

**CONCURRING OPINION OF JUDGE SERGIO GARCIA RAMIREZ IN THE
JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE
CASE OF *HERRERA ULLOA VS. COSTA RICA*,
OF JULY 2, 2004**

1. Freedom of expression, the media and the practice of journalism

1. This is not the first time that the Inter-American Court has had to adjudicate matters constituting violations of freedom of expression. The Court has examined cases in which such violations were alleged, but the backdrop against which those violations occurred has varied. It might be one of gross human rights violations, a weakening of democracy and institutional conflict. Then again, the context might also be one in which democracy flourishes and fundamental rights are, on the whole, observed. The latter scenario is the one that best fits the case of *Herrera Ulloa vs. Costa Rica*, which the Court decided in its *Judgment of July 2, 2004*. I concur with the Court's judgment in the case and am attaching the present *Opinion* thereto. The differing backdrops point up an important issue, although not the one I am addressing here: the features that attend the clash between legally protected interests and the preservation of human rights in an "authoritarian environment" as opposed to those that attend such a clash in a "democratic environment."

2. When on those previous occasions the Court examined violations of Article 13 of the American Convention on Human Rights, it took into account, as it does in the present judgment to which this Concurring Opinion is affixed, the specific characteristics of freedom of expression when exercised through the mass media. The mass media carry messages to a large audience and therefore have a social impact that the Court has also identified with Article 13 of the American Convention. In a democratic society, the mass media provide information to society as a whole and thus serve to inform the decisions that its members make, with all the consequent implications.

3. Obviously, freedom of expression is upheld and defended, no matter the circumstance. There are no subjective boundaries. Freedom of expression is not confined to any particular human group defined by socioeconomic status, ethnicity, nationality, gender, age, conviction or belief. It is truly universal in that it is a freedom that all people enjoy. However, when that freedom is exercised as a profession, it does have some significant distinctive features that require qualifications, precautions, and specific conditions. Professional journalists cultivate an attitude that takes freedom of expression as a given. They use freedom of expression as a tool for their personal realization and as a means to enable others to develop their human and collective potential. Thus, specific declarations or instruments concerning freedom of expression are premised on its universality and from there go to the particular nature of freedom of expression in the context of the mass media. One finds this, too, at the domestic level, where the effort is made—as it has been in Costa Rica—to have laws that pertain to the mass media and not just freedom of expression in general.

4. The "transcendental quality" of freedom of expression manifests itself in journalism. The distinctive features of freedom of expression exercised through the mass media include its sweeping scope (which enables it to reach many people, most of them well-removed from the source of the message and unknown to it), and the

condition of those who practice journalism as a profession (communications professionals upon whom the recipients of the message to a large extent rely for their information.). The implication here is that freedom of expression has two aspects: on the one hand, it is a fundamental right, connected to the other basic rights and plays a role in social life as a whole. But freedom of expression can also be viewed from a "functional" perspective, having to do with the service that it provides and that enables the existence, survival, exercise, development and guarantee of other rights and freedoms.

5. Other rights suffer, weaken or disappear when freedom of expression is eroded. The protection of life and liberty, preservation of integrity of person, respect for property, and access to the courts: all these owe much to freedom of expression manifesting itself as criticism or a power to denounce, which is an individual and collective imperative. Authoritarianism tends to wield its power against freedom of expression as a means to forestall revelation of the truth, to silence differences, to dissuade or frustrate voices of protest and, in the end, to negate the pluralism that is one of the distinctive features of a democratic society. Hence, society's "democratic senses" must be constantly alert so as to prevent and combat any violation of freedom of expression which might bring with it, sooner or later, other forms of oppression.

2. Limitation of and restrictions on the enjoyment and exercise of freedom of expression.

6. Although the instant case did not occur against a backdrop of authoritarianism, it does bring to mind issues that are both relevant to and important for freedom of expression and, by extension, its institutions and practices in a democratic society. It also draws attention to some of the issues that are at the heart of the contemporary debate. One of these is how to resolve the conflict between legally protected interests and rights, on the one hand, and what constitutes a legitimate reaction to what happens when boundaries are crossed and the exercise of one encroaches upon the other. Of course, this is hardly unexplored territory. Indeed, these topics have been under constant study. The highest national courts and international courts have heard cases involving the exercise of freedom of expression as opposed to other rights and freedoms equally deserving of recognition and protection. The deliberations on the questions raised here have not always resulted in unanimous conclusions. There are, in this area, unfinished deliberations and settlements pending.

