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The IACHR requested Commissioner Víctor Abramovich to prepare this review as a conceptual framework for the process of preparing progress indicators on the economic, social, and cultural rights contained in the Protocol of San Salvador, pursuant to resolution AG/RES. 2178 (XXXVI-O/06), adopted by the General Assembly of the OAS on June 6, 2006. Commissioner Abramovich was able to rely on the support of the Executive Secretariat of the IACHR for this task. Gabriela Kletzel, attorney-at-law, played an active part in the preparation of this review in the framework of the research project on "International Standards on Access to Justice" that she pursues at *Universidad de San Andres* in Argentina.

ACCESS TO JUSTICE AS A GUARANTEE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS. A REVIEW OF THE STANDARDS ADOPTED BY THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

EXECUTIVE SUMMARY

1. International human rights law has developed standards on the right of access to judicial and other remedies that serve as suitable and effective grievance mechanisms against violations of human rights. In that sense, States not only have a negative obligation not to obstruct access to those remedies but, in particular, a positive duty to organize their institutional apparatus so that all individuals can access those remedies. To that end, states are required to remove any regulatory, social, or economic obstacles that prevent or hinder the possibility of access to justice.

2. In recent years, the inter-American system of human rights (the "IASHR" or "System") has recognized the need to outline principles and standards on the scope of the rights to a fair trial and effective judicial protection in cases involving violation of economic, social and cultural rights ("social rights" or "ESCR").

3. Accordingly, the Inter-American Commission on Human Rights (the "IACHR" or "Inter-American Commission") has prepared this review in order to highlight and systematize the case law of the IASHR–both the IACHR and the Inter-American Court of Human Rights (the "I/A Court H.R." or "Court") – on four core issues that it has regarded as priorities for the judicial protection of economic, social and cultural rights: 1) the obligation to remove economic obstacles to ensure access to the courts; 2) the components of due process of law in administrative proceedings concerning social rights; 3) the components of due process of law in judicial proceedings concerning social rights; and, 4) the components of effective judicial protection of individual and collective social rights.

4. These standards are valuable not only as guidelines for domestic courts to interpret the American Convention on Human Rights ("American Convention" or "Convention") but also in terms of their potential contribution for enhancing the institutional framework of social services and policies in the countries of the Americas, as well as for strengthening oversight, transparency, and accountability systems, as well as mechanisms for participation and societal oversight of public policies in this area. This overview of the case law of the inter-American system also makes it possible to have a better analysis of the main problems in the region as regards access to justice systems. Individual cases cannot be considered absolutely representative of the social and institutional problems of all the countries in the region; however, it is fair to say that the petitions system makes a good sound box for these problems.

5. The first issue that affects the right of access to justice in the area of social rights is the existence of economic or financial obstacles in access to the courts and the extent of the positive obligation of the State to remove those obstacles in order to ensure an effective right to a hearing by a tribunal. In this way, numerous aspects connected with effective access to justice, such as availability of a free public defense for persons without means and procedural costs, are of inestimable instrumental value to ensure the enforceability of economic, social and cultural rights. In this regard, it is common for the unequal economic or social status of litigants to be reflected in an unequal possibility of defense in trial.

6. In this respect, the IASHR has recognized the obligation to remove any obstacles in access to justice that originate from the economic status of persons. Both the Inter-American Court and the IACHR have made it an obligation in certain circumstances to provide free legal services to persons without means in order to

prevent infringement of their right to a fair trial and effective judicial protection. With this in view, the Inter-American Commission has identified certain guidelines for determining the propriety of free legal counsel in specific cases. These are: a) the resources available to the person concerned; b) the complexity of the issues involved; and, c) the significance of the rights involved.

7. At the same time, the IACHR has determined that in certain judicial proceedings free legal counsel is necessarily required, in order to present and pursue those proceedings. Thus, the Inter-American Commission has found that the technical complexity of certain constitutional proceedings obligates the provision of free legal counsel in order effectively to institute them.

8. By the same token, the IASHR has established that procedural costs, whether in judicial or administrative proceedings, and the location of tribunals are factors that may also render access to justice impossible and, therefore, result in a violation of the right to a fair trial. The organs of the IASHR have found that a proceeding in which the costs are prohibitive violates Article 8 of the American Convention. In this regard, the Commission has held that judicial remedies created to review administrative decisions must be not only prompt and effective, but also "inexpensive" or affordable.

9. In turn, the IASHR has begun to identify situations of structural inequality that restrict access to justice for certain segments of society. In these cases, the IACHR has underscored the obligation of the State to provide free legal services and to strengthen community mechanisms for this purpose, in order to enable these groups that suffer disadvantage and inequality to access the judicial protective bodies and information about the rights they possess and the judicial resources available to protect them.

10. A second aspect to be considered is the existence of a right to a fair trial in administrative proceedings as well as the precise scope or substance of that right. The administrative sphere is where the majority of decisions regarding the award of social security benefits are made. In most countries in the region social policies and the organization and workings of state social benefits have not usually been guided by a rights-based approach. On the contrary, benefits have mainly been organized and provided according to the inverse logic of the handout approach and for that reason, institutional controls notwithstanding, this area of activity of public administration has traditionally been the preserve of the political discretion of the authorities.

11. In this way, the IASHR has established its position on the observance of due process guarantees in administrative proceedings on social rights. At the same time, it has underscored the obligation for states to establish clear rules governing the behavior of their agents in order to avoid inappropriate levels of discretionality in the administrative sphere that might encourage arbitrary or discriminatory practices.

12. In this way, in their examinations of cases that concern, *inter alia*, economic, social and cultural rights, rights of indigenous peoples, rights of migrants, and environmental rights, both the IACHR and the Inter-American Court have developed a clear standard as regards the full applicability of the guarantee of due process of law in administrative proceedings. Thus, both organs have determined that due process of law must be observed in all proceedings for the determination of obligations and rights.

13. In keeping with this notion, the IASHR has underscored the need to regulate and restrict state discretionary power. The Court and the IACHR have determined that the activities of administrations are subject to specific limits, among them respect for human rights. In cases that involve especially vulnerable groups, the

Inter-American Court has identified the need to draw links between the scope of administrative due process and effective observance of the prohibition of discrimination.

14. The IASHR has begun to identify the elements that comprise the rights to a fair trial in administrative proceedings. In this connection, the Inter-American Commission has considered that one of the elements that make up administrative due process is the guarantee of a hearing for the determination of the rights at issue. According to the IACHR, that guarantee includes: the right to legal assistance; the right to exercise the right of defense; and the right to a reasonable time in which to prepare and formalize arguments, as well as to seek and adduce the corresponding evidence. The Inter-American Commission has also concluded that prior notification of charges is also a core component of that guarantee.

15. The IACHR and the Court have also pinpointed the right to a reasoned decision on merits and the need to ensure publicity of administrative proceedings as integral components of due process. Furthermore, the IASHR has underscored the importance of the right to an administrative proceeding in a reasonable time. The Inter-American Court has determined that a prolonged delay in an administrative proceeding constitutes, in principle, a violation of Article 8 of the Convention and that, in order to refute such a conclusion, it is up to the State to show that the delay in the proceeding was due to the complexity of the case or to the conduct of the parties.

16. Another element of the guarantee of due process of law in administrative proceedings that has evolved in the framework of the IASHR is the right to judicial review of administrative decisions. In this respect, the IACHR has determined that any law or measure that obstructs access to the courts and is not warranted by what is reasonably needed for the administration of justice must be regarded as contrary to Article 8(1) of the Convention. The IACHR has also made a number of clarifications as to the appropriate extent of this review, and stated that there should be at least a basic judicial supervision of the lawfulness and reasonableness of administrative decisions, in order to ascertain that they are compatible with the guarantees enshrined in the Convention.

17. The third aspect examined in the case law of the IASHR is the existence of clear criteria on due process of law in judicial proceedings, in cases concerning the determination of economic, social and cultural rights. The case law of the IASHR has recognized a close link between the scope of the rights embodied in Articles 8 and 25 of the American Convention. Accordingly, it has been determined that states have the obligation not only to design and adopt into law effective remedies for the comprehensive protection of human rights, but also to ensure proper implementation of said remedies by their judicial authorities in proceedings that offer the due guarantees.

18. There is a direct connection between the suitability of available judicial remedies and the real possibility of observance of economic, social and cultural rights. Both the Inter-American Court and the IACHR have started to identify those elements that comprise the right to a fair trial enshrined in Article 8(1) of the American Convention as regards social rights proceedings, which bear certain characteristics that distinguish them from other criminal or civil proceedings, in addition to having a number of features in common.

19. The IASHR has identified the principle of equality of arms as an integral part of the right to a fair trial and has begun to develop standards for its observance and assurance. This principle is a highly significant given that the types of relationships governed by social rights usually give rise to and presuppose conditions of inequality between the parties in a dispute --workers and employers-- or between the beneficiary

of a social service and the State that provides the service. That inequality generally translates into disadvantages in the framework of judicial proceedings.

20. The Court has found that real inequality between the parties in a proceeding engages the duty of the State to adopt all the necessary measures to lessen any deficiencies that thwart effective protection of the rights at stake. The Inter-American Commission has also noted that the particular circumstances of a case may determine that guarantees additional to those explicitly prescribed in the pertinent human rights instruments are necessary to ensure a fair hearing. For the IACHR this includes recognizing and correcting any real disadvantages that the parties in a proceeding might have, thereby observing the principle of equality before the law and the prohibition of discrimination.

21. The *right to a reasoned decision on the merits of a matter* has also been recognized by the IACHR and the Court as an integral element of due process of law in judicial proceedings. Thus, the Inter-American Commission has found that after the stages in which the evidence and arguments are presented, the jurisdictional organs should provide a reasoned basis for their decisions and so determine the admissibility or not of the legal claim on which the complaint is founded. The Court, too, has held that states should ensure that effective judicial remedies are decided in accordance with Article 8(1) of the American Convention, for which reason, the courts should adopt decisions that address the merits of suits brought before them.

22. *The right to a trial within a reasonable time* is another of the components of the guarantee of a fair trial in judicial proceedings that is particularly relevant as regards protection of social rights. The IACHR and the Inter-American Court have identified certain criteria for determining a reasonable time in a proceeding. These are: a) the complexity of the matter; b) the judicial activity of the interested party; c) the behavior of the judicial authorities; d) the purpose of the judicial proceeding in question; and, e) the nature of the rights at issue.

23. In various precedents dealing with economic, social and cultural rights, the Inter-American Commission has emphasized the need to ensure expedition in proceedings on petitions for constitutional relief (*amparo*). The IACHR has determined that *timeliness* is critical to the effectiveness of a remedy and that the right to judicial protection requires that courts act with due dispatch in issuing opinions and decisions, particularly in urgent cases. Accordingly, the Inter-American Commission has underscored that the organs responsible for dispensing justice unquestionably have the obligation to conduct proceedings quickly and promptly.

24. In this way, the IACHR has pointed out that the main criteria in making a determination as to reasonable time in proceedings is not the quantity of actions, but their efficacy.

25. With respect to this right, the IACHR has also found in a number of cases that the length of a trial should be counted from the start of the administrative proceedings, not when the case reaches the judicial stage. While it cannot be said that a definitive standard yet exists on this issue, the case law of the IACHR denotes that the IASHR has begun to adopt a position in this respect.

26. In turn, the organs of the IASHR have indicated that judgment enforcement should also be considered an integral part of the proceeding and that, consequently, it should be taken into account in examining if the length of a trial is reasonable. The foregoing is due to the fact that the right of access to justice requires that all disputes be settled within a reasonable time. This issue is critical because in many social rights cases --particularly in connection with social security matters--

judgment enforcement proceedings have been severely delayed and obstructed by emergency rules and dilatory defense measures in favor of states.

27. The fourth aspect examined by the IASHR is the right to effective judicial protection of social rights. This right creates an obligation for states to provide suitable and effective judicial remedies for the protection of social rights, in both their individual and their collective dimension. The traditional judicial remedies on the law books were conceived for the protection of conventional civil and political rights. Most countries in the hemisphere have created and enacted regulations on simple and prompt judicial remedies to protect rights in serious and urgent situations. However, often these remedies are not adequate for protecting social rights. Sometimes this is due to limits on the standing of groups or collectives of victims of violations, or to bureaucratic delays in judicial proceedings, which render them ineffective. In some cases there are problems in accessing these remedies because the protection does not extend to certain social rights owing to the fact that they are not considered fundamental rights, or because the procedural requirements for their admission are excessively onerous. The IASHR has sought to establish a number of basic principles to be met by urgent protection remedies in order to be compatible with the American Convention. The right to effective judicial protection also requires that judicial procedures intended to protect social rights do not impose conditions or obstacles such as to render them ineffective for accomplishing the purposes for which they were designed. Thus, the IASHR has found that in certain cases there are major obstacles and restrictions to the enforcement of binding judgments against states, in particular with respect to judgments that recognize social security rights. The tendency to invoke emergency laws in this area limits the possibility of states to discharge financial obligations and tends to grant disproportionate privileges to the administration vis-à-vis the persons whose rights have already been recognized by the courts.

28. Article 25 of the Convention establishes the duty of states parties to provide a simple, prompt, and effective recourse for the protection and assurance of rights. Thus, the organs of the IASHR have set about drawing up standards on the scope of that obligation in the area of economic, social and cultural rights. Both the IACHR and the Inter-American Court have identified the need to provide *procedural measures by which to ensure immediate -and even precautionary or preventive- protection of social rights* even though the merits of the matter in question may require more prolonged analysis.

29. The Inter-American Commission has identified certain basic characteristics that such measures should meet in order to be considered suitable by the standards of the American Convention. Thus, it has found that such remedies should be simple, urgent, informal, accessible, and processed by independent bodies; that they can be processed on an individual basis or as collective precautionary actions to protect a particular group or one that is identifiable; that the such remedies enjoy broad, active legitimacy; that individuals have the opportunity to approach federal or national legal entities when bias is suspected in the conduct of state or local bodies, and, finally, that provision be made for the implementation of protective measures in consultation with the affected parties.

30. On this point, the IACHR has noted that inasmuch as such actions are designed to protect fundamental rights in urgent cases, the evidentiary procedures should not be the same as that required in ordinary proceedings; the idea is that measures be adopted within a brief time period for the immediate protection of the threatened rights.

31. At the same time, in recent years the Inter-American Court and the IACHR have also recognized the need for protection of economic, social and cultural

rights, no longer simply in their individual dimension, but also in their collective dimension. In this framework, the IASHR has begun to outline standards on judicial protection mechanisms designed to ensure access to collective litigation and, in particular, on the scope of the obligation of states to make available grievance procedures of this type. The IASHR has clearly evolved in this area insofar as it has expressly recognized the collective dimension of certain rights and the need to draw up and put into practice legal mechanisms in order fully to ensure that dimension. Thus, the greater scope that the organs of the IASHR have recognized to the guarantee provided in Article 25 of the American Convention, in order to include effective judicial protection of collective rights in its framework, is plainly visible.

32. At the same time, of late the case law of the IASHR has also been firmer and more robust in demanding effective observance of the right to effective judicial protection for economic, social and cultural rights in their individual dimension. Thus, for example, the Inter-American Court has recognized the need for states to design and implement effective judicial grievance mechanisms to claim protection of basic social rights, such as the rights of workers.

