CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ IN RELATION TO THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE *CASE OF ESCHER ET AL. V. BRAZIL* OF JULY 6, 2009.

1. Issues that are new – for this jurisdiction – are being submitted to the Court so that they can incorporate the wide-ranging list of topics on which it works to the benefit of the rights and freedoms of the inhabitants of the Americas; a constantly evolving case law. Evidently, many questions that are of interest to the situation of the contemporary individual are still pending review and have not yet been submitted to the Court's consideration in either advisory opinions or litigation. However, new issues that open up spaces for reflection and protection have been added with growing frequency to the traditional offenses that were the starting point for this case law, including some issues that the Inter-American Court examines in the judgment in *Escher et al. v. Brazil*, to which I am adding this opinion.

2. Together with life, integrity and freedom, the wide-ranging domain of privacy is among the most important rights. This is the region of our existence that the legal human rights system – both the domestic system, described in constitutional provisions, and the international system, consigned in international human rights law – protects from undue interference. This is a space controlled by the individual alone, in which the individual ensures – or trusts – his development, shapes his destiny, cultivates his freedoms. It constitutes a very personal "reserved area" that is only entered by its owner, who preserves and regulates it. This sphere – according to the Court – "is characterized by being exempt from and immune to abusive or arbitrary invasions or aggression by third parties or the public authorities (paragraph 113 of the judgment).

3. In this intimacy – area and shield of protection – many issues of life appear, are analyzed and resolved; protected – always relatively – from outside circumstances and protected from the will of others. In brief, it is the reserved space in which the reflections and decisions, thoughts and feelings, experiences and hopes that will, in due course, influence the conduct and fate of the individual, take refuge. It is where the essential individual resides, alone and free: in front of the mirror in which he looks at himself, removed from examination by others.

4. Evidently, the invasion of the reserved zone confers an immense power on the invader and profoundly affects the autonomy of the person who suffers it. Clearly, it is of interest to preserve and develop all the rights of the increasing status of the individual, but none of them will be sufficient and robust enough, if they are not rooted in the intimacy of the owner of the rights. Hence, the importance of preserving this profound region of the personality with effective guarantees, and hence also the growing temptation, cultivated by authoritarianisms of different types – open or veiled despotism – to breach the frontiers of intimacy, take over the reserved zone, submit it to scrutiny and, based on the knowledge and the invasion, take charge of the fate of the individual. This is the foremost, the most effective and expeditious way to rule the thoughts and the will. The power to know, to intervene, to influence, to decide, without the individual authorizing, wanting or even knowing it, is advancing on the right to be "left in peace" – or left alone, free to ruminate, protected from obligations and demands. Often, the invader works clandestinely.

5. Scientific and technological progress – to which the judgment in the *Case of Escher et al.* refers – provides instruments of protection, but can also make the individual vulnerable, inasmuch as it provides means or tools for invasion that, a few years ago, we

could only surmise. If, in other times, “possession” by fantastic powers was feared, today, a “modern” version is practiced which has nothing to do with fantasy; by ever more complex, penetrating and invasive means. This desecrates the “inviolable sanctuary” of the individual, dissolves intimacy, opens up the reserved zone to the eyes and ears of the world; in brief, influences the entire course of existence. The individual, who is exposed, weakened, by the undue visibility, robbed of autonomy, is placed at the mercy of the observer. In sum, the all-seeing mechanism is updated – “big brother is watching you” – the probing, all-embracing look, respects no frontiers. The observers look, listen, inquire, invade and, finally, dictate. If free rein were to be given to the interferences associated with the development of technology, it would be a “fatality” derived from progress, not a benefit subject to regulation and control.

6. We reject the furtiveness with which the tyrant hides his intolerable arbitrariness. We condemn the secrecy that shrouds the symbols of authoritarianism. We censure opacity in the exercise of public authority. We demand – and we are achieving, step by step, based on the argument of human rights – transparency in the acts of Government and in the conduct of those who govern us. All well and good; but, beside this legitimate clarity another type of surveillance lies in wait and advances: this one does not throw light on the conduct of those who govern, but invades the intimacy of those who are governed, through the actions of the former who, in this way, extend their arbitrary powers and annul or dissuade, without violence or upheaval, the exercise of the freedoms.

