

**CONCURRING OPINION OF JUDGE EDUARDO FERRER MAC-GREGOR POISOT
TO THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS
IN THE CASE OF LIAKAT ALI ALIBUX V. SURINAME, OF JANUARY 30, 2014**

INTRODUCTION

1. Essentially I concur with the decision in this case, wherein relevant inter-American standards were established, *inter alia*, on the scope of the right to freedom from ex post facto laws regarding regulations that govern procedure (Article 9 of the American Convention on Human Rights, hereinafter "American Convention" or "Pact of San Jose"), as well as the scope of the right to appeal the judgment to a higher court—article 8(2)(h) of the Pact of San Jose—, when a criminal process is carried out in a single instance before highest judicial body in a domestic legal system.

2. I write this separate opinion, pursuant to the terms established in Article 66(2) of the American Convention,¹ because I wish to highlight two aspects that I consider relevant to the inter-American system in its entirety, and that were not discussed in the Judgment on Preliminary Objections, Merits, Reparations and Costs in regard to the Case of Liakat Ali Alibux v. Suriname (hereinafter the "Judgment").

3. The first aspect is in regard to the first preliminary objection raised by the respondent State, *on the lack of exhaustion of domestic remedies for the filing of the petition before the Inter-American Commission*, on matters relating to substantial and functional consequences of the protection of the right to access to justice of the alleged victims before the Inter-American System, and also on the understanding of the principle of subsidiarity and complementarity that govern it, in light of the American Convention and its *effet util*.

4. The second aspect is in regard to a new dimension that has barely been explored in Inter-American jurisprudence on the right to judicial protection as an *integrating element of the fundamental rights* of national and conventional sources, established by Article 25 of the American Convention.² Traditionally, the Inter-American Court of Human Rights ("Inter-

¹ This precept notes: "If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment."

² "Art. 25. *Judicial Protection*.

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;

b. to develop the possibilities of judicial remedy; and

c. to ensure that the competent authorities shall enforce such remedies when granted.

American Court of HR" or "Inter-American Court") has widely developed in its jurisprudence the dimension of the *obligation to guarantee access to a judicial remedy that is effective, adequate, prompt and simple* considering any recourse or as a challenge as a dimension of the right of access to justice in general.

5. However, there is a particular dimension, which to my understanding is of great substantive importance to the protection of rights, which is expressly provided in Article 25(1) of the Pact of San José itself, on the need for the existence of "a simple and prompt recourse" or "any other effective recourse" for "protection [of the person] against acts that violate the fundamental rights granted by the constitution, or the laws of the State or by this Convention." The right to judicial protection that *protects fundamental rights* of a national or conventional nature is an integral element of the rights for the protection of these at the national level, having a significant effect on the control model of constitutionality and control for conformity with the Convention taken by States and its effectiveness. For this reason, judicial protection should be given independent treatment in order to better understand its scope.

6. In this sense, had the Inter-American Court developed this dimension of Article 25(1) of the American Convention, most likely it would have declared a violation of that provision autonomously, attempting not to subsume the consequences in the violation of Article 8(2)(h) as done in the Judgment³ declaring that the State did not violate Article 25, which in turn affects the reparations and just compensation to the victim,⁴ in terms of Article 63(1) of the Pact of San José.⁵

7. In this regard, it is true that there is interdependence and interrelation between the rights of the American Convention. In this case, particularly regarding the right to due process established in Article 8 (which the Pact of San José entitles "the Right to a Fair Trial") and the right to "judicial protection" established in Article 25, in that, in general, any recourse must be made with respect to the minimum guarantees of due process, and hence the interconnection between Articles 8 and 25, as established and developed by the Inter-American Court's jurisprudence. However, it cannot be forgotten that every right in the Pact of San José was envisioned as an autonomous right, with their own dimension and scope, allowing individualized interpretive developments, adding to the understanding and configuration of the essential core of every right to achieve greater protection of persons through regional standards, while at the same time these developments contribute by clarifying State obligations in order for them to be respected.

8. As such, I consider that in the case, the right to appeal the judgment to a higher court (Art. 8(2)(h)) could have been differentiated from the diverse right to a remedy that *protects fundamental rights* of national or conventional sources. This vision of *the right to the guarantee of rights*, as is literally laid down in Article 25 of the American Convention, *plays the role of integrating the fundamental rights of national and conventional sources for their adequate protection in a model exercising control for conformity with the Convention.*

³ Para. 119 of the Judgment.

⁴ Para. 151 of the Judgment in regard to Article 25 notes: "In light of this, the Court will not order any measure of reparation in this regard."

⁵ Article 63(1). If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the *consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.* (italics added)

9. In this case, the current Constitution of Suriname includes a Constitutional Court, which had not been established at the time of the facts (and which has still not been established), and thus the relevant recourses under its jurisdiction have not been developed, which obviously, generated legal uncertainty about the mechanism and the body that effectively protects the fundamental rights in regard to the proposals on constitutionality and control for conformity with the convention, which may have led the Inter-American Court to declare the failure to conform with the Convention by omission by violating Article 25 of the American Convention, in connection with Articles 1(1) and 2 thereof, given that the body and the recourses that constitutionally are necessary for the protection of fundamental rights of national and conventional sources were not established. And this is without acknowledging the powers and specific functions of the High Court of Justice of Suriname, which in this case did not protect the rights established in the Convention that Mr. Alibux alleged had been violated, which warranted international intervention and protection. Also, there was no proper response in regard to the failure to conform to the Convention that was alleged by the victim, in that the mere reply of the High Court judges was that the judges could not implement an action that was not provided for in the legislation.

10. Under such circumstances, I will divide this opinion into two parts. *The first part*, concerning the preliminary objection filed by the State on the lack of exhaustion of domestic remedies at the time of filing the petition before the Commission (paragraphs 11 to 29). *The second part* will address the dimensions of the right to judicial protection under Article 25 of the American Convention, under the following headings: (i) Inter-American jurisprudence (para. 30-46); (ii) The difference between the right to judicial protection (Article 25) and the right to appeal the judgment to a higher court (Article 8(2)(h)) - (paras 47 to 68); (iii) the integrative dimension of the rights in light of Article. 25 of the American Convention (paras 69 to 94); (iv) The right to judicial protection in this case (paras 95 to 126); and (v) Conclusion: *the right to the guarantee of rights*, as integrating dimension of fundamental rights (of national and conventional sources) in a model that exercises control for conformity with the Convention (paras 127 to 134).

FIRST PART

ON THE FILING OF THE PETITION BEFORE THE INTER-AMERICAN COMMISSION AND THE RULE OF EXHAUSTION OF DOMESTIC REMEDIES

11. In the first of the three preliminary objections that were challenged, the State argued *inter alia* that the alleged victim did not exhaust domestic remedies at the time of filing the brief submitting the case before the Inter-American Commission, given that the judgment in the criminal process against him had not been rendered.⁶

12. The brief submitting the case was received by the Commission on August 22, 2003, being that the final judgment issued by the High Court of Justice was issued on November 5, and it was not until April 18, 2005, that the Commission transmitted the pertinent parts of the petition of the alleged victim to the State. Moreover, the State argued as of July 18, 2005, that the case had been submitted prior to the adoption of a final decision on the merits from the High Court of Justice and that the Admissibility Report was issued on March 9, 2007.⁷

⁶ Cf. para. 11 of the Judgment.

⁷ Cf. para. 17 of the Judgment.

13. The Inter-American Court dismissed the preliminary objection because it essentially considered that “the petitioner argued that the alleged violations to the right to appeal the conviction and the rule of freedom from ex post facto law before the High Court of Justice were unfavorably resolved by the Interlocutory Verdict of June 12, 2003 [...] prior to submitting the petition to the Commission. Consequently, in the present case, the Court finds that, due to the absence of a mechanism by which to appeal the possible conviction, the issuance of said judgment was not a prerequisite for purposes of presenting the case before the Commission.”⁸

14. As such, I concur with the decision of the Inter-American Court in this case. Also, I consider it necessary to take into account the conventional norms that govern procedure before the Inter-American Commission, in order to properly interpret that procedure and for the purposes of the *effet utile* of the Inter-American human rights system as a whole.

15. Chapter VII of the American Convention establishes the organization, functions, jurisdiction, and procedure of the Inter-American Commission in regard to the rights recognized therein. In Section 3, on the Jurisdiction of the Commission, Article 46(1) states:

Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:

a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;

[...]

16. By way of a literal interpretation of the norm, stemming from the ordinary meaning of its terms,⁹ it can be inferred that the assessment made by the Inter-American Commission on the exhaustion of domestic remedies occurs in the determination of admissibility.

17. It is necessary to distinguish between three procedural stages, namely: a) the filing of the initial petition b) its initial assessment, through a preliminary examination (*prima facie*), and if appropriate, the transfer of the relevant parts of the petition to the respondent State, and c) the admission of the case, if considered relevant, before the inter-American system, through the adoption of the Report on Admissibility.

18. In this regard, the *Order of Preliminary Objections* in the case of *Castillo Petruzzi and others v. Peru*, the Inter-American Court noted that “the receipt of the complaint, which derives from an act of the complainant, should not be confused with its admission and processing, which are accomplished by specific acts of the Commission itself, such as the decision to admit the complaint and, when appropriate, the notification of the State.”¹⁰

19. It was necessary to interpret Article 46(1) in relation to the procedure in question; thus, while the inter-American system is subsidiary and complementary, the integrative

⁸ Para. 18 of the Judgment.

⁹ See the Vienna Convention on the Law of Treaties. Article 31. *General rule of interpretation*. I. to treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

¹⁰ *Case of Castillo Petruzzi et al. V. Perú. Preliminary Objections*. Order of September 4, 1988, Series C No. 41, para. 54.

nature of the system requires that a distinction be established between the time in which the initial petition is filed by the petitioner, and the preliminary inquiry (initial processing) which the Inter-American Commission carries out in response to the petition.¹¹ In the latter procedural stage, the admissibility is assessed of the relevant parts that are to be forwarded to the State, after a preliminary study of the admissibility requirements is carried out. That is, if the petition is not "manifestly unfounded," the Commission decides to pursue the matter and inform the State of that decision, which does not mean that the case is admissible for the purposes of Articles 46 or 47 of the American Convention.

20. The State, once the petition has been forwarded, must specify, if applicable, the domestic remedies that have not yet been exhausted, and show that these remedies were available and were adequate, appropriate and effective,¹² which has been reiterated in the jurisprudence of the Inter-American Court. Once the petition has been forwarded to the State, the adversarial proceedings begins, and it is at that stage where the Inter-American Commission –always respecting the procedural fairness and adequate protection of the parties– is able to assess the merits of the petition and, if applicable, the admissibility or inadmissibility of the petition as provided in Articles 46 or 47 of the American Convention. Otherwise, upon receiving the petition, that is, before processing it or beginning the initial assessment of the petition, the Commission would be required to verify with complete certainty whether in each situation the domestic remedies have been exhausted and assess the laws of each State to determine whether there might be other possible remedies to be exhausted and whether they are effective, which the Inter-American Court has consistently held, is a responsibility of the State.¹³ In this regard, the Inter-American Court has established that:¹⁴

First, the Court has pointed out that the matter of the failure to exhaust remedies is one of pure admissibility and that the State which alleges it must express which domestic remedies should be exhausted, as well as prove the effectiveness thereof. Second, for the objection of failure to exhaust the domestic remedies to be held timely, it should be filed at the admissibility stage of the proceeding before the Commission, that is, before any consideration of the merits of the case; otherwise, the State is assumed to have waived constructively its right to resort to it. Third, the respondent State may waive, either expressly or tacitly, the right to raise an objection for failure to exhaust the domestic remedies.¹⁵ (Underlining added)

¹¹ Articles 26 to 29 of the Rules of Procedure of the Inter-American Commission on Human Rights and the Rules of Procedure in force when the admissibility of the petition filed by Mr. Liakat Ali Alibux on March 9, 2007 was decided upon.

¹² Cf. *Case of Velásquez Rodríguez V. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 91; and *Case of Vera Vera et al. V. Ecuador. Preliminary Objection, Merits, Reparations and Costs*. Judgment of May 19, 2011. Series C no. 226, para. 13. Moreover, see para. 20 of the Judgment.

¹³ Cf. para. 16 of the Judgment. Moreover, see *Case of Velásquez Rodríguez V. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 88; and *Case of Mémoli V. Argentina. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 22, 2013. Series C No 265, para. 47.

¹⁴ Cf. para. 16 of the Judgment. Moreover, see *Case of Almonacid Arellano et al. V. Chile. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 26, 2006. Series C No. 154, para. 64.

¹⁵ Cf. *Case of Ximenes-Lopes v. Brazil. Preliminary Objections*, *supra* note 3, para. 5; *Case of the Moiwana Community v. Suriname*, *supra* note 3, para. 49; and *Case of the Serrano-Cruz Sisters v. El Salvador. Preliminary Observations*, *supra* note 2, para. 135.

21. Indeed, it has been consistently held by the Inter-American Court that an objection to the exercise of its jurisdiction based on the alleged failure to exhaust domestic remedies must be filed at the appropriate procedural moment,¹⁶ that is, during the first stages of the admissibility procedure carried out before the Commission,¹⁷ and thus it is understood that after that opportune procedural moment, the principle of legal *estoppel* comes into effect;¹⁸ in addition it befalls upon the State, upon arguing the non-exhaustion of domestic remedies, to note which remedies have not been exhausted and their effectiveness.¹⁹ The Inter-American Court has held that the interpretation given to Article 46(1) of the American Convention for more than two decades is in conformity with international law.²⁰ The Inter-American Court has held that the interpretation it has given to article 46.1.a of the American Convention for more than two decades is in conformity with international law.

22. In this case, we must distinguish between three stages, namely: (i) receipt of the initial petition of the victim before the Commission (August 22, 2003); (ii) the submission of the relevant parts of the initial petition to the State (April 18, 2005); and (iii) the Commission's Report on Admissibility (March 9, 2007). The Inter-American Court, in its judgment, considered it reasonable that the petitioner not wait until the issuance of the judgment of the High Court of Justice of Suriname, being that an adequate remedy to challenge said decision did not exist and that the victim's objections had already been rejected by Interlocutory Resolution of the High Court of Justice of June 12, 2003.²¹ If the Commission had determined the non-exhaustion of domestic remedies *prima facie* —using the moment when the petition was filed as the point at which the question of exhaustion would be evaluated — it would have forgone the opportunity to evaluate the situation, one which warranted waiting for the issuance of the judgment and subsequently transmitting the case to the State. It must not be overlooked, as stated in this Judgment, and following the jurisprudence of the Inter-American Court itself,²² that "it is not the duty of the Court, or the Commission, to identify *ex officio* the domestic remedies that have not yet been exhausted. The Court emphasizes that it is not up to the international bodies to remedy the imprecision in the State's arguments."²³

23. It is true that the principle of prior exhaustion of domestic remedies is designed in the interest of the State, because it seeks to exempt the latter from responding before an

¹⁶ Cf. *Case Velásquez Rodríguez V. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 88; and *Case of Mémoli V. Argentina. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 22, 2013. Series C No. 265, para. 47.