7. The judgment adopted by the Court, with which I am in agreement, takes into account, on the one hand, the duality of freedom of expression to which I alluded earlier; but it also considers the limits on the exercise of freedom of expression. The proclamation of the basic rights of man as statute marked the advent of modern man: no longer vassal, but a citizen and *titulaire* by the mere fact that he is a human being. But the proclamation of the basic rights of man occurred in conjunction with another resounding declaration embodied in the very same documents: that an individual's rights stop where another's begin. One is *titulaire* of rights and exercises them, on condition that the *titularite* and exercise of those rights do not deny other fellow citizens of the *titularite* and exercise of their own rights. This boundary, announced in the classic declarations and preserved in modern-day instruments, is

expressed in various concepts: the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy, to use, by way of example, the language of the American Declaration of the Rights and Duties of Man (Article XXVII) and echoed in the Pact of San José (Article 32(1)).

8. From this dialectic, which is a constant in social relations and an ever-present issue before the courts, comes the limitation or restriction on the enjoyment and exercise of rights and freedoms. These restrictions “may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established” (Article 30 of the American Convention). The rules for interpreting treaties, with the special importance they have in the case of human rights, strive for maximum and optimum respect for and enforcement of rights and freedoms, in keeping with the object and purpose of the corresponding treaty. Hence, limitations must be understood and applied by a narrow criterion and by the strictest standards of reasonableness, opportunity and moderation. This point, too, is explored in international case law and echoed in the decisions of the Inter-American Court.

9. Apart from the regime of generic limitations that pertain to various rights and freedoms, the Convention adds specific limitations in the area of freedom of thought and expression, as is evident in Article 13, paragraphs 2, 4 and 5. The Court has put together a careful formula concerning the admissible restrictions in this case, which can be used as a rule of thumb when assessing the restrictions that domestic legal systems establish. In *Advisory Opinion OC-5/85, on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, of November 13, 1985, this Court pointed out that the “necessity and, hence, the legality of restrictions imposed under Article 13(2) on freedom of expression, depend upon a showing that the restrictions are required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts the right protected must be selected. Given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees. Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected by Article 13 more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.” (para. 46)

3. The criminal law reaction

10. And so, one accepts the possibility and even the necessity of reacting in ways that keep everyone's rights and freedoms intact and that therefore punish those who cross boundaries and in so doing violate the rights and freedoms of others. This is the bedrock of the system of responsibilities, in its various aspects, with the corresponding list of sanctions. By selecting the lawful options wisely, a balance is struck that discourages anarchy and authoritarianism.

11. Not infrequently the freedom of expression protected under Article 13 of the American Convention comes in conflict with, or seems to come in conflict with, other rights, such as the rights to privacy, honor, dignity, and to the presumption of

innocence. Article 11 of the Convention alludes to the right to have one's honor respected and one's dignity recognized. The potential is there for a collision of protected rights, a collision that has particular connotations when it is freedom of expression exercised through the mass media, with the enormous impact they (the media) have, the power they represent and the effect that they can have, for that very reason, on the lives of persons, their integrity and the preservation of their legally protected interests. When such a collision cannot be averted, an authority must intervene to correct the inequity, demand accountability and impose the measures that follow from the responsibility incurred. This is where the "necessity" comes into play. Identifying the interests that need to be protected, weighing their importance in the democratic scheme of things and selecting the proper means to protect them are not always a simple matter.

12. In the case brought to the Inter-American Court's attention, resulting from the publication of certain articles in "*La Nación*" newspaper in Costa Rica, written by journalist Mauricio Herrera Ulloa, it was argued that criminal sanctions had to be considered as a means to punish what was alleged to be unlawful conduct in the practice of journalism, conduct that, it was claimed, caused harm to private persons. From the beginning, this position necessitates an examination of the crimes alleged and how they were interpreted in trial. This examination raises the problem of malice in general, and the specific malice that must be present when crimes against honor are involved. It also raises the matter of the *exceptio veritatis* as a possible grounds for preclusion of punishment –either because the conduct did not fit the crime, or because of justification or lack of culpability, depending on how that possibility is dealt with in the positive law systems and the position that the doctrine takes on the subject. Then, too, all this raises questions concerning the so-called presumption of innocence, or to be more rigorous, the principle of innocence that governs and tempers the treatment of the accused under criminal law and procedural law.