33. Finally, in recent years, the System has made significant strides in setting standards on the obligation of states to have in place mechanisms to ensure the *effective enforcement of judgments* handed down by the judiciary in each state. In this regard, The Inter-American Commission has taken it upon itself to underscore certain distinctive features of the judgment enforcement process when it is the State that is required to carry out the judgment. In this way, it has noted that the obligation of the State to guarantee the enforcement of judicial rulings takes on special importance when it is the State itself that must carry out the ruling, whether this is to be done through the executive, legislative or judicial branch, at the provincial or municipal level, through the central administration or the decentralized structure, through public enterprises or institutes, or any similar body, since such bodies are part of the State and generally enjoy procedural privileges, such as freedom from attachment of their assets. According to the IACHR, these bodies may seek to use their power and privileges in an effort to ignore judicial rulings that go against them. The Inter-American Commission considers that when an organ of the State is unwilling to carry out an unfavorable judgment, it may try to ignore the ruling simply by failing to observe it, or it may opt for more elaborate methods also with the aim of rendering the ruling ineffective, while trying to maintain a certain appearance of formal validity in the way in which it acts.

34. The IACHR has held on several occasions that failure to abide by a binding judicial decision constitutes a continuing breach of Article 25 of the American Convention. In this regard, the Inter-American Commission has also outlined an incipient standard whereby it has held that non-compliance with judicial rulings that protect social rights, such as the right to social security, may also amount to a violation of Article 26 of the American Convention.

35. At the same time, the IACHR has determined that the right to effective judicial protection requires the implementation of court-ordered provisional measures. Accordingly, failure to implement such measures may also constitute violation of this right.

36. The Inter-American Commission has also forged an important standard regarding the lengths to which victims should have to go in seeking compliance with judicial rulings in their favor. Accordingly, the Commission considered that states should enforce such judicial decisions immediately, without making it necessary for the persons affected to bring additional actions of a criminal, administrative, or any other nature, in order to secure their enforcement.

37. The Commission has also been emphatic with regard to the need to ensure enforcement of administrative decisions. Thus, it considers it necessary for the Administration to have effective mechanisms to ensure compliance with orders issued by administrative authorities.

38. Both the Inter-American Court and the Inter-American Commission have started to develop important standards on the design and implementation of effective judgment enforcement mechanisms. In this connection, the Court has found that State responsibility does not end when the system of justice issues a final judgment and it becomes binding. In the Court's view, from that point forward the State must also guarantee the necessary means to enable effective execution of said final judgment. Indeed, the right to judicial protection would prove illusory if the State's domestic legal system were to allow a final binding decision to remain inoperative to the detriment of one of the parties.

39. In keeping with the foregoing, the Court has considered that to speak of "effective judicial remedies" it is not sufficient for final judgments to be delivered that protect the rights at issue, since the enforcement of judgments should be considered an integral part of the right to effective judicial protection. At the same time, the Court has held that in the case of judgments on guarantee remedies, due to the special nature of the protected rights, states should comply with them as soon as possible, adopting all necessary measures to that end. On that score, the Court has emphatically stated that budget regulations may not be cited as an excuse for a protracted delay in complying with the judicial decisions that protect human rights.

40. Thus, the Court has found that delay in executing a judgment may not be such as to cause greater impairment of the rights protected in the decision and, so, undermine the right to effective judicial protection.

I. INTRODUCTION

41. International human rights law has developed standards on the right of access to judicial and other remedies that serve as suitable and effective grievance mechanisms against violations of human rights. In that sense, states not only have a negative obligation not to obstruct access to those remedies but, in particular, a positive duty to organize their institutional apparatus so that all individuals can access those remedies. To that end, states are required to remove any regulatory, social, or economic obstacles that prevent or hinder the possibility of access to justice.

42. In recent years, the inter-American system of human rights has recognized the need to begin to outline principles and standards on the scope of the rights to a fair trial and effective judicial protection in cases involving violation of economic, social and cultural rights.

43. Accordingly, the Inter-American Commission has prepared this review in order to highlight and systematize the case law of the IASHR–both the IACHR and the Court–on four core issues that it has regarded as priorities for the book that the at the judicial protection of economic, social and cultural rights: 1) the obligation to remove economic obstacles to ensure access to the courts; 2) the components of due process of law in administrative proceedings concerning social rights; 3) the components of due process of law in judicial proceedings concerning social rights; and, 4) the components of effective judicial protection of individual and collective social rights.

44. These standards are valuable as guidelines for domestic courts to interpret the American Convention. Furthermore, they can enhance the institutional framework of social services and policies in the countries of the Americas,

strengthening oversight, transparency, and accountability systems, as well as mechanisms for participation and societal oversight of public policies in this area. This overview of the case law of the inter-American system also makes it possible to have a better analysis of the main problems in the region as regards access to justice systems. Individual cases cannot be considered absolutely representative of the social and institutional problems of all the countries in the region; however, it is fair to say that the petitions system makes a good sound box for these problems.

45. The purpose of this review is to underscore and systematize the principal standards adopted by the IACHR in its reports on individual petitions, country reports, and thematic reports; and by the Inter-American Court in its case law and advisory opinions. The review is intended to be purely descriptive and does not include an examination of the case law mentioned, other than to organize precedents according to common themes and relate the principles and standards adopted to the specific problems and actual situations examined in each case. The IACHR believes that this systematization could help improve understanding and dissemination of its jurisprudence and so serve to guide the application of international instruments in the countries of the region.

46. This review also serves as a basis for the IACHR to draft indicators to measure progress in the area of economic, social and cultural rights with a view to their application by the body created to monitor implementation of the Protocol of San Salvador. In its proposed "Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights" submitted to the Permanent Council of the OAS, the IACHR recommends the inclusion of access to justice indicators, whose design is essentially based on the standards and problems examined in this review.

47. Furthermore, the IACHR believes that this document could also provide the building blocks for a more extensive research effort on the issue, in order to collect information on obstacles, problems, challenges, and progress in the performance by states of their duty to ensure access to justice for the protection of the economic, social and cultural rights.

II. THE RIGHT OF ACCESS TO JUSTICE AND THE OBLIGATION TO REMOVE ECONOMIC OBSTACLES TO ENSURE SOCIAL RIGHTS

48. Numerous aspects connected with effective access to justice, such as availability of a free public defense for persons without means and procedural costs, are of inestimable instrumental value to ensure the enforceability of economic, social and cultural rights. In this regard, it is common for the unequal economic or social situation of litigants to be reflected in an unequal possibility of defense in trial. One aspect that affects the extent of the right of access to justice has to do with economic or financial obstacles in access to the courts and with the scope of the positive obligation of the State to remove those obstacles in order to ensure an effective right to a hearing by a tribunal.

49. Policies that are designed to ensure legal services for persons without means act as mechanisms to compensate for situations of material inequality that impair the effective protection of individual interests. Therefore, it may be that judicial polices are connected with social services and policies. Accordingly, this is an area in which it is worth determining the precise scope of state obligations and the principles on which the organization and provision of services of this type should be based, inasmuch as they are essential instruments for ensuring the exercise of human rights by excluded and impoverished sectors.

50. The IASHR has recognized the key role of the realization of the right of access to justice in ensuring human rights in general and social rights in particular. It has established a series of standards that impact on the workings of judicial systems in the region.

A. The Obligation to Provide Free Legal Counsel

51. It was in Advisory Opinion OC-11/90 of the Inter-American Court of Human Rights,[1] that the IASHR first specifically addressed the need to remove obstacles in access to justice that might originate from a person's economic status.[2] On that occasion, the IACHR submitted a request for an advisory opinion to the Court in which it inquired, *inter alia*, if the rule of exhaustion of domestic legal remedies applied to an indigent, who, because of economic circumstances, was unable to avail himself of the legal remedies within a country.[3]

52. In this framework, the Inter-American Court confirmed the prohibition of discrimination against persons by reason of their economic status and found that "...[i]f a person who is seeking the protection of the law in order to assert rights which the American Convention guarantees finds that his economic status (in this case, his indigence) prevents him from so doing because he cannot afford [...] the necessary legal counsel [...], that person is being discriminated against by reason of his economic status and, hence, is not receiving equal protection before the law."[4]

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[1] I/A Court H.R., *Exceptions to the Exhaustion of Domestic Remedies* (Arts. 46(1), 46(2)(a) and 46(2)(b), American Convention on Human Rights). Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11.

[2] In the European system this issue was analyzed more than a decade earlier in the framework of the Airey case. Mrs. Johana Airey was unable to find a solicitor to assist her in proceedings for judicial separation from her husband before the High Court of Ireland. In Ireland judicial separation proceedings could only be taken up by the High Court, and the complexity of the proceedings required the assistance of lawyers, whose fees were prohibitive for the applicant. The complexity of the evidence required in the case and the normal practice of that tribunal made it most improbable that the applicant would have been able successfully to pursue her separation without legal representation, even though Irish law did not expressly prohibit it. At the time, Ireland had not yet organized a system of legal aid that included family law matters. The applicant claimed a breach, *inter alia*, of Article 6(1) of the European Convention on Human Rights, which recognizes the right of effective access to the courts. In its judgment, the European Court of Human Rights considered that Ireland did not have a specific obligation - as a party to the European Convention on Human Rights - to provide free legal assistance on civil-law matters, since it was up to each state to choose reasonable measures to ensure access to justice, removing the material obstacles mentioned (legal aid may be a mechanism, but there are others, such as simplification of procedure). However, in the specific case of Mrs. Airey -who was unable to retain a lawyer to assist her in the judicial separation proceeding because she could not afford the costs that she would be forced to incur in that proceeding-, the State did not guarantee her right to effective access to justice and, therefore, breached Article 6(1) of the European Convention. Cf. ECHR, *Case of Airey v. Ireland*, Judgment of 9 October 1979, Series A, No. 32.

The ECHR has also referred in more recent cases to the obligation to provide free legal counsel in circumstances in which the absence of an attorney could constitute a violation of the right of access to justice. See in this connection, for example, ECHR *Steel and Morris v. United Kingdom*, Judgment of 15 February 2005.

[3] Cf. Advisory Opinion OC-11/90, cit., para. 2.

[4] Cf. Advisory Opinion OC-11/90, cit., para. 22. On this point, it should be mentioned, too, that this case law extends also to violation of fundamental rights recognized by the Constitution and the law, pursuant to Article 25(1) of the American Convention.

53. On this occasion, despite recognizing the positive obligation of the State to ensure access to justice, the Court only went as far as the noting that "the circumstances of a particular case or proceeding -its significance, its legal character, and its context in a particular legal system- are among the factors that bear on the determination of whether legal representation is or is not necessary for a fair hearing."[5]

54. In the framework of a later advisory opinion, the Court again referred expressly to the duty of the state to provide free legal counsel. In this connection, in Advisory Opinion OC-18/03, "Juridical Condition and Rights of the Undocumented Migrants,"[6] the Court found that the refusal to provide a free public legal aid service to a person without means constitutes a violation of the rights to a fair trial and to effective judicial protection. In that opinion, the Court set out the aforementioned standard in the following terms:

> The right to judicial protection and judicial guarantees is violated for several reasons: owing to the risk a person runs, when he resorts to the administrative or judicial instances, of being deported, expelled or deprived of his freedom, and by the negative to provide him with a free public legal aid service, which prevents him from asserting the rights in question.[7]

55. It is appropriate here to cite the "*Report on the Situation of Human Rights in Ecuador*" prepared by the IACHR in 1997.[8] In that report, the Inter-American Commission referred to the importance of providing free legal services in order to comply with the mandate contained in the American Convention. The IACHR observed that:

> Domestic law requires that individuals be represented by counsel to access judicial protection. Under the present system, litigants who are unable to afford private counsel must wait for a public defender to become available. Such claimants must often wait for long periods to have access to justice. This is clearly inconsistent with the provisions of the American Convention. [...] discrimination in the application or availability of judicial guarantees on the basis of economic status is prohibited by a reading of the provisions of Articles 1.1, 8 and 24 of the American Convention [...] Given that all claimants must be

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[5] Cf. Advisory Opinion OC-11/90, cit., para. 28. As regards the specific consultation submitted by the IACHR, the Court concluded that, "if it can be shown that an indigent needs legal counsel to effectively protect a right which the Convention guarantees and his indigence prevents him from obtaining such counsel, he does not have to exhaust the relevant domestic remedies." Cf. Advisory Opinion OC-11/90, cit., para. 31.

[6] I/A Court H. R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18.

On May 10, 2002, Mexico submitted to the Court a request for an advisory opinion on the "[...] deprivation of the enjoyment and exercise of certain labor rights [of migrant workers,] and its compatibility with the obligation of the American States to ensure the principles of legal equality, non-discrimination and the equal and effective protection of the law embodied in international instruments for the protection of human rights; and also with the subordination or conditioning of the observance of the obligations imposed by international human rights law, including those of an erga omnes nature, with a view to attaining certain domestic policy objectives of an American State." OC18/03 is the result of that consultation.

[7] Cf. Advisory Opinion OC-18/03, cit., para. 126.

[8] IACHR, *Report on the Situation of Human Rights in Ecuador*, April 24, 1997, (OEA/Ser.L/V/II.96).

> represented by counsel to pursue their actions, *the number of public defenders available to assist claimants must be increased, so that this service is available to every individual who requires them* to have access to judicial protection to vindicate a protected right.[9] (Emphasis Added)

56. Thus, the IACHR has not only recognized the general standard establishing the obligation of the state to provide free legal assistance to persons without means,[10] but also identified a series of criteria by which to determine its propriety in specific cases. Thus, in the "*Report on Terrorism and Human Rights*,"[11] the Inter-American Commission has identified the following factors for the purposes of such a determination: a) the resources available to the person concerned; b) the complexity of the issues involved; and, c) the significance of the rights involved.[12]

57. In the Case of Andrew Harte and Family, the IACHR outlined certain guidelines as regards the necessary proof to attest to lack of access to justice for economic reasons. Mr. Harte was a Guyanese national and a permanent resident of Canada. In 1994, Canada ordered his deportation because of multiple convictions for criminal offences. Mr. Harte was scheduled to be deported to Guyana in October 1997. In February 1998, Mr. Harte applied for a 'Minister's permit' to allow him to remain in Canada. The State denied his application in August 1998, with the argument stating that the proper procedure was an application to remain in Canada on humanitarian and compassionate grounds. The petitioner contended that Mr. Harte did not have the money or access to legal aid to pursue judicial review of this decision.

58. In his petition, Mr. Harte argued that he was denied access to domestic remedies on account of his indigence and inability to access legal aid at critical junctures of domestic legal processes. Canada is not a party to the American Convention. However, the Commission considered that the case law of the Inter-American Court was applicable to it in this case and so, therefore, were provisions of Advisory Opinion OC 11/90.

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[9] See in this respect, *Report on the Situation of Human Rights in Ecuador*, Cit., Chapter III. It is also apt to cite here the recent report of the IACHR, *Violence and Discrimination against Women in the Armed Conflict in Colombia*. Among its conclusions and recommendations concerning the administration of justice, the report mentioned the need "[t]o increase access to legal representation free of charge for victims of violence and discrimination against women." Cf. IACHR, *Violence and Discrimination against Women in the Armed Conflict in Colombia*, October 18, 2006 (OEA/Ser.L/V/II., Doc. 67), Chapter VI, para. 51.

[10] See in this respect, IACHR, *Report on Terrorism and Human Rights,* October 22, 2002 (OEA/Ser.L/V/II.116), para. 236. There, for example, the Commission reaffirmed the need to ensure free legal representation in any proceeding for the determination of rights, and it expressly stated, "Both the Commission and the Inter-American Court have observed in this respect that in criminal proceedings and those relating to rights and obligations of a civil, labor, fiscal or any other nature, *an indigent has the right to legal counsel free of charge where such assistance is necessary for a fair hearing*...".