¹⁷ Cf. *Case of Herrera Ulloa V. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107, para. 81; and *Case of Mémoli V. Argentina. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 22, 2013. Series C No. 265, para. 47.

¹⁸ *Case of Mémoli V. Argentina. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 22, 2013. Series C No. 265, para. 47.

¹⁹ Cf. *Case of Velásquez Rodríguez V. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, paras. 88 and 91; and *Case of Mémoli V. Argentina. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 22, 2013. Series C No. 265, paras. 46 and 47. See also para. 15 of the Judgment.

²⁰ *Case of Santo Domingo Massacre V. Colombia. Preliminary Objections, Merits and Reparations*. Judgment of November 30, 2012. Series C No. 259, para. 34.

²¹ Cf. para. 18 of the Judgment.

²² Cf. *Case of Reverón Trujillo V. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of June 30, 2009. Series C No. 197, para. 23; and *Case of Artavia Murillo et al. (in vitro Fertilization) V. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2012 Series C No. 257, para. 23.

²³ Cf. para. 16 of the Judgment.

international body for acts that are attributed to it, before it has had the opportunity to remedy them by its own means.²⁴ The foregoing is established in the preamble of the American Convention which establishes that international protection is “reinforcing or complementing the protection provided by the domestic law of the American states.” However, as noted, in general, it is with the transfer of the petition to the State, that adversarial stage begins and the State’s ability to file preliminary objections takes effect, and the admissibility stage begins, wherein equality before the law and adequate defense must be guaranteed at all times, in particular in regard to each of the actions and subsequent briefs.

24. Now, in my understanding, the principle of prior exhaustion of domestic remedies is not only established as being in the *interest of the State* –pursuant to the line of cases rendered by the Inter-American Court since its first contentious cases--; this principle also implies, in turn, *a right of the alleged victims* to effective legal remedies pursuant to Article 25 of the Pact of San José designed to protect fundamental rights in domestic courts, before the international protection is activated. In this way, this procedural requirement before the Commission, while acting in the interest of the State in that it releases it from having to respond before international institutions for the protection of human rights, it also implies an *obligation* of the State to provide proper and adequate remedies suitable for the effective protection of the rights within national courts and in accordance with the rules of due process in the manner provided by the American Convention, inasmuch as it permits national protection of fundamental rights more promptly than that protection which may be achieved in international forums.

25. In this regard, it must be recalled, as the Inter-American Court has established, that the State “is the main guarantor of the human rights of the individual, so that, if an act that violates the said rights occurs, it is the State itself that has the obligation to decide the matter at the domestic level [...], before having to respond before international instances, such as the inter-American system, which derives from the subsidiary nature of the international proceedings in relation to the national systems that guarantee human rights”²⁵. These ideas have also been incorporated in recent case law based on the opinion that all the authorities and bodies of a State Party to the Convention have the obligation to ensure “control for conformity with the Convention.”²⁶

26. In addition, the provision of Article 46 of the American Convention must be interpreted in accordance with Article 29(a) thereof, which establishes that “no provision” of the Pact of San José can be interpreted in the sense that it “[...]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.” This means that the inter-American system should be the functional and effective protector of human rights, and thus it is not reasonable to state that if the requirement of exhaustion of domestic remedies was reached during the course of the original proceedings before the Commission, before the adoption of

²⁴ Cf. *Case of Velásquez Rodríguez V. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 61; and *Case of Santo Domingo Massacre V. Colombia. Preliminary Objections, Merits and Reparations*. Judgment of November 30, 2012, Series C No. 259, para. 33.

²⁵ *Case of Avevedo Jaramillo et. al. V. Perú, Interpretation of the Judgment of Preliminary Objections Merits, Reparations and Costs*. Judgment of November, 24 2006, Series C No. 157, para.66 and Concurring Opinion of of Ad Hoc Judge Eduardo Ferrer Mac-Gregor Posiot. para. 9 *Case of Cabrera García and Montiel Flores V. Mexico. Preliminary Exceptions, Merits, Reparations and Costs*. Judgment of November 26, 2010 Series C No. 220.

²⁶ *Case of Santo Domingo Massacre V. Colombia. Preliminary Objections, Merits and Reparations*. Judgment of November 30, 2012. Series C No. 259, para. 142.

Report on Admissibility, or even before the State receive the petition, once it goes before the Inter-American Court, the Court shall decide whether to fully or partially admit the case, notwithstanding the existence of alleged violations. This standard would obviously be contrary to an interpretation that is favorable in regard to the alleged victim, and thus, contrary to the principle *pro persona*, highlighting that the right of access to justice is at stake—in the broad sense. Similarly, a stance of this nature would lead to a lack of acknowledgment of the need for the prevalence of substantial over procedural rights.

27. In the same sense and in accordance to a systematic interpretation of the Inter-American System, a restrictive stance such as the consideration that the exhaustion of domestic remedies must be made as of the filing of the initial petition, would affect its functionality and its *effet util*. Even more so when Article 44 of the American Convention grants the possibility that "[a]ny person or group of persons, or any nongovernmental entity [...] may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." In this sense, and in view of the effective protection of Human Rights, the American Convention did not intend to require arduous requirements in order to file a petition before the System, which would have required legal assistance with knowledge of the domestic and international jurisdiction. On the contrary, given the initial proceedings before the Inter-American Commission, it is reasonable that, if the petition is not "manifestly inadmissible," it duly assesses the initial petition, by way of a preliminary assessment, and if necessary, send it to the State in order for the State to respond. As such, the Commission may, where appropriate, assess the positions of the parties regarding the exhaustion of domestic remedies, ensuring at all times the adversarial nature, equality of the parties, and the adequate defense, in order to determine, within a reasonable period,²⁷ the admissibility of the petition, by way of the adoption of the Report on Admissibility.

28. It should be noted that the European Court of Human Rights also has not considered that the exhaustion of domestic remedies is necessary at the time of the filing of the petition. Indeed, the Strasbourg Tribunal has held that this exhaustion can be achieved shortly after the presentation of the petition, but before the admissibility is determined.²⁸ This standard was also shared, at the time, by the same Tribunal in the operations stage before the European Commission of Human Rights, before the entry into force of Protocol 11 to the European Convention for the Protection of Fundamental Rights and Freedoms.²⁹ In this sense, the similarity of the provisions of the American Convention (Art. 46(1))³⁰ and the

²⁷ In the *Case of Mémoli V. Argentina*, the State filed to Preliminary Objection arguing that the Inter-American Commission had taken too long in forwarding the initial petition, and it argued to procedural fault, to which the Inter-American Court responded with the following in paragraph 41:

"Nonetheless, this Court emphasizes that *the Commission must guarantee, at all times, the reasonableness of the time frames during the processing of its proceedings*. However, within certain temporal and reasonable limits, *certain omissions or delays in the observance of the Commission's own procedures may be excused if an adequate balance is maintained between justice and legal certainty*. The foregoing consideration allow the conclusion to be reached that the State has not proved that the length of time that the petition spent at the stage of the initial review resulted in non-compliance with the procedural norms of the inter-American system or to serious error that affected its right of defense, in to way that justified the inadmissibility of this case." (Italics added)

²⁸ Cf. *TEDH, Karoussiotis Vs. Portugal*. No. 23205/08. Judgment of February 1, 2011, para. 57. This has been the standard followed by the ECHR in its procedures on admissibility.

²⁹ Cf. *TEDH, Ringeisen Vs. Austria*. No. 2614/65. Judgment of July 26, 1971, para. 91.

³⁰ Art. 46. Admission by the Commission of to petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: a). that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law; b). that the petition

European Convention (Article 35(1))³¹ on Human Rights should be noted; moreover, the differences and functional realities between the two systems of protection must be considered, since the Inter-American System has a Commission which acts as an initial instance, which is the channel through which the Convention gives the individual the right to move forward with an initial impetus that gets the wheels spinning before the international system of protection of human rights, a procedure that must be exhausted.³² The dynamics and reality of the operation of the Inter-American Commission has meant that, to date, relatively few cases before the Inter-American Tribunal continue to be filed.

29. In conclusion, in accordance with Article 46(1)(a) of the American Convention, which provides that "[a]dmission by the Commission of a petition [...] shall be subject to the following requirement[...] that the remedies under domestic law have been pursued and exhausted," it is relevant to consider that the initial petition, if it is not manifestly inadmissible at the time of the preliminary assessment, it may be subject to the objections of the parties, including the exhaustion of domestic remedies (and at all times the procedural equality and adequate defense must be respected); thus the exhaustion of those remedies must be verified and updated in a definitive manner *up until the Commission renders a decision*, within a reasonable period, *on the admissibility of the petition*, that is, when the Report on Admissibility is issued or when declared inadmissible.

SECOND PART

THE DIMENSIONS OF THE RIGHT TO JUDICIAL PROTECTION (ARTICLE 25 OF THE AMERICAN CONVENTION)

I. THE JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

A) The right to guarantee access to a judicial remedy that is effective, adequate, prompt, and simple

30. Article 25(1) of the American Convention guarantees the existence of a simple, prompt, and effective remedy before a competent court or tribunal.³³ The Inter-American Court has established that, in accordance with the Pact of San José, States Parties are obliged to provide effective judicial remedies to victims of human rights violations (Art. 25),³⁴ remedies that must be substantiated in accordance with the rules of due process of

or communication is lodged within to period of six months from the date on which the party alleging violation of his rights was notified of the final judgment; c). that the subject of the petition or communication is not pending in another international proceeding for settlement; and d). that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.

³¹ Art. 35. *Admissibility criteria*. 1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within to period of six months from the date on which the final decision was taken

³² *Matter of Viviana Gallardo et al.* Series to No. 101, Order of November 13, 1981, para. 23.

³³ Cf. *Case of Velásquez Rodríguez V. Honduras. Merits*. Judgment of July 29, 1988, Series C No. 4, para. 63; and *Case of Mejía Idrovo V. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 5, 2011. Series C No 228. para. 91.

³⁴ Cf. *Case of Fairén Garbí and Solís Corrales V. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 2, para. 90; and *Case of Massacres de Río Negro V. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of September 4, 2012. Series C. No. 250, para. 191.

law (Article 8(1)),³⁵ all within the general obligation, responsibility of the States, to guarantee the free and full exercise of the rights recognized by the Pact of San José to all persons under its jurisdiction (Article 1(1)).³⁶

31. The effectiveness means that, in addition to the formal existence of remedies, these provide results or responses to the violations established in either the American Convention, the Constitution, or in the legislation.³⁷ That is, the Inter-American Court has established that for an effective remedy to exist, it is not enough that it be established by the Constitution or in legislation or that it be formally recognized, but rather it is required that it be truly effective in establishing whether there has been a violation of human rights and that it provide a means to remedy the violation. Those remedies that, due to the general conditions of the country or even the particular circumstances of a given case, are illusory cannot be considered effective.³⁸

32. The Inter-American Court has also noted that, under the terms of Article 25 of the American Convention, two specific State obligations can be identified. First, establish by law and ensure proper implementation of effective remedies before the competent authorities, which *protect* all persons within its jurisdiction from acts that violate their fundamental rights or that determine the rights and obligations thereof. Second, guarantee the means to implement the respective decisions and final judgments issued by the competent authorities,³⁹ so that the rights that are declared or recognized are effectively protected.

33. The right established in Article 25 is closely linked to the general obligation established in Article 1(1) of the American Convention, as it attributes protective functions to the domestic law of the States Parties.⁴⁰ In view of the aforementioned, the State has a responsibility not only to design and adopt into law an effective remedy, but also to guarantee the proper application of that remedy by its judicial authorities.⁴¹ The process should lead to the materialization of the protection of the right recognized in the judicial

³⁵ Cf. *Case of Godínez Cruz V. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 3, para. 92; and *Case of Mohamed V. Argentina. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 23, 2012. Series C No. 255, para. 82.

³⁶ Cf. *Case of Velásquez Rodríguez V. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 91; and *Case of Massacres El Mozote and nearby places V. El Salvador. Merits, Reparations and Costs*. Judgment of October 25, 2012. Series C No 252, para. 242.

³⁷ Para. 116 of the Judgment. Cf. *Case of Bámaca Velásquez V. Guatemala. Merits*. Judgment of November 25, 2000. Series C No. 70, para.191, and *Case of the Constitutional Tribunal (Camba Campos et. al.) V. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 28, 2013. Series C No. 268, para. 228.

³⁸ Cf. *Case of Ivcher Bronstein V. Perú. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74, para. 136; and *Case of García and Family V. Guatemala. Merits, Reparations and Costs*. Judgment of November 19, 1999. Series C No. 63, para. 142.

³⁹ Cf. *Case of de the "Street Children"(Villagrán Morales et al.) V. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 237.

⁴⁰ Cf. *Case of Castillo Páez V. Perú. Merits*. Judgment of November 3, 1997. Series C No. 34, para. 83; and *Case of Xákmok Kásek Indigenous Community. V. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, para. 141.

⁴¹ Cf. *Case of de the "Street Children"(Villagrán Morales et al.) V. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 237; and *Case of Xákmok Kásek Indigenous Community. V. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, para. 141.

ruling in the proper application of the ruling.⁴² Therefore, the effectiveness of judgments and judicial decisions depends on their implementation. Otherwise, the denial of the right is implied.⁴³ This implies, in accordance with Article 25(2)(b)) of the American Convention, that States commit themselves to develop the possibilities of judicial remedy.⁴⁴ As a consequence of the aforementioned, the lack of effective domestic remedies renders a person in a state of defenseless.⁴⁵

34. The Inter-American Court has held that the meaning of the protection afforded by Article 25 of the Pact of San José is based on the *real possibility* of accessing a judicial remedy so that the competent authorities can issue a binding decision that determines whether there has been a violation of any rights that the person claims to have, and if a violation is established, that the remedy be useful in reestablishing the individual in the enjoyment of his right and providing reparation. It would be unreasonable to establish said judicial guarantee if people would be required to know in advance whether their situation would be covered by the court under the protection of a specific law.⁴⁶ It is for this reason that the Inter-American Court does not evaluate the effectiveness of the remedies filed in regard to a possible favorable decision in the interests of the alleged victim.⁴⁷

35. In view of the foregoing, regardless of whether the judicial authorities declared the claim of the individual that files a remedy unfounded because it was not covered by norms that were invoked or a violation of the allegedly violated right was not found, the State is obliged to provide effective remedies that enable people to challenge those acts by the authorities that they deem to be in breach of human rights under the American Convention, the Constitution or legislation. In the *Case of Castañeda*, the Inter-American Court concluded that Article 25 of the Pact of San José establishes the *right to judicial protection of rights*, which can be violated irrespective of whether or not there has been a violation of the right claimed or that the situation on which it was based fell within the sphere of application of the right invoked.⁴⁸

36. It is important to note that the Inter-American Court has established that in all domestic legal systems there are multiple remedies, but not all are applicable under all circumstances. If in a specific case the remedy is not appropriate, it is thereby evident that it cannot be exhausted.⁴⁹ The foregoing, without detriment to the possibility that all

⁴² Cf. *Case of Baena Ricardo et al. V. Panamá. Jurisdiction*. Judgment of November 28, 2003. Series C No. 104, para. 73; and *Case of Mejía Idrovo V. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 5, 2011. Series C No. 228, para. 104.

