Treaties (which reflects customary international law), and is particularly less useful in the context of human rights treaties, which are living instruments and need to be interpreted in light of changing circumstances (*pro homine* approach), the history of this provision sheds some light on why it was inserted to begin with, and what role it plays in the ACHR.

What is now Article 1(2) of the American Convention was inserted by the Inter-American Commission (“the Commission”) during its meeting in 1-11 July 1968, which was a special session convened specifically to prepare a draft of the Convention for the upcoming San José Conference.¹

During this meeting, the Commission had at its disposal the opinions of the Council of the Organization of American States,² as well as the projects prepared by the Inter-American Council of Jurists,³ and the Draft prepared at the Second Special Inter-American Conference.⁴ None of these drafts or opinions proposed what is now Article 1(2). It was an initiative of the Commission, during its July 1968 special meeting, to include this new paragraph, “explaining the term ‘person’, for purposes of the Convention.”⁵ Therefore, this provision was included as a definition of person for the purposes of the ACHR, and it seems to have deliberately excluded juridical persons from that definition.

After the conclusion of this special meeting, a Draft American Convention was submitted for consideration during the San José Conference. There, the provision included by the Commission was not discussed during the meetings of the relevant Commission (Commission I). While other parts of Article 1 were discussed, the specific paragraph on the definition of “person” was not the object of discussion, and was adopted unanimously by the members of the Commission,⁶ and subsequently adopted by the Conference.

It is clear, therefore, that the drafting history of the Convention restricts the application of the instrument to natural persons, by the inclusion of Article 1(2). But, as the Convention is a living instrument, and must be interpreted *pro homine* and in the way most conducive to its effectiveness, there are still possibilities for the indirect protection of the rights of legal entities, discussed in detail below.

In summary, to answer these two questions:

1. Does the second paragraph of Article 1 of the American Convention on Human Rights restrict the inter-American protection of human rights to natural persons and exclude legal entities from the Convention’s sphere of protection?

Answer: The history of the drafting of the Convention seems to exclude juridical persons from its scope.

2. Can Article 1(2) of the Convention also protect the rights of legal entities such as cooperatives, trade unions, associations and companies, inasmuch as they are composed of natural persons associated in these entities?

¹ Inter-American Yearbook of Human Rights 1968, page 93.

² Ibid.

³ Id., 67-69.

⁴ Id., 69-73.

⁵ Id., 95.

⁶ Conferencia Especializada Interamericana sobre Derechos Humanos. San José, Costa Rica, 7-22 de noviembre de 1969. Actas y Documentos, p. 157.

Answer: Not as such. The rights of juridical persons can only be protected indirectly, via their members.

Question 5

Under the American Convention, in addition to natural persons, do legal entities composed of human beings have the rights to freedom of association of Article 16, to privacy of Article 11, to freedom of expression of Article 13, to property of Article 21, to judicial guarantees, due process, and the protection of their rights of Articles 8 and 25, and to equality and non-discrimination of Articles 1 and 24, all of the American Convention?

Preliminary Observations on Interpretation of the Convention (Article 29 ACHR)

This article of the Convention is not cited in the request for an advisory opinion. However, we believe that the Court should consider it, in the exercise of its competences under the principle of *iura novit curia*. Consideration of this provision is essential, we believe, because it orients the interpretation of the entirety of the Convention.

Although not cited in the decisions regarding the rights of legal entities, article 29 of the Convention provides support for the Court's current approach. Article 29 (also known as the '*pro homine*' principle) is the Convention's 'in built' mechanism for ensuring the Convention is interpreted in a manner which protects human rights. The Convention thus chooses to favour a beneficial interpretation over the plain and ordinary meaning of the text.⁷

The case of *Cantos* provides the closest application of the *pro homine* principle in the context of granting rights to legal entities under the Convention. In that case, the Court cited the Vienna Convention on the Law of Treaties (VCLT) in support of its consequentialist approach to interpretation, reasoning that the Court should interpret the Convention so as to not create unreasonable results:

In addition, we could recall the Vienna Convention on the Law of Treaties in this respect, as this Court has on several occasions¹⁰, and affirm that the interpretation alleged by the State leads to unreasonable results, because it implies removing an important group of human rights from protection by the Convention.⁸

The Court should therefore employ article 29 of the Convention in considering whether other rights enshrined in the Convention should extend to protecting legal entities. And we suggest that the *pro homine* interpretation of the Convention and the rights enshrined in it requires that some form of recognition is given to juridical persons and their rights with respect to the ACHR.

⁷ See Lucas Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21(3) *European Journal of International Law*, 585.

⁸ *Cantos*, [28].

5.1. Right to Property (Article 21 ACHR)

Article 21 of the ACHR recognises the right to private property, establishing that:

- a) “[e]veryone has the right to the use and enjoyment of his property”;
- b) such use and enjoyment may be subordinated, by law, to “social interest”;
- c) a person may be deprived of his property for reasons of “public utility or social interest and in the cases and according to the forms established by law”; and
- d) this deprivation shall be upon payment of just compensation.⁹

‘Property’ may be defined as those material objects that may be appropriated, and also any right that may form part of a person’s patrimony. This includes all movable and immovable property, corporal and incorporeal elements, and any other intangible object of any value.¹⁰

The right to property is discussed first as it is in this context that the Court made a definitive statement on the interpretation of article 1(2), recognising that organisations could have rights infringed under the ACHR so long as they are attributed to the rights of its individual members. The approach was adopted in *Cantos v. Argentina*¹¹ and has formed the basis for recognising legal persons in other fundamental rights.