[11] The Commission decided in December 2001 to undertake a study by which it would reaffirm and elaborate upon the manner in which international human rights requirements regulate state conduct in responding to terrorist threats. Accordingly, the Commission endeavored to provide a timely and focused analysis of the principal human rights implications of efforts by states to respond to terrorist threats. It has done so by placing those efforts within the established framework of several core international human rights, in particular the right to life, the right to humane treatment, the right to personal liberty and security, the right to a fair trial, the right to freedom of expression and the right to judicial protection. The outcome of this effort is the *Report on Terrorism and Human Rights*. Cf. *Report on Terrorism and Human Rights*, cit., paras. 6 and 7.

[12] Cf. *Report on Terrorism and Human Rights*, cit., para. 341.

59. The IACHR examined the situation of Mr. Harte under the parameters set forth by the Court in said Advisory Opinion and found in its analysis of admissibility that:

> Mr. Harte's claim of indigence relates to his alleged inability to access legal representation generally and, more particularly, with respect to his alleged inability to pay the fees required by the State to pursue an application to remain in Canada on humanitarian and compassionate grounds. In a statutory declaration submitted to the Commission on his behalf, Mr. Harte stated that he is unemployed and that his bail bond was posted by virtue of a loan raised by his mother and not by his own resources. Mr. Harte also stated that he and the children reside with his mother, where he has the sole responsibility for their care, because their mother is unable to do so because of mental illness. *The Commission received no further information or evidence in support of Mr. Harte's claim of indigence*. […] [T]he Commission has previously observed that "Allegations of indigence are insufficient without other evidence produced by the Petitioner to prove that he was prevented from invoking and exhausting the domestic remedies…" In the Commission's view, Mr. Harte's statutory declaration of indigence without any corroborating evidence is insufficient to establish that "indigence" prevented the Petitioner from invoking and exhausting domestic remedies in Canada. Accordingly, the Commission finds that Mr. Harte was not prevented by indigence from accessing legal representation necessary to pursue domestic remedies or paying the requisite fees to apply to remain in Canada on humanitarian and compassionate grounds.[13] (Emphasis added)

60. At the same time, the petitioner held that he was unable to avail himself of the services of community legal clinics because said clinics lacked "the resources or the competence to deal with cases like Mr. Harte's."[14] In turn, the State furnished a comprehensive list of institutions that offer free legal assistance. In this framework, the Inter-American Commission noted that the evidence of availability of legal representation was not disproved by the petitioner's largely general and uncorroborated claims that Mr. Harte was refused legal aid or that community legal clinics were incapable of providing assistance. Therefore, the IACHR concluded that legal assistance was available to Mr. Harte to invoke domestic remedies and it proceeded to declare the case inadmissible.

61. This case enabled the IACHR to develop an important standard in this area. Thus, it was determined that it is not sufficient to claim to be indigent and that legal assistance is unavailable but that such an assertion must be substantiated with appropriate evidence.[15]

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[13] IACHR, Report Nº 81/05, Petition 11.862, Inadmissibility, *Andrew Harte and Family,* Canada, October 24, 2005.

[14] Cf. *Andrew Harte and Family*, cit. para. 82.

[15] The IACHR had already referred to the need sufficiently to accredit an alleged situation of destitution in its inadmissibility report in the *Rosa Margarita Aráuz et al. case.* On that occasion the IACHR noted: "…As evidence of their economic situation, the petitioners merely submitted a number of documents, such as the report of the Nicaraguan Institute of Social and Economic Research, the Central Bank of Nicaragua's 1994 report, and the Inter-American Development Bank's 1995 report on Nicaragua. *However, these studies provided no specific evidence of the economic situation of each individual plaintiff; there is insufficient evidence in the case file to show that the 8,288 plaintiffs were destitute or unable to provide the surety required by the Nicaraguan courts*. […] *Requiring the plaintiffs to guarantee costs in order for them to be heard at trial and*

Continued…

62. The IACHR has also moved forward with the identification of certain judicial proceedings in which it has considered that free legal counsel is essential in order to comply with the mandate of the American Convention.

63. In this respect, *inter alia*, in its report on merits in the Whitley Myrie case,[16] the IACHR considered that the State was obliged under the American Convention to provide individuals with effective access to constitutional motions, which may require the provision of legal assistance when individuals lack the means to bring such motions on their own.

64. In this particular case, the petitioner demanded free legal assistance -- on account of his indigence-- to bring a constitutional motion to challenge a criminal conviction; however, the standard set by the IACHR as regards the obligation of the State to provide legal assistance transcends the framework of criminal proceedings and is tied directly to the technical complexity of the type of judicial remedy that the victim was seeking in the case. Thus, the IACHR took into account the argument that constitutional motions involve "sophisticated and complex questions of law" which require the assistance of counsel.

65. Finally, in its recent report "*Access to Justice for Women Victims of Violence in the Americas,*"[17] the IACHR again drew attention to the need to offset situations of economic disadvantage and highlighted the consequent obligation to increase the availability of free legal assistance services. In this regard, the IACHR observed:

> Women of means have far greater access to the justice system than do economically disadvantaged women. In their replies to the questionnaire, some States said that pro bono legal services were being provided to victims. The IACHR, however, notes that given the severity and prevalence of the problem of violence against women, recognized as being one of the priority challenges, more pro bono legal services are needed.[18]

...continuation
their material inability to post the required bond should be proved on a case-by-case basis and not globally, as the petitioners did with the aforesaid reports; this fact led to the dismissal of the suits filed with the different courts. [...]The Commission believes that in the case at hand, the petitioners' submissions do not contain sufficient grounds or evidence to indicate the responsibility of the Nicaraguan State in violations of rights enshrined in the American Convention..." Cf. Report Nº 101/00, Case 11.630, *Rosa Margarita Aráuz et al,* Nicaragua, October 16, 2000, paras. 55, 57.

[16] IACHR, Report Nº 41/04, Case 12.417, Merits, *Whitley Myrie*, Jamaica, October 12, 2004. See also in this respect, IACHR, Report Nº 55/02, Case 11.765, Merits, *Paul Lallion*, Grenada, October 21, 2002, paras. 91-99; IACHR, Report Nº 56/02, Case 12.158, Merits, *Benedict Jacob*, Grenada, October 21, 2002, paras. 99-107; IACHR, Report Nº 49/01, Cases 11.826 (Leroy Lamey), 11.843 (Kevin Mykoo), 11.846 (Milton Montique), 11.847 (Dalton Daley), Jamaica, April 4, 2001, among others.

[17] IACHR, *Access to Justice for Women Victims of Violence in the Americas*, 2007.

[18] Cf. *Access to Justice for Women Victims of Violence in the Americas*, cit. para. 182.

B. Procedural Costs, Location of Tribunals, and the Right of Access to Justice

66. In addition to the lack of organized free legal representation services, the IASHR has identified other factors that can render access to justice impossible: procedural costs and the location of tribunals

67. In Advisory Opinion OC 11/90, the Court expressly recognized that lack of free legal assistance may not be the only economic obstacle to justice. Thus, it found that procedural costs are also a factor to the borne in mind on this point.[19]

68. In this connection, in its judgment in the Cantos case,[20] the Court held that:

> This provision of the Convention [Article 8(1)] upholds the right of access to the courts. It follows from this provision that States shall not obstruct persons who turn to judges or the courts to have their rights determined or protected. *Any domestic law or measure that imposes costs or in any other way obstructs individuals' access to the courts and that is not warranted by what is reasonably needed for the administration of justice must be regarded as contrary to Article 8(1) of the Convention.*[21] (Emphasis added)

69. In that case, the Court had to decide, *inter alia*, if the amount of the filing fee that the Argentine courts demanded from the petitioner,[22] having refused him the benefit of litigating without costs, was compatible with the rights enshrined in Articles 8 and 25 of the American Convention. In its ruling, the Court found:

> [T]he amount set in the form of filing fees and the corresponding fine are, in the view of this Court, an obstruction to access to the courts. They are unreasonable, even though in mathematical terms they do

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[19] Thus, the Court has held: "...29. *Lack of legal counsel is not, of course, the only factor that could prevent an indigent from exhausting domestic remedies. It could even happen that the state might provide legal counsel free of charge but neglect to cover the costs that might be required to ensure the fair hearing that Article 8 prescribes. In such cases, the exceptions to Article 46(1) would apply*. Here again, the circumstances of each case and each particular legal system must be kept in mind. [...] 30 [...]if legal services are required either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized and a person is unable to obtain such services because of his indigence, then that person would be exempted from the requirement to exhaust domestic remedies. *The same would be true of cases requiring the payment of a filing fee. That is to say, if it is impossible for an indigent to deposit such a fee, he cannot be required to exhaust domestic remedies unless the state provides some alternative mechanism*." (Emphasis added) Cf., Advisory Opinion OC-11/90, cit., paras. 29 and 30.

[20] I/A Court H.R., *Case of Cantos.* Judgment of November 28, 2002. Series C No. 97.

[21] Cf. *Case of Cantos*, cit., para. 50.

[22] The claim that Mr. Cantos filed with Argentina's Supreme Court totaled 2,780,015,303.44 pesos (two billion, seven hundred eighty million, fifteen thousand and three hundred three pesos and forty-four cents), the equivalent of the same amount in United States dollars. Under Argentine law, the fee at time of filing was three percent (3%) of the total amount of relief being claimed. The filing fee is the sum of money that every person filing suit in court must pay to have access to the courts. Under Argentine law, the filing fee is a flat percentage, and there is no maximum filing fee. In the case *sub judice*, that three percent (3%) represents 83,400,459.10 pesos (eighty-three million, four hundred thousand, four hundred fifty-nine pesos and ten cents), or the equivalent of the same amount in United States dollars. Cf., *Case of Cantos*, cit., para. 53.

> represent three percent of the amount of relief being claimed. This Court considers that while the right of access to a court is not an absolute and therefore may be subject to certain discretional limitations set by the State, the fact remains that the means used must be proportional to the aim sought. The right of access to a court of law cannot be denied because of filing fees. [...] The fact that a proceeding concludes with a definitive court ruling is not sufficient to satisfy the right of access to the courts. Those participating in the proceeding must be able to do so without fear of being forced to pay disproportionate or excessive sums because they turned to the courts. The problem of excessive or disproportionate filing fees is compounded when, in order to force payment, the authorities attach the debtor's property or deny him the opportunity to do business.[23]

70. Consequently, the Court determined that the amount charged patently obstructed Mr. Cantos' access to the courts and thereby violated Articles 8 and 25 of the American Convention.

71. With a view to removing economic obstacles of this type, the IACHR has begun to outline the scope of the various obligations of states, both as regards judicial proceedings, and in relation to the development of administrative procedures.

72. In this connection, in the Yean and Bosico case,[24] the IACHR expressly referred to the need to set limits on costs in proceedings in order to prevent violation of fundamental human rights.

73. The aforesaid case provides a clear illustration of various aspects of the connection between administrative due process and the enjoyment and exercise of human rights. While this case is examined in detail later in this report, it should be mentioned here that in its application to the Inter-American Court the IACHR requested that the Dominican Republic be ordered to:

> C) Create a legal mechanism that, in case of dispute, allows individuals to file their reports directly before the judicial instance, so that their complaints can be reviewed by an independent and impartial judicial organ. D) This mechanism should *provide a simple, prompt and inexpensive recourse for individuals without a birth certificate.*[25] (Emphasis added)

74. In this way, the IACHR added a new characteristic to the type of remedies that states are required to ensure in order to comply with the mandate contained in the American Convention. Furthermore, it established the obligation to take steps to make certain that judicial remedies created to review administrative decisions are not only prompt and effective, but also "inexpensive."

75. In its arguments to the Court, the IACHR set an important standard with respect to costs in administrative procedures. The Inter-American Commission determined that the insistence on certain requirements in the administrative procedure for late registration of births in the Dominican Republic, which were difficult to comply

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[23] Cf., *Case of Cantos*, cit., paras. 54 and 55.

[24] I/A Court H. R., *Case of the Girls Yean and Bosico*. Judgment of September 8, 2005. Series C No. 130. The IACHR adopted the admissibility report on this case on February 22, 2001.

[25] Cf. IACHR, Application to the I.A. Court of H.R. v. The Dominican Republic, Case 12.189, Dilcia Yean and Violeta Bosico Cofi, para. 218.

with and involved costs, amounted to obstacles that prevented the enjoyment of rights contained in the American Convention. Concretely, the IACHR stated that,

> The Central Electoral Board insists that a series of documents must be presented in order to proceed with a late declaration of birth. These requirements *violate not only rights contained in the Constitution and laws deriving from it, but also rights enshrined in the American Convention, because they are difficult to comply with, involve expenditure and constitute obstacles that prevent the enjoyment of the right to nationality of most children in the same situation as the children Dilcia and Violeta; namely, Dominicans of Haitian origin.*[26] (Emphasis added)

76. In turn, in the above-cited report "*Access to Justice for Women Victims of Violence in the Americas*," the IACHR draws particular attention to the failure of judicial proceedings in cases of violence against women owing to the costs involved in the proceedings.

77. In this connection, the research that IACHR conducted in preparing this report led it to conclude that lack of economic resources to furnish evidence very often obstructs progress in judicial proceedings on violence against women. Concretely the IACHR observed that:

> One of the problems cited by the prosecutors interviewed in Tegucigalpa was pursuing cases that complainants have already "abandoned"; this ties in with a number of factors, among them the *economic means to mobilize and move the individual and witnesses*, intimidation or threats on the part of the accused, or the use of extrajudicial avenues to settle the family dispute, such as mediation before other bodies. Our view is that such cases should not be considered abandoned, since the problems with the system in terms of double victimization and *the difficulties of getting a court hearing at no cost and on an equal footing, are more often the reasons why a victim is unable to see her case through to the end*.[27] (Emphasis added)

78. In the above-cited report, the IACHR also drew attention to another economic obstacle of enormous significance in terms of access to justice: location of tribunals. On this point, the Inter-American Commission noted:

> *The judicial presence and state advocacy services available to women victims nationwide is inadequate, which means that victims have to draw on their own economic and logistical resources to file a complaint and then participate in judicial proceedings*.[28] (Emphasis added)

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[26] I/A Court H. R., *Case the Girls Yean and Bosico*. Judgment of September 8, 2005. Series C No. 130, para. 111.c).

[27] Cf. *Access to Justice for Women Victims of Violence in the Americas*, cit., para. 158. The report also mentions that a study on gender discrimination in the administration of justice in Bolivia found that women no longer turn to the justice system for a variety of reasons, including: "the lack of identification papers, *a preconceived notion that it must be costly to work through the judicial system*, the time they need to invest to go through with proceedings, fear of losing the case and the possibility of reprisals on the part of the aggressor. They also believe that the administration of justice is politicized and can be bought." (Emphasis added) Cf. *Access to Justice for Women Victims of Violence in the Americas*, 2007, para. 178.

[28] Cf. *Access to Justice for Women Victims of Violence in the Americas*, cit., para. 182.