⁴³ Cf. *Case of Baena Ricardo et al. V. Panamá. Jurisdiction*. Judgment of November 28, 2003. Series C No. 104, para. 82; and *Case of Mejía Idrovo V. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 5, 2011. Series C No. 228, para. 104.

⁴⁴ Cf. *Case of Castañeda Gutman V. México. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 6, 2008. Series C No. 184, para. 78.

⁴⁵ Cf. *Case of the Constitutional Court V. Perú. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 71, para. 89.

⁴⁶ Cf. *Case of Castañeda Gutman V. México. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 6, 2008. Series C No. 184, para. 100.

⁴⁷ Cf. *Case of López Mendoza V. Venezuela. Merits Reparations and Costs*. Judgment of September 1, 2011 Series C No. 233, para. 184.

⁴⁸ Cf. *Case of Castañeda Gutman V. México. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 6, 2008. Series C No. 184, para. 101.

available remedies within domestic law may, in certain circumstances, satisfy in a collective manner the requirements established in Articles 8 and 25 of the American Convention, even if none of them, individually, fulfill those provisions in a comprehensive manner.⁵⁰

37. The Inter-American Court has established that the remedy of *amparo* due to its nature is a "simple and prompt remedy designed for the protection of all of the rights recognized by the constitutions and laws of the States Parties and by the Convention."⁵¹ Moreover, it also considered that such a remedy falls within the scope of Article 25 of the Pact of San José, and thus it has to meet several requirements, including adequacy and effectiveness.⁵² However, the Inter-American Court has considered that it is not in itself incompatible with the American Convention that a State limit its remedy of *amparo* to specific matters, as long as it provides another remedy of similar nature and scope for those same human rights that are not governed by the jurisdiction of *amparo*.⁵³ In any case, what matters is that the legal remedy be suitable to combat the violation, and that its implementation by the competent authority be effective,⁵⁴ as everyone should have access to a simple and prompt remedy before competent courts or tribunals that protect their fundamental rights.⁵⁵

38. At times it has been interpreted that the effective remedy of which the Inter-American Court speaks, can be offered within criminal proceedings, particularly in cases of serious human rights violations. Thus, the Inter-American Court has established that victims of human rights violations, or their next of kin, should have ample opportunities to be heard and carry out their respective processes, which in the Court's opinion may include both clarification of the facts and punishment of those responsible, as well as due reparation.⁵⁶

39. The Inter-American Court has also understood that for a criminal investigation to constitute an effective remedy that ensures the right of access to justice for the alleged

⁴⁹ Cf. *Case of Velásquez Rodríguez V. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 64.

⁵⁰ Cf. *Case of the Ituango Massacres V. Colombia. Preliminary Objection, Merits, Reparations and Costs*. Judgment of July 1, 2006. Series C No. 148, para. 288.

⁵¹ *Habeas Corpus in Emergency Situations*(Arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights). *Advisory Opinion OC-8/87* of January 30, 1987. Series to No. 8, para. 32.

⁵² Cf. *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 of the American Convention on Human Rights) *Advisory Opinion OC-9/87* of October 6, 1987. Series to No. 9, para. 24; *Case of Castañeda Gutman V. México. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 6, 2008. Series C No. 184, para. 78; and *Case of Escher et al. V. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 6, 2009. Series C No. 200, para. 196.

⁵³ Cf. *Case of Castañeda Gutman V. México. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 6, 2008. Series C No. 184, para. 92.

⁵⁴ Cf. *Case of Tibi V. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 7, 2004. Series C No. 114, para. 131; *Case of Acosta Calderón V. Ecuador. Merits, Reparations and Costs*. Judgment of June 24, 2005. Series C No. 129, para. 93; and *Case of Palamara Iribarne V. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135, para. 184.

⁵⁵ Cf. *Case of the Mayagna (Sumo) Awaj T'ingni Community V. Nicaragua. Merits, Reparations and Costs*. Judgment of August 31, 2001. Series C No. 79, para. 112; *Case of Cantos V. Argentina. Merits, Reparations and Costs*. Judgment of November 28, 2002. Series C No. 97, para. 52; and *Case of Juan Humberto Sánchez V. Honduras. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 7, 2003. Series C No 99, para. 121.

⁵⁶ Cf. *Case of de the "Street Children"(Villagrán Morales et al.) V. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, paras. 225 and 227.

victims, and guarantees the rights that were affected, it must be carried out in a *serious manner* and *not as a mere formality* preordained to be ineffective; it must have a purpose and be assumed by the States as a legal obligation in itself and not as a measure taken by private interests that depends upon the initiative of the victim or his or her next of kin or the private provision of evidentiary elements.⁵⁷ Similarly, the Inter-American Court in certain circumstances has examined the effectiveness of appeals filed within the administrative jurisdiction.⁵⁸ In such cases, it has been analyzed whether the decisions therein have effectively contributed to put an end to a situation that violates rights, to ensure non-repetition of the wrongful acts, and to ensure the free and full exercise of the rights protected by the American Convention.⁵⁹

40. Thus, the right of access to justice must ensure, within a reasonable period, the right of the alleged victims or their next of kin that everything be done for them to know the truth of what happened and investigate, prosecute, and where applicable, punish those responsible.⁶⁰

41. The Inter-American Court has held since its *Advisory Opinion OC-9/87* that for a remedy to be effective, "it must be truly effective in establishing whether there has been a violation of human rights and in providing redress."⁶¹ It is clear that the remedy will not be truly effective if it is not resolved within a period that allows for protection from the violation that is claimed.⁶² As such, it follows that the remedy must be prompt.

42. In an important part of the jurisprudence of the Inter-American Court itself, it was determined that Article 8 together with Article 25 of the American Convention affirms the *right of access to justice*.⁶³ As such, the Inter-American Court determined that Article 8(1) of the Pact of San José has a direct relation to Article 25 in relation to Article 1(1), both of the same treaty, which ensures everyone a prompt and simple remedy to obtain, among other results, that those who are responsible for human rights violations be prosecuted and

⁵⁷ Cf. *Case of Velásquez Rodríguez V. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 177; and *Case of Garibaldi V. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 23, 2009. Series C No. 203, para. 113.

⁵⁸ Cf. *Case of the Mapiripán Massacre V. Colombia. Merits, Reparations and Costs*. Judgment of September 15, 2005. Series C No. 134, para. 210; *Case of the Rochela Massacre V. Colombia. Merits, Reparations and Costs*. Judgment of May 11, 2007. Series C No. 163, para. 217; and *Case of Manuel Cepeda Vargas V. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of May 26, 2010. Series C No. 213, para. 139.

⁵⁹ Cf. *Case of the Mapiripán Massacre V. Colombia. Merits, Reparations and Costs*. Judgment of September 15, 2005. Series C No. 134, para. 214; *Case of the Rochela Massacre V. Colombia. Merits, Reparations and Costs*. Judgment of May 11, 2007. Series C No. 163, para. 219; and *Case of Manuel Cepeda Vargas V. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of May 26, 2010. Series C No. 213, para. 139.

⁶⁰ Cf. *Case of Bulacio V. Argentina. Merits, Reparations and Costs*. Judgment of September 18, 2003. Series C No. 100, para. 114; and *Case of Massacres El Mozote and nearby places V. El Salvador. Merits, Reparations and Costs*. Judgment of October 25, 2012. Series C No. 252, para. 242.

⁶¹ *Judicial Guarantees in States of Emergency (Arts. 27(2) and 8 of the American Convention on Human Rights)*. *Advisory Opinion OC-9/87 of October 6, 1987*. Series to No. 9, para. 24. In this sense, Cf. *Case of Ivcher Bronstein V. Perú. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74, paras. 136 and 137 and *Case of "Five Pensioners" Vs Perú. Merits. Reparations and Costs*. Judgment of February 28, 2003. Series C No. 98, para. 136.

⁶² Cf. *Case of "Juvenile Reeducation Institute" V. Paraguay. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 2, 2004. Series C No. 112, para. 245.

⁶³ Cf. *Case of Cantos V. Argentina. Preliminary Objections*. Judgment of September 7, 2001. Series C No. 85, para. 52.

that reparation to those who suffered harm is provided.⁶⁴ As stated by the Inter-American Court, Article 25 “is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention,” since it contributes decisively to ensure access to justice.⁶⁵ In the *Case of La Cantuta*, the Inter-American Court determined that *access to justice* constitutes a peremptory norm of International Law (*jus cogens*) and, as such, generates *erga omnes* obligations for States to adopt the measures necessary to avoid leaving such violations unpunished, whether exercising their jurisdiction to apply domestic law and International Law to prosecute and, if applicable, punish those responsible for such acts, or collaborating with other States aiming in that direction, in what constitutes “a collective guarantee mechanism.”⁶⁶

43. Finally, recently, the Inter-American Court has determined that this remedy must provide means to an adequate judicial review. This occurs when the judicial body reviews all submissions and arguments submitted to it concerning the contested decision or act, without declining jurisdiction to resolve or determine the facts. By contrast, it has noted that there is no judicial review if the court is unable to determine the primary purpose of the dispute, as may occur in cases where it is considered limited by the factual or legal determinations carried out by another body that would have rendered a final decision in the case.⁶⁷

B) The right to judicial protection against acts that violate the fundamental rights recognized by the Constitutional, legislation, or the Convention

44. An important aspect in the Inter-American Court is the fact that Article 25(1) of the Pact of San José has established, in broad terms, that the court proceedings must *not only protect and guarantee the respect of the rights established in the Convention*, but also of those that are recognized by the Constitution or by legislation.⁶⁸ This clearly is linked to Article 29(b) of the Pact of San José, according to which minimum guarantees are established that are susceptible to a broader application by other provisions of a constitutional or national nature, which the American Convention *makes its own* when it grants them *the same level of guarantee* that it grants the rights it establishes—ideally, an effective, prompt, and simple remedy—; and, as a consequence, assuming as its own, the extension of those norms of greater protection that were once foreign to it.

45. In the *Advisory Opinion 9/87*, the Inter-American Court has established that the Pact of San José provides some evidence to clarify the fundamental characteristics that are to be had by the guarantees of rights. In this respect, at that time, the Inter-American Court noted that the assessment must stem from the obligation in the American Convention of the States Parties to “respect the rights and freedoms recognized (in the Convention) and to

⁶⁴ Cf. *Case of Castillo Páez V. Perú. Reparations and Costs*. Judgment of November 27, 1998. Series C No. 43, para. 106.

⁶⁵ Cf. *Case of Castillo Páez V. Perú. Reparations and Costs*. Judgment of November 27, 1998. Series C No. 43, para. 106.

⁶⁶ *Case of La Cantuta V. Perú. Merits, Reparations and Costs*. Judgment of November 29, 2006 Series C No. 162, para. 160.

⁶⁷ Cf. *Case of Barbani Duarte et al. V. Uruguay. Merits Reparations and costs*. Judgment of October 13, 2011. Series C No. 234, para. 204

⁶⁸ Cf. *Judicial Guarantees in States of Emergency (arts. 27.2, 25 and 8 American Convention on Human Rights)*. *Advisory Opinion OC-9/87* of October 6, 1987. Series to No. 9, para. 23.

ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms” pursuant to the provisions of Article 1(1) of the American Convention. From this general obligation is derived the right of every person, set out in Article 25(1), “to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention.”⁶⁹

46. Thus, it is in this manner that Article 25(1) of the Pact of San Jose provides that the guarantee established therein applies not only to the rights contained in the American Convention, but also to those that are recognized by the Constitution or by law.⁷⁰ While this standard at the time was applied in this Advisory Opinion when interpreting what rights that are not subject to derogation in a state of emergency, since then, on rare occasion has this standard been used by the Inter-American Court and has not been developed in regard to all possible implications.