In *Cantos*, the state seized vital documentation belonging to Mr Cantos’ business group without them being inventoried. The group suffered financial losses through an inability to conduct regular business. Argentina argued that the property was that of a legal entity unprotected under article 1(2). Notably, Argentina cited paragraph 17 from *Mevopal, S.A., Argentina*,¹² currently under deliberation, to substantiate its argument.¹³ However, the argument was rejected since the harm suffered by the group was attributable to Mr Cantos.

Though the Court accepted *Mevopal*’s interpretation of rejecting legal entities from protection,¹⁴ it refused to accept the consequence of denying individuals their rights merely because it was exercised via a legal entity.¹⁵ The Court recognised the interrelationship between legal persons and the rights of the individuals:

... 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.¹⁶

Further, the Court considered that:

... although the figure of legal entities has not been expressly recognized by the American Convention, ... this does not mean that, in specific circumstances, an individual may not resort to the inter-

⁹ *Ivcher-Bronstein v. Peru (Merits, Reparations and Costs)* (Judgment, IACtHR, 6 February 2001) [120].

¹⁰ *Ivcher-Bronstein v. Peru (Merits, Reparations and Costs)* (Judgment, IACtHR, 6 February 2001) [122].

¹¹ *Cantos v. Argentina (Preliminary Objections)* (Judgment, IACtHR, 7 September 2001) (‘*Cantos*’).

¹² *Mevopal, S.A., Argentina* (Report No. 39/99, IACHR, 11 March 1999) (‘*Mevopal*’).

¹³ *Cantos* [23]; *Request for an Advisory Opinion by the Government of the Republic of Panama* (IACtHR, 28 April 2014), 3.

¹⁴ See *Cantos* [24].

¹⁵ See *Cantos* [25]-[26], [28].

¹⁶ *Cantos* [27].

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.¹⁷

The Court encouraged the formation of distinctions in order to identify which situations could be examined within the framework of the ACHR.

The *Cantos* approach was used more recently in *Perozo v. Venezuela*. Paragraph 29 was cited to determine that the Court had competence to hear cases involving the property rights of shareholders where the fundamental rights that a human being, as owner or part owner of a corporation, has assigned to that legal entity are violated. *Perozo* expanded on the 'distinctions' supported in *Cantos* by focusing on a connection between the right of the individual and a legal person. The Court held that, although state agents had damaged Globovisión's (the company) property on several occasions, it was not proven that the damage to such assets translated into an abridgement of the rights of the shareholders in question. Therefore, violation of the right to property was not proven.

The *Cantos* approach is further reflected in the Commission's recent decisions. In *Marcel Granier et al., Venezuela*, the Commission rejected the claim that the state's inappropriate reassigning of the use transmitters, antennas and towers from the radio channel RCTV to another company infringed the right to property. The Commission determined that a claim would be established if it can be proven that the right of the individuals (in most cases, the shareholder) have been adversely affected. In this case, the petitioners did not present 'sufficient evidence of a *direct effect on the personal patrimony of the shareholders* presented as victims as a result of the State's seizure of RCTV's tangible assets'.¹⁸ If a sufficient connection were established, the right to property could have been infringed.

Therefore, the Court should consider the *Cantos* judgment as indicative of the approach now adopted by the Inter-American system, and the rights of a legal entity are recognized by the system indirectly through the rights of natural persons who are shareholders or directors of the juridical person. This submission will continue to demonstrate the consistent use of the *Cantos* approach over that of *Mevopal*, expressed definitively by the Commission in *Gómez Vargas, Costa Rica* regarding freedom of expression.¹⁹

5.2. Freedom of Thought and Expression (Article 13 ACHR)

The right to freedom of thought and expression may be violated if the communication, diffusion, and circulation of ideas and opinions, is prohibited even through indirect means.²⁰ This is where the rights of legal persons may be linked to the individual and recognised under the ACHR.

¹⁷ *Cantos* [29]; See also *Perozo v. Venezuela (Preliminary Objections, Merits, Reparations, and Costs)* (Judgment, IACtHR, 28 January 2009) [399] ('*Perozo*').

¹⁸ [175] (emphasis added). The Commission cited the *Ivcher-Bronstein* case [128] which itself cited *Barcelona Traction, Light and Power Company, Limited (Judgment)* [1970] ICJ Rep 3 [47]. This maintains the distinction between shareholder and company previously supported by the Commission, for example, in *105 Shareholders of the Banco de Lima v Peru* (Report No 10/91, IACHR, 22 February 1991) [2]-[3].

¹⁹ See [32]-[33].

²⁰ *Ríos et al. v Venezuela (Preliminary Objections, Merits, Reparations, and Costs)* (Judgment, IACtHR, 28 January 2009) [340] explaining art 13(3).