13. Seen from this perspective, the following must be said: a) that in order to be classified as a punishable offense for the improper exercise of freedom of expression, the following must be present: specific malice to discredit a person's reputation, to damage his good name or prestige, to cause harm to the passive subject, and to not to confine oneself to predicting and suggesting a certain outcome; b) in democratic systems, criminal law rightly lays the burden of proof on the party making the accusation, not the party who, as the accused, denies the charge based on the principle of presumption of innocence; c) that if the principle of *exceptio veritatis* is statute, then it ought not to reverse the burden of proof which would confound the evidentiary consequences of that principle; and d) that the practice of the journalism profession involves rights and duties vis-à-vis information –among them certain obligations of prudence and care, as is true of any profession. The practice of journalism is provided for and protected by the law, inasmuch as journalism is a social interest that the State protects; there may, therefore, be a premise for preclusion of crime on the grounds that the conduct is permissible if it meets the conditions set forth in the law regulating this preclusion, conditions similar or identical to those required in the case of other grounds for justification. Of course, the boundaries of the duty to be cautious must be established thoughtfully. The fact that the duty exists does not mean that the obligatory caution needs to exceed the boundaries of what is reasonable. Otherwise, journalists would feel overly inhibited and silence would take the place of the free flow of ideas.

14. Before settling on how best to classify these behaviors as criminal offenses, one first has to decide whether the criminal law avenue is the one best suited to getting at the crux of the problem –in a manner consistent with the conflicting rights and interests and with the implications of the alternatives available to the lawmaker- or whether some other avenue, such as administrative or civil law, for example, might be the better juridical response. Indeed most infractions are not addressed as matters of criminal law or through criminal courts, but through measures of other kinds.

15. At this point in the analysis, it is worth recalling that as a rule, save for some digressions into authoritarianism -all too many and unfortunately not yet on the decline, the current thinking favors the so-called minimalist approach to criminal law. In other words, moderate, restricted, marginal use of the criminal-law apparatus, reserving it instead for only those cases when less extreme solutions are either out of the question or frankly inadequate. The power to punish is the most awesome weapon that the State –and society, for that matter- has in its arsenal, deploying its monopoly over the use of force to thwart behaviors that seriously –very seriously- threaten the life of the community and the fundamental rights of its members.

16. In an authoritarian political milieu, the criminal law solution is used frequently: it is not the last resort; it is one of the first, based on the tendency to “govern with the penal code in the hand,” a proclivity fostered by blatant and concealed authoritarianism and by ignorance, that can think of no better way to address society’s legitimate demand for security. The opposite happens in a “democratic environment”: criminalization of behaviors and the use of sanctions are a last resort, turned to only when all others have been exhausted or have proven to be inadequate to punish the most serious violations of important legal interests. Then, and only then, does a democracy resort to punitive measures: because it is indispensable and unavoidable. Even so, classifying behaviors as criminal offenses must be done carefully and by rigorous standards, and the punishment must always be tailored to the importance of the protected interests, the harm done to them or the peril to which they are exposed, and the culpability of the perpetrator. The lawmaker has a number of useful options available to choose from, as does the judge. Of course, a distinction has to be made between the “real need” to use the criminal law system, which must have a clear, objective basis, and the “false need” to do so because the authorities have been ineffective in doing their job and then pretend “to correct” the problem by unleashing the repressive machinery.

17. Reserving the criminal law forum for as few cases as possible must not be interpreted to mean that illegal conduct is justified or that impunity is authorized, allowing the offense to go unanswered. Were the State to do so, it would be remiss in its obligations *vis-à-vis* the victim. It simply means redirecting the juridical response into a forum where the offenses can be adjudged reasonably and the perpetrators punished appropriately. This alternative allows the State to address, in an appropriate manner and at less social cost, the need to preserve cherished but apparently conflicting interests, without resorting to unnecessary and by extension excessive punishments, while also ensuring that those who engage in unlawful behavior will receive the condemnation they deserve. In short, decriminalization does not mean license or impunity.