II. THE DIFFERENCE BETWEEN THE RIGHT TO JUDICIAL PROTECTION (ARTICLE 25) AND THE RIGHT TO APPEAL THE JUDGMENT TO A HIGHER COURT (ARTICLE 8(2)(H))

A) The scope of the right to appeal the judgment to a higher court (Article 8(2)(h) of the American Convention)

47. Article 8(2) of the American Convention provides for the protection of basic guarantees (in reality, the rights that constitute due process of law) in favor of “[e]very person accused of a criminal offense.” In the last paragraph in which it sets forth these rights, subsection (h), it protects the “right to appeal the judgment to a higher court.” The Inter-American Court understands that Article 8(2) refers, in general terms, to the minimum guarantees of a person who is subject to an investigation and criminal proceedings. These minimum guarantees must be protected within the context of the various stages of criminal proceedings, which encompass the investigation, accusation, prosecution, and conviction.⁷¹

48. Since the case of *Herrera Ulloa*, the Inter-American Court has considered that the right to appeal a judgment is an essential guarantee that must be respected as part of due process of law, so that a party may turn to a different and higher court for revision of a judgment that was unfavorable to that party’s interests.⁷² This is why the Court has determined that the right to file an appeal against a judgment must be guaranteed before the judgment becomes *res judicata*, because the aim is to protect the right of defense by creating a remedy to prevent a flawed ruling, containing errors that are to the detriment of a person’s interests, from becoming final.⁷³

⁶⁹ *Judicial Guarantees in States of Emergency (arts. 27.2, 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series to No. 9, para. 22.*

⁷⁰ *Cf. Judicial Guarantees in States of Emergency (arts. 27.2, 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series to No. 9, para. 23.*

⁷¹ *Cf. Case of Mohamed V. Argentina. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 23, 2012. Series C No. 255, para. 91.*

⁷² *Cf. Case of Herrera Ulloa V. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 158.*

⁷³ *Cf. Case of Herrera Ulloa V. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 158.*

49. Therefore, the right to review by a higher court, expressed by means of the complete review of the conviction, ratifies the grounds and provides more credibility to the judicial acts of the State and, at the same time, offers more security and protection to the rights of the accused.⁷⁴

50. Similarly, the Inter-American Court has indicated that the right to appeal the judgment embodied in the Convention is not satisfied merely because there is a higher court than the one that tried and convicted the accused and to which the latter has or may have access. For a true review of the judgment, in the sense required by the American Convention, the higher court must have the jurisdictional authority to take up the specific case in question. It is important to underscore the fact that from first to last instance, a criminal proceeding is a single proceeding in various stages,⁷⁵ including the processing of the ordinary challenges filed against the judgment.⁷⁶

51. In accordance with the object and purpose of the American Convention, which is the effective protection of human rights,⁷⁷ it must be understood that the remedy contemplated in Article 8(2)(h) of the foregoing treaty must be an *ordinary, accessible, and effective* remedy whereby a higher court or tribunal seeks to correct jurisdictional decisions that are not in keeping with the law.⁷⁸

52. The *effectiveness* of the remedy implies that it must seek to provide results or answers for the purpose for which it was conceived.⁷⁹ Moreover, the remedy must be *accessible*; that is, it should not involve great complexities that render this right illusory.⁸⁰ In this regard, the Court has considered that the formalities required for the appeal to be admitted should be minimal and should not constitute an obstacle to the remedy fulfilling its purpose of examining and resolving grievances argued by the appellant.⁸¹

53. While States have a margin of discretion in regulating the exercise of that remedy, they may not establish restrictions or requirements that violate the very essence of the right to appeal a judgment.⁸² As such, the Inter-American Court has stated that it should be

⁷⁴ Cf. *Case of Barreto Leiva V. Venezuela. Merits, Reparations and Costs*. Judgment of November 17, 2009. Series C No. 206, para. 89.

⁷⁵ Cf. *Case of Castillo Petruzzi et al.. Merits, Reparations and Costs*. Judgment of May 30, 1999. Series C No. 52, para. 161.

⁷⁶ Cf. *Case of Herrera Ulloa V. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107, para. 159.

⁷⁷ Cf. *Case of Baena Ricardo et al. Jurisdiction*. Judgment of November 28, 2003. Series C No. 104, para. 95

⁷⁸ Cf. *Case of Herrera Ulloa V. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107, paras. 161 and 164; and *Case of Barreto Leiva V. Venezuela. Merits, Reparations and Costs*. Judgment of November 17, 2009. Series C No. 206, para. 88.

⁷⁹ Cf. *Case of Case of Herrera Ulloa V. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107, para. 161; and *Case of Mohamed V. Argentina. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 23, 2012. Series C No. 255, para. 99.

⁸⁰ Cf. *Case of Herrera Ulloa V. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107, para. 164.

⁸¹ Cf. *Case of Mohamed V. Argentina. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 23, 2012 Series C No. 255, para. 99.

⁸² Cf. *Case of Herrera Ulloa V. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107, para. 161.

understood that, regardless of the regimen or system of appeals adopted by States Parties and of the name given to a means for challenging the conviction, in order for it to be *effective*, it must constitute an appropriate means for attempting to correct a wrongful conviction. This requires it to *analyze questions of fact, evidence, and law* upon which the contested judgment is based, since in judicial activity there is interdependence between the factual determinations and the application of law in such a way that an erroneous finding implies a wrong or improper application of law. Consequently, the reasons for which the remedy is admissible should allow for extensive control of the contested aspects of the sentence.⁸³

54. Furthermore, the Inter-American Court has considered that “the regulations that States develop in their respective systems of review, must ensure that an appeal against a conviction respects the minimum procedural guarantees that are relevant and necessary under Article 8 of the Convention to resolve grievances raised by the appellant, which does not necessarily imply a new trial [...]”.⁸⁴

55. The higher court or judge in charge of deciding the remedy filed against a criminal judgment has a special duty to protect the judicial guarantees and due process to which all parties to the criminal proceeding are entitled, in accordance with the principles governing that proceeding.⁸⁵ Thus, this Court has indicated that the “possibility of ‘appealing the judgment’ must be *accessible*; the kind of complex formalities that would render this right illusory must not be required.”⁸⁶

56. “Regardless of the label [that is] given to the existing remedy to appeal a judgment, what matters is that the remedy *guarantees a full review* of the decision being challenged.”⁸⁷ “In this respect, while States have a margin of discretion in regulating the exercise of that remedy, they may not establish restrictions or requirements that infringe upon the very essence of the right to appeal a judgment.”⁸⁸ In the case of *Barreto Leiva*, the Inter-American Court established that even in the context of special judicial privileges for the prosecution of high-ranking government authorities, the State must allow the accused the possibility of appealing a condemnatory judgment.⁸⁹

⁸³ Cf. *Case of Mohamed V. Argentina. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 23, 2012 Series C No. 255, para. 100.

⁸⁴ *Case of Mohamed V. Argentina. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 23, 2012. Series C No. 255, para. 101.

⁸⁵ Cf. *Case of Herrera Ulloa V. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107, para. 163.

⁸⁶ *Case of Herrera Ulloa V. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107, para. 164.

⁸⁷ *Case of Herrera Ulloa V. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107, para. 165.

⁸⁸ *Case of Vélez Loor V. Panamá. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 3, 2010. Series C No. 218, para. 179.

⁸⁹ *Case of Barreto Leiva V. Venezuela. Merits, Reparations and Costs*. Judgment of November 17, 2009. Series C No. 206, para. 90.

57. In the case of *Velez Loor*, the Inter-American Tribunal also considered that a situation of factual impediment to ensure a *real access to the right to appeal*, as well as a situation of lack of guarantees and judicial insecurity, may violate Article 8(2)(h).⁹⁰

58. Moreover, the Inter-American Court has further determined that the State Parties to the American Convention are obligated to, in terms of Articles 1(1) and 2 thereof, to adapt their domestic law in accordance with the parameters established in conjunction to Article 8(2)(h) of such international instrument. The same holds true even where judges exercise control for conformity with the Convention in order to ensure the right to appeal a judgment pursuant to Article 8(2)(h) of the American Convention and this Court's jurisprudence.⁹¹

B) The differences between the rights provided in Articles 8(2)(h) (right to appeal the judgment to a higher court) and 25 (judicial protection)

59. In the jurisprudence of the Inter-American Court, an increasing development of the right enshrined in Article 8(2)(h) of the American Convention can be observed. It is also possible to note that the independent analysis of this provision of the American Convention forms part of a jurisprudential era in which the Court has attempted to be much more specific in describing the content of each of the rights and clauses that are framed within Articles 8 and 25 of the American Convention. With this, the jurisprudence which originally encompassed the multiple and complex rights enshrined in Articles 8 and 25 of the American Convention on the general notion of the right of "access to justice *sensu lato*" has been enriched. In this manner, the Inter-American Court has increasingly delineated with more precision the fact that each of the rights contained in the Convention has its own sphere, meaning and scope.⁹²

60. As has already been mentioned, Article 25 of the Convention guarantees the existence of a simple, prompt, and effective remedy before a judge or competent tribunal.⁹³ Owing to this, the State Parties are obliged to provide effective judicial remedies to the victims of human rights violations (Article 25),⁹⁴ remedies that must be substantiated in accordance with the rules of due process of law (Article 8(1)),⁹⁵ all within the general obligation of those same States to guarantee the free and full exercise of the rights recognized in the American Convention to all persons subject to their jurisdiction (Article 1(1)).⁹⁶ The Inter-American Court has considered that the meaning of the protection

⁹⁰ *Case of Vélez Loor V. Panamá. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 3, 2010. Series C No. 218, para. 180.

⁹¹ *Case of Mendoza et al. V. Argentina. Preliminary Objections, Merits and Reparations.* Judgment of May 14, 2013 Series C No. 260, para. 332.

⁹² *Cf. Case of Manuel Cepeda Vargas V. Colombia. Preliminary Objections, Merits and Reparations.* Judgment of May 26, 2010. Series C No. 213, para. 171.

⁹³ *Cf. Case of Velásquez Rodríguez V. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 63; and *Case of Mejía Idrovo V. Ecuador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of July 5, 2011. Series C No 228. para. 91.

⁹⁴ *Cf. Case of Fairén Garbí and Solís Corrales V. Honduras. Preliminary Objections.* Judgment of June 26, 1987. Series C No. 2, para. 90; and *Case of Massacres de Río Negro V. Guatemala. Preliminary Objection, Merits, Reparations and Costs.* Judgment of September 4, 2012. Series C. No. 250, para. 191.

⁹⁵ *Case of Godínez Cruz V. Honduras. Preliminary Objections.* Judgment of June 26, 1987. Series C No. 3, para. 93; and *Case of Mohamed V. Argentina. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 23, 2012. Series C No. 255, para. 82.

granted by Article 25 of the Convention is the *real possibility* of access to a judicial remedy so that the competent authority, with jurisdiction to issue a binding decision, determines whether there has been a violation of a right claimed by the person filing the action, and that the remedy is useful to reconstitute to the interested party the enjoyment of his right and to repair it, if it finds there has been a violation.⁹⁷

61. On another note, Article 8(2)(h) of the American Convention refers to an essential guarantee that must be respected as part of due process of law, so that a party may turn to a different or higher court for revision of a judgment that was unfavorable to that party's interests.⁹⁸ For a true review of the judgment, in the sense required by the Convention, the higher court must have the jurisdictional authority to take up the particular case in question. This is part of a criminal proceeding, including the processing of the ordinary challenges filed against the judgment.⁹⁹

62. The parallels between the remedies provided for by both rights are, at times, evident, especially in the manner of substantiation. Both must be effective, accessible, and must respect the framework of due process of law set forth in Article 8(1) of the American Convention. Nevertheless, the right to judicial protection (Article 25) is broad and general, to protect the rights recognized by the Constitution, the laws of the State concerned, or the American Convention, while the other right (8(2)(h)) is limited to promoting the review of a decision within the context of a process which can include the determination of rights and obligations of both a criminal, as well as a civil, labor, fiscal, or any other nature.¹⁰⁰

63. To understand the difference between the two, it is also necessary to consider that those two recourses are not the only ones provided for in the American Convention; for instance, on another note, we have the recourse of pardon or clemency relied upon in the regulation of capital punishment established in Article 4(6) of the American Convention.¹⁰¹ Likewise, we have the remedy set forth in Article 7(6) of the foregoing international instrument, which provides for the right of individuals to recourse to a competent court in order for that court to decide, without delay, on the lawfulness of his arrest or detention, or even of the threat that his liberty will be deprived.¹⁰²

64. The distinction between each of the remedies in relation to the provisions of Article 25 of the American Convention has not always been clear. In fact, in the beginning of Inter-American jurisprudence, formulas combining remedies with Article 25 of the American

⁹⁶ Cf. *Case of Velásquez Rodríguez V. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 91; and *Case of Massacres El Mozote and nearby places V. El Salvador. Merits, Reparations and Costs*. Judgment of October 25, 2012. Series C No 252, para. 242.

⁹⁷ Cf. *Case of Castañeda Gutman V. México. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 6, 2008. Series C No. 184, para. 100.

⁹⁸ Cf. *Case of Herrera Ulloa V. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107, para. 158.

⁹⁹ Cf. *Case of Herrera Ulloa V. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107, para. 159.

¹⁰⁰ Cf. *Case of de la "White Van" (Paniagua Morales et al.) V. Guatemala. Merits*. Judgment of March 8, 1998. Series C No. 37, para. 149.

¹⁰¹ See, for example, the decision in the *Case of Fermín Ramírez V. Guatemala. Merits, Reparations and Costs*. Judgment of June 20, 2005. Series C No. 126, para. 105 to 110.

¹⁰² García Ramírez, Sergio. *Due Process. Standards of the Inter-American Jurisprudence [Debido Proceso. Criterios de la Jurisprudencia Interamericana]*. México, Porrúa, 2012, págs. 49 and 50.

Convention were accepted, as was the case with respect to Article 7(6) of said international instrument in regard to the writ of habeas corpus.¹⁰³ However, the recent jurisprudential trend is clear in that it tends to separate and confine them to their specific domains of application. It should be noted that this task is still incomplete in various respects and, in many cases, it is very difficult to realize these differentiations with absolute precision due to the natural interaction or overlap of the substantive or qualifying rights, and to the different configurations of judicial remedies in each State against which the Inter-American Court is competent to hear cases.

65. With respect to the right to appeal the judgment to a higher court embodied in Article 8(2)(h), the Inter-American Court has consistently avoided, in any way, to confuse this recourse with the provisions of Article 25, which provides for the right to an effective legal remedy. In other words, the Inter-American Court has identified that the remedy enshrined in Article 25 of the American Convention is not the process of appeal (usually named that in domestic law) set forth in Article 8(2)(h) thereof.

66. For example, in the cases of *Barreto Leiva*¹⁰⁴ and *Mohamed*,¹⁰⁵ the Inter-American Court avoided declaring the violation of the right to judicial protection (Article 25) in relation to the right to appeal the judgment to a higher court. In these cases, the arguments of the parties with respect to a possible violation of Article 25 of the American Convention were closely linked to the inexistence of a remedy by which to enforce the right to appeal the judgment to a higher court.¹⁰⁶

67. Moreover, in the case of *Vélez Loor* and in the recent case of *Mendoza et al.*, although the standard in the above mentioned cases consisting of the non-declaration of a violation of Article 25 of the Pact of San José for the inexistence of a remedy by which to appeal the judgment to a higher court was ratified,¹⁰⁷ the Inter-American Court did find other sorts of circumstances that had affected the right of Article 25 of the Convention in

¹⁰³ Cf. *Habeas Corpus in Emergency Situations* (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series to No. 8, para.32 and et seq..

¹⁰⁴ Cf. *Case of Barreto Leiva V. Venezuela. Merits, Reparations and Costs*. Judgment of November 17, 2009. Series C No. 206, paras. 100 to 103.

¹⁰⁵ Cf. *Case of Mohamed V. Argentina. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 23, 2012 Series C No. 255, paras. 118 and 119.

¹⁰⁶ In the *Case of Mohamed*, the Inter-American Court mentioned that "The Court also emphasizes that, notwithstanding the fact that each of the rights contained in the Convention has its own sphere, meaning and scope¹⁰⁰, the failure to guarantee the right to appeal the judgment prevents the exercise of the right to defense which is protected through this mechanism and implies the lack of protection of other basic guarantees of due process that must be assured to the appellant, as applicable, so that a higher judge or court may rule on the grievances argued. Accordingly, the Court does not consider it necessary to issue an additional ruling on the alleged violation of the rights to defense, the right to be heard, the duty to substantiate the decision and the right to a simple and prompt remedy." *Case of Mohamed V. Argentina. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 23, 2012 Series C No. 255, para. 119.