79. Faced with this situation, the Inter-American Commission highlighted the importance of community resources --such as justices of the peace and community ombudspersons-- and the need for them to have access to mechanisms and resources to ensure their effectiveness. The purpose of the foregoing is to provide basic services to women victims of violence in rural, marginal and poor areas, as well as information on legal procedures, support with administrative procedures, and legal assistance to victims in judicial proceedings.[29]

80. Further to the foregoing, in the aforementioned report of its Rapporteur on the Rights of Women the IACHR has pinpointed a number of structural problems that create economic obstacles in access to justice: a) the absence of institutions necessary for the administration of justice in rural, poor and marginalized areas;[30] b) the lack of court-appointed attorneys or public defenders available for victims of violence who are without economic means;[31] c) the economic cost of judicial proceedings.[32] Among its recommendations, the IACHR included the following:

> Create adequate and effective judicial bodies and resources in rural, marginalized and economically disadvantaged areas so that all women are guaranteed full access to effective judicial protection against acts of violence. 2) Increase the number of court-appointed attorneys available for women victims of violence and discrimination...[33]

C. Situations of Systematic Exclusion from Access to Justice

81. The IACHR has recently begun to draw attention to certain social groups that are caught in situations of structural inequality and exclusion and, therefore, are denied the possibility of access to justice.

82. In the Case of Simone André Diniz,[34] the petitioner was denied the possibility of securing employment because she was of African descent. Ms. Diniz reported the racial discrimination she had suffered but the Office of the Attorney General simply decided that there were no grounds to bring a criminal suit for racism.[35] The judge, in turn, accepted the arguments of the prosecution and decided to dismiss the case.

83. In its report on merits in the case, the IACHR concluded that the State did not guarantee the full exercise of the right to justice and due process of law because it failed to pursue domestic remedies to look into the racial discrimination suffered by Ms. Simone André Diniz and, therefore, breached its obligation to ensure the exercise of the rights provided in Articles 8(1) and 25 in conjunction with Article 1(1) of the American Convention.

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[29] Cf. *Access to Justice for Women Victims of Violence in the Americas*, cit., para. 182. In this respect, see also, *Report on the Situation of Human Rights in Ecuador,* cit., Chapter III.

[30] Cf. *Access to Justice for Women Victims of Violence in the Americas*, cit., para. 10.

[31] Cf. *Access to Justice for Women Victims of Violence in the Americas*, cit., para. 10.

[32] Cf. *Access to Justice for Women Victims of Violence in the Americas*, cit., para. 12.

[33] Cf. *Access to Justice for Women Victims of Violence in the Americas*, cit., Specific Recommendations.

[34] IACHR, Report Nº 66/06, Case 12.001, Merits, *Simone André Diniz*, Brazil, October 21, 2006.

[35] Provided in Law 7.716/89 of Brazil.

84. With regard to the existence of economic obstacles in access to the courts in order to institute proceedings for the crime of racism, the IACHR noted:

> The perpetrator of injuria racista in Brazil enjoys impunity in most cases. According to attorneys of Afro-Brazilian organizations, the fact that insulto racial is not covered by Law 7716/89 creates a hindrance to the administration of justice, as injuria, according to the Brazilian Criminal Code, is a crime of private action, and so opening an investigation depends on the initiative of the victim. Yet most victims of racism in Brazil are poor and have no way to hire an attorney.[36]

85. This is a landmark case in the framework of the IASHR, since the Commission expressly identified the existence of a systematic practice on the part of the Brazilian judiciary that tended to undermine enforcement of the countries anti-racism law.[37] Consequently, the Inter-American Commission drew attention to the fact that this practice gave rise to a generalized situation of unequal access to justice for victims of racial discrimination.[38]

86. At the same time, in its report "*Access to Justice for Women Victims of Violence in the Americas*," the IACHR drew particular attention to the difficulties that Afro-descendant women and indigenous people have in availing themselves of judicial remedies. With respect to the former, the IACHR noted that:

> Afro-descendant women who live in marginalized, rural areas in small, tightly clustered social groups that still preserve their languages, traditions and customs and sometimes even their own systems of justice, will have to contend with problems of geographic accessibility, an inability to communicate with judicial authorities in their own languages, a knowledge of the process, and a lack of economic means. These are the very same problems that indigenous women face. And like indigenous women, Afro-descendant women will have to contend with discrimination on two levels: one based on their gender and the other based on their race. [...] Theirs is not unlike the situation of Afro-descendant women in urban areas, where the difficulties they will face in availing themselves of effective judicial remedies, have to do with their economic disadvantage and skin color. In those areas where the economic factor and social exclusion have been conquered, the difficulties are generally related to skin color.[39]

87. The IACHR also drew attention to the plight of indigenous women:

> From a variety of sources and through implementation of the inter-American system's mechanisms, the IACHR has compiled information on the obstacles that indigenous women encounter in attempting to access the justice system. These obstacles are generally a function of the social exclusion and ethnic discrimination that they have historically suffered. The problem that women encounter is

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[36] Cf. *Simone André Diniz,* cit., para. 89.

[37] Cf. *Simone André Diniz,* cit., paras. 60, 77, 85, 87, among others.

[38] Cf. *Simone André Diniz*, cit., para. 95.

[39] Cf. *Access to Justice for Women Victims of Violence in the Americas*, cit., paras. 211 and 212. In this regard see, too, IACHR, *Violence and Discrimination against Women in the Armed Conflict in Colombia*, October 18, 2006 (OEA/Ser.L/V/II., Doc. 67), Chapters IV and V(f).

> compounded by the geographic remoteness of indigenous territories. To be able to access the justice system, indigenous women may have to walk for days, overland or by water, to get to the nearest city to report the violence they have suffered. This also poses evidentiary problems. Indeed, an indigenous woman's problems do not end when she reaches the city, because there she will likely encounter obstacles of another sort: financial problems, a lack of information, discomfort with an urban environment. A lack of command of the language of the court is also routinely cited as one of the factors that makes access to justice difficult for indigenous women.[40]

88. The IACHR considers that poverty is particularly prevalent among these women and that States, therefore, have the obligation to provide them with pro bono legal services to enable them to access the judicial protective bodies. They also need more information about the resources available to them within the justice system and about their rights.[41]

D. Conclusions

89. The foregoing precedents show that the IASHR has recognized the obligation to remove any obstacles in access to justice that originate from the economic status of persons.

90. First of all, both the Inter-American Court and the IACHR have made it an obligation to provide free legal services to persons without means in order to prevent infringement of their right to a fair trial and effective judicial protection. With this in view, the Commission has identified certain guidelines for determining the propriety of free legal counsel in specific cases. These are: a) the resources available to the person concerned; b) the complexity of the issues involved; and, c) the significance of the rights involved.

91. At the same time, the IACHR has determined that in certain judicial proceedings free legal counsel is necessarily required, in order to present and pursue those proceedings. Thus, the Inter-American Commission has found that the technical complexity of certain constitutional proceedings obligates the provision of free legal counsel in order effectively to institute them.

92. In second place, the IASHR has established that procedural costs -- whether in judicial or administrative proceedings-- and the location of tribunals are factors that may also render access to justice impossible and, therefore, result in a violation of the right to a fair trial.

93. In this way, the IASHR have found that any proceeding in which the costs are prohibitive is an outright violation of Article 8 of the American Convention. On this point, the Inter-American Commission has held that judicial remedies created to review administrative decisions must be not only prompt and effective, but also "inexpensive."

94. Finally, the IASHR has begun to identify situations of systematic exclusion of particularly vulnerable sectors of society from access to justice. In these cases, the IACHR has underscored the obligation of the State to provide free legal services and to strengthen community mechanisms for this purpose, in order to enable

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[40] Cf. *Access to Justice for Women Victims of Violence in the Americas*, cit., para. 199.

[41] Cf. *Access to Justice for Women Victims of Violence in the Americas*, cit., para. 215.

these groups to access the judicial protective bodies. They also need more information about the resources available to them within the justice system and about their rights.

III. ADMINISTRATIVE DUE PROCESS AND ASSURANCE OF SOCIAL RIGHTS

95. A second aspect to bear in mind with regard to access to justice and effective protection of economic, social and cultural rights is due process in administrative proceedings, in which the majority of decisions with respect to the award of social security benefits are made. Neither social policies nor the organization and workings of state social benefits have been guided by a rights-based approach. On the contrary, benefits are mainly organized and provided according to the inverse logic of the handout approach and for that reason, institutional controls notwithstanding, this area of activity of public administrations has traditionally been the preserve of the political discretion of the authorities.

96. The social functions of the state have expanded into in areas such as health, housing, education, labor, social security, consumption, or promotion of participation for disadvantaged social groups. However, that has not necessarily translated, technically speaking, into the creation of concrete rights. Very often, the State assumed these functions as a result of discretionary interventions or because of how it organized its activities, such as provision of public services, or design of targeted social plans or programs. The social and economic effects of those functions do not necessarily assign rights, whether of an individual or a collective nature. However, in theory and in practice it would be by no means impossible for enforceable rights to be created in these areas also, in such a way that service providers or public officials would be brought under the supervision of institutional, administrative, or policy oversight mechanisms on behalf of the persons entitled to such social benefits. There are no grounds for not recognizing, in the framework of social policy, the possibility to demand either civil rights, such as the right to equality and nondiscrimination or the right of access to information, or social rights that set frameworks and minimum standards for such policies. Indubitably a rights-based approach to the design of plans should lead to the inclusion of the basic standards of due process in the way in which they are institutionally engineered.

97. In this way, the IASHR has established its position on the observance of due process guarantees in administrative proceedings. Thus it has established the obligation for states to have clear rules governing the behavior of their agents in order to avoid inappropriate levels of discretionality in the administrative sphere that might encourage arbitrary or discriminatory practices. At the same time it has proceeded with the identification of certain standards of due process that should govern administrative proceedings, including, *inter alia*, reasonable time, the right to judicial review of administrative decisions, the right to an attorney, the right to a reasoned decision, and publicity of administrative proceedings.

A. Effectiveness of Due Process in Administrative Proceedings

98. In the framework of the inter-American system the applicability of the right to a fair trial in administrative proceedings on social rights is clear. Indeed, the provision that governs this guarantee expressly recognizes its applicability to any proceeding for the determination of rights and obligations of a civil, labor, fiscal, or any other nature.[42]

[42] Article 8(1) of the American Convention provides, "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a

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99. The Inter-American Court has had occasion to underscore the full applicability of the right in administrative proceedings. It has ruled accordingly in its analysis of cases and situations that involve the rights of workers, migrants, and indigenous peoples. At the same time, it recently developed standards on the link between administrative due process and the right of access to public information in a case concerning protection of environment.

100. In the Baena Ricardo *et al*. Case,[43] the petitioners were 270 government employees, who were dismissed after being accused of complicity in a military coup because they had participated in a demonstration for labor rights that coincided with an attempted military uprising.[44] Initially, the dismissals were carried out by means of written communications, mostly issued by the Director General or Executive Director of the entity concerned, by order of the President of the Republic, based on their participation in the supposedly illegal measures of protest. Later, with the enactment of a special law to that end --"Law 25", as it was called, which was applied retroactively--[45] the directors of the autonomous and semi-autonomous institutions, State and municipal enterprises, and other public agencies of the State were authorized to declare non subsistent, subject to a previous identification, the appointments of those public servants who took part "in the organization, convocation or implementation of actions that attempted against democracy and the constitutional order." Based on their participation in the aforesaid measures of protest the appointments of the remaining workers were declared non subsistent. In this way, the dismissals were carried out in open violation of the rules governing the procedures to be observed for the dismissal of employees of these entities.[46]

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criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

[43] I/A Court H.R., *Baena Ricardo et al. Case.* Judgment of February 2, 2001. Series C No. 72.

[44] The workers had taken part in a march and a 24-hour stoppage, both called by the Coordinating Organization of State Enterprise Workers Unions to demand a series of labor claims. According to the petition submitted to the Government of Panama by the Coordinating Organization of State Enterprise Workers Unions, the demands consisted of: "non-privatisation of State enterprises; derogation of the laws that reformed the Labour Code; halting of the dismissals and immediate reinstatement of the leaders of the State sector; payment of bonuses and of the thirteenth bonus month; respect for labour laws, internal regulations and the agreements arrived at with State sector organisations; respect for labour organisations and their leaders; derogation of war decrees and anti-worker decrees; compliance with the job and work manuals, classifications, salary scales and evaluations; ratification and implementation of Agreement 151 of the International Labour Organisation (ILO); respect for the autonomy of State entities; approval of an "Administrative, scientific and democratic career;" non-modification of the Organic Law of the Social Security Administration and other social laws, such modification being intended to reduce the benefits thereby provided for; satisfactory response to the situation of the construction workers sector..." Cf. *Baena Ricardo et al. Case*, cit., para. 88(a).

[45] On December 14, 1990, the Legislative Assembly passed Law 25. The cited Law 25 was published in the Official Gazette of Panama N° 21.687 of December 17, 1990. In Article 6 of said Law it was stated that it was a public order law, and that it would have a retroactive effect as of December 4, 1990. Cf. *Baena Ricardo et al. Case,* cit., para. 88(n).

[46] Two of the State entities were governed by a specific law and by their respective internal labor regulations, under a special labor jurisdiction, while all other public servants were subject to the provisions of the Administrative Code, the organic law, and the internal regulations of the institution at which they worked. For the various procedures originally provided for the dismissal of an employee of these institutions, see Cf. *Baena Ricardo et al. Case,* cit., para. 88(m).

101. Under "Law 25" the only available recourse against dismissal was a motion for reconsideration to the same authority that ordered the dismissal, followed by an appeal to the superior authority; the latter exhausted administrative remedies. Thereafter, the workers could institute contentious administrative proceedings before the Third Chamber of the Supreme Court.

102. The workers attempted different remedies in various proceedings,[47] including contentious administrative suits with the Third Chamber of the Supreme Court Justice, which ruled that the dismissals were legal under Law 25.

103. The violation of the workers' rights led the Inter-American Court to outline standards on observance of due process guarantees in proceedings at the administrative level, which is where the dismissals occurred. In its judgment of February 2, 2001, the Inter-American Court noted the following with regard to the scope of Article 8 of the American Convention:

> Although Article 8 of the American Convention is entitled "Right to a Fair Trial," its application is not limited to judicial remedies in a strict sense, "but [to] all the requirements that must be observed in the procedural stages,"(This translator's version of the quotation.) in order for all persons to be able to defend their rights adequately vis-à-vis any type of State action that could affect them. *That is to say that the due process of law must be respected in any act or omission on the part of the State bodies in a proceeding, whether of a punitive administrative, or of a judicial nature.* [...] The Court makes the observation that the range of minimum guarantees established in section 2 of Article 8 of the Convention is applied to the realms to which reference is made in section 1 of the same Article, that is, "the determination of his rights and obligations of a civil, labor, fiscal, or any other nature." *This reveals the broad scope of the due process*; Te individual has the right to the due process as construed under the terms of Articles 8(1) and 8(2) in both, penal matters, as in all of these other domains.[48] (Emphasis added)

104. With respect to administrative due process, the Inter-American Court held:

> The right to obtain all the guarantees through which it may be possible to arrive at fair decisions is a human right, and the administration is not exempt from its duty to comply with it. The minimum guarantees must be observed in the administrative process and in any other procedure whose decisions may affect the rights of persons.[49]

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[47] See in this respect, Cf. *Baena Ricardo et al. Case,* cit ., para. 88(w), (x), (y), and (z).

[48] Cf. *Baena Ricardo et al. Case,* cit., paras. 124, 125.

[49] Cf. *Baena Ricardo et al. Case,* cit., para. 127. The same quotation can also be found in the above-cited Advisory Opinion OC-18/03, cit., para. 125.