The Inter-American Commission confronted the issue of corporate versus individual rights in relation to the freedom of expression in the case of *William Gómez Vargas, Costa Rica*.²¹ The state challenged the standing of the news organisation, claiming that legal persons do not have this right under the Convention and the right of Mr Vargas was unaffected.²² In allowing the petition, the Commission acknowledged the judgment of *Cantos v Argentina* and accepted that:

... a system for the effective and material protection of human rights is obliged to examine whether in each concrete case, beyond formal appearances, the allegedly arbitrary acts that affected a legal person also had by extension a material or substantial effect on the human rights of the natural persons related to, associated with, or in any way connected to the legal person. If that were the case, and the other requirements for admissibility of the petition were met, the Commission could not reject the case under the pretext that the violation, *prima facie*, affected the legal person.²³

Hence, legal entities composed of human beings have de facto rights under the ACHR. They hold the right to freedom of expression insofar as restricting the freedom of the organisation interferes with the freedoms of these individual members.

In particular, media outlets are seen as ‘instruments’ and ‘mechanisms that enable the exercise of the fundamental right to freedom of expression by those who use the outlet to disseminate ideas and information.’²⁴ Such an interpretation may be applied beyond news organisations to cooperatives, associations, companies and trade unions that are ‘instruments’ for the collective opinions of individuals.

In *Vargas*, the Commission examined three factors in order to determine whether the encumbrance of the legal person had, by extension, a substantial and real negative impact on the right to freedom of thought and expression of the alleged victims:

- i) the origin, nature and scope of the action that triggered the restriction;
- ii) the role that the alleged victims have within the media outlet; and
- iii) whether in fact the interference in the media outlet could have affected the right to freedom of expression of these persons.²⁵

These criteria provide a frame of reference for distinguishing cases in which the rights of a business are at stake, from those in which a natural person’s human rights have been adversely affected. The sanction’s impact is only considered if attributable to the natural person; other spheres of the outlet’s commercial or corporate activities are outside of the

²¹ *William Gómez Vargas, Costa Rica* (Report No. 72/11, Petition 1164-05, IACHR, 31 March 2011) (‘*Vargas*’).

²² *Vargas* [31].

²³ *Vargas* [33]. See contrasting example in *Herrera Ulloa v. Costa Rica (Preliminary Objections, Merits, Reparations, and Costs) (Judgment)* (2004) IACtHR (ser C no. 107) [97], [100] where the Commission argued that Mr. Fernán Vargas Rohmoser, legal representative of ‘La Nación’, was a victim. The Court did not accept this position.

²⁴ *Ivcher Bronstein v. Peru (Merits, Reparations and Costs) (Judgment)* (2001) IACtHR (ser C no. 74) [149]; *Vargas* [36].

²⁵ *Vargas* [36]; *Marcel Granier et al., Venezuela (Admissibility)* (Report No. 114/11, IACHR, 22 July 2011) [40]; see also *Tomás Enrique Carvallo Quintana, Argentina* (Report No. 67/01, Case 11.859, IACHR, 14 June 2001) [56].

ACHR's protection.²⁶ Such a distinction is also supported in the European system, where expression that is relevant to 'political' discourse and speech is separate from expression that is purely 'commercial', i.e., expression for profit-making activities or incitement to purchase a particular product is unprotected.²⁷

The close relationship between freedom of expression and functioning democracy also supports the argument in favour of legal persons holding de facto rights.²⁸ In *Marcel Granier et al., Venezuela*, the radio channel RCTV was deliberately targeted by the state for its political opinions and forced to shut down. The Commission concluded that the nonrenewal of RCTV's franchise constituted an indirect curtailment of the freedom of expression of the shareholders, directors, and staff of RCTV.²⁹ The Commission established the victim status of the individuals via their inclusion in the harm suffered by the company. Two petitioners were removed from the list when their status as employees or executives of RCTV during the violation was put into question.³⁰

Therefore, the Inter-American system has accepted that the legal person and the individual can be interdependent when it comes to the exercise of freedom of expression. The harm suffered by a corporation is a collective harm suffered by the human beings that constitute it.

5.3. Freedom of Association (Article 16 ACHR and Article 8 of the San Salvador Protocol – Trade Union Rights)

Article 16(1) of the ACHR provides that individuals have the right and freedom to associate freely with others, without any interference by the public authorities that could limit or impair the exercise of such right. It relates to the right to join with others in lawful common pursuits, without pressure or interference that may alter or impair the nature of such purpose.³¹ Quintessentially, the right to freedom of association is the right of natural persons to form juridical persons in the pursuance of their own human rights. It would be therefore incompatible with the object and purpose of a human rights treaty like the ACHR not to allow for some form of protection for juridical persons in the context of the individual rights of freedom of association, which can only be fully exercised collectively. Freedom of association can only be exercised in a situation in which fundamental human rights are fully guaranteed and respected.³²

²⁶ *Marcel Granier et al., Venezuela (Admissibility)* (Report No. 114/11, IACHR, 22 July 2011) [39].

²⁷ Emberland, 118-9.

²⁸ See *Herrera Ulloa v. Costa Rica (Preliminary Objections, Merits, Reparations, and Costs) (Judgment)* (2004) IACtHR (ser C no. 107) [116]-[117]; *Marcel Granier et al., Venezuela* (Report No 112/12, Case No 12.828, IACHR, 9 November 2012) [117]

²⁹ *Marcel Granier et al., Venezuela* (Report No 112/12, Case No 12.828, IACHR, 9 November 2012) [165].

³⁰ *Marcel Granier et al., Venezuela* (Report No 112/12, Case No 12.828, IACHR, 9 November 2012) [71].