¹⁰⁷ In the *Case of Vélez Loor*, the Inter-American Court considered that the facts of this case are confined to the sphere of application of Article 8(2)(h) of the Convention, which embodies a specific type of remedy that must be offered to every individual in custody, as guarantee of the individual's right to defense, and it rules that here there are no grounds for the application of Article 25(1) of the treaty. Mr. Vélez Loor's helplessness was due to the impossibility of appealing the punitive ruling, a situation covered by Article 8(2)(h) in question. Cf. *Case of Vélez Loor V. Panamá. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 3, 2010. Series C No. 218, para. 178.

relation to the absence of an effective judicial remedy to enforce the right to consular assistance,¹⁰⁸ and regarding the lack of due diligence in the investigations,¹⁰⁹ respectively.

68. While the jurisprudence is consistent up to this point, and the difference between the remedies that are provided for both in Article 8(2)(h), as well as Article 25 of the American Convention, seem, at least, *prima facie* evident, there exists, undoubtedly, a *gray area* where these distinctions may not be as easy to realize, especially when you take into account the broad range of expectations that the recourse framed in Article 25 of the Convention can have, in comparison with the diverse claims that can be substantiated in domestic jurisdictions.

III. THE INTEGRATIVE DIMENSION OF THE RIGHTS IN LIGHT OF ARTICLE 25 OF THE AMERICAN CONVENTION

A. The right to judicial protection as an integrative instrument of fundamental rights from both domestic sources and the Convention

69. Article 25(1) (judicial protection) of the American Convention states that “*Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.*”

70. From its earliest jurisprudence, the Inter-American Court identified that the American Convention establishes the obligation that all State Parties undertake to “respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms” (Article 1(1)). From this general obligation comes the right provided for in Article 25(1) of every person “to a simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention.”¹¹⁰ Moreover, in addition to the formal existence of remedies, such effectiveness supposes that these provide results or responses to the violations of rights provided for in either the Convention, Constitution, or legislation.

71. Despite being cited by the Inter-American Court on multiple occasions, as is the case in the present Judgment,¹¹¹ these criteria have not been sufficiently developed with respect to all of their implications, especially in regard to the fact that this recourse must *protect* the people against acts that violate their rights recognized not only by domestic legislation, but by the American Convention as well. Taking the provisions of Article 25 seriously would lead us to establish the obligation that effective judicial remedies be provided, and that these remedies monitor compliance not only with the laws, but also with the Constitution of

¹⁰⁸ Cf. *Case of Vélez Loor V. Panamá. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 3, 2010. Series C No. 218, para. 254.

¹⁰⁹ Cf. *Case of Mendoza et al. V. Argentina. Preliminary Objections, Merits and Reparations*. Judgment of May 14, 2013. Series C No. 260, para. 227.

¹¹⁰ *Judicial Guarantees in States of Emergency*(arts. 27.2, 25 and 8 American Convention on Human Rights). *Advisory Opinion OC-9/87* of October 6, 1987. Series to No. 9, para. 22.

¹¹¹ Para. 116 of the Judgment.

the State concerned and the American Convention itself. This is what the *right to the guarantee of fundamental rights* is about.¹¹²

72. In this scheme, through the substantive right to judicial protection,¹¹³ the law should provide for, and the courts effectuate, a recourse that takes into account the monitoring and controlling of compliance with the laws, the Constitution, and the treaties. In other words, the Inter-American Court has identified this with the duty to adopt the legislative and other type of measures to give effect to the right to judicial protection, and the duty of all authorities to exercise *control for conformity with the Constitution and the Convention*.

73. In this sense, Article 25 of the American Convention possesses an integrative dimension of the sources of law (domestic and of the Convention) that serve as the basis for guaranteeing judicial protection. This *normative integration* can result, in turn, through the judicial institution responsible for implementing the recourse that has been put into action by the person who claims to have been the subject of a violation of human rights from various sources both domestic and international.

74. Nevertheless, this effort of normative integration between the provisions of domestic and Inter-American legislation can, and on occasion, must, be more widely recognized when there is a norm that might result more favorable to the individual.

75. Thus, Article 29(b) of the American Convention provides that "No provision of this Convention shall be interpreted as [...] restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party." This necessarily leads to the approach regarding that in the domestic forum the integrative exercise of the rights must be broad and marked by the diverse international treaties of which each State is a Party. In some latitudes, this integration of norms –and of jurisprudence– has led to the understanding or recognition of the existence of "blocks of rights" or "blocks of constitutionality"¹¹⁴ or "parameter of constitutional regularity."¹¹⁵

¹¹² From this perspective, the right to judicial protection is *substantive*, since its presence or absence, leads respectively to the effectiveness or ineffectiveness of the fundamental rights of all individual cases; he or she who does not have a remedy according to Article 25(1) of the American Convention, or lacks for some reason the right to use it, could lead to the establishment of a violation of their right recognized by the Pact of San José, the Constitution or legislation of their country; if the *right to judicial protection* is not identified with the fundamental right that it guarantees, undoubtedly this is apparent in nothing less than the effectiveness and "effet utile" of the provisions that constitute it.

¹¹³ See *supra*, previous footnote.

¹¹⁴ The design, content and scope of the "constitutional block" takes on different nuances and particularities of each country. On the matter, the classical studies of Favoreu, Louis, and Rubio Llorente, Francisco are illustrative, *The constitutionality block. [El bloque de la constitucionalidad]*, Madrid, Civitas, 1991. See also Manili, Pablo Luis, *The reception of international law on human rights in constitutional Argentine law. [El bloque de constitucionalidad. La recepción del derecho internacional de los derechos humanos en el derecho constitucional argentino]*, Madrid, Civitas, 1991. Also see, Manili, Pablo Luis Buenos Aires, *The Law*, 2003; Londoño Ayala, César Augusto, *Constitutionality Block [Bloque de constitucionalidad]*, Bogotá, New Legal Editions, 2010; Uprimny, Rodrigo, *Constitutionality Block, human rights and criminal proceedings [Bloque de constitucionalidad, derechos humanos and proceso penal]*, Bogotá, Superior Council of the Judiciary, 2006. An interesting comparative study and of reception of this doctrine in Latin American countries, can be seen in Góngora Mera, Manuel Eduardo, *Inter-American judicial Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin American through National and Inter-American Adjudication*, San José, Inter-American Institute of Human Rights, 2011.

¹¹⁵ Supreme Court of Justice of the Nation (México). Contradiction Thesis 293/2011, resolved on September 3, 2013 (pending more). It is useful to understand the dimension of the "constitutional block/conformity with the Convention" in Mexico, the works of Caballero Ochoa, José Luis, *The interpretation in conformity. The Constitutional model under international treaties on human rights and the control of conformity with the*

76. In the jurisprudence of the Inter-American Court, the interpretative norm of Article 29 of the American Convention has been utilized in order to integrate the rights provided for in both the Convention, as well as in the constitutions and domestic laws.

77. The Inter-American Court has recognized that, in conformance with Article 29(b) of the American Convention – which precludes a restrictive interpretation of rights – an *evolutionary interpretation* of the American Convention, in relation to the international instruments on the protection of human rights, is evident,¹¹⁶ which, in turn, leads to the affirmation that human rights treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions.¹¹⁷ The Inter-American Court has found that such an evolutionary interpretation is consistent with the general rules of interpretation set forth in Article 29 of the American Convention, as well those set forth in the Vienna Convention on the Law of Treaties.¹¹⁸ In this regard, when interpreting the American Convention, the alternative that is most favorable to protection of the rights enshrined in said treaty must always be chosen, based on the principle of the rule most favorable to the human being.¹¹⁹

78. Although the Inter-American Court, in its usual exercise, only has authority to apply the treaties of the Inter-American System over which it has jurisdiction, it is also common to find an integrative exercise of the rights when international standards are taken into account – at a strictly interpretative level – from the European or African systems, or the Universal Human Rights Systems.

79. For instance, in analyzing the content and scope of Article 21 of the American Convention in relation to the communal property of the members of indigenous communities, the Inter-American Court has taken into account Convention No. 169 of the ILO in the light of the general interpretation of rules established under Article 29 of the Convention, in order to construe the provisions of the aforementioned Article 21 in accordance with the evolution of the Inter-American system considering the development that has taken place regarding these matters in international human rights law.¹²⁰ In

Convention, [La interpretación conforme. El modelo constitucional ante los tratados internacionales sobre derechos humanos and el control de convencionalidad], México, Porrúa-IMDPC, 2013, p. 184 and ss.

¹¹⁶ Cf. *Case of the Mayagna (Sumo) Awas Tingni Community V. Nicaragua. Merits, Reparations and Costs*. Judgment of August 31, 2001. Series C No. 79, para. 148.

¹¹⁷ Cf. *Case of the Mapiripán Massacre V. Colombia. Merits, Reparations and Costs*. Judgment of September 15, 2005. Series C No. 134, para. 106.

¹¹⁸ Cf. *Case of the Mapiripán Massacre V. Colombia, Merits, Reparations and Costs*. Judgment of September, 15, 2005. Series C No. 134, para. 106.

¹¹⁹ Cf. *Case of Ricardo Canese V. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111, para. 181; *Case of Herrera Ulloa V. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107, para. 184; and *Case of Baena Ricardo et al. V. Panamá. Merits, Reparations and Costs*. Judgment of February 2, 2001. Series C No. 72, para. 189.

¹²⁰ See, for example: *Case of the Yakye Axa Indigenous Community V. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, paras. 124 to 131, and *Case of the Mayagna (Sumo) Awas Tingni Community V. Nicaragua. Merits, Reparations and Costs*. Judgment of August 31, 2001. Series C No. 79, paras. 148 and 149; and *Case of Sawhoyamaya Indigenous Community V. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, para. 117.

another recent example, in a case on the rights of immigrants and refugees, the Inter-American Court considered¹²¹ that:

129. In response to the special needs of protection for migrant persons and groups, this Court interprets and warrants substance to the rights recognized under the Convention, in accordance with the evolution of the international *corpus juris* applicable to the human rights of migrants.¹²²
(...)

143. In accordance with Article 29(b) of the Convention, in order to interpret and apply the norms of the Convention specifically in order to determine the scope of State obligations in relation to the facts of this case,¹²³ the Court takes into account the important evolution of the regulations and principles of International Refugee Law, also established in the guidelines, standards and other authorized decisions of bodies such as the UNHCR.¹²⁴ In this sense, although the obligations contained in Articles 1(1) and 2 of the Convention constitute the basis for determining a State's international responsibility for violations thereof,¹²⁵ the Convention itself expressly refers to the rules of general International Law for its interpretation and application.¹²⁶ Thus, upon determining the compatibility of the actions and omissions of the

¹²¹ *Case of Pacheco Tineo Family V. Plurinational State of Bolivia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 25, 2013. Series C No. 272, paras. 129 and 143.

¹²² *Cf. Juridical Condition and Rights of the Undocumented Migrant.* Advisory Opinion OC-18/03 of September 17, 2003. Series to No. 18, para. 117, citing United Nations, Report of the World Summit for Social Development held in Copenhagen, 6 to 12 of March, 1995, A/CONF.166/9, of April 19, 1995, Annex II Program of Action, paras. 63, 77 and 78, available at: <http://www.inclusion-ia.org/espa%F1ol/Norm/cops spanish.pdf>; United Nations, Report of the International Conference on Population and Development held in Cairo on September 5 to 13, 1994, A/CONF.171/13, of October 18, 1994, Program of Action, Chapter X.A. 10. 2 to 10.20, available at: <http://www.un.org/popin/icpd/conference/offspa/sconf13.html>, and United Nations, General Assembly, World Conference on Human Rights held Vienna, Austria, from June 14 to 25, 1993, A/CONF. 157/23, from July 12, 1993, Declaration and Program of Action, I.24 and II.33-35, available at: <http://www.cinu.org.mx/temas/dh/decvienapaccion.pdf>.

¹²³ *Cf. Mutatis mutandi, Case of Santo Domingo Massacre V. Colombia. Preliminary Objections, Merits and Reparations.* Judgment of November 30, 2012. Series C No. 259, para. 255; and *mutatis mutandi Case of Atala Riffo and Girls V. Chile. Merits, Reparations and Costs.* Judgment of February 24, 2012. Series C No. 239, para. 83.

¹²⁴ The States Parties to the Convention of 1951 and the Protocol of 1967 have conferred monitoring of compliance to the UNHCR, established in the Preamble itself of the Convention (para. 6th), to promote and assure compliance of the principle legal instruments of the protection of refugees. *Cf.* Executive Committee of the Program of the United Nations High Commissioner for Refugees, *Note on International Protection*, 51st period of sessions, July 7, 2000, A/AC.96/930, available at: <http://www.unhcr.org/refworld/docid/3ae68d6c4.html>, para. 20. This function coexists with the corresponding obligation of the States to cooperate with the UNHCR in the exercise of this function, pursuant to Article 35 of the Convention of 1951, Article II of Protocol of 1967 and paragraph 8 of the Statute of the Office of the UNHCR. Moreover, in relation to the Manual of Procedures and Standards to Determine Refugee Status of the UNHCR, the expert witness Juan Carlos Murillo stated that "in 1978 when the Manual was adopted [...] it was drafted because the UNHCR Executive Committee in 1977 called the office to assist States in the interpretation of the provisions of the 1951 Convention. As such, it is an interpretive guide of a non-binding nature. However, in the UNHCR's history, after more than sixty years overseeing the implementation of the Convention and the Protocol on the Status of Refugees, many countries, including many of the Latin American countries have included specific reference to the Manual as an interpretive guide, that is, that it has sufficient authority to serve as interpretative guidance to the States. and therefore although it is not binding, many countries have fully incorporated it into their domestic legislation each time they have to determine refugee status."

Cf. Expert statement rendered by Juan Carlos Murillo before the Inter-American Court in public hearing held on June 20, 2012.

¹²⁵ *Case of the Mapiripan Massacre V. Colombia. Merits, Reparations and Costs.* Judgment of September 15, 2005. Series C No. 134, para. 107.