It is also worth noting that upon expressing its opinion regarding the observance of due process in administrative proceedings, the Inter-American Court cites the following precedents in the European system of human rights: "Cf., *inter alia*, Eur. Court. H.R., *Campbell and Fell*, Judgment of 28 June 1984, Series A No. 80, para. 68; Eur. Court H.R., *Deweer*, Judgment of 27 February 1980, Series A No. 35, para. 49; and Eur. Court H.R., *Engel and others*, Judgment of 8 June 1976, Series A No. 22, para. 82." Cf. *"Baena Ricardo et al. Case,"* cit., para. 129.

On this point it should be mentioned that the European Court of Human Rights has developed abundant case law on the connection between due process guarantees in administrative

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proceedings and the guarantee of economic, social and cultural rights. It expressed its opinion accordingly, for instance, in the *Feldbrugge* case.

In this case, the applicant, a Dutch national, ceased to register at the Regional Employment Exchange as a result of an illness that left her unfit to work. However, subsequently, an administrative body suspended the sickness allowance she had been receiving on the ground that, based on a medical examination, it was found that she was fit to resume work. The applicant appealed the decision in successive administrative proceedings to no avail. However, she alleged that, due to flaws in the procedure imputable to the public agencies, *inter alia*, limitations on her ability to participate in the proceedings and the restrictive nature of the available remedies, she had not been given a hearing that complied fully with the guarantees provided in Article 6(1) of the European Convention on Human Rights, which enshrines the right to a fair trial. In deciding the case, the ECHR had to examine the nature of the right to health insurance under Dutch law. A number of factors, such as the compulsory nature of insurance, the legal rules governing social security benefits, and assumption by the State of responsibility for social protection, tended to suggest that it should be considered a public-law right. However, other considerations argued that it should be considered a private right; to wit, its personal and economic nature, its connection with a contract of employment, the fact that the benefit was a substitute for the applicant's salary, affinities with insurance under the ordinary law, and participation of workers in the financing of social security schemes. In spite of the fact that the right in question was considered a public law right under Dutch law, according to the principle of autonomous interpretation, that circumstance was not considered relevant. Finally, the Court concluded that the right was covered by Article 6(1) and that the State had violated that provision. In that regard, the ECHR found that "the procedure followed before the President of the Appeals Board by virtue of the Netherlands legislation was clearly not such as to allow proper participation of the contending parties, at any rate during the final and decisive stage of that procedure. To begin with, the President neither heard the applicant nor asked her to file written pleadings. Secondly, he did not afford her or her representative the opportunity to consult the evidence in the case-file, in particular the two reports - which were the basis of the decision - drawn up by the permanent experts, and to formulate her objections thereto." In conclusion, the ECHR found that there had been a violation of Article 6(1). Cf. ECHR, *Case of Feldbrugge v. The Netherlands*, Application No. 8562/79, Judgment of 29 May 1986.

In 1993, the ECHR advanced further on the issue upon recognizing in *Salesi v. Italy* and *Schuler-Zgraggen v. Switzerland* that Article 6(1) of the European Convention on Human Rights applies to matters concerning social security benefits created as a public right. Accordingly, regardless of whether the social security, welfare assistance, or benefit has private-law characteristics (in particular, if can be connected to a contract of employment) or is guaranteed only by public law, all of the standards that comprise the general guarantee of due process are applicable if the right concerned is an individual economic right originating from a legal norm. In *Salesi,* the ECHR applied Article 6(1) in connection with a monthly disability allowance that the applicant received as social assistance because she lacked the basic wherewithal to live. The benefit did not derive from an employment contract and was not dependent on the payment of contributions. It was instituted by a law enacted pursuant to Article 38 of the Italian Constitution, which provides that all citizens who are unfit for work and lack the basic wherewithal to live shall be entitled to means of subsistence and welfare assistance. For the rest, the service was provided exclusively by the Italian State. In this case, the ECHR held that its interpretation of Article 6(1) was applicable to the field of social insurance even though the applicant's benefit was more akin to a social welfare allowance than to social insurance. See, ECHR, *Salesi v. Italy*, Judgment of 26 February 1993, (Pub.ECHR, Series A, No. 257-E).

In *Schuler-Zgraggen*, the ECHR moves further toward the inclusion of economic, social and cultural rights under the protection of the fair trial clause, by finding that Article 6(1) is applicable to social insurance, including welfare assistance. In this case, the right to a fair trial was taken together with a violation of Article 14 of the Convention (prohibition against discrimination in the enjoyment of the rights recognized therein) since the applicant had been refused an invalidity pension on the curious grounds that as a married woman with a two-year-old son there was scant likelihood that, though healthy, she might return to work instead of looking after her home as a wife and mother. The ECHR found in its judgment that "Article 6 (1) does apply in the field of social insurance, including even welfare assistance." See, ECHR, *Schuler-Zgraggen v. Switzerland,* Judgment of 24 June 1993, (Pub.ECHR, Series A, No. 263). As we shall see below, the link between the right to a fair trial and the prohibition of discrimination was also addressed in the

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105. In conclusion, therefore, with respect to the facts in the case and the rights in dispute:

> The general directors and the boards of directors of the State enterprises are not either judges or tribunals in a strict sense; however, in the instant case the decisions adopted by them affected rights of the workers, for which reason it was indispensable for said authorities to comply with what was stipulated in Article 8 of the Convention. [...] The Court is not oblivious to the fact that the dismissals, made without the guarantees of Article 8 of the Convention, had serious social and economic consequences for the persons dismissed and their relatives and dependants, such as the loss of income and a reduction of the living pattern. There is no doubt that, in applying a sanction with such serious consequences, the State should have ensured to the worker a due process with the guarantees provided for in the American Convention. [...] the Court concludes that the State violated Articles 8(1), 8(2), and 25 of the American Convention, to the detriment of the 270 workers..."[50]

106. Thus, a case in which the rights at issue were workers rights (social rights par excellence) provided a clear example of the applicability of due process guarantees in administrative proceedings.

107. A few days later, the Inter-American Court issued its judgment in the Case of Ivcher Bronstein.[51] Mr. Ivcher Bronstein, a naturalized Peruvian citizen, was the majority shareholder, director and president of a Peruvian television network, which denounced violations of human rights perpetrated by members of the Army Intelligence Service, as well as acts of corruption reputedly committed by officers of the National Intelligence Service.

108. On May 23, 1997, the Joint Chiefs of Staff of Peru issued an official communiqué denouncing Mr. Ivcher for conducting a defamatory campaign of libel with the aim of tarnishing the good name of the Armed Forces.[52] The same day, the Peruvian Executive issued a decree that regulated the Nationality Law and established the possibility of canceling the citizenship of naturalized Peruvians.[53] On July 10, 1997, the Migration and Naturalization Directorate issued a report that stated that the file that supported Mr. Ivcher's citizenship had not been found in the Directorate's archives and there was no evidence that he had renounced his Israeli nationality.[54] On July 11, 1997, a "Directorial Resolution" signed by the Director General of Migration and Naturalization was issued, annulling Mr. Ivcher Bronstein's citizenship. The Migration and Naturalization Directorate did not contact Mr. Ivcher before issuing the "directorial

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framework of the IASHR, particularly in the Case of the Girls Yean and Bosico v. Dominican Republic. See, in this respect, Inter-American Court, *Case of the Girls Yean and Bosico*. Judgment of September 8, 2005. Series C No. 130.

[50] Cf. *Baena Ricardo et al. Case,* cit., paras. 130, 134, and 143.

[51] I I/A Court H.R., *Ivcher Bronstein Case.* Judgment of February 6, 2001. Series C No. 74.

[52] *Cf.* Official Communiqué No. 002-97-CCFFAA, issued on May 23, 1997, by the Joint Chiefs of Staff. Cf. *Ivcher Bronstein Case*, cit., para. 76(k).

[53] *Cf.* Supreme Decree 004-97-IN of May 23, 1997. Cf. *Ivcher Bronstein Case*, cit., para. 76(l).

[54] Cf. *Ivcher Bronstein Case*, cit., paras. 76(p) and (q).

resolution" which annulled his citizenship, so that he might submit his opinion or any evidence he might possess. Faced with this situation, Mr. Ivcher Bronstein attempted a number of remedies in a succession of different proceedings,[55] all to no avail.

109. After analyzing the case, the Inter-American Court concluded that the Peruvian State arbitrarily deprived Mr. Ivcher of his citizenship, and therefore violated his rights to nationality and a fair trial.[56] Thus, in the opinion of the Court, the administrative procedure by which the State deprived Mr. Ivcher Bronstein of his citizenship infringed the rights recognized in Articles 8(1) and 8(2) of the American Convention.[57]

110. This case is examined in further detail later in this report; however, it is timely to cite here what the Inter-American Court found with respect to the applicability of the right to due process guarantees in administrative proceedings. Thus, the Court held that:

> *[A]lthough Article 8(1) of the Convention alludes to the right of every person to a hearing by a "competent tribunal" for the "determination of his rights", this article is also applicable in situations in which a public rather than a judicial authority issues resolutions that affect the determination of such rights.*[58] (Emphasis added)

111. More recently, the Court had another opportunity to express itself in this regard. In the Case of the Indigenous Community Sawhoyamaxa[59] it was again necessary for the Inter-American Court to draw attention to the need to ensure the right to effective judicial protection in claims on indigenous ancestral lands.[60] In that case it was alleged that the Paraguayan State had not ensured the ancestral property rights of the Sawhoyamaxa Community and its members, inasmuch as their claim for territorial rights had been pending since 1991 and it had not been satisfactorily resolved. This had barred the community and its members from title to and possession of their lands, and implied keeping them in a state of nutritional, medical and health vulnerability, which constantly threatened their survival and integrity. The Court had to examine a series of administrative proceedings on recognition of community rights. The Inter-American Court ruled in the case that there had been a violation of Article 8 of the American Convention and found:[61]

> In the instant case, the Court has been requested to rule on the alleged violations of the rights prescribed in the above mentioned Articles in four proceedings conducted before domestic authorities, to wit: i) proceedings for recognition of leaders; ii) proceedings for recognition of legal capacity; iii) injunctions, and iv) land claim proceedings. [...] Therefore, in this Chapter, the Court will analyze whether said

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[55] Cf. *Ivcher Bronstein Case*, cit., para. 76(t).

[56] Cf. *Ivcher Bronstein Case*, cit., para. 95.

[57] Cf. *Ivcher Bronstein Case*, cit., para. 110.

[58] Cf. *Ivcher Bronstein Case*, cit., paras. 104 and 105.

[59] I/A Court H. R., *Case of the Indigenous Community Sawhoyamaxa*. Judgement of March 29, 2006. Series C No. 146.

[60] As it did in the *The Mayagna (Sumo) Awas Tingni Community Case* (Judgment of August 31, 2001) and in the *Case of the Indigenous Community Yakye Axa* (Judgment of June 17, 2005).

[61] Cf. *Case of the Indigenous Community Sawhoyamaxa*, cit., para. 111.

> proceedings were conducted with respect for the right to a fair trial and within a reasonable time, as well as whether they were an effective remedy to ensure the rights of the petitioners. To that effect, the Court recalls that the *due process of the law guarantee must be observed in the administrative process and in any other procedure whose decisions may affect the rights of persons."*[62] (Emphasis added)

112. In another recent judgment, the Court reaffirmed the aforementioned position. The case in question was that of Claude Reyes *et al.* v. Chile,[63] in which the Court had to decide the scope of the right of access to public information.

113. Claude Reyes, as Executive Director of a nongovernmental organization that specializes in the analysis of investments connected with the use of natural resources, submitted a request for information to the Foreign Investment Committee of Chile.[64] His intention was to obtain information on a forestry exploitation project with potential environmental impact. Said Committee refused to provide part of the information requested without justifying said refusal in writing. The victims attempted remedies in a series of judicial proceedings so that the Committee might be ordered to respond to the request for information and place it at their disposal within a reasonable time. None of the remedies were successful.

114. While this report examines this recent judgment of the Court in more detail below in the analysis of the components of due process of law in administrative proceedings identified by the IASHR, it is relevant to note here that that the Court ruled that:

> Article 8(1) of the Convention does not apply merely to judges and judicial courts. *The guarantees established in this provision must be observed during the different procedures in which State entities adopt decisions that determine the rights of the individual, because the State also empowers administrative authorities, comprising one or more authorities to adopt decisions that determine rights*[65] (Emphasis added)

115. The standards established and consistently confirmed in the different cases outlined hereinabove, denote the broad scope that the Inter-American Court believes should be accorded to observance of the guarantee of due process of law, which underscores the full applicability of said guarantee in administrative proceedings.

116. By the same token, it should also be mentioned that the IACHR has also consistently stressed the need to ensure the right to a fair trial in all proceedings to decide rights and obligations, expressly mentioning administrative proceedings in that regard. In fact, the IACHR addressed the issue before the Court had its first opportunity to do so in the Baena Ricardo *et al.* Case.

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[62] Cf. *Case of the Indigenous Community Sawhoyamaxa*, cit., paras. 81 and 82.

[63] I/A Court H. R., *Case of Claude Reyes et al.* Judgment of September 19, 2006. Series C No. 151.

[64] This Committee is the only body authorized, in representation of the State of Chile, to approve the entry into Chile of foreign capital under the Foreign Investment Statute. Cf. *Case of Claude Reyes et al.*, cit., para. 57.3.

[65] Cf. *Case of Claude Reyes et al.*, cit., para. 118.

117. In April 1999, in its report on merits in the Case of Loren Riebe *et al.*,[66] the IACHR examined the scope of the right to a fair trial and highlighted the need for it to be observed and ensured in administrative proceedings.

118. The priests Loren Riebe Star, Jorge Barón Guttlein, and Rodolfo Izal Elorz were representatives of the Catholic diocese of San Cristóbal de las Casas in the state of Chiapas, Mexico. On June 22, 1995, the three priests were taken by force to Tuxtla Gutiérrez Airport,[67] from where they were flown in a government plane to Mexico City airport, where they were subjected to a political interrogation by Mexican immigration officers. The Mexican authorities told the priests that they were not entitled to: assistance from a lawyer; to be informed of the charges against them, the evidence adduced, or the names of their accusers; or to any form of defense. Finally, the authorities said that the three priests would be expelled "for engaging in activities not permitted under the terms of their visas."[68] The three priests were later escorted by immigration officers and put on a plane bound for the United States. It was only on their arrival in that country that they received a notification from the Mexican Ministry of the Interior, explaining why they had been deported and the charges against them by the Mexican immigration authorities.

119. In its decision on this case, the IACHR recognized the need to adopt standards in the area of administrative procedures. To that end, it decided to turn to the case law already developed in this area in the framework of the European system of human rights,[69] by constitutional courts, and by specialized doctrine. Thus, the IACHR observed:

> The European Commission on Human Rights has established, in general, that the rights to a fair trial and to defense are applicable to administrative proceedings and investigations [...] As regards the extent of the guarantees of due legal process to be observed in administrative proceedings, the Commission notes a consensus in the jurisprudence of several countries. For example, the Constitutional Court of Colombia has established that "any administrative act shall be the result of a proceeding in which the person had an opportunity to express his opinions and present any evidence in support of his rights, and which fully observes all procedural requirements [...] No less interesting is jurist Agustín Gordillo's view on this matter: 'The principle of hearing the interested party prior to deciding anything that may affect him is not only a principle of justice but also a principle of efficacy, because it undoubtedly ensures a better understanding of the

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[66] IACHR, Report Nº 49/99, Case 11.610 *Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz*, Mexico, April 13, 1999.