³¹ *Baena-Ricardo et al. v. Panama (Merits, Reparations and Costs)* (Judgment, IACtHR, 2 February 2001) [156]; *Huilca-Tecse v. Peru (Merits, Reparations and Costs)* (Judgment, IACtHR, 3 March 2005) [69]; *Kawas-Fernández v. Honduras (Merits, Reparations and Costs)* (Judgment, IACtHR, 3 April 2009) [143]

³² *Huilca-Tecse v. Peru (Merits, Reparations and Costs)* (Judgment, IACtHR, 3 March 2005) [75]; *Cantoral Huamaní and García-Santa Cruz v. Peru (Preliminary Objections, Merits, Reparations and Costs)* (Judgment, IACtHR, 10 July 2007) [146].

The Inter-American system strongly recognises the freedom of association of legal persons in the context of trade unions. For example, article 8 of the San Salvador Protocol³³ permits trade unions ‘to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice’, treating this as ‘an extension’ of workers’ rights.

The Court has also employed a broad and flexible interpretation in labour-related freedom of association, stating that it goes beyond theoretical recognition of the right to form trade unions to the right to use ‘any appropriate means’ to exercise this freedom:

When the Convention proclaims that freedom of association includes the right to freely associate “for [... any] other purposes,” it is emphasizing that the freedom to associate and to pursue certain collective goals are indivisible, so that a limitation of the possibilities of association represents directly, and to the same extent, a limitation of the right of the collectivity to achieve its proposed purposes.³⁴

This replicates the practice of the Human Rights Committee when considering the freedom of association in article 22 of the ICCPR:

The beneficiaries of the rights recognized by the Covenant are individuals. Although, with the exception of article 1, the Covenant does not mention the rights of legal persons or similar entities or collectivities, many of the rights recognized by the Covenant, ... may be enjoyed in community with others. The fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals ... does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights.³⁵

The Court has recognised the connection between freedom of association and the full and free enjoyment of human rights in other contexts, for example, with human rights groups³⁶ and environmental defenders.³⁷ Therefore, the existence of this connection again suggests that legal persons have de facto rights via its members. The Court would have to identify who these members are, but nothing prevents them from bringing a claim under the auspices of the organisation.³⁸

³³ *Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights “Protocol of San Salvador”*, opened for signature 17 November 1988, OAS Treaty Series No. 69 (entered into force 16 November 1999).

³⁴ *Huilca-Tecse v. Peru (Merits, Reparations and Costs)* (Judgment, IACtHR, 3 March 2005) [70].

³⁵ Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) [9].

³⁶ *Escher et al v Brazil (Preliminary Objections, Merits, Reparations, and Costs)* (Judgment, IACtHR, 6 July 2009) [172]; *Lysias Fleury et al v. Haiti (Merits and Reparations)* (Judgment, IACtHR, 23 November 2011) [100]-[102].

³⁷ *Kawas-Fernández v. Honduras (Merits, Reparations and Costs)* (Judgment, IACtHR, 3 April 2009) [146].

³⁸ See eg, *Kawas-Fernández v. Honduras (Merits, Reparations and Costs)* (Judgment, IACtHR, 3 April 2009) [140]. The applicants framed their claim as Ms Kawas exercising her right to freedom of association by establishing and carrying out the functions of the foundation Prolansate

5.4. Right to Privacy (Article 11 ACHR)

Article 11 of the Convention prohibits all arbitrary or abusive interference in the private life of individuals, setting out different aspects such as the privacy of their families, their home or their correspondence.³⁹ In this regard, the Court has stated that ‘the sphere of privacy is characterized by being exempt and immune from abusive and arbitrary invasion by third parties or public authorities.’⁴⁰

In the case of *Escher et al v. Brazil*, the Court decided against the state’s use of wiretaps to illegally monitor two organizations in Paraná State associated with the Landless Movement. In doing so, the Court recognised that:

Article 11 protects conversations using telephone lines installed in private homes *or in offices*, whether their content is related to the private affairs of the speakers, *or to their business or professional activity*.⁴¹

The Court specifically cited the European Court of Human Rights case of *Halford v United Kingdom*, which recognised the right to privacy at work.⁴²

Further, the right to privacy is placed in conjunction with freedoms of expression and association. The Inter-American Commission has observed four legally protected interests within the right to privacy that are closely related to the exercise of other fundamental rights. These are arguably transferrable to collective organisations:

- (1) The right to have an individual sphere impervious to the arbitrary interference of the State or third parties.
- (2) The right to govern oneself, in that solitary space, by one’s own rules defined autonomously according to one’s individual life plan.
- (3) The confidentiality of all the data produced in that private space—in other words, it prohibits the disclosure or circulation of information captured, without the consent of their owner, in that space of private protection reserved to the individual.
- (4) The right to one’s own image, meaning the right to not have one’s image used without consent.⁴³

However, it must be noted that legal persons are organs typically subject to corporate government regulations. They are often required to disclose their inner workings as a matter of law and to prevent wrongdoing. In this sense, the Court will have to balance between justifiable laws that require public disclosure from organisations and the protection of rights that human beings have in their individual capacity.

Clarification on how to approach the conflict between corporate regulation and privacy may be informed by the European system, specifically the principle of proportionality.

³⁹ *Escher et al v Brazil (Preliminary Objections, Merits, Reparations, and Costs)* (Judgment, IACtHR, 6 July 2009) [113] (*‘Escher’*).