18. This way of dealing with unlawful conduct seems particularly appropriate in the case of (some or all) offenses against honor, good name and the prestige of private persons. The civil law court can be used to achieve the same results that one

might hope to get through the criminal court, without the risks and disadvantages that the latter poses. In fact, a conviction in civil court is in itself a statement that the conduct in question was unlawful, a statement no less emphatic and effective than a conviction in criminal court. Although the forum may be different in name, it can arrive at the same finding that a criminal law court would: i.e., that the respondent's behavior constituted wrongful conduct detrimental to the plaintiff, who has the law and reason on his side. Thus, the civil verdict itself becomes a form of reparation that serves to redeem the honor and good name of the person seeking the court's protection. In a number of its judgments, including the judgment in the *Case of Herrera Ulloa vs. Costa Rica*, the Inter-American Court underscored the importance of the judgment itself as a means of reparation or moral satisfaction. Furthermore, a civil judgment can order payment of moral damages and, where appropriate, pecuniary damages to redress the harm caused to the person who was defamed. So a civil judgment provides two types of reparation that are of greater interest to an aggrieved party and social satisfaction in the form of the court's censure of the unlawful conduct.

19. And so, this solution should be –and in fact has been– given serious consideration, *de lege ferenda*, as a substitute for the options under criminal law when a journalist is on trial for offenses against honor in the practice of his profession. Naturally, bases of justification, under civil and criminal law, resulting from the exercise of a right or the performance of a duty in accordance with the standards of journalism would remain intact. When such justification is present, there can be no liability. Obviously, the civil solution does not pose the same problems that the criminal law solution poses vis-à-vis domestic and international human rights standards, nor does the civil law solution have the intimidating effect that the criminal law solution has. As the Court has pointed out, the criminal law solution can ultimately inhibit the exercise of freedom of expression.

20. In seeking alternative solutions, which should ideally yield “the” reasonable solution to this matter, it is worth recalling that in some cases, provision has been made to punish, as criminal offenses, the repeated commission of illicit acts initially punishable under civil or administrative law. In such cases, the repetition of the offense implies aggravation of the wrongdoing, to the point that it moves from the realm of civil or administrative law into the realm of criminal law and is punishable with measures provided for under criminal law. There may have been other less drastic options to find a solution, which many of us would consider preferable: to resolve in the civil courts the excesses committed through the mass media, by professionals in the information business. This proposal does not necessarily mean either the exclusion or the inclusion of all possible offenses against honor. Several legal systems have opted to remove this from the realm of criminal law, to allow it to be solved by civil and administrative means.

21. When the Court heard this case, it learned about a bill in Costa Rica on the subject of freedom of expression and freedom of the press, which would introduce changes into the Penal Code and the Code of Criminal Procedure and in the Press Act. This bill points up the existence of a school of thought that believes that certain provisions closely related to the subject of freedom of expression need to be amended. Under the bill, which the Court is not called upon to address in the case *sub judice*, certain grounds for preclusion of the crime related to behaviors of the kind that the present case involves would be added to Article 151 of the Penal Code. These include situations such as “publication or reproduction of information or value judgments on matters of public interest that offend honor or public reputation, that

have been aired by other mass media, by news agencies, public authorities or private persons with authoritative knowledge of the facts, provided the publication always indicates the source being cited" (paragraph 2); or the situation when an "unfavorable opinion is expressed in discharging a duty or exercising a right, provided that the *modus operandi* or the lack of discretion, when discretion was in order, do not establish the presence of an intent to offend" (paragraph 4).

4. Protection of honor. Public interest and status as a public official

22. Given the particulars of the instant case, the Court's judgment has addressed some aspects of the conflict between freedom of expression, exercised in journalism for purposes of reporting, and the right to a good name, to dignity, honor, privacy of the person alluded to in the press report. In the instant case, a distinction has been drawn between the situation of a public official and that of the ordinary citizen who is not performing any function by mandate of or on behalf of the State.

23. Among the central purposes of the information required by citizens and provided by the mass media is one that concerns "*res populi*", understood in a broad, contemporary and "realist" sense to mean that "everyone can know that which of interest to everyone." There is a legitimate interest in knowing what is of interest to society as a whole, what impacts the functioning of the State, what affects general interests or rights, and what has important consequences for the community: all that engenders a legitimate use of freedom of expression for informative purposes. The business of government –and more broadly the activities of the State through its various organs- are not inconsequential to the everyday citizen and knowledge of the business of government should not be beyond the reach of that everyday citizen. Democracy is built upon a duly informed public, which steers its way of thinking and makes its decisions on the basis of that information. Information about the business of government should be much more readily available than strictly private information about an individual's personal or private life that does not cross over those strict boundaries. Indeed, the business of government is one of the natural domains for so-called "transparency."