¹²⁶ In this sense, the preamble itself of the American Convention refers expressly to the principles reaffirmed and developed in international instruments, "both in the universal as well as regional sphere" (para. 3) and Article 29 requires its interpretation heeding to the American Declaration "and other international acts of the same

State or of its norms, with the Convention or other treaties applicable to its jurisdiction, the Court can interpret the rights and obligations contained therein in light of other treaties and relevant norms. In this case, using the sources, principles, and standards of international refugee law and special applicable regulations¹²⁷ to situations that determine refugee status of a person and their correlative rights, in a manner that is complimentary to the norms of the Convention, the Court is not assuming the existence of a hierarchy between the normative orders.

80. If the Inter-American Court were to ignore the plethora of existing approaches with respect to a single topic, emanating normatively from different international treaties and functionally from different international mechanisms, it would not only be impossible to speak of a jurisprudential dialogue – which constitutes an integrative element of rights itself, – it would also make it extremely complicated for the States to comply with their international obligations, if such duties were downright contradictory with norms of a distinct order, with whose application they coincide, or completely devoid of connection to them. The foregoing is based on the assumption that many States with whom this Court relates with actively participate both in the Inter-American System, as well as the Universal System of Human Rights, and that, naturally, have their own constitutional procedural systems for the protection of fundamental rights.

81. This interaction has been recognized by the Inter-American Court through the concept of the *corpus juris* of international human rights law, which is comprised of a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). For the Inter-American Tribunal, its dynamic evolution has had a positive impact on international law in affirming and developing up the latter's faculty for regulating relations between States and the human beings within their respective jurisdictions.¹²⁸

82. As a result, Article 25 of the American Convention establishes the right to an effective judicial remedy, which may be the remedy of *amparo* or another remedy of a similar nature and equal scope for those rights that cannot be heard by the courts using the *amparo* remedy;¹²⁹ on the other hand, by virtue of Article 29 of the Convention, which requires a more favorable or extensive interpretation, based on the *pro persona* principle, the rights protected by Article 25 are those included in the *corpus juris*. Of course, this protection should be executed taking into consideration the different powers of each judicial

nature." Other norms refer to obligations imposed by international law in relation to the suspension of guarantees (Article 27), as well as to "generally recognized principles of International Law" in definition of the exhaustion of domestic remedies (Article 46(1)(a)).

¹²⁷ In this sense, that express *mutatis mutandi* in the *Case of the Mapiripan Massacre V. Colombia* is applicable in that, "with regard to establishment of the international responsibility of the State in the instant case, the Court cannot set aside the existence of general and special duties of the State to protect the civilian population, derived from International Humanitarian Law, specifically Article 3 common of the August 12, 1949 Geneva Agreements and the provisions of the additional Protocol to the Geneva Agreements regarding protection of the victims of non-international armed conflicts (Protocol II)." *Case of the Mapiripan Massacre V. Colombia. Merits, Reparations and Costs*. Judgment of September 15, 2005. Series C No. 134, para. 114.

¹²⁸ Cf. *Juridical Condition and Rights of the Undocumented Migrant*. Advisory Opinion OC-18/03 of September 17, 2003. Series to No. 18, para. 120; and Cf. *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series to No. 16, para. 115.

¹²⁹ Cf. *Case of Castañeda Gutman V. México. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 6, 2008. Series C No. 184, para. 92.

organism, which requires that the control for conformity with the Convention that is exercised be of varying intensity.¹³⁰

83. Article 25 of the American Convention, which establishes the right to judicial protection, clearly has a procedural dimension as well, as it stipulates *the right to a guarantee*, an instrument to assert rights; in this case, the existence of a recourse with certain characteristics that must be established and effectively comply with the obligations of Articles 1(1) and 2 of the Convention. However, on the other hand, this recourse must “protect all persons” against acts that violate their rights from various sources. Hence, from this, one can actually see that, in reality, this dimension of Article 25 makes it so the right to an effective judicial remedy is really a genuine *substantive right of the guarantee of rights*, which depends upon nothing less than the effectiveness of the fundamental rights, whether they be of a constitutional or conventional source.

84. It is important to note here that, just as is stated in the Judgment in the present case, “*the American Convention does not impose a specific model for the regulation of issues of constitutionality and control for conformity with the Convention.*”¹³¹ In any event, the Inter-American Court has repeatedly held that the important thing is that the treaty be granted a “useful purpose.” That is, that it be respected and guaranteed in the manner in which the State Parties consider it most pertinent. The integrative dimension of constitutional and conventional fundamental rights, which may result through the exercise of the right to judicial protection, is, in sum, an element of fundamental integration in a model of exercise of control for conformity with the Convention.

B) The right to a judicial remedy as an essential part of a model of exercise of control for conformity with the Convention

85. The Inter-American Court has established that control for conformity with the Convention is “*an institution that is utilized to apply international law, in this case, the international law on human rights, and, specifically, the American Convention and its sources, including the case law of this Court.*”¹³²

86. Likewise, the Inter-American Court has indicated that the Inter-American jurisprudence, or the “*interpreted conventional norm*” is binding on two fronts: one related to the case in particular (*res judicata*) addressed to the State that has been a material party in the international process; and, the other which, at the same time, radiates general effects for the remaining States Parties to the American Convention, as a matter of interpretation (*res interpretata*). The foregoing is especially important for “control for conformity with the Convention,” as all domestic authorities, in conformance with their respective powers and the corresponding procedural regulations, should exercise this sort of control, which is also helpful for compliance with judgments from the Inter-American Court.¹³³

¹³⁰ In regard to the various intensities of “control of conformity with the Convention,” see the Opinion in the Order of Compliance of the Judgment. *Case of Gelman V. Uruguay*. Order of March 20, 2013.

¹³¹ Para. 124 of the Judgment.

¹³² *Case of Gelman V. Uruguay. Monitoring of Compliance with Judgment*. Order of March 20, 2013, para. 65.

¹³³ Cf. *Case of Gelman V. Uruguay. Monitoring of Compliance with Judgment*. Order of March 20, 2013, para. 67 and ss.

87. Similarly, the Inter-American Court has reiterated that the existence of a norm does not, by itself, guarantee that its application be appropriate. It is necessary that the application of the norms or their interpretation, both in jurisdictional practices and manifestation of the legal order, be adapted to the same objective pursued by Article 2 of the American Convention. In other words, the Inter-American Court has emphasized that the judges and other bodies involved in the administration of justice at all levels have a duty to exercise *ex officio* a form of “control for conformity” between domestic legal provisions and the American Convention, obviously within the framework of their respective competences and the corresponding procedural regulations. To perform this task, the judiciary has to take into account not only the treaty at issue, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.¹³⁴

88. Throughout the jurisprudential development in the shaping of the concept of control for conformity with the Convention, an aspect that has resulted more important is the role that the judges have, in their respective spheres of competence, to apply this scheme of control in the exercise of their duties. Since the origin of the legal doctrine of control for conformity with the Convention, it has been established that “domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception.”¹³⁵

89. The exercise of “control for conformity with the Convention” results, in part, from the substantive interpretation of the rights of the American Convention. This substantive interpretation of the Convention is also reflected in complying with the minimum procedural requirements set forth within the right to judicial protection, as Article 25 of the Convention establishes, which consists of providing effective remedies so that the remaining rights can be guaranteed and, in turn, protected in judicial mechanisms.

90. To consider the right to judicial protection in the integrative dimension of fundamental rights posed by the provisions of Article 25(1) of the American Convention, in relation to Articles 1(1), 2, and 29(b) therein, implies the existence of a model of exercise of “control for conformity with the Convention” that allows for a broader protection at the domestic level of the other rights protected by the American Convention.

91. While control for conformity with the Convention has the characteristic that it may be exercised by authorities and courts in various degrees of intensity (depending on their competencies and legal powers), Article 25 of the American Convention clearly establishes the right of all persons to have access to an effective judicial remedy so that a competent authority, with jurisdiction to issue a binding decision, may determine whether or not there has been a violation of a fundamental right claimed by the person filing the action, and that the remedy is useful to restitute to the interested party the enjoyment of his right and to

¹³⁴ Cf. *Case of Almonacid Arellano et al. V. Chile. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 26, 2006. Series C No. 154, para. 124; and *Case of Castañeda Gutman V. México. Monitoring of Compliance with Judgment*. Order of the Court of August 28, 2013, considering clause 23.

¹³⁵ *Case of Almonacid Arellano et al. V. Chile. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 26, 2006. Series C No. 154, para. 124.

repair it, if it finds there has been a violation.¹³⁶ As was previously mentioned, the existence of these guarantees, and by extension, of a model of exercise of control for conformity with the Convention “constitutes one of the basic pillars, not only of the American Convention, but also of the rule of law in a democratic society as per the Convention.”¹³⁷

92. Likewise, it cannot be ignored that the fulfillment of the obligation to guarantee the right to judicial protection does not correspond solely to the judges, but to all public authorities, including the legislature, who must ensure that this type of remedy is provided for in the law. Thus, the commitments of the States pursuant to Article 25(2) have an intimate relationship with the general obligation to guarantee established in Article 1(1) of the American Convention, as well as the obligation to adopt domestic legal measures that Article 2 of the Convention provides. The foregoing serve to guarantee that the competent authority provided for by the legal system of the State determines the rights of any person claiming such remedy;¹³⁸ the development of the possibilities of judicial remedy;¹³⁹ and that the competent authorities shall enforce such remedies when granted.¹⁴⁰

93. It is important to once again note that the State Parties to the American Convention have wide margins to comply with these general obligations. This approach has been constant in the jurisprudence of the Tribunal by indicating that what is important is the observance of “effectiveness” in terms of the principle of the *effet utile* “and this means that the State must take such measures as may be necessary to actually comply with the provisions of the Convention”;¹⁴¹ as such, the Inter-American Court has considered it necessary to reaffirm that such obligation, by its very nature, constitutes an *obligation of results*.¹⁴²

94. Therefore, it can be said that *integration at the normative level*, but especially at the *interpretative level* in the international and domestic domain contributes to the consolidation of an integrated Inter-American System, which allows an intense dialogue between all judicial practitioners, especially with judges of all hierarchies and subject-matters, which inextricably produces the basis for the consolidation of the legal means to guarantee the effectiveness of fundamental rights and the creation of a *ius constitutionale commune* in the area of human rights in our region.

IV. THE RIGHT TO JUDICIAL PROTECTION IN THIS CASE

¹³⁶ Cf. *Case of Castañeda Gutman V. México. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 6, 2008. Series C No. 184, para. 100.

¹³⁷ *Case of Cantos V. Argentina. Merits, Reparations and Costs*. Judgment of November 28, 2002. Series C No. 97, para. 52; *Case of Juan Humberto Sánchez V. Honduras. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 7, 2003. Series C No 99, para. 121; and *Case of Maritza Urrutia V. Guatemala. Merits, Reparations and Costs*. Judgment of November 27, 2003. Series C No. 103, para. 117.

¹³⁸ Cf. Article 25(2)(a) of the American Convention.

¹³⁹ Cf. Article 25(2)(b) of the American Convention.

¹⁴⁰ Cf. Article 25(2)(c) of the American Convention.

¹⁴¹ *Case of Comunidad Indígena Yakye Axa V. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C, No. 125, para. 101.

¹⁴² Cf. *Case of Caesar V. Trinidad and Tobago. Merits, Reparations and Costs*. Judgment of March 11, 2005. Series C No. 123, para. 93.

A) On the arguments of Mr. Alibux before the High Court of Justice of Suriname and the decision of the Inter-American Court

95. In this case, Mr. Alibux argued before the High Court of Justice of Suriname, the incompatibility of Article 140 of the Constitution of Suriname and the Indictment of Political Office Holders Act with the provisions of Article 8(2)(h) of the American Convention and Article 14(5) of the International Covenant on Civil and Political Rights, for establishing criminal proceedings in a single instance. Given this clear statement of incompatibility with the Convention, the High Court of Suriname that heard the criminal proceedings, through an Interlocutory Resolution, responded that while such international treaties have binding effects on the State, *they have no direct legal effect*, since a domestic court cannot establish processes of appeal that are not recognized by the law.

96. In its Judgment, the Inter-American Court declared the violation of Article 8(2)(h) precisely because no second instance was provided. Although the foregoing was established years later in the amendment to the aforementioned Indictment of Political Office Holders Act in 2007 through the creation of a process of appeal, the violation materialized at the inability to appeal the conviction in 2003; moreover, the victim had already served his sentence prior to this amendment. The Inter-American Court held that by declaring the violation of Article 8(2)(h) of the Convention, it did not deem it necessary to issue an additional ruling regarding the violation of Article 25 of the American Convention "as the consequences of the damages described in his allegations are subsumed in the considerations"¹⁴³ regarding Article 8(2)(h); that is, the alleged violation of the right to judicial protection "is encompassed within the aforementioned violation of the right to appeal the judgment. It was precisely the absence of a remedy under the terms of Article 8(2)(h) of the Convention, which would have guaranteed the possibility of challenging the judgment of conviction, which propitiated and enabled the situations alluded to by the Commission and the representatives."¹⁴⁴

97. With respect to the arguments of Mr. Alibux and of the Commission before this Inter-American Tribunal concerning the violation of the right to judicial protection due to the lack of implementation of the Constitutional Court of Suriname, as established in article 144 of the Constitution, the Court determined that "although [...] it recognizes the importance of such bodies as protectors of constitutional mandates and fundamental rights, the American Convention does not impose a specific model for the regulation of issues of constitutionality and control for conformity with the Convention[.] [It also reiterated] that the obligation to monitor the compliance of domestic legislation with the American Convention is delegated to all bodies of the State, including its judges and other mechanisms related to the administration of justice at all levels."¹⁴⁵

B) The analysis of the effective judicial remedy from the jurisprudence of the Inter-American Court and from the integrative dimension of the rights under Article 25 of the American Convention

98. As I mentioned at the beginning of this opinion, I agree with the decision adopted by the Inter-American Court. However, I consider it appropriate to comment on certain aspects related to the integrative dimension of rights (an under-developed facet in Inter-American jurisprudence) and its implications in a model of exercising control for conformity with the

¹⁴³ Para. 119 of the Judgment.

¹⁴⁴ Cf. Para. 106 of the Judgment.

¹⁴⁵ Para. 124 of the Judgment.

Convention. If the Court had developed this view of Article 25 of the American Convention, its differences with the right to appeal the judgment to a higher court under Article 8(2)(h) of the Convention would have been brought to light, and hence, "the consequences of the damages" caused by the violation of Article 8(2)(h) would not have necessarily been encompassed in the alleged affectations of Article 25 of the American Convention.

99. If these standards were to eventually be developed and applied in cases similar to that of Mr. Alibux, at least two clear violations to the right of judicial protection would be found.

100. *First*, I consider the failure to create a Constitutional Court, which is provided for by the Constitution of Suriname, to have constituted a violation of the American Convention for the omission in its installation and operation to allow the existence of an effective recourse for "protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention," as stipulated in Article 25, in relation to Articles 1(1) and 2, of the American Convention.