[67] For an account of the humiliating treatment to which the priests were subjected on the way to Tuxtla Gutiérrez airport, see, *Case of Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz*", cit., paras. 6, 7, and 8.

[68] Cf. *Case of Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz*, cit., para. 10.

[69] The IACHR cited the following precedents in the European system of human rights: "European Commission on Human Rights, Huber v. Austria, 1975 Yearbook of the European Convention on Human Rights, Martinus Nijhoff, The Hague 1976, paras. 69 to 71. In the same sense, the European Court of Human Rights has considered that the principles of due process are applicable, *mutatis mutandis*, to disciplinary sanctions of an administrative nature. European Court, Case of Albert and Le Compte, Judgement." Cf. *Case of Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz*, cit., para. 66.

> facts and therefore contributes to better administration, as well as to a more just decision.'[70]

120. Accordingly, having examined the case through the lens of precedents such as the aforementioned, the IACHR concluded that:

> [T]he State should have determined the fundamental rights of the accused priests, and that the consequences of an adverse decision– such as that which ultimately resulted-warrant *a reasonable interpretation, as broad as possible, of the right to due process*. Therefore, bearing in mind the standards for interpretation of the American Convention, the IACHR considers that this right should have included the opportunity to be assisted by a lawyer if the accused parties had so wished, or by a representative in whom they had confidence, during the administrative proceeding that was held on the night of June 22, 1995, and in the early hours of the following day at Mexico City airport. […] The Commission establishes that the Mexican State denied Fathers Loren Riebe Star, Jorge Barón Guttlein, and Rodolfo Izal Elorz the right to a hearing in order to determine their rights. *This guarantee should have included the right to be assisted during the administrative sanction proceedings; to practice their right of defense, with enough time to ascertain the charges against them and hence to refute them; to have a reasonable time in which to prepare and formalize their statements; and to seek and adduce the corresponding evidence. Thus the IACHR concludes that the aforementioned State violated said persons' right to judicial protection, in breach of Article 8 of the American Convention*.[71] (Emphasis added)

121. The IACHR reiterated its position in this regard in its arguments to the Inter-American Court in the above-cited Case of Baena, Ricardo *et al.*:

> Concerning Article 8 of the Convention, the Commission argued that: a) *it is not possible to construe the due process as being limited to judicial actions; it must be guaranteed in all proceedings or actions of the State that may affect the rights and interests of individuals*; […] the administration must act according to legality and the general principles of rationality, reasonableness, and proportionality, permitting those who are the objects of administrative actions to exercise their right to defense.[72] (Emphasis added)

122. For its part, the Special Rapporteurship on Migrant Workers and Their Families also established standards on the scope of the right to a fair trial. Thus, in April 2001, in its Second Progress Report, it expressed its opinion on the link between the rights of migrant workers and due process of law in administrative proceedings as follows:

> In any non-criminal proceedings against a migrant worker, a certain *quantum* of due process must also be respected […] whenever effective enjoyment of a right or a legitimate interest is at stake, the

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[70] Cf. *Case of Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz*, cit., paras. 66, 67 and 69 and their respective footnotes.

[71] Cf. *Case of Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz*, cit., paras. 70 and 71.

[72] Cf., *Baena Ricardo et al. Case,* cit., para. 116.

> authorities should decide the case only after the interested party has been duly heard [...] The principle of due process, with this degree of flexibility, applies not only to court decisions, but also to decisions made by administrative bodies.[73]

123. The standards outlined here reflect the position adopted by the IASHR on the applicability of the right to a fair trial in administrative proceedings. As shown, both the IACHR and the I. A. Court of H.R. have confirmed the full applicability of this right in that context. It is worth noting that the cases and reports cited on this first point are a mere sample of the framework that will be erected as the precise scope that the IASHR has recognized to administrative due process is defined.

B. Limits of the Discretionary Authority of the State

124. Social rights are without doubts the rights most vulnerable to arbitrary administrative decisions, as the State tends to exercise a greater margin of discretion in determining many of the benefits that are the object of such decisions. In the face of this situation, in various decisions the IASHR has pronounced in favor of the need to limit and condition so-called state discretionality.

125. In the above-cited Baena Ricardo *et al.* Case, the Inter-American Court held emphatically that:

> *In any subject matter, even in labor and administrative matters, the discretionality of the administration has boundaries that may not be surpassed, one such boundary being respect for human rights. It is important for the conduct of the administration to be regulated and it may not invoke public order to reduce discretionally the guarantees of its subjects.*[74] (Emphasis added)

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[73] Cf. IACHR, *Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere* (OEA/Ser./L/V/I111 doc. 20 rev.), April 16, 2001; par. 95. The At the same time, regarding the process of determination on the status of the migrant worker the report states: "*migration policy is circumscribed by general respect for human rights, and in that context, by guarantees of due process* [...] a decision on the legal status of a migrant worker does affect his chances of making a living, working under decent conditions, feeding his family and providing an education for his children. It will also affect his right to raise a family and the special protection extended to minors within a family [...] the value at issue in such proceedings is similar to liberty, or at least closer to liberty than would be the case in other administrative or judicial proceedings. Thus, at the very least, *a minimum threshold of complete of due process guarantees should be provided*." (Emphasis added), Cf. *Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere*, cit., para. 98.

The IACHR has also cited the considerations of the Rapporteurship on Migrant Workers and Their families in the Hemisphere in its Report on Terrorism and Human Rights. Cf. R*eport on Terrorism and Human Rights*, cit., paras. 400 and 401.

[74] Cf. *Baena Ricardo et al. Case,* cit., para. 126. It is valid to refer here to Case 11.430. The petiton alleged that following his promotion to Brigadier General of the Mexican Army, José Francisco Gallardo Rodríguez began to be the victim, of threats, harassment, and intimidation by high-level authorities of the Secretariat for National Defense (SEDENA). Furthermore, the petition asserts that SEDENA, through Mexican Army officers, undertook a campaign of defamation and sought to discredit him, and that he was subjected to unjust judicial procedures and imprisonment. In its report on merits, the IACHR referred to the so-called "theory of abuse of power" in examining the behavior of the Office of the Attorney General of Mexico toward Mr. Gallardo. Thus, the IACHR noted, "'...*The abuse of power is an abuse of mandate, an abuse of law. An administrative act may have been performed by the competent official with all the appearances of legality and yet this discretionary act, which the qualified official had the strict right to perform, may be rendered illegal if its author has used his powers for a purpose other than that for which they were conferred on him, or to speak in terms of jurisprudence, for a purpose other than the public interest or the*

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126. The Court held a similar opinion in an important case that concerned the right to social security. In the Case of the "Five Pensioners".[75] In said case the matter at issue was the reduction in the amount of the pension benefits of five pensioners who had served in the public administration of Peru, as well as a failure to abide by court decisions that ordered the payment of those benefits in accordance with the original rules for their calculation.

127. The victims had retired after serving in the Public Administration for more than 20 years. To be specific, they worked in the Superintendency of Banking and Insurance (SBS). According to the law in force upon their retirement, the State recognized the victims' right to a retirement pension, progressively equalized with the salary "of the active public servants in the respective categories", who occupied the same position or a similar function to that occupied by the pensioners when they ceased to work for the SBS.[76] These pensioners were enjoying this pension scheme when the SBS reduced their pension benefits to one-fifth or one-sixth of their nominal value, depending on the person concerned. Furthermore, the SBS later disregarded the judgments of the Supreme Court of Justice and the Constitutional Court of Peru "that ordered the organs of the Peruvian State to pay the pensioners a pension in an amount calculated as established in the legislation in force when they began to enjoy a determined pension regime."[77]

128. In this framework, the Court referred again to the limits to which the decisions of the administration should be subject and their connection with the right to a fair trial. Accordingly, in its judgment of February 28, 2003, the Court ruled that:

> instead of acting arbitrarily, if the State wished to give another interpretation to Decree Law No. 20530 and its related norms, in relation to the five pensioners, it should have: a) executed an administrative procedure with full respect for the appropriate guarantees; and b) in any event, given precedence to the decisions of the courts of justice over the administrative decisions.[78]

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good of the service.' The Commission notes that, while it may appear that the law has been adhered to in all the procedures by which the accused has been detained, the above-cited investigations have been opened, and the subsequent criminal actions have been brought, nevertheless the Mexican justice authorities, whether regular or military, who are responsible together with the Judicial Police for the prosecution of crimes, pursuant to Article 21 of the Mexican Constitution, *have used the public power to launch preliminary investigations, whether ex officio or ex parte, and to bring subsequent criminal actions, for purposes other than those established in Mexican legislation, and in so doing have abused that power*, through a series of successive and seemingly legal acts that have tended to deprive General José Francisco Gallardo of his personal liberty." (Emphasis added) Cf. IACHR, Report Nº 43/96, Case 11.430, Mexico, October 15, 1996, para. 114.

[75] I I/A Court H. R., *Case of the "Five Pensioners"*. Judgment of February 28, 2003. Series C No. 98.

[76] Cf. *Case of the Five Pensioners,* cit., para. 88(d).

[77] Cf. *Case of the Five Pensioners,* cit., para. 2.

[78] Cf. *Case of the Five Pensioners,* cit., para. 117. It should be clarified that in this case the Inter-American Court found that it was unable to rule on the alleged violation of Article 8 of the American Convention because it found that there was insufficient evidence in the record in that regard. The IACHR did not allege violation of Article 8 in its application to the Court; rather the victims' representatives included it in the catalogue of violations that they claimed in their brief. On this point, see paras. 149 and 150.

129. In turn, the Case of the Girls Yean and Bosico,[79] clearly highlighted the need to establish limits and rules for the Administration to observe. According both to the application of IACHR and to the judgment of the Court in this case, it was imperative to restrict the discretionary authority of the State in light of the discriminatory practices to which children of Haitians born in that country were subjected by the Dominican administration when they attempted late registration of their births.

130. Specifically, the Dominican State, through its Registry Office authorities, refused to issue birth certificates for the girls Dilcia Yean and Violeta Bosico, even though they were born within the State's territory and the Constitution of the Dominican Republic recognizes the principle of *ius soli* to determine those who have a right to Dominican citizenship. The Commission indicated that by keeping them stateless for several years, the State obliged the girls to endure a situation of continued illegality and social vulnerability, and violated their right to nationality. In the case of child Violeta Bosico this situation also impaired an essential social right (the right to education) since she was unable to attend school for one year because she lacked an identity document.[80]

131. The absence of a mechanism or procedure for judicial review of Registry Office decisions, as well as the discriminatory actions of Registry Office officials who did not permit the girls to obtain their birth certificates, prompted the IACHR and the Inter-American Court to underscore that administrative proceedings should as a matter of necessity be conducted according to clear and objective rules that tend to restrict the exercise of discretionary authority in order to avoid any violation of the prohibition of discrimination. In this way, the Court found as follows:

> The Court considers that the peremptory legal principle of the equal and effective protection of the law and non-discrimination determines that, when regulating mechanisms for granting nationality, States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights. […] The Court considers that, by applying to the children requirements that differed from those requisite for children under 13 years of age in order to obtain nationality, *the State acted arbitrarily, without using reasonable and objective criteria, and in a way that was contrary to the superior interest of the child, which constitutes discriminatory treatment to the detriment of the children Dilcia Yean and Violeta Bosico*. This situation placed them outside the State's juridical system and kept them stateless, *which placed them in a situation of extreme vulnerability, as regards the exercise and enjoyment of their rights* […] In accordance with the obligation arising from Article 2 of the American Convention, the Court considers that *the requirements for obtaining nationality must be clearly and objectively established previously by the competent authority*. Likewise, *the law should not provide the State officials applying it with broad discretionary powers, because this creates opportunities for discriminatory acts*.[81] (Emphasis added)

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[79] I/A Court H. R., *Case of the Girls Yean and Bosico*. Judgment of September 8, 2005. Series C No. 130.

[80] See in this respect, the section on "Proven Facts" in the Court's judgment, *Case of the Girls Yean and Bosico*, cit., Chapter VIII.

[81] Cf. *Case of the Girls Yean and Bosico*, cit., paras. 165, 166, 190, 191. It should be clarified that the Inter-American Court did not rule that there had been a violation of Article 8 of the

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132. Thus, in this case the IASHR recognized an important link between the scope of administrative due process and the protection of a fundamental principle of the system: the prohibition of discrimination. Accordingly, in the part on reparations, the judgment of the Inter-American Court reads as follows:

> The Court finds that, when establishing the requirements for late registration of birth, the State *should take into consideration the particularly vulnerable situation of Dominican children of Haitian origin*. The requirements should not constitute an obstacle for obtaining Dominican nationality and should be only those essential for establishing that the birth occurred in the Dominican Republic. […] *Moreover, the requirements should be specified clearly and be standardized, and their application should not be left to the discretion of State officials, in order to guarantee the legal certainty of those who use this procedure and to ensure an effective guarantee of the rights embodied in the American Convention, pursuant to Article 1(1) of the Convention* […] The Court also finds that the State should implement, within a reasonable time, *a program to provide training on human rights, with special emphasis on the right to equal protection and non-discrimination, to the State officials responsible for registering births, during which they should receive guidance on the special situation of children, and a culture of tolerance and non-discrimination is fostered*.[82] (Emphasis added)

133. In addition to the *Case of the Girls Yean and Bosico* v. *Dominican Republic,* the Inter-American Court also had occasion to state its opinion on the need to impose limits on administrative decisions that affect particularly vulnerable sectors, in Advisory Opinions OC-17/2002, *Juridical Condition and Human Rights of the Child*[83] and OC-18/03, *Juridical Condition and Rights of the Undocumented Migrants*.[84] In the first of these advisory opinions, the Inter-American Court held:

> Finally, it is appropriate to point out that there are children exposed to grave risk or harm who cannot fend for themselves, solve the problems that they suffer or adequately channel their own lives, whether because they absolutely lack a favorable family environment, supportive of their development, or because they have insufficient education, suffer health problems or have deviant behavior that requires careful and timely intervention […] by well-prepared institutions and qualified staff to solve those problems or allay their consequences […]Obviously, these children are *not immediately deprived of rights and withdrawn from relations with their parents or guardians and from their authority. They do not pass into the "dominion" of the authorities, in such a manner that the latter, disregarding legal procedures and guarantees that preserve the rights and interests of the minor, take over responsibility for the case and full*

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American Convention in this case because it found that facts with which the analysis of this guarantee was concerned occurred before the Dominican Republic accepted the contentious juridiction of the Court. See in this respect, *Case of the Girls Yean and Bosico*, cit., paras. 198 to 201.

[82] Cf. *Case of the Girls Yean and Bosico*, cit., paras. 240 and 242.

[83] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17.

[84] I/A Court H. R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18.

> *authority over the former. Under all circumstances, the substantive and procedural rights of the child remain safeguarded. Any action that affects them must be perfectly justified according to the law, it must be reasonable and relevant in substantive and formal terms, it must address the best interests of the child and abide by procedures and guarantees that at all times enable verification of its suitability and legitimacy*.[85] (Emphasis added)

134. In Advisory Opinion OC-18/03 the Court found that:

> ...States may not discriminate or tolerate discriminatory situations that prejudice migrants. However, the State may grant a distinct treatment to documented migrants with respect to undocumented migrants, or between migrants and nationals, provided that this differential treatment is reasonable, objective, and proportionate and does not harm human rights. [...] States may also establish mechanisms to control the entry into and departure from their territory of undocumented migrants, which must always be applied with strict regard for the guarantees of due process and respect for human dignity.[86]

135. Finally, it is worth drawing attention in this respect to a recent case in which the IACHR referred in particular to the limits of the discretionary authority of the State.