24. In today's complex, heterogeneous, developed society, which operates under the influence of a variety of social, political and economic agents, that public "zone of interest" is not confined to what might be formally classified as "state," "governmental," or "official." It extends far beyond that, as far as the public interest demands. The situation and decisions of private persons are not affected just by the formal acts of the State: other agents can exert a powerful and even decisive influence on the lives of private individuals. We cannot disregard another sensitive and important aspect here: the distortions that the information can contain and the abuses of power –formal and informal- that can be concealed through the dissemination of news and the expression of thought.

25. It has never been asserted that public officials, because they are public officials, lose the right that all persons have to protection of their honor, good name, reputation, personal and private life. However, the life of a public official – understood in the broad sense- does not have the clear boundaries, if any boundaries at all, that a private citizen has in his life. In the case of a public official it will not always be easy to distinguish between private acts and public acts; or between personal acts that are of no public importance, relevance or interest, and the personal acts that are of public importance, relevance or interest. The difficulty

in establishing the boundary does not mean that a strictly private zone does not exist, one that is legitimately removed from public scrutiny.

26. When analyzing this point, which has been examined and debated time and time again, one cannot ignore the fact that a public official can use the authority or influence he has, precisely by virtue of his position, to serve private interests, his own or those of third parties. Where this kind of accommodation of private interests exists, it ought not to be beyond the realm of collective democratic scrutiny. Otherwise, it would be an easy matter to erect artificial borders between “public and private” matters, as a means of removing private acts or situations that rely on the individual’s position as a public official from that democratic scrutiny. The “umbrella of protection” of someone who has agreed to serve the republic, in the broad sense, is lower than someone who has not (just as it is lower in the case of those who have sought to put themselves in the public eye and thus permitted broad public access). Again I must emphasize: the umbrella is there, of course; however, it is different from the one that protects the citizen who has not taken on the position and the responsibility of someone in public office who, for that very reason, has certain obligations –ethical and legal- vis-à-vis the society he serves or the State that manages society’s interests.

27. To put it another way, the republic heeds –as well it should- the manner in which its public officials represent it, serve its interests, perform the functions inherent in the office conferred, and exercise their authority, the influence or the advantages that that representation or those offices represent. The trust that society invests –directly or through the appointments that certain organs of the State make- is not a “blank check”. It rests upon and is renewed upon a rendering of accounts. That rendering of accounts is not given in some solemn, periodic ceremony; it is given in service, through reports, explanations, vouchers. Obviously, the exercise of that public scrutiny through the information made available to the public is not without its responsibilities: in today’s world, no one is *legibus solutus*. Democracy does not mean transferring abusive exercise of power from someone’s hands to someone else’s, who would be free to do whatever he wanted. However, I already addressed the issue of accountability and the way to exact it.

5. Recourse to a higher judge or court

28. The *Judgment in the Case of Herrera Ulloa vs. Costa Rica* raises other issues that I would like to examine in this Opinion. One is the remedy attempted to challenge the court ruling that went against the victim. As to the minimum guarantees to which the accused shall have a right, the American Convention provides that every person accused of a criminal offense shall have “the right to appeal the judgment to a higher court” (Article 8(2)(h)). This is one of the ingredients of due process, which the Court recognizes as applying to trials of all types, not just criminal trials. In my view, this “right to appeal” may also apply to the system of judicial protection provided for in Article 25 of the Convention, if it is understood that the recourse or remedy to which Article 25 refers, which has an essence of its own that distinguishes it from the proceeding to which Article 8 refers, must also conform to the system of due process of law, with everything that implies.

29. The dual instance system is well known, although the second instance is perhaps more common in some places than in others. The purpose of that second instance is to re-examine the material heard in first instance and to confirm, modify or vacate the lower-court decision on the basis of that re-examination of the facts.