⁴⁰ *Escher* [113]; *Ituango Massacres v. Colombia (Preliminary Objections, Merits, Reparations, and Costs)* (Judgment, IACtHR, 1 July 2006) [194]; *Escué Zapata v. Colombia (Merits, Reparations and Costs) (Judgment)* (2007) IACtHR (ser C no. 165) [95].

⁴¹ *Escher* [114] (emphasis added).

⁴² *Halford v United Kingdom (Judgment)* (Application No. 20605/92, ECtHR, 25 June 1997) [44]-[45].

⁴³ Office of the Special Rapporteur for Freedom of Expression, *Freedom of Expression and the Internet* (Inter-American Commission on Human Rights, 2013) [131]; *Fontevicchia y D’Amico. Argentina* (Report No. 82/10. Case No. 12.524. IACHR, 13 July 2010) [91] et seq.

First, although legal persons can bring claims under article 34 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (“the European Convention” or “ECHR”), the courts differentiate the rights based on whether or not they can (or should) be granted to a corporation or organisation. The Strasbourg organs ‘concede’ that this will depend on the specific right or freedom in question.⁴⁴ For example, article 3 (prohibition against torture of inhuman or degrading treatment or punishment) and article 5 (freedom for arbitrary detention) are unquestionably reserved for natural persons.⁴⁵ Similarly, the right to privacy was originally drafted to only protect the natural person.⁴⁶ However, as recognised in the *Escher* case, the European system has been willing to extend certain aspects of the right outside the private home into business premises.⁴⁷ Therefore, the Inter-American Court could replicate this interpretive approach and base its decisions on the context in which the right to privacy is pursued.

Second, the European Court of Human Rights’ interpretation of the ECHR

implies a just balance between the protection of the general interest of the community and the respect due to fundamental human rights, while attaching particular importance to the latter.⁴⁸

An example includes the von Hannover litigation, in which the right to private life was superseded by the public’s right to engage in a debate of ‘general interest’.⁴⁹ Adopting such an interpretation will help the Court protect the rights of individuals within legal entities, whilst ensuring that such entities do not perceive the right to privacy as a tool to avoid government regulation.

Article 11 of the Convention also recognises that every person has the right to respect for his honour, prohibits an illegal attack against honour and reputation, and imposes on the States the obligation to provide legal protection against such attacks. In general, the right to honour relates to self-esteem and self-worth, while reputation refers to the opinion that others have of a person.⁵⁰ This aspect of the right to privacy is specific to the individual and would not readily apply to legal persons.

5.5. Right to a Fair Trial and Judicial Protection (Articles 8 and 25 ACHR)

States have a positive obligation to provide effective judicial remedies to victims of human rights violations (article 25), and must provide such remedies in accordance with the due

⁴⁴ *Verein "Kontakt-Information-Therapie" (KIT) and Siegfried HAGEN v. Austria (Admissibility)* (Application No. 11921/86, European Commission of Human Rights, 12 October 1988); Marius Emberland, *The Human Rights of Companies* (Oxford University Press, 2006), 53.

⁴⁵ Emberland, 53-4.

⁴⁶ See Emberland 114-6.

⁴⁷ See additionally, *Niemietz v Germany (Judgment)* (Application No. 13710/88, ECtHR, 16 December 1992) [29]-[33] discussing the right to privacy in the context of human relationships; see also *Huvig v. France (Judgment)* (1990) ECHR (ser A No. 176-B) [8] and [25] which discusses the right to privacy in the context of telecommunications tapping similar to *Escher*.

⁴⁸ *Case relating to certain aspects of the laws on the use of languages in education in Belgium (Merits)* (1979) ECtHR (ser A) [5].

⁴⁹ See *von Hannover v. Germany (No. 2) (Judgment)* (Application Nos. 40660/08 and 60641/08, ECtHR, 7 February 2012); *von Hannover v. Germany (No. 3) (Judgment)* (Application No. 8772/10, ECtHR, 19 September 2013).

⁵⁰ *Escher* [117].

process of law (article 8).⁵¹ The obligation to provide due process extends to all proceedings (including administrative) in which the State may affect the rights and interests of individuals.⁵² These obligations are seen as ‘non-derogable’ and thus must be provided for even during State emergencies.⁵³ A lack of effective domestic remedies for human rights violations is therefore also seen as a violation of the American Convention itself.⁵⁴

There has been limited consideration by the Inter-American Commission and Court of the right to fair trial and judicial guarantees in the context of legal entities. The majority of the cases that concern articles 8 and 25 and legal entities analyse the scope of a legal entity’s rights with respect to other substantive rights such as the right to property.⁵⁵ However, these cases do suggest that a right to a fair trial and judicial guarantees would extend to the legal entity, as long as doing so would protect a right under the Convention that is attributable to an individual. In other words, the extension of procedural and judicial guarantees to legal entities is derivative; it depends on the existence of the right of a legal entity which is attributable to an individual.