136. In the Case of Eduardo Perales Martínez,[87] the petitioner presented a complaint to the IACHR against the Republic of Chile for alleged violation of the rights to a fair trial (Article 8), freedom of thought and expression (Article 13) and judicial protection (Article 25), together with violation of the obligation to respect rights (Article 1(1)), contained in the American Convention on Human Rights. These alleged violations were caused by to the petitioner's dismissal from the national militarized police force of Chile (The *Carabineros*) in 1998, for having made a joke critical of the institution.[88] Mr. Perales Martínez complained to the IACHR that the Director of the *Carabineros*, without

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[85] Cf. Advisory Opinion OC-17/02, cit., paras. 112 and 113.

Specifically with respect to the scope of administrative due process where the rights of the child are concerned, the Inter-American Court has determined the following: "Participation of the Child [...] Finally, those responsible for application of the law, whether in the administrative or judiciary sphere, must take into account the specific conditions of the minor and his or her best interests to decide on the child's participation, as appropriate, in establishing his or her rights. *This consideration will seek as much access as possible by the minor to examination of his or her own case*. [...] Administrative Process [...] Protection measures adopted by administrative authorities must be strictly in accordance with the law and must seek continuation of the child's ties with his or her family group, if this is possible and reasonable[...]; in case a separation is necessary, it should be for the least possible time possible [...]; those who participate in decision-making processes must have the necessary personal and professional competence to identify advisable measures from the standpoint of the child's interests [...]); the objective of measures adopted must be to re-educate and re-socialize the minor, when this is appropriate; and measures that involve deprivation of liberty must be exceptional. *All this enables adequate development of due process, reduces and adequately limits its discretion, in accordance with criteria of relevance and rationality.*" (Emphasis added), Cf. Advisory Opinion OC-17/2002, cit.*,* paras. 102 and 103.

[86] Cf. Advisory Opinion OC-18/03, cit., para. 119.

[87] IACHR, Report Nº 57/05, Petition 12.143, Admissibility, *Eduardo Perales Martínez*, Chile, October 12, 2005.

[88] Cf. *Case of Eduardo Perales Martínez*, cit., para. 1.

permitting him a fair trial to determine his guilt, asked the President of Chile to order Captain Perales' dismissal. As a result, Supreme Decree 304 of June 3, 1998, issued by the Ministry of Defense, ordered the officer's immediate retirement, terminating a professional career of 13 years in the police force.[89] With respect to the topic under discussion here, in its report on admissibility in the case, the IACHR noted the following:

> The petitioner argues that he was denied due process: *he had no access to any procedure that would allow him to be heard before an appropriate and impartial judge*. His punishment was applied by a subordinate of the General Director of *Carabineros*, exercising a power not conferred upon him by law. *The petitioner also claims violation of the right to administrative due process* [...] *The Commission finds that the facts of the case raise important questions about the limits of discretionary power in a State governed by the rule of law, and in relation to the American Convention. In particular, the Commission will examine, during the merits stage, whether the standard established by the Convention would accord validity to a purely discretionary decision taken by the Chilean President, at the proposal of the General Director of the Carabineros, to dismiss a police officer, if such dismissal affects individual rights recognized in the American Convention and in the Chilean Constitution. Is a police officer entitled to due process in a disciplinary administrative procedure established by law, and does he have the right to defend himself against the charges presented? If the answer is affirmative, what are the guarantees required for due process? In addition, what purpose is served by guarantees of due process for the accused if the final decision on his dismissal can be taken by the President on purely discretionary ground?* While the Commission recognizes that states have the jurisdiction to exercise certain discretionary powers in the course of government decisions and policies (for example, the appointment and removal of senior political figures such as cabinet ministers), *the Commission must in this case determine whether, in light of the American Convention, those discretionary powers can be invoked in situations that involve the exercise of individual rights. [...]* In this light, *the Commission finds that the matter at issue could characterize violations of Articles 8, 13 and 25 of the American Convention.*[90] (Emphasis added)

137. The judgments, advisory opinions, and reports summarized here show how the IASHR has evolved in terms of setting standards for the adoption of rules and guidelines on the actions or of government authorities and recognition of the right to a fair trial in administrative proceedings.

C. Elements that Comprise Due Process of Law in Administrative Proceedings

138. Having clarified the position of the IASHR with regard to the applicability of due process of law in administrative proceedings, it is appropriate to specify the substance that the IACHR and the Inter-American Court believe that this guarantee should have; in other words, the various elements that said organs have progressively identified as core components.

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[89] Cf. *Case of Eduardo Perales Martínez*, cit, para. 13.

[90] Cf. *Case of Eduardo Perales Martínez*, cit, paras. 17 and 36.

1. The Guarantee of a Hearing for the Determination of Rights. The Right to Legal Representation

139. In its report on merits in the above-cited Case of Loren Riebe *et al.*,[91] the IACHR found that the State denied the victims the guarantee of a hearing for the determination of their rights.

140. In the opinion of the Inter-American Commission, said guarantee should have included: a) the right to be assisted during the punitive administrative proceeding; b) the right to exercise their right of defense, with enough time to ascertain the charges against them and hence to refute them; and, c) the right to a reasonable time in which to prepare and formalize their arguments, and to seek and adduce the corresponding evidence.

141. Having determined that said rights were not ensured in the case, the IACHR concluded that the Mexican State violated the right of the priests to a fair trial, in contravention of Article 8 of the American Convention.[92]

142. Specifically with regard to violation of the right to legal assistance during the administrative proceeding, the IACHR mentioned the following in its report:

> *The Commission concluded above that the Mexican State should have guaranteed the petitioners' right to be represented during the administrative proceedings*. That conclusion is based not just on the right to a hearing in the context of the instant case, but also from the point of view of effective judicial protection. [...] The lack of a lawyer the priests could trust is relevant when it comes to analyzing judicial protection, because a professional of that kind could have counseled his clients regarding their right to file a writ of *amparo* immediately, in order to preempt consummation of the violations set forth above. [...] [T]he reason for the presence of an attorney in the hearing is the legal

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[91] Cf. *Case of Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz*, cit.

[92] In particular, the IACHR noted, "The Commission establishes that the Mexican State denied Fathers Loren Riebe Star, Jorge Barón Guttlein, and Rodolfo Izal Elorz the right to a hearing in order to determine their rights. This guarantee should have included the right to be assisted during the administrative sanction proceedings; to practice their right of defense, with enough time to ascertain the charges against them and hence to refute them; to have a reasonable time in which to prepare and formalize their statements; and to seek and adduce the corresponding evidence. Thus the IACHR concludes that the aforementioned State violated said persons' right to judicial protection, in breach of Article 8 of the American Convention." Cf. *Case of Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz*, cit, para. 71.

It is significant that in its analysis the IACHR used the same interpretation of Article 14 of the Mexican Constitution as that adopted in Mexican case law. Thus, in its report, the Commission found, "The Mexican authorities have stated their case regarding the essential requisites for an administrative procedure, which they describe as 'those that guarantee an appropriate and timely defense prior to the privative act.' Specifically they have established that: 'The guarantee of a hearing established by Article 14 of the Constitution consists of granting citizens the opportunity to defend their case prior to any act depriving them of liberty, property, possessions, or rights, and due respect for that guarantee obliges the authorities, among other things, to 'comply with the formal prerequisites inherent in the procedure.' That means the formalities required to guarantee adequate defense prior to the privative act, in other words basically the following requirements: 1) notification of when the procedure begins and its consequences; 2) the opportunity to present and expound evidence supporting their case; 3) the opportunity to argue their case; 4) a verdict settling the issues raised. Failure to fulfill these requisites constitutes failure to comply with the purpose of the right to a hearing, which is to avoid leaving an affected party defenseless.'" Cf. *Case of Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz*, cit, para. 51.

> counsel such professional could have been able to provide his or her clients, in the face of the imminence of a decision that was going to affect their fundamental rights. For example, an attorney who is a person of confidence could have explained to the priests the "simplicity and rapidity" of the rules on *amparo* described by the State in its response to Report Nº 41/98, which would have enabled them to file it before the situation of violations described in this report had been consummated.[93] (Emphasis added)

143. Accordingly, the IACHR concluded in the case that the right to judicial protection recognized in Article 25 of the American Convention had also being violated.[94]

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[93] Cf. *Case of Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz*, cit. paras. 74, 75, and 123.

[94] Cf. *Case of Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz*, cit. para. 82.

It should be mentioned that, in the framework of its *Second Progress Report*, the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere, set itself the task of listing the component parts of administrative due process, in particular with regard to decisions connected with migration: "A. **An accountable and impartial adjudicator**. Decisions in the area of migration cannot be left to non-specialized administrative or police officials. Public officials responsible for such decisions must be accountable before the law, to superiors and to any horizontal control bodies charged with reviewing decisions. The process of appointing an adjudicator and the status of the office within the administrative structure of the state must guarantee impartiality and protection against any possible pressure or influence. We are not saying that only judges should make such decisions. In our opinion, conferring the power on administrative officials is compatible with international human rights law. Nonetheless, the requirements of impartiality and accountability mentioned above must be met. B. **The right to be heard**. A migrant worker must have and be able to effectively exercise the right to be heard, to have his say and defend his right not to be expelled. The right to a hearing should include the right to be informed of evidence to be used against him and the opportunity to counter it, and to produce and present relevant evidence in his own favor, with a reasonable amount of time granted to do so. C. **Information, translation and interpretation**. An immigrant, whatever his legal status, must be able to understand the proceedings he is involved in and all the procedural rights he is entitled to. Thus, translation and interpretation in his language must be made available as necessary. D. **Legal Counsel**. A person facing possible expulsion must have the opportunity of being represented by an attorney of his choosing or other qualified persons. It may be that the state cannot be asked to provide a lawyer free of charge as in criminal proceedings but free representation should at least be offered to indigents. Further, the information referred to in the preceding paragraph should include some form of specialized advice or the rights that assist the immigrant. E. **Judicial Review**. As has been mentioned, the decisions under consideration can legitimately be administrative in nature. However, judicial review must always be provided for, either through appeal in administrative law or by recourse to *amparo* or *habeas corpus*. This does not mean that every administrative decision on deportation must be examined judicially *de novo*, but we do believe that judges should maintain at least baseline oversight of the legality and reasonableness of administrative law decisions in order to comply with the guarantees provided for in Article 1(1) of the Convention and the right to prompt and effective recourse set out in Article 25. F. **Access to Consular Officials**. We have already said that timely access to consular officials must be ensured, above all for detainees. Such access should be made available in accordance with the terms of the Vienna Convention on Consular Relations. G. **Appropriate Detention Conditions**. Persons in detention must be treated humanely and in a way that does not endanger health or life. Rules governing detention should meet the minimum levels set out in international instruments such as the Convention against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment and the Standard Minimum Rules for the Treatment for Prisoners, among others."(Emphasis added) Cf. *Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere* (OEA/Ser./L/V/I111 Doc. 20 rev.), April 16, 2001, para. 99.

144. The decision of the IACHR in the case demonstrates the significance of the specific rights violated and their nature as component elements of due process of law in administrative proceedings.

2. Prior Notification of Charges

145. In presenting its arguments on merits in the Case of Ivcher Bronstein the IACHR proceeded with its identification of the elements that comprise the right to a fair trial in administrative proceedings.[95] Accordingly, the Commission determined, based on the following arguments, that Mr. Ivcher Bronstein had been arbitrarily deprived of his citizenship and that there had been a violation of Article 8 of the American Convention in the case:

> With regard to Article 8 of the Convention, the Commission alleges that [...] c) Mr. Ivcher's was deprived of his nationality title arbitrarily. *When the resolution that annulled this title was issued, Mr. Ivcher was never summonsed, he did not received any prior detailed communication on the matter being examined by the authorities, with information on the corresponding charges, he was not informed that the nationalization file had been mislaid, he was not asked to submit copies in order to reconstruct it, nor was he allowed to present witnesses to support his position; in brief, he was not allowed to exercise the right of defense*.[96] (Emphasis added)

146. In this way, the IACHR highlighted the importance of prior notification of charges in order to safeguard due process guarantees and identified it as an essential component of the right to a fair trial.

147. It is also appropriate to mention the Case of Elías Gattass Sahih in which it was alleged that due process guarantees had been violated in an administrative proceeding in which the petitioner had his immigrant visa revoked.[97] The Commission declared the petition admissible inasmuch as it believed that it "address[ed] a number of issues related to the right of foreign citizens to the legal guarantees of due process in the procedures to revoke their migratory status."[98] Accordingly, the Commission considered that the facts alleged in the case could constitute a violation of Article 8 of the American Convention.[99] Insofar as it is relevant here, it should be mentioned to that among the elements that the IACHR took into account in reaching that conclusion was the precise fact that Mr. Gattass Sahih was not notified of the administrative action against him.[100]

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[95] Cf. *Ivcher Bronstein Case*, cit.

[96] Cf. *Ivcher Bronstein Case*, cit., para. 98.

[97] IACHR, Report Nº 9/05, Petition 1/03, Admissibility, *Elías Gattass Sahih*, Ecuador, February 23, 2005.

[98] Cf. *Elías Gattass Sahih*, cit. para. 41.

[99] Cf. *Elías Gattass Sahih*, cit, para. 41. It should also be noted that the IACHR considered that the facts in the case could constitute violations of the rights contained Articles 7, 22, and 25 of the American Convention, in conjunction with the general oligation of the State to respect and ensure the aforementioned rights established in Article 1(1) of said instrument and in connection with the provisions of Article 2 thereof.

[100] Cf. *Elías Gattass Sahih*, cit, para. 6. The absence of prior notification of an administrative proceeding was also an important factor in the *Case of Benito Tide Méndez, Antonio Sensión, Andrea Alezi, Janty Fils-Aime, William Medina Ferreras, Rafaelito Pérez Charles, Berson Gelim* et al*. v.* Dominican Republic. See, in this respect, IACHR, Report Nº 68/05, Petition 12.271, Admissibility, October 13, 2005.

3. The Right to a Reasoned Decision

148. Another element that the IASHR considers important, based on its analysis of the scope of administrative due process, is the right to a reasoned decision.

149. In the above-cited Case of Claude Reyes *et al.*,[101] the Inter-American Court was emphatic as regards the need for the Administration to cite the reasons for its decisions and make them available to the persons under its supervision. In the case, the State authority refused satisfactorily to resolve a request for information without providing proper justification for that refusal in a written decision. This situation led the Court to conclude that the Administration had acted arbitrarily and, therefore, violated the American Convention. Specifically, the Court found that:

> In this case, *the State's administrative authority responsible for taking a decision on the request for information did not adopt a duly justified written decision, which would have provided information regarding the reasons and norms on which he based his decision not to disclose part of the information in this specific case and established whether this restriction was compatible with the parameters embodied in the Convention. Hence, this decision was arbitrary and did not comply with the guarantee that it should be duly justified protected by Article 8(1) of the Convention*. [...] In view of the above, the Court concludes that the said decision of the administrative authority violated the right to judicial guarantees embodied in Article 8(1) of the Convention, in relation to Article 1(1) thereof...[102] (Emphasis Added)

150. For its part, the IACHR has also determined in cases that it has examined that state authorities have a duty to justify and disclose their decisions.