Review of the final judgment, i.e., the one delivered by the court of second instance, is also a possibility; in some cases there is a legal time frame in which review may be requested, in some cases not; the request for review is in the form of a challenge to review the judgment to test whether it was delivered in accordance with the law that was to be applied, the case being *error in judicando* and *error in procedendo*. In criminal law, there is another possibility, which is the extraordinary appeal, which authorizes, in a limited number of circumstances, reconsideration and eventual nullification of a conviction and sentence currently being served: proof that the person that the convicted person is said to have murdered is still alive; a finding that the public document that was the sole evidence upon which the conviction was based was false; conviction of two persons, in separate cases, when it was impossible that both committed the crime, and so on. Obviously, this exceptional remedy is not one of the ordinary remedies for challenging a definitive criminal conviction. Neither is the remedy by which one challenges the constitutionality of a law.

30. Here, we ought to ask ourselves what can be required of the appeal mentioned in Article 8(2)(h), from the standpoint of the maximum protection of the individual's rights and, therefore, in keeping with the principle of presumption of innocence to which the accused is entitled until a final judgment is handed down, and of the right to formal and material access to justice, which demands issuance of a "just" verdict (even if it is for conviction, although with a punitive content different from what the appropriate one seemed to be at first glance). Is this a limited review that could disregard factors that were truly relevant to determine the accused' criminal responsibility? Ought we to content ourselves with a limited review, that examines only certain aspects of the conviction, but must relegate others into some dark territory that cannot be entered, even though one might find there the motives and reasons that could prove the accused' innocence?

31. The answer is obvious from the way in which the question is posed. The goal here is to protect the human rights of the individual, one of which is not to be convicted unless and until the commission of an offense punishable under criminal law has been proved and the accused' guilt under the law has been proved. It is not merely a question of preserving the integrity of the process or the verdict. Therefore, recourse to a higher court or judge –which would have to outrank, in the area of competence and jurisdiction, the court whose decision is being challenged– must allow that higher court or judge to get into the merits of the case, examine the facts alleged, the defense's counter-arguments, the evidence taken, the weighing of that evidence, the laws invoked and their application, even for such matters as identifying the punishment or measure (which includes the pertinent substitution), and whether that punishment is just given the severity of the crime, the legally protected interest affected, the culpability of the agent and other facts that go into determining what the punishment should be (extenuating or aggravating circumstances or other information that steers the court to a reasoned conclusion).

32. Obviously, those needs are not met with a narrow, "phantom" remedy, much less when the system offers no remedy at all, which some legal systems do not in the case of crimes regarded to be of much less importance and in regard to which court proceedings are very abbreviated. Affording the accused all the benefits of a substantive defense is the best way to ensure a just outcome, rather than rely on technicalities, which are hardly the best way to achieve justice. Therefore, to fully satisfy these needs, the system for appealing grievances to a higher court has to be adopted and expanded. The errors and shortcomings of an incompetent defense would be sorted out by the court, and justice will have been well served.

33. In the judgment delivered in the *Case of Castillo-Petruzzi*, one Judge of the Court produced a Concurring Opinion in which he alluded to this matter (and others), although he did so in reference to a military court system that had failed to respect the right of appeal: "that the victim's right to a court of second instance was not respected (because the courts that heard the case on review) did not function as tribunals that re-examine all the facts in a case, weigh the probative value of the evidence, compile any additional evidence necessary, produce, once again, a juridical assessment of the facts in *question based on domestic laws and give the legal grounds for that assessment.*" (*Concurring opinion of Judge Carlos Vicente de Roux Rengifo, in the Judgment on the Case of Castillo-Petruzzi et al., May 30, 1999*).

34. In the instant case, the remedy of cassation was used, as it is the only one that the Costa Rican procedural system provides, since the remedy of appeal –which is what the court of second instance is for- was done away with. The Court is not unmindful of the important role that the petition of cassation has had in its long history, or of how effective it has been and is to this day. However, as a rule, it is a complicated challenge procedure and not always available as a remedy for everything that is justiciable. The Court has considered the universe of issues that, under positive law, are covered by a cassation system and therefore subject to the material jurisdiction of the higher court. In the instant case, cassation does not have the scope that I described in paragraph 30 above and to which the Judgment of the Court referred to confirm the scope of Article 8(2)(h) of the American Convention. It is possible that elsewhere, where the petition seeking a writ of cassation has developed differently, it may well cover points that an appeal would ordinarily address, as well as a review of legality which is the essential function of cassation.