Such an approach is seen in the *Marcel Granier et al. v Venezuela*, where the Commission found that the procedural guarantees in article 8 apply fully to the radio entity RCTV, because doing so is essential for the protection of other substantive rights for individuals in the Convention:

The obligation to respect due process in administrative proceedings fully applies to the procedures through which radio or television concessions are granted since, as previously observed, these decisions have a definitive impact on the right to freedom of expression. Therefore, it is worth repeating that the process of granting and renewing concessions must be carried out in strict accordance with the law, and be a transparent process guided by criteria that are objective, clear, public, non-discriminatory, and compatible with a democratic society. Finally, before any decision is taken, a party seeking a decision of this kind must have the right to a hearing and to offer evidence; that party also has a right to a reasoned decision delivered within a reasonable period of time, and to judicial review.⁵⁶

In a similar vein, although the Court in *Cantos* analyses the rights of legal entities in relation to article 21 of the Convention (the right to property), it suggests that the same principles which grant legal entities protection under the Convention apply to article 25 (the right to judicial protections) and potentially other articles as well:

⁵¹ *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights) (Advisory Opinion)* (IACtHR, Advisory Opinion OC-9/87, 6 October 1987), (*Judicial Guarantees Advisory Opinion*) [24]; *Velásquez Rodríguez Case (Preliminary Objections)* (Judgment, IACtHR, 26 June 1989), [91].

⁵² *Baena-Ricardo et al. v. Panama (Merits, Reparations and Costs)* (Judgment, IACtHR, 2 February 2001), [124]; *Marcel Granier et al. v Venezuela*, [188].

⁵³ *Judicial Guarantees Advisory Opinion*, [29]-[32].

⁵⁴ *Judicial Guarantees Advisory Opinion*, [24].

⁵⁵ See for example *Cantos*.

⁵⁶ *Marcel Granier et al. v Venezuela* (Report No 112/12, Case No 12.828, IACHR, 9 November 2012 (*‘RCTV’*), [189].

For the time being, it will be useful to accept the interpretation suggested in the passages cited above and the consequences it would have. According to this opinion, a civil or commercial company that suffered a violation of its constitutional rights, such as the inviolability of defense in a lawsuit or the impunity of its correspondence, would be unable to invoke Article 25 of the Convention merely because it was a legal entity. *Similar examples could be mentioned with regard to Articles 10 and 24 of the Convention, among others.*⁵⁷

The argument put forward in defense of the right to property for legal entities in *Cantos* is thus equally applicable to the right to procedural and judicial guarantees. Denying procedural and judicial guarantees to legal entities may leave a class of natural persons who exercise their rights through legal entities unprotected.⁵⁸ Such a result is undesirable and thus an interpretation which protects legal entities should be preferred.

A similar but less direct approach is taken in *Ivcher Bronstein v Peru*.⁵⁹ In this case, Mr Ivcher Bronstein claimed that he was arbitrarily deprived of his nationality title by the state of Peru, in order to remove him from the editorial control of television network 'Channel 2- *Frecuencia Latina*'. Mr Ivcher Bronstein claimed that this deprived him of his shareholding in the television network company, and restricted his freedom of expression.⁶⁰

In considering the right to property, the Court made a distinction between the rights of the company itself, and the rights of individual shareholders (e.g. right to receive dividends, right to attend and vote at general meetings). The Court found a violation of the right to property because Mr Ivcher Bronstein's rights as a shareholder were unjustly interfered with.⁶¹ Following a similar principle, the Court found a violation of the freedom of expression, because Mr Ivcher Bronstein had been deprived of a *method* of disseminating information (i.e. through the television network company).⁶²

In the context of these violations, the Court's assessment of articles 8 and 25 of the Convention suggests that the right to a fair trial and judicial guarantees would extend to legal entities, because doing so gives effect to the individual's rights under the Convention:

Although Article 8 of the American Convention is entitled "Right to a Fair Trial", its application is not limited strictly to judicial remedies, "but to a series of requirements that must be observed by the procedural bodies" so that a person may defend himself adequately against any act of the State that could affect his rights.⁶³

Such an interpretation is supported by the analysis of the Court in *Cantos*, which highlights the undesirable consequences for natural persons by excluding legal entities from the scope

⁵⁷ *Cantos*, [24] (emphasis added).

⁵⁸ *Cantos*, [25].

⁵⁹ *Ivcher-Bronstein v. Peru (Merits, Reparations and Costs)* (Judgment, IACtHR, 6 February 2001) ('*Ivcher-Bronstein*').

⁶⁰ *Ivcher-Bronstein*, [3].

⁶¹ *Ivcher-Bronstein*, [127].

⁶² *Ivcher-Bronstein*, [147].

⁶³ *Ivcher-Bronstein*, [102] (emphasis added).

of the Convention.⁶⁴ Therefore, providing procedural and judicial guarantees to legal entities in defense of the rights of natural persons under the Convention is consistent with the Court's prior approach to legal entities.

5.6. Right to Equality and Non-discrimination (Articles 1 and 24 ACHR)

Articles 1 and 24 of the Convention seek to promote the free and full exercise of the rights and freedoms contained within the Convention, without any discrimination. Thus, any law or legal instrument (including regulations) which legitimises such discrimination is incompatible with the Convention.⁶⁵ The types of discrimination which violate the Convention are not exhaustive or restrictive; the list provided in article 1(1) is 'merely explanatory'.⁶⁶ The onus lies on the State to demonstrate that the disputed discrimination is a reasonably necessary means to achieving a legitimate end.⁶⁷

The applicability of the right to equality and non-discrimination to legal entities is best seen in the context of media organisations and the right to freedom of expression. This context suggests that treating legal entities with equality and without discrimination is essential for the equal treatment of individuals under the Convention, particularly where individuals exercise their rights through legal entities.