101. *Second*, I consider that from this perspective, the victim in the present case would not, at any moment, have had access to an effective judicial remedy that would have protected his claims for conformity with the Convention, constitutionality, and legality, beyond the specific claim with regard to the necessity to respect the right to appeal the judgment enshrined in Article 8(2)(h) of the American Convention. And, for that reason, in the particular case, the process of appeal (which was eventually established to challenge the conviction against Mr. Alibux) would not have necessarily been the appropriate remedy to "protect" against violations of either domestic or conventional fundamental rights.

1) The failure to establish a Constitutional Court and the remedies under its jurisdiction as an unconventional act by omission

102. It is not redundant to reiterate that Article 25(1) of the American Convention guarantees the existence of a simple, prompt, and effective remedy before a judge or competent tribunal,¹⁴⁶ and that the States Parties are obligated to provide effective judicial remedies to the victims of human rights violations (Article 25),¹⁴⁷ remedies that must be substantiated in accordance with the rules of the due process of law (Article 8(1)),¹⁴⁸ all within the general obligation of the States to guarantee the free and full exercise of the rights recognized in the Convention to all persons subject to their jurisdiction (Article 1(1)),¹⁴⁹ and, in accordance with Article 25(2)(b) of the Convention, the States the States undertake to develop the possibilities of judicial remedies.¹⁵⁰ The inexistence of effective domestic remedies places an individual in a state of defenselessness.¹⁵¹

¹⁴⁶ Cf. *Case of Velásquez Rodríguez V. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 63; and *Case of Mejía Idrovo V. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 5, 2011. Series C No 228, para. 91.

¹⁴⁷ Cf. *Case of Fairén Garbí and Solís Corrales V. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 2, para. 90; and *Case of Masacres de Río Negro V. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of September 4, 2012. Series C. No. 250, para. 191.

¹⁴⁸ Cf. *Case of Godínez Cruz V. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 3, para. 93; and *Case of Mohamed V. Argentina. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 23, 2012. Series C No. 255, para. 82.

¹⁴⁹ Cf. *Case of Velásquez Rodríguez V. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 91; *Case of Massacres El Mozote and nearby places V. El Salvador. Merits, Reparations and Costs*. Judgment of October 25, 2012. Series C No 252, para. 242.

103. As established in the proven facts of the case, the Constitution of Suriname, in its fourth section "Constitutional Court," Article 144, textually states that:

1. There shall be a Constitutional Court which is an independent body composed of a President, Vice-President and three members, who - as well as the three deputy members - shall be appointed for a period of five years at the recommendation of the National Assembly.
2. The tasks of the Constitutional Court shall be to:
 - a. Verify the purport of Acts or parts thereof against the Constitution, and against applicable agreements concluded with other states and with international organization;
 - b. Assess the consistency of decisions of government institutions with one or more of the constitutional rights mentioned in Chapter V.
3. In case the Constitutional Court decides that a contradiction exists with one or more provisions of the Constitution or an agreement as referred to in paragraph 2 sub a, the Act or parts thereof, or those decisions of the government institutions shall not be considered binding.
4. Further rules and regulations concerning the composition, the organization and procedures of the Court, as well as the legal consequences of the decisions of the Constitutional Court, shall be determined by law. (underlining added)

104. In this case, it was determined by the Inter-American Court, and there is no dispute between the parties, that a Constitutional Court had not yet been established by the date of issuance of this Judgment.¹⁵²

105. During the proceedings before the Inter-American Court, the Inter-American Commission alleged that the absence of a sitting Constitutional Court implied the lack of a judicial mechanism to review the constitutionality of the use of the Indictment of Political Office Holders Act against the alleged victim.¹⁵³ Meanwhile, the representative indicated that it had been necessary to resort to a Constitutional Court, which should have as one of its powers the authority to review laws and international treaties in light of the Constitution; however, this had not been possible because such judicial mechanism had not been established.¹⁵⁴ In its defense, the State argued that a Constitutional Court could not be considered an instance of appeal, nor could it determine whether or not the High Court of Justice applied a law in contravention to the Constitution.¹⁵⁵ It further affirmed that it had already furnished the instructions necessary to make the Constitutional Court an operational institution.¹⁵⁶

106. Given its inexistence, and despite its constitutional powers, it is impossible to know under what terms the Constitutional Court of Suriname would operate or have operated. It

¹⁵⁰ Cf. *Case of Castañeda Gutman V. México. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 6, 2008. Series C No. 184, para. 78.

¹⁵¹ Cf. *Case of the Constitutional Court V. Perú. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 71. para. 89; and *Case of "Five Pensioners" V. Perú. Merits, Reparations and Costs.* Judgment of February 28, 2003. Series C No. 98, para. 126.

¹⁵² Cf. Para. 51 of the Judgment.

¹⁵³ Cf. Para. 112 of the Judgment.

¹⁵⁴ Cf. Para. 113 of the Judgment.

¹⁵⁵ Cf. Para. 114 of the Judgment.

¹⁵⁶ Cf. Para. 149 of the Judgment.

is even difficult to firmly ascertain how duties would be divided with the High Court of Justice. This lack of legal certainty, in my opinion, has had effects on the breach of duties set forth in subsections (a) and (b) of Article 25(2) of the American Convention as it is evident that the constitutional procedural model of judicial protection provided for in the Constitution of Suriname has not been fully implemented. In other words, the powers and functions of the competent authorities who determine the rights of a person claiming such remedy have not been specifically determined —Article 25(2)(a) of the American Convention—. As a consequence of the foregoing, it has been impossible to date to develop the possibilities of judicial remedy or judicial remedies to be implemented through the Constitutional Court (Article 25(2)(b)), or rather, it has not been possible to even implement them.

107. Although this situation by itself does not necessarily affect all cases under the jurisdiction of the judiciary in Suriname, in the very specific case of Mr. Alibux, it resulted in a high degree of legal uncertainty as he was the first individual indicted and convicted based on the procedure established in the Indictment of Political Office Holders Act and Article 140 of the Constitution.¹⁵⁷ In my opinion, the level of uncertainty does not refer to that relevant to ordinary proceedings, *but rather to the impossibility to have an effective, adequate, prompt, and simple recourse that would have protected him against acts that could have allegedly violated his fundamental rights recognized by the Constitution, law of the State, or the American Convention, pursuant to Article 25(1) of the American Convention.*

108. Personally, I find it peculiar that in the Interlocutory Resolution of June 12, 2003, the High Court of Justice of Suriname analyzed and answered only some of Mr. Alibux's allegations, such as those related to the right to freedom from ex post facto laws, yet it did not answer those arguments related to the need for conformity with the Convention. More specifically, the arguments regarding the actions of the Procurator General were answered to the effect that the Constitution did not grant it "jurisdiction for such purposes."¹⁵⁸ It is clear that any state institution had to possess such jurisdiction in terms of Article 25 of the Convention, if in the end, the authorities of Suriname eventually determine that the High Court or the Constitutional Court or the ordinary tribunals has jurisdiction, this is a decision that is in its power. Nevertheless, what is not permissible is the inexistence of any such body that could have taken care of these allegations.

109. This idea became germane in the Judgment of the Inter-American Court because, even though it was not determined that a violation of Article 25 of the American Convention could have occurred, in the section on reparations of the Judgment, the Court did consider it noteworthy to highlight, as the State itself recognized, the importance of the operation of such institution, the creation of which is set forth in Article 144 of the Constitution of Suriname. Such importance, determined the Inter-American Court in its Judgment, lies in *the role that a court of that nature plays in the protection of constitutional rights of the citizens subject to its jurisdiction.*¹⁵⁹ This is consistent with the intent of the Inter-American Court to establish an Inter-American standard of control for conformity with the Convention so that controversies of this nature may be resolved by state authorities through effective recourses at the domestic level.

¹⁵⁷ Cf. Para. 50 of the Judgment.

¹⁵⁸ Para. 122 of the Judgment.

¹⁵⁹ Cf. Para. 151 of the Judgment.

110. In my opinion, had Mr. Alibux, at any moment, had access to a simple, prompt, appropriate, and effective remedy before a judge or competent tribunal,¹⁶⁰ and had such remedy been substantiated in accordance with the rules of the due process of law,¹⁶¹ and had, in conformance with Article 25(2)(a) and (b) of the American Convention, the possibilities of judicial remedy been developed,¹⁶² the controversies raised in this case would have been resolved at the domestic level, and the violations of his rights been promptly repaired and amended in domestic courts. In this manner, the instant case would have never come to the attention of the Inter-American Court, since Mr. Alibux would have never been placed in a situation of defenselessness in the absence effective judicial remedies.¹⁶³

2) The absence of an effective judicial remedy to hear the claims regarding conformity with the Convention, constitutionality, and legality raised by Mr. Liakat Ali Alibux

111. On another note, Mr. Alibux argued to the High Court of Justice of his country, among other things, that Article 140 of the Constitution and the Indictment of Political Office Holders Act were inconsistent with Article 14(5) of the Covenant on Civil and Political Rights and Article 8(2)(h) of the American Convention for creating a process in a single instance before said High Court of Justice.¹⁶⁴ In this regard, in the Judgment, the Inter-American Court found that the alleged damages suffered by Mr. Alibux were encompassed within the aforementioned violation of the right to appeal the judgment and that it should be declared as violated. As a result, the Inter-American Court did not deem it necessary to make additional determinations with respect to the violation of the right to judicial protection set forth in Article 25 of the American Convention, as the consequences of the damages described in his allegations were subsumed in the considerations in the Judgment in relation to Article 8(2)(h),¹⁶⁵ regarding the right to appeal the judgment to a higher court or judge.

112. As noted above, had the Inter-American Court considered the integrative dimension of rights and its implications in a model of exercising control for conformity with the Convention in the present case, it would have been able to reach different conclusions with respect to Article 25 of the American Convention.

113. *First*, the differences between the right set forth in Article 8(2)(h) of the American Convention and the right to judicial protection established in Article 25 thereof (*supra*, paras. 59 to 68) would have brought about the independent declaration of a violation of the latter.

¹⁶⁰ Cf. *Case of Velásquez Rodríguez V. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 63; and *Case of Mejía Idrovo V. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 5, 2011. Series C No 228, para. 91.

¹⁶¹ Cf. *Case of Godínez Cruz V. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 3, para. 93, and *Case of Mohamed V. Argentina. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 23, 2012. Series C No. 255, para. 82.

¹⁶² Cf. *Case of Castañeda Gutman V. México. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 6, 2008. Series C No. 184, para. 78.

¹⁶³ Cf. *Case of the Constitutional Court V. Perú. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 71, para. 89; and *Case of "Five Pensioners" V. Perú. Merits. Reparations and Costs*. Judgment of February 28, 2003. Series C No. 98, para.126.

¹⁶⁴ Cf. Para. 117 of the Judgment.

¹⁶⁵ Cf. Para. 119 of the Judgment.

114. As was stated at the time, the effective judicial remedy under Article 25 of the Convention is broad and general to protect the rights contained in the Constitution, the legislation, or the American Convention; while the right to appeal the judgment to a higher court set forth in Article 8(2)(h) is aimed at the review of a decision reached in the context of a process that can include the determination of rights and obligations of a criminal nature, as well as of a civil, labor, fiscal, or any other nature.¹⁶⁶ While the latter is encompassed within the scope of due process, the first one is within the dimension of the right to the guarantee of fundamental rights of both constitutional and conventional sources.

115. With respect to the right to appeal the judgment to a higher court or tribunal enshrined in Article 8(2)(h), the Inter-American Court has consistently avoided any confusion between this recourse and the provisions of Article 25 of the American Convention, which provides for the right to an effective judicial recourse. That is, the Inter-American Court has identified that the remedy set forth in Article 25 of the American Convention is not the same as the process of appeal provided for in Article 8(2)(h) of the same treaty.¹⁶⁷ From the foregoing, the differences between the remedies that are provided for both in Article 8(2)(h), as well as Article 25 of the American Convention, seem, at least, *prima facie* evident. However, undoubtedly, there exists a gray area where these distinctions may not be as easy to realize, especially when you take into account the broad range of expectations that the recourse framed in Article 25 of the Convention can have, in comparison with the diverse claims that can be substantiated in domestic jurisdictions. In my opinion, the case of *Liakat Ali Alibux* is situated on that assumption.

116. As can be inferred from the Interlocutory Resolution of the High Court of Justice of Suriname, at the heart of the arguments raised by Mr. Alibux was the lack of a process of appeal in the proceedings that were ongoing, but it was also reasonably clear that his claim was related to the illegality, unconstitutionality, and non-conformity with the Convention of the inexistence of such recourse. Likewise, this objection raised by Mr. Alibux was neither in legal nor factual terms in the eyes of international law *an appeal*, since such remedy did not exist in the legislation of Suriname at the time of the facts, and because the High Court of Justice did not want to give it that effect. In any case, the recourse sought by Mr. Alibux could have been classified within that broader sphere of judicial protection afforded by Article 25 of the American Convention. As such, the substantiation of this recourse could have been evaluated from this perspective, and not as an issue in the Judgment that was subsumed within the right to appeal the judgment embodied in Article 8(2)(h) of the Convention.

117. In controversies of this sort, to subsume such recourses within the sphere of Article 8(2)(h) denies, from the get-go, the need of access to a judicial remedy of control that can deal with constitutional and conventional questions when the absence of certain specific recourse provided for in the American Convention is anticipated. Moreover, this can also result in ignoring the need to adopt accurate practices of control for conformity with the

¹⁶⁶ Cf. *Case of de la "White Van" (Paniagua Morales et al.) V. Guatemala. Merits*. Judgment of March 8, 1998. Series C No. 37, para. 149.

¹⁶⁷ See, among others, *Case of Vélez Loor V. Panamá. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 3, 2010. Series C No. 218, para. 178; *Case of Barreto Leiva V. Venezuela. Merits, Reparations and Costs*. Judgment of November 17, 2009. Series C No. 206, para. 100 to 103; and *Case of Mohamed V. Argentina. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 23, 2012. Series C No. 255, paras. 118 and 119.

Convention, such as those performed by tribunals in various countries in the region, as has been observed, for instance, in the cases of Argentina and the Dominican Republic.