35. I am, of course, aware that this raises important problems. There is a strong and respected trend, embodied, for example in the excellent Model Code of Criminal Procedure for Ibero-America put together by a select group of jurists, that favors doing away with the traditional two-tiered system, leaving review of judgments solely in the hands of the court of cassation. This position argues, *inter alia*, that two-tiered systems –a lower court and an appellate court- are costly and that the principle of procedural immediacy has to be preserved. Appellate courts do not always observe that principle, as we customarily understand it. To retain the advantages of the two-tiered system where a case is heard first by one judge and then by a collegiate body whose members collectively represent an added guarantee of a just outcome, the option that would do away with the two-tiered system would have a collegiate bench for the one court that hears the case before it goes to the court of cassation.

6. Tax exemptions

36. The *Judgment in the Case of Herrera-Ulloa* raises two other questions that I would like to briefly touch upon, although they have no bearing at all on those previously discussed. One has to do with the practice of ordering that none of the pecuniary reparations, expenses and costs ordered may be subject to any existing tax or any tax legislated into law at any time in the future. I understand and agree with the material sense of that order, and have therefore voted in favor of this clause: the idea, of course, is not to allow tax laws to eat into the reparations ordered, and thus defeat the purpose of pecuniary damages and leave the victim's rights unprotected.

37. However, on previous occasions I have observed –and do so again in this opinion– that the very same end can be achieved through less controversial means. The solution that the Court customarily uses in its orders presupposes an alteration to the State’s tax system: a tax exemption that may be complicated and impractical. The same end can be achieved by some other means. One alternative would be to order that the agreed upon sums shall be “liquid” or “net” of taxes. So long as the amount ordered by the Court is covered, the State could make allowance for taxes owed by using a subsidy or by adding something to the amount ordered by the Court so that, once the deductions for taxes required under tax law have been made, the amount owed and paid is precisely the amount that the Court ordered in its Judgment.

7. Expenses and fees of legal counsel

38. This case is the first time that the Court has ruled that the amounts owed to third parties in the form of expenses and fees for those who provided the victim’s legal counsel, would be handed over directly to the victim, so that the victim –and not the Court- would apportion that sum as he saw fit and with that satisfy any obligations that he may have incurred or as equity dictates. It was with the *Judgment on Reparations in the Case of Garrido and Baigorria*, of August 27, 1998, that the Court established certain criteria regarding the amounts owed to those who provide that assistance, which is unquestionably of the utmost importance. The function of providing international protection of human rights would be a difficult one without the efficient services so frequently rendered by professionals who are the advocates, both domestically and internationally, of the victim’s rights. They are an important –and sometimes even decisive- ingredient in the activities aimed at enabling access to justice.

39. To assess costs and expenses in the present judgment, one of which is for the legal counsel to which I alluded in the preceding paragraph, the Inter-American Court deemed it appropriate to take into account not only the receipts and vouchers provided –which in many cases is virtually impossible to do in the manner that rigorous accounting practices require- but also the particular circumstances of the case, the characteristics of the respective proceedings and the nature of the jurisdiction for the protection of human rights, which is so very different from what one would find, for example, in the case of strictly financial matters. When the time came to set costs and expenses, therefore, the Court dismissed the idea of setting attorney’s fees as a percentage of the compensation obtained and held that there were other factors to consider, such as “the evidence introduced to demonstrate the facts alleged, full knowledge of international jurisprudence and, in general, everything that would demonstrate the quality and relevance of the work performed.” (par. 83).

40. The Inter-American Court’s finding was that while it must recognize the victim’s need to acknowledge the assistance he has received and the expenses that have been incurred to provide that assistance, it is not the function of the Court to assess the performance of the legal advisors and to order that payment be made to them directly. This has to be decided by the person who retained their services and who was at all times abreast of their work and their progress. The Court did not order direct payment of fees to physicians who attended the victim, or payment of any other considerations to certain parties. It is the victim, using the sum that he receives, who can best determine what is owed or what is equitable. The contract was made between the victim and his advisors, directly and of their own free will,

and the Court has no reason to intervene in the matter by setting a value on the amount owed to each. What the Court has to do –as it has in this case, invoking the principle of equity- is to provide for the considerations herein mentioned, take them into account when deciding the compensation, and let the victim make the decisions and determinations that are his.

Sergio García-Ramírez
Judge

Pablo Saavedra-Alessandri
Secretary