For example, in the case of *Perozo v Venezuela*, the news organisation Globovisión claimed that it was prevented from accessing official sources of information because it had previously published news stories critical of the Venezuelan government.⁶⁸ In analysing the issue, the Court emphasised the ability for individual rights to equality and non-discrimination to derive from circumstances pertaining to a group or legal entity:

It is possible for a person to feel discriminated by the way other people think about its relation to a group or social sector, independently of whether such perception corresponds to reality or to the victim's self-identification. Considering what has been established in the previous chapter (supra para. 360 to 362) it is possible that the people linked to Globovisión have been included in the category of "political opinions" contained in Article 1(1) of the Convention and for this reason, be subjected to discrimination in certain situations. As a result, the alleged discriminations of fact should be analyzed under the general non-discrimination obligation contained in Article 1(1) of the Convention, in connection with Article 13(1) therein.⁶⁹

This approach is also seen in the case of *Marcel Granier et al. v Venezuela*. The Commission found that by not renewing radio channel RCTV's licence without reasonable

⁶⁴ *Cantos*, [25]. The Court reasoned that if a right which is attributed to a company is excluded from the Convention, it may result in the exclusion of individual actions which rely on the rights of a company. Such a result is undesirable because it excludes an important category of natural persons from the scope of the Convention.

⁶⁵ *Perozo*, [379]. See also *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica* (IACtHR, Advisory Opinion OC-4/84 19 September 1984) [53].

⁶⁶ *RCTV*, [160]; *Case of Atala Riffo and Children v. Chile (Merits, Reparations, and Costs)* (IACtHR, Judgment, 24 February 2012), [85].

⁶⁷ *RCTV*, [160].

⁶⁸ *Perozo*, [370]; [378].

⁶⁹ *Perozo*, [380].

justification, RCTV had been subject to differential treatment which was discriminatory and arbitrary, contrary to Venezuela's obligations under articles 1(1) and 24 of the Convention.⁷⁰ Throughout its analysis, the Commission focused on the discrimination faced by legal entity RCTV, because it acknowledged that the harm suffered by RCTV can be attributed to the directors, shareholders and employees of RCTV.⁷¹

Therefore, the approach undertaken by the Court and the Commission suggests that the right to equality and non-discrimination extends to legal entities. The differential treatment of a legal entity may prejudice the rights of natural persons who rely on the legal entity to exercise their rights. The legal entities should therefore be afforded protection under the Convention, to the extent that the harm they face is attributable to an individual.

In summary, in answer to the question posed:

5. Under the American Convention, in addition to natural persons, do legal entities composed of human beings have the rights to freedom of association of Article 16, to privacy of Article 11, to freedom of expression of Article 13, to property of Article 21, to judicial guarantees, due process, and the protection of their rights of Articles 8 and 25, and to equality and non-discrimination of Articles 1 and 24, all of the American Convention?

Answer: Internationally, legal entities themselves are not entitled to those rights, but their members are.

Question 6

Can a legal entity, in defence of its rights/or of its members, exhaust domestic remedies and have recourse to the Inter-American Commission on Human Rights on behalf of its members, or must each member or shareholder do so in his or her own capacity as a natural person?

Question 7

If a legal entity, in defense of its rights and of the rights of its members (natural persons associated in, or shareholders of, the entity), has recourse to the domestic jurisdiction and exhausts its jurisdictional proceedings, are its members or shareholders able to resort directly to the international jurisdiction of the Inter-American Commission in defense of their rights as natural persons that have been infringed?

Question 8

Under the American Convention on Human Rights, must natural persons exhaust the remedies of the domestic jurisdiction themselves in order to have recourse to the Inter-American Commission on Human Rights in defense of their human rights, or can the legal entities in which they participate do on their behalf?

⁷⁰ RCTV, [164].

⁷¹ RCTV, [165].

Questions 6, 7 and 8 all raise similar issues, and will therefore be addressed jointly below.

A complainant is required to exhaust domestic remedies of a legal character that are 'available' as a matter of practice,⁷² 'effective' in offering a reasonable prospect of success,⁷³ and 'sufficient' to redress the violations.⁷⁴ The onus is on the State to prove such domestic remedies exist.⁷⁵ Where such remedies exist, a complainant must exhaust all of these remedies before approaching the Commission.

This is encapsulated in article 46(1)(a) of the ACHR and article 31(1) of the Commission's Rules of Procedure, which state that the remedies under domestic law must have been pursued and exhausted in accordance with generally accepted principles of international law for it to be admissible.

Article 46(2) of the ACHR and article 31(2) of the Commission's Rules of Procedure provide that the rule requiring exhaustion of domestic remedies shall not apply when:

- 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, or
- c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

An alleged victim is only required to exhaust those remedies that are suitable for addressing his legal situation and redressing the harm done, i.e., he need only exhaust the proper remedies for any given case.⁷⁶

In principle, the Commission has previously held that complaints before it are inadmissible if they have been subject to the proceedings of domestic courts on behalf of legal persons rather than individual victims, because it lacks jurisdiction *ratione personae*.⁷⁷ However, the Commission has adopted the *pro homine* approach in *Cantos* discussed above when it is proved that the rights of the individual victims are affected.

Hence, if legal persons have exhausted domestic remedies for rights that are attributable to its individual members, the domestic remedies requirement will be satisfied. The Commission clarified this position in *Vargas*:

[32]...Nevertheless, the Inter-American Court has ruled that the mere fact that a right is exercised through a legal person does not necessarily exclude it from protection under the Convention.⁷⁸ The Court has observed that "in general, the rights and obligations

⁷² *Vernillo v France (Judgment)* (1991) 1988 Eur Court HR (ser A) [27].