7. Hence, there is a right to privacy, to intimacy, to the inviolability or integrity of that reserved zone– the deepest and the most secret - in an individual’s existence. It is not merely a matter of protecting the good reputation, the prestige, the honor, the social acceptability of the individual. The right to intimacy – privacy, in the best term – exists with absolute independence of fame, or the social or public position of the individual who has and enjoys it. It is a right in itself, above and beyond the harm caused by the intruder, deliberately or not, to the enjoyment and exercise of other rights, affected by unlawful surveillance or undue revelations.

8. Obviously, these invasions can generate harmful consequences or even involve serious danger to the enjoyment and exercise of other rights. In this case, the harm would be two-fold, as can be seen in the *Case of Escher et al.*, which underscores the violation of the right to intimacy, on the one hand, and its consequence – also a violation – on the right to free and lawful association. Moreover, the unlawful dissemination of the contents of communications increases the violation, extends the damage to private life, and annuls intimacy.

9. It has been rightly said that individual rights are not absolute. They can be restricted, limited, their exercise conditioned in function of higher-ranking rights and requirements: for example, the rights of others or the common good. However, this frontier of the individual rights only cedes under the justifying and regulating control of certain principles, precisely those that the Inter-American Court has explored, with particular care, when they refer to legitimate restrictions to the right to freedom, for example, through precautionary measures: legality, necessity (and even, inevitability; the means used must be the only one possible), appropriateness, proportionality, timeliness. No restriction is admissible when these principles are not respected. It must be shown that the public authority has considered the application of each of them in the specific case and that the restriction has passed this test of legitimacy.

10. In the judgment in the *Case of Escher et al.*, the Inter-American Court examined the issue of telephone interceptions on the basis – real or apparent – of a criminal

investigation. Obviously, the protection of privacy is not limited to this matter. It goes much further than the illegal listening to private conversations by third parties. But this listening and the subsequent dissemination are the specific issue of the *Case of Escher et al.* The Court in no way criticizes the public authority's interference in the space of individual liberty, the intimate and reserved zone, normally removed from unknown invasions or inferences, unauthorized and unwanted by the owner. It accepts the possibility of carrying out certain interventions, as it accepted, for a long time, the invasion of the home – the "inviolable sanctuary" – correspondence, and movement.

11. Nevertheless, the acceptance of this interference is conditioned by strict requirements that mark the frontier – in a democratic society – between the legitimate exercise of authority and the intolerable abuse of power. Those principles enter into play that legitimate the conduct of the authority, and their inobservance entails a violation of rights and involves the responsibility of those who fail to observe them. Evidently, the requirements that regulate the intervention in an individual's privacy restrict the revelation of the findings derived from this intervention. Basically, intervention and revelation are the two sides of a single coin: invasion of private life, lawful or unlawful. The legitimate purpose that could justify the interception – or the interference in spaces of private life – ceases in the face of the unlawful dissemination of information that should have been known only by the authorities and safeguarded by them.

12. It is important that these issues have been brought to the fore by the ruling of a human rights court because, nowadays, interferences with privacy are increasing, as the ways to practice them multiply. And these ways do not always respect the principles set out above, in accordance with strict procedures and under the control of the authorities who should ensure protection of the rights – especially the judicial authorities – all based on the discourse that compares, in a false antithesis, public safety and fundamental rights. This inadmissible and dangerous rhetoric – which must be denounced constantly – proposes the decrease of right on the pretext of safety, or threatens the reduction of safety because of rights. On several occasions, I have challenged – and I do so again – this false dilemma, which jeopardizes the rule of law and the fundamental rights, and entails harm or danger to all.

13. To defend their excesses, the "classic" tyrants – allow me to use this expression – who oppressed many countries in our hemisphere, invoked reasons of national security, sovereignty, public peace. Based on this reasoning, they wrote their chapter in history. There was clearly an ideological component to their reasoning; there were powerful interests operating behind them. Other, more recent, forms of authoritarianism, invoke public safety and the fight against crime to impose restrictions on rights and to justify the infringement of freedom. With a biased discourse, they attribute the lack of security to the constitutional guarantees and, in brief, to the rule of law, to democracy and freedom.

14. In this regard, we should examine and assess any conduct that impairs the right to privacy, not to leave society unprotected – which would be absurd – but as a guarantee for its members. We have already indicated that there are channels, principles and conditions for restricting rights. Outside those channels, in the margin of those principles, without respecting those conditions, only authoritarianism prospers. We have not left the Orwellian "1984" behind us, even though the calendar may say so. It could be before us.

Sergio García Ramírez
Judge

Pablo Saavedra Alessandri
Secretary