118. On the one hand, in the case of *Mendoza et. al v. Argentina*, the Inter-American Court analyzed the pertinent part of the “*Casal* judgment,” whereby the highest Argentinean court, the Supreme Court of Justice of the Nation, adjusted the remedy of cassation to Inter-American standards.¹⁶⁸ In the aforementioned judgment, the Supreme Court of Justice of the Nation of Argentina indicated that “Articles 8(2)(h) of the American Convention and 14(5) of the [International] Covenant [on Civil and Political Rights] require the review of every issue of fact and law and, therefore, any error that the judgment may contain shall be subject to appeal.”¹⁶⁹ The Inter-American Court appreciated the *Casal* judgment with regard to the criteria it reveals on the scope of the review comprised by the appeal in cassation, in accordance with the standards derived from Article 8(2)(h) of the American Convention.¹⁷⁰ From the foregoing, the Court deemed it appropriate to consider that the judges in Argentina should continue exercising control for conformity with the Convention in order to ensure the right to appeal the judgment pursuant to Article 8(2)(h) of the Convention and the jurisprudence of the Inter-American Court itself. Nonetheless, the Court considered that, even with the judges exercising control for conformity with the Convention, it was necessary to, within a reasonable time, adapt domestic laws to the Inter-American parameters on the matter.¹⁷¹

119. Meanwhile, in the Dominican Republic, on February 24, 1999, the Supreme Court of Justice recognized that the protection provided for in Article 25(1) of the American Convention comprised part of the positive domestic law by virtue of the provisions of Articles 3 and 10 of the Constitution, thus establishing the writ of *amparo* in the country.¹⁷² The foregoing was in response to an appeal filed against a judgment from the Court of Labor of the National District. Similarly, the Supreme Court established the general guidelines of competency, procedure, and deadlines of the writ of *amparo*.¹⁷³ The writ of *amparo* is currently found established in the new Constitution of 2010, and the recently installed Constitutional Court hears appeals filed in connection to judgments rendered in this matter.¹⁷⁴

120. With the foregoing examples, I do not intend to demonstrate that the High Court of Justice of Suriname should have necessarily followed the same steps of these Latin American tribunals, but rather that, in any case, the American Convention should have been given practical effect, specifically in regard to the arguments of the violation of Article

¹⁶⁸ Cf. Judgment of the Supreme Court of Justice of the Nation on September 20, 2005 in the case “*Casal*, Matías Eugenio et al. s/ attempted robbery.”

¹⁶⁹ *Case of Mendoza et al. V. Argentina. Preliminary Objections, Merits and Reparations*. Judgment of May 14, 2013 Series C No. 260, para. 254.

¹⁷⁰ Cf. *Case of Mendoza et al. V. Argentina. Preliminary Objections, Merits and Reparations*. Judgment of May 14, 2013 Series C No. 260, para. 331.

¹⁷¹ Cf. *Case of Mendoza et al. V. Argentina. Preliminary Objections, Merits and Reparations*. Judgment of May 14, 2013 Series C No. 260, para. 332.

¹⁷² Cf. Supreme court of Justice of Dominican Republic, Case of Productos Avon, S.A. February 24, 1999.

¹⁷³ As such, Law No. 437-06 was enacted which establishes the Remedy of Amparo (no longer in effect).

¹⁷⁴ It is established as such in the Dominican Constitution of 2010 (Article 185) and in the Organic Law of the Constitutional Tribunal and the Constitutional Procedures, num. 137-11 (Article 94).

8(2)(h), which was flagrantly violated. In this regard, it is important to note that, on occasion, the Inter-American Court has ordered that control for conformity with the Convention be exercised to remedy these situations. Surely, the law should have facilitated the operation of the High Court of Justice or, if applicable, created the Constitutional Court and given it jurisdiction to resolve matters of this sort. Therefore, the turning to an instance to claim the unconstitutionality and non-conformity with the Convention of the absence of a specific recourse should have translated into some response on the part of the judiciary, in this case, perhaps by the High Court of Justice. However, the same omissions in the full implementation of the model of constitutional control compromised the ability of the High Court to do more and, without doubt, left Mr. Alibux in a situation of defenselessness, thereby violating his right to judicial protection embodied in Article 25 of the American Convention, in relation to Article 1(1) and 2 of such international instrument, in such a way that, in the case at hand, the Inter-American System had to act in the alternative.

121. *Second*, viewing the right to judicial protection as a means of integrating the rights would have shed a different light on the claims of Mr. Alibux in a model of exercising control for conformity with the Convention.

122. As it has already been mentioned, Article 25(1) (judicial protection) of the American Convention provides that *"Everyone has the right to simple and prompt recourse, or any other effective recourse [...] for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention [...]."*

123. In this case, Mr. Alibux argued before the High Court of Justice of his country that Article 140 of the Constitution and the Indictment of Political Office Holders Act were inconsistent with Article 14(5) of the Covenant on Civil and Political Rights and Article 8(2)(h) of the American Convention for creating a process in a sole instance before such High Court of Justice;¹⁷⁵ that is, he presented in a precise manner an argument of non-conformity with the Convention of the Constitution itself and the law that was applied. The response of the High Court of Justice was to mention that *"despite having binding effects on the State, the provisions of the Covenant on Civil and Political Rights and the American Convention on Human Rights had no direct legal effect, since a domestic court could not establish processes of appeal that are not recognized by the law, and therefore, had to abide by the terms set forth in Article 140 of the Constitution."*¹⁷⁶ As can be appreciated, the response of the High Court of Justice did not properly study the problem of conformity with the Convention raised, rather it simply limited itself to express the reasons why domestic courts were not able to establish processes not regulated by law, so that they had to apply the constitutional article, whose lack of conformity with the Convention was precisely challenged by the now victim, consequently subtracting any useful effect of the treaty provisions.

124. In my opinion, through the substantive right to judicial protection enshrined in Article 25 of the American Convention, the legislation should provide for, and the judges effectuate, a recourse that takes into account the monitoring and controlling of compliance with the laws, the Constitution, and the treaties, this in terms of the Convention itself. This case illustrates that for a judicial remedy to be effective, in light of Article 25 of the already mentioned treaty, it must consider that the same right can have its basis both in domestic sources and diverse international sources, in this case, the American Convention, as well as even other international instruments.

¹⁷⁵ Cf. Para. 117 of the Judgment.

¹⁷⁶ Para. 118 of the Judgment.

125. Although “the American Convention does not impose a specific model for the regulation of issues of constitutionality and control for conformity with the Convention,”¹⁷⁷ the various systems of judicial protection of the rights at the domestic level must provide effective means by which to resolve this sort of disputes, whatever its denomination and body of control that determines it. Pursuant to this integrative dimension of the rights set forth in Article 25 of the American Convention, a response as the one expressed by the High Court of Justice, which is that although the Convention is binding, “*it has no legal effect*,” makes it impossible to defend rights in court at the domestic level, and it suppresses an indication of effectiveness to the rights enshrined therein, ignoring, in fact, the rules of interpretation that the Convention itself establishes in its Article 29.

126. To avoid such situations, the Inter-American Court has emphasized that judges and other bodies involved in the administration of justice at all levels have a duty to exercise *ex officio* a form of “control for conformity” between domestic legal provisions and the American Convention, obviously within the framework of their respective competences and the corresponding procedural regulations.¹⁷⁸ From my perspective, it is clear that this control must be, in essence, effective and integrative of domestic and treaty rights, as established in Article 25(1) of the Convention, in conjunction with Articles 1(1), 2, and 29(b) therein, which gives it a unique scope and characterization of control for conformity with the Convention. However, regardless of what it is called or how it regulated or to what extent or manner each domestic judge or court exercises it, this control must seek to ensure that it is effective, and not an illusory recourse doomed to fail or that subtracts from the effectiveness of the American Convention and, in general, the Inter-American *corpus juris*.

V. CONCLUSION: THE RIGHT TO THE GUARANTEE OF RIGHTS, AS AN INTEGRATIVE DIMENSION OF FUNDAMENTAL RIGHTS (FROM A DOMESTIC SOURCE OR THE CONVENTION) IN A MODEL OF EXERCISE OF CONTROL FOR CONFORMITY WITH THE CONVENTION

127. The rights provided for in Articles 8 (right to a fair trial) and 25 (judicial protection) of the American Convention represent the most claimed rights and that have most frequently been declared violated by the Inter-American Court along the more than twenty-five years that it has exercised its contentious jurisdiction.¹⁷⁹ This has further generated a rich body of Inter-American case law that recognizes the intimate relationship that exists between them, not without certain controversy among judges of previous compositions.¹⁸⁰

128. The right to a fair trial (Article 8), the right to judicial protection (Article 25), and the general obligation contained in Article 1(1) of the American Convention have a close

¹⁷⁷ Para. 124 of the Judgment.

¹⁷⁸ Cf. *Case of Almonacid Arellano et al. V. Chile. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 26, 2006. Series C No. 154, para. 124; and *Case of Castañeda Gutman V. México. Monitoring of Compliance with Judgment*. Order of the Court of August 28, 2013, considering clause 23.

¹⁷⁹ In effect, of the 172 cases that the Inter-American Court has resolved to date, violations of Article 8 (in any chapter) have been declared in 136 occasions and of Article 25 in 134 cases. In 121 cases a violation of both rights has been declared, while in only 14 cases only Article 8 was declared and in 13 only Article 25.

¹⁸⁰ There are interesting debates that have taken place in the individual or dissenting opinions of former presidents of the Inter-American Court, Antonio Augusto Cançado Trindade, Cecilia Medina and Sergio García Ramírez, about binding nature, scope and the autonomy of Articles 8 and 25 of the Pact of San José.

relationship since the judicial protection referred to in Article 25 is one way to fulfill the obligation to guarantee derived from Article 1(1) of the Convention; furthermore, such judicial protection is linked to the right to be heard in terms of Article 8 and that it be carried out with the minimum guarantees of due process laid out therein. In this sense, since the case of *Cesti Hurtado V. Peru* (1999), the Inter-American Court established that Article 25 is intimately linked to Article 1(1) as the State has the obligation to design and enforce a remedy that should be properly applied.¹⁸¹ Likewise, since its *Advisory Opinion OC-9/87*¹⁸², the Inter-American Court established that Article 25 is linked to Article 8 in that the remedies of *amparo* and *habeas corpus* must be substantiated in accordance with the rules of due process of law.¹⁸³

129. However, notwithstanding the obvious link between the three treaty provisions mentioned above and developed in the Inter-American case law, it is possible to state that within the design of the American Convention, the three articles maintain their autonomy and specific content. This results in, among other factors, both in the obvious fact that each of the provisions are found in different articles, as well as that Article 8 has a more general language and regulates a wider range of procedures of either a criminal type, or of a civil, labor, fiscal, or any other nature, in the logic of due process. Article 25, on the other hand, establishes the rules of a remedy to *protect* any person against acts that violate his fundamental rights. Therefore, both rights have their own origin, configuration, and characteristics that must not be confused.

130. This case highlights the *gray area* that often exists to determine the independence of these rights, especially in reference to the right to appeal the judgment to a higher court (Article 8(2)(h)) with respect to the duty to guarantee access to a judicial remedy that is effective, appropriate, prompt and simple (Article 25(1)).

131. In order to achieve the differentiation between these rights, I have tried, in the second part of this concurring opinion, to point out a new dimension of Article 25 of the American Convention, that has been under-developed so far in Inter-American case law, as is the understanding of the scope of the right of individuals to a recourse "for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention." This understanding of the *right to the guarantee of fundamental rights* serves the normative force of Article 25, which has an important place within the structure of the American Convention itself.

132. This logic even has its origins in the preparatory work of the American Convention, which, pursuant to an interesting debate and a proposal by the government of Chile, it was included that judicial protection should not only refer to fundamental rights provided for within the domestic sphere, but also those embodied in the American Convention.¹⁸⁴ The

¹⁸¹ Cf. *Case of Cesti Hurtado V. Perú. Merits*. Judgment of September 29, 1999. Series C No. 56, para. 168.

¹⁸² Cf. *Judicial Guarantees in States of Emergency*(Arts. 27(2) and 8 of the American Convention on Human Rights). *Advisory Opinion OC-9/87 of October 6, 1987*. Series to No. 9, para. 24.

¹⁸³ As established in the *Case of Hilaire, Constantine and Benjamin et al. V. Trinidad and Tobago*: "For the right to an effective remedy within the meaning of Article 25 of the Convention to be preserved, it is essential that the remedy be processed according to the norms of due process enshrined in Article 8 of the Convention, including access to legal assistance."

¹⁸⁴ In this regard, Chile stated that "Article 23 [(currently Article 25) of the American Convention was] insufficient, since it is limited in that it provides that 'all persons have the right to an effective, prompt, and simple remedy before competent domestic courts or tribunals, that protect against acts that violate fundamental rights recognized by the Constitution or legislation. [To which][this] provision of the project did not refer to the rights recognized specifically in the Convention. [Therefore, the government of Chile suggested that] it would be best to

foregoing allows us to note that, through judicial protection from this integrative perspective of the rights provided for in Article 25(1), in relation to Articles 1(1), 2, and 29(b) of the Convention, an authentic *integration is forged at a normative and interpretative level on the matter of fundamental rights*, allowing for a view of an integrated Inter-American System and promoting *jurisprudential dialogue* for the creation of regional standards on the subject that effectuate the full enjoyment thereof.

133. The dimension of the right to the guarantee of rights constitutes an integral element of both domestic fundamental rights, as well as those derived from the Convention, allowing a more extensive protection in domestic courts to individuals, so that they may effectuate their rights in a model of exercise of control for conformity with the Convention. Although it is possible to deduce that these implications are derived from the text itself of Article 25 of the American Convention, I consider that, to date, they have not been sufficiently explored by this Inter-American Tribunal. Moreover, had this been addressed and developed in the present case, it is very likely that the independent violation of Article 25 of the Convention would have been declared.

134. Pursuant to this reading of the right to judicial protection, Mr. Alibux would not have had, at any moment, access to an effective judicial remedy to *protect his claims of constitutionality, legality, and conformity with the Convention*, beyond the specific claim in regard to the requirement that the right to appeal the judgment enshrined in Article 8(2)(h) of the American Convention be respected. In this sense, the Inter-American Court would have had to declare the violation of Article 25 of the Convention, in connection to Article 1(1) and 2 of such international treaty, instead of subsuming it – as is done in the Judgment – as a consequence of the violation declared regarding the lack of a process of appeal before a higher court, which refers to the dimension of due process of law and not to the duty to guarantee the rights that Article 25 of the American Convention provides for, as an integrative element of fundamental rights of both a domestic sources and the convention.

Eduardo Ferrer Mac-Gregor Poisot
Judge

Pablo Saavedra Alessandri
Registrar

insert in this Article a provision similar to that in paragraph 3 of Article 2° of the International Pact on Civil and Political Rights [...]". Specialized Conference on Human Rights, San José, Costa Rica, November 7 to 22, 1969, Acts and Documents, OEA/Ser.K/XVI/1.2, pages. 41 and 42.