⁷³ Human Rights Committee, *Views on Patiño v Panama*, *Communication No 437/1990*, 52nd sess, UN Doc CCPR/C/52/D/437/1990 (21 October 1994) [5.2].

⁷⁴ African Commission on Human and People's Rights, *Sir Dawda K Jawara v Gambia: Communication Nos 147/95-149/96*, 27th sess (11 May 2000) [35].

⁷⁵ Human Rights Committee, *Views on Miguel Angel Millan Sequeira v Uruguay*, *Communication No R1/6*, 35th sess, UN Doc A/35/40 (29 July 1980) [6]; *Granier v Venezuela (Admissibility)* [27].

⁷⁶ *Granier v Venezuela (Admissibility)* [27]-[28].

⁷⁷ *Venezuela, Elias Santana et al.* (Report No 92/03, IACHR, 2003 Annual Report) [50].

⁷⁸ *Cantos* [29]; See also *Argentina, Tomás Enrique Carvallo Quintana* (Report No 67/01, IACHR, 14 June 2001) [54] which states that 'in principle shareholders cannot claim to be victims of interference with the rights of a company absent a showing of direct effect on their rights'.

attributed to companies become rights and obligations for the individuals who comprise them or who act in their name or representation,” and that “although the figure of legal entities has not been expressly recognized by the American Convention... 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.”⁷⁹

[33]...In this regard, a system for the effective and material protection of human rights is obliged to examine whether in each concrete case, beyond formal appearances, the allegedly arbitrary acts that affected a legal person also had by extension a material or substantial effect on the human rights of the natural persons related to, associated with, or in any way connected to the legal person. If that were the case, and the other requirements for admissibility of the petition were met, the Commission could not reject the case under the pretext that the violation, *prima facie*, affected the legal person.

The Commission held that the Mr Vargas exhausted domestic remedies available in Costa Rica despite the remedies being initiated on behalf of the company in which he was owner and Editor-in-Chief. In doing so, the Commission noted that the complaints exhausted in the domestic proceedings on behalf of the company coincided with those submitted by Mr Vargas before the Commission.⁸⁰

It seems, therefore, that an approach consistent with the jurisprudence of the Inter-American system and the principle of interpretation *pro homine* requires that, in the exhaustion of local remedies, regard be given primarily to the substance of the rights being argued with respect to the specific factual scenario, as opposed to the narrow formality of on whose behalf those rights are being argued domestically. As long as no two people argue the same case before the Inter-American system on behalf of a corporation (which would be a violation of the *lis pendens* principle),⁸¹ it should be allowed that a natural person appears before the Inter-American system with respect to rights litigated on behalf of a corporation domestically. Any other solution would be a blatant denial of human rights of the natural persons who have a stake in the juridical person, and would go against the effectiveness of the Inter-American system and the protection of human rights in the continent.

In summary, in answer to the questions posed:

6. Is a corporation or private company, a cooperative, a civil society organization or commercial company, a trade union (legal entity), a communications medium (legal entity), or an indigenous organization (legal entity), in defense of its rights and/or of its members, able to exhaust the remedies of the domestic jurisdiction and have recourse to the Inter-American Commission on Human Rights on behalf of its

⁷⁹ *Cantos* [27], [29].

⁸⁰ *Vargas* [43].

⁸¹ On the *lis pendens* principle in international human rights law, see Lucas Lixinski, ‘Choice of Forum in International Human Rights Adjudication and the Unity/Fragmentation Debate: Is Plurality the Way Ahead?’ (2008) 18 *Italian Yearbook of International Law*, 183.

members (natural persons associated in, or owners of, the entity or corporation), or must each member or shareholder do so in his or her capacity as a natural person?

Answer: while a corporation lacks procedural capacity before the Inter-American system, it can exhaust local remedies on behalf of its members.

7. If a legal entity, in defense of its rights and of the rights of its members (natural persons associated in, or shareholders of, the entity), has recourse to the domestic jurisdiction and exhausts its jurisdictional proceedings, are its members or shareholders able to resort directly to the international jurisdiction of the Inter-American Commission in defense of their rights as natural persons that have been infringed?

Answer: Yes, to suggest otherwise would go against the effectiveness of the Inter-American system.

8. Under the American Convention on Human Rights, must natural persons exhaust the remedies of the domestic jurisdiction themselves in order to have recourse to the Inter-American Commission on Human Rights in defense of their human rights, or can the legal entities in which they participate do on their behalf?

Answer: No, it should be permissible that legal persons exhaust the rights when that is allowed under domestic law, as long as the natural persons appearing before the Inter-American system do not engage in *lis pendens*, and present the case based on the same factual scenario.

Conclusions

While there is very limited scope for the *direct* protection of the rights of legal entities or juridical persons under the American Convention, because of its drafting history, the practice of the organs of the system, in applying the *pro homine* principle and promoting the effectiveness of the system, have created multiple avenues for the *indirect* protection of the rights of these entities. An approach that flatly denied the rights of natural persons who are members of legal entities would amount to a denial of justice, and this notion pervades not only the interpretation of substantive rights of the American Convention, but also procedural safeguards of the Inter-American system, such as the exhaustion of local remedies requirement.