151. It concluded as much recently in a case in which it found it necessary, moreover, to apply the principle of *iura novit curia* in declaring the petition admissible under Article 8 of the American Convention. The alleged victims in the case are members of the Chilean security forces who say that they were dismissed from the national militarized police force of Chile (The *Carabineros*) due to their alleged participation in a demonstration over the distribution of an additional economic benefit that they considered as unequal. In the petition, the alleged victims claimed that they did not have access to the files, nor did they participate at all in the process and, as a result of the impossibility of producing and challenging evidence, they were unable to avail themselves properly of the right to defense in administrative proceedings. They also said that they were discharged from the force without any basis, without due process, and without the grounds for the evaluation leading to discharge having been set forth in writing. Faced with this situation, the IACHR noted:

> Accordingly, and although they have not been invoked by the petitioners, applying the principle iura novit curia, the Inter-American Commission considers that the facts described constitute violations of the right to a fair trial and the right to judicial protection, protected by Articles 8 and 25 of the American Convention. In addition, the Commission considers that they could constitute violations of the

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[101] Cf. *Case of Claude Reyes et al.*, cit.

[102] Cf. *Case of Claude Reyes et al.*, cit., paras. 122 and 123.

> State's obligations under Articles 1(1) and 2 of the American Convention.[103]

152. Similarly, in the Case of Roger Herminio Salas Gamboa, the petitioner alleged violation of Article 8 of the American Convention based on the refusal of the National Council of the Magistracy to provide a basis for its decision or to inform the judges under review of the results of said review. In this case, the violations claimed concerned irregularities allegedly committed by the National Council of the Magistracy in its decision not to ratify his appointment as a full judge of the Supreme Court of Justice of the Republic. Mr. Salas Gamboa argues that the decisions of the National Council of the Magistracy are arbitrary because no basis is given for them, nor are the judges under review informed of the factors that were taken into account in reaching the decision. In this framework, the IACHR decided to declare the case admissible, finding that the allegations could constitute a violation of Article 8 of the American Convention on Human Rights.[104]

4. Publicity of Administrative Proceedings

153. The IASHR has also expressed its position on the need to ensure publicity of administrative proceedings. In this connection, in its "*Report on Terrorism and Human Rights*,"[105] the IACHR made clear its position in favor of publicity of administrative proceedings:

> An additional aspect of the right to access to information is "a presumption that all meetings of governing bodies are open to the public." This presumption is applicable to any meeting in which decision-making powers are exercised, including administrative proceedings, court hearings, and legislative proceedings. Any limitations on openness of meetings should be subject to the same requirements as the withholding of information.[106]

154. Simillarly, in the *Case of Claude Reyes et al.,*[107] the Inter-American Court urged the adoption of measures necessary to ensure access to information in the possession of the State. Specifically, it found that such measures should include the due guarantees recognized in American Convention. Thus, it noted in its judgment that, in order to comply with the obligation contained in Article 2 of the American Convention, Chile should take the necessary measures to guarantee the protection of the right of access to State-held information, and these should include a guarantee of the effectiveness of an appropriate administrative procedure for processing and deciding requests for information, which establishes time limits for taking a decision and providing information, and which is administered by duly trained officials.[108]

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[103] Cf. IACHR, Report Nº 21/04, Petition 12.190, Admissibility, *José Luis Tapia González et al.*, Chile, February 24, 2004, para. 36.

[104] As we shall see, Mr. Salas Gamboa also alleged violation of Articles 8 and 25 of the Convention on the grounds that there is no possibility of judicial review of the decisions of the National Council of the Magistracy. The IACHR also declared the case admissible as regards alleged vioaltion of Article 25 of the Convention.

[105] Cf. *Report on Terrorism and Human Rights*, cit.

[106] Cf. *Report on Terrorism and Human Rights*, cit., para. 287.

[107] Cf. *Case of Claude Reyes et al.*, cit.

[108] Cf., *Case of Claude Reyes et al.*, cit., para. 163. It should be mentioned here that the ECHR has also ruled on the obligation of the State to ensure access to public information in

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155. The foregoing shows the importance that the IASHR attaches to the guarantee of publicity of administrative proceedings, which, in its opinion, should be considered one of the elements of legal due process.

5. The Principle of a Reasonable Time in Administrative Proceedings

156. Another element considered to play a central role with regard to the guarantee of due process of law in administrative proceedings is the right to a reasonable time. Thus, it should be noted that in some circumstances the design and operation of mechanisms for the determination of rights have a direct effect on those rights. Hence the importance of ensuring the guarantee of "reasonable time" in proceedings to determine obligations in the area of economic and social rights, since excessively lengthy proceedings could obviously cause irreparable harm to the exercise of these rights, in which, as we know, urgency is the prime consideration, forcing the weaker party to reach a compromise or capitulate on the integrity of their claim.

157. Both the IACHR and the Inter-American Court have identified the connection between due process of law in administrative proceedings and the right to a reasonable time therein.

158. The Commission referred precisely to that connection in its application in the *Case of the Indigenous Community Yakye Axa of the Enxet-Lengua People* v. *The Republic of Paraguay.*[109] On that occasion, the IACHR alleged that the Paraguayan State had not ensured the right of the Yakye Axa indigenous community and its members to their ancestral lands since the processing of the claim for the community's land had been going on since 1993 without a satisfactory solution. This situation meant that it was impossible for the community and its members to enjoy ownership and possession of their land and kept them in a state of vulnerability as regards their food and health, posing a continuous threat to the survival of the community's member as well as the integrity of the community itself. The IACHR has observed the following specifically with respect to the duration of the administrative procedures instituted by the community to claim their ancestral territory:

> 3.1. *Steps taken before administrative authorities. a. Request for recognition of the leaders and legal identity of the Yakye Axa Indigenous Community* [...] Regarding this point, the Commission notes that the formalities for recognizing the Community's leaders and legal identity took between three and five years to be resolved; *under the applicable Paraguayan laws, they should have been settled in a matter of months.* [...] In the case at hand, in 1993 the leaders of the Yakye Axa Indigenous Community of the Enxet-Lengua peoples, in compliance with the administrative procedure established for the purpose in Paraguay's domestic laws, began proceedings to recover their ancestral territory. During the years that the processing of the request has been ongoing, a series of procedures have been pursued by the responsible administrative bodies – the INDI and the IBR – which, by law, must provide conclusive solutions for the requests lodged with them. Moreover, the executive itself asked the legislature to expropriate a part of the ancestral lands claimed by Indigenous Community, although

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environmental protection cases. In this respect, see, ECHR, *Oneryildiz v. Turkey,* Judgment of 30 November 2004.

[109] I/A Court H. R., *Case of the Indigenous Community Yakye Axa*. Judgment of June 17, 2005. Series C No. 125.

> the request was dismissed by the National Congress of Paraguay. *More than ten years have passed since the Community began these proceedings, and to date their right of property has not been effectively upheld. […]The administrative remedy provided for resolving the Yakye Axa Indigenous Community's claim, under the procedure set forth in the Indigenous Communities Statute, has not proved effective for settling the Community's demands.*[110] (Emphasis added)

159. In line with the foregoing, when it fell to the Court to render its decision, it drew particular attention to the violation of the principle of reasonable time in the case and, consequently, of the right to a fair trial generally. The Court observed the following:

> The Court has noted that on August 15, 1993, the members of the Yakye Axa Community requested that INDI recognize Messrs. Tomás Galeano and Esteban López as community leaders and that it register the community in the National Register of Indigenous Communities […] The President of INDI's Board of Directors did not issue a resolution approving said request until September 18, 1996. […] *The period of three years, one month and three days that was taken to decide a request of minimal complexity, for which the legal time limit is 30 days, disregards the principle of reasonable time.* […] The Court has found that the formalities for recognition of the legal identity of the Yakye Axa Community were initiated with INDI on May 21, 1998. […] The decree recognizing the legal identity of the Community was issued on December 10, 2001, that is, three years, six months and 19 days afterward. […] *The Court finds that the complexity of this procedure was minimal and that the State has not justified the aforementioned delay, for which reason the Court considers it disproportionate.* […] The Court considers that *a prolonged a delay, such as the one that has occurred in this case, in itself constitutes, in principle, a violation of the right to a fair trial. The lack of reasonableness, however, may be refuted by the State if it can show that the delay was directly connected with the complexity of the case or with the conduct of the parties therein. […]* However, *the Court finds that the delays in the administrative proceeding examined in this judgment were not caused by the complexity of the case but by proceedings that were systematically delayed by the State authorities.*[111] (Emphasis added)

160. It is interesting to note the standard that the Inter-American Court adopts in the case. The Court holds that a prolonged delay in an administrative proceeding constitutes, in principle, a violation of Article 8 of the American Convention on Human Rights and that to refute such a conclusion, the State must duly demonstrate that the sluggishness of the process stemmed from the complexity of the case or the conduct of the parties therein.

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[110] IACHR, Application to the Inter-American Court in the *Case of the Indigenous Community Yakie Axa* v. *Paraguay*, paras. 75, 158, and 207.

[111] Cf. I/A Court H. R., *Case of the Indigenous Community Yakye Axa*. Judgment of June 17, 2005. Series C No. 125, paras. 66, 71, 86, and 88.

161. The IACHR and the Court also examined the violation of the principle of reasonable time in the above-cited *Case of the Indigenous Community Sawhoyamaxa.*[112] The Commission considered in that regard that:

> In the present case, adhering to the administrative procedure provided for that purpose under Paraguay's domestic law, in 1991 the leaders of the Sawhoyamaxa Community filed a claim to recover a portion of their ancestral territory. Since 1991, the government agencies in charge of processing that application –namely, the INDI and the IBR- have carried out various measures in processing the application. As explained above, under Paraguayan law these two agencies are required to find permanent solutions to the applications filed with them. However, more than 13 years have passed since the required formalities were instituted, yet the Sawhoyamaxa Community's right to ownership of its ancestral territory has not been effectively protected. […] *Under Articles 25 and 8(1) of the Convention and the provisions of ILO Convention No. 169, the Paraguayan State has an obligation to provide the Indigenous Community with an effective and efficient recourse to settle its land claim, a duty to ensure that the Community will be given a hearing, with due guarantees, and a duty to arrive at a decision within a reasonable period of time to guarantee the rights and obligations submitted to its jurisdiction*. […]The Commission observes that the Paraguayan State did not guarantee an effective and efficient recourse to respond to the Sawhoyamaxa Community's claims to ancestral territory, thereby denying them a hearing, with due guarantees. The Commission therefore considers that the Paraguayan State violated Articles 8 and 25 of the Convention, to the detriment of the Sawhoyamaxa Indigenous Community and its members[113] (Emphasis added)

162. In turn, the Court ruled,

> The Community alleged that the State has not ensured the ancestral property right of the Sawhoyamaxa Community and its members, inasmuch as their claim for territorial rights is pending since 1991 and it has not been satisfactorily resolved to date. As stated in the Commission's application, this has barred the Community and its members from title to and possession of their lands, and has implied keeping it in a state of nutritional, medical and health vulnerability, which constantly threatens their survival and integrity. […] The Court has ascertained that a petition for recognition of what in Paraguay is known as "legal personality" of the Sawhoyamaxa Community was filed with the *INDI* on September 7, 1993 […] and that the Executive Order recognizing said personality was issued on July 21, 1998, that is to say, four years, ten months and fourteen days later. […]*The foregoing being considered, and taking into account that said proceedings are not complex and that the State has not justified said delay, the Court deems it to be out of proportion and a violation of the*

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[112] I/A Court H. R., *Case of the Indigenous Community Sawhoyamaxa*. Judgement of March 29, 2006. Series C No. 146.

[113] Cf. Application to the Inter-American Court in the *Case of the Indigenous Community Sawhoyamaxa*, paras. 130, 183, and 184.

> *right to be heard in a reasonable time as provided for in Article 8(1) of the American Convention.*[114] (Emphasis added)

163. Finally, it is apt to mention that in the case of *Loren Laroye Riebe Star, Jorge Barón Guttlein, and Rodolfo Izal Elorz v. Mexico*,[115] the Commission had already referred to the implicit nature of the principle of reasonable time, although not, on this occasion, to underscore the existence of an unwarranted delay but to draw attention to the unreasonable brevity of the administrative proceeding that the three priests underwent. The IACHR found,

> It is quite clear that the three priests were not given the opportunity to prepare their defense, formulate their claims and submit evidence, taking into consideration the unreasonably short time in which the government's decision was carried out and the distance between where they were and their place of permanent residence in the State of Chiapas, where the witnesses or documents they might have produced in their defense were located. [...] Based on the aforementioned analysis, the IACHR considers that in those proceedings, the authorities did not comply with the explicit requirements of Mexican law, the jurisprudence established by that country's legal authorities and the American Convention, to protect the right to a hearing enshrined in Article 14 of the Mexican Constitution, which is compatible with Article 8 of the American Convention and with other international human rights instruments.[116]

6. The Right to Judicial Review of Administrative Decisions

164. One final element of the right to a fair trial in administrative proceedings that has been accepted and developed in the framework of the IASHR is the right to judicial review of administrative decisions. In this connection, it should be noted that the absence of adequate judicial mechanisms for the comprehensive review of administrative decisions also has a direct impact on the observance of social rights inasmuch as many of these rights depend on administrative decisions.

165. The standards established in the above-cited *Case of the Girls Yean and Bosico,*[117] are illustrative in this respect. Both in its application and in its arguments to the Court, the IACHR gave particular attention to the impossibility for the victims to appeal the decisions of the Dominican Registry Office that refused them the possibility of late registration of their births. In its initial brief to the Court, the IACHR explained that,

> Under Dominican law, two procedural avenues –one administrative and the other judicial- are pursued to have Civil Registry decisions on late declarations reviewed. The administrative avenue is the review that the District Attorney does of Civil Registry decisions, which can also be reviewed by the JCE. The second avenue is review by the court of

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[114] Cf. I/A Court H. R., *Case of the Indigenous Community Sawhoyamaxa*. Judgment of March 29, 2006. Series C No. 146, paras. 2, 88, and 89.

[115] Cf. *Case of Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz*, cit.

[116] Cf. *Case of Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz*, cit, para. 60.

[117] I/A Court H. R., *Case of the Girls Yean and Bosico*. Judgment of September 8, 2005. Series C No. 130.

> first instance. The Commission believes that the two avenues are contradictory and inadequate, as neither avenue for review of a Civil Registry decision is an appeals procedure consistent with Article 8 of the Convention. The mothers of Dilcia and Violeta tried to register their daughters' births, but the Civil Registry officials turned down their applications; and despite the petitioners' efforts, their requests were never reviewed by a competent court. [...] Having examined the documentation offered during the Commission's proceedings on the case, it has concluded that the domestic laws contain no legal provision permitting a private individual to appeal a decision that the District Attorney adopts under Article 41 (in force) with the court of first instance, since under Law 659 on Civil Records, the District Attorney is to present late declarations to the court of first instance, which did not happen in the instant case. [...] The procedure that Article 41 of Law 659 establishes specifies the stages that the authorities must follow assuming the requirements set by the JCE are present; however, neither this article nor any other describes how applicants should access the courts directly and independently, should they wish to challenge the District Attorney's decision to deny their request. The Commission, therefore, considers that Law 659 offers no recourse to access a court of law for a review and, where appropriate, correction of administrative officials' acts.[118]

166. Faced with this situation, the IACHR noted that the regulations in force in the Dominican Republic denied Violeta, Dilcia and their mothers access to a judicial recourse that would enable them to challenge the administrative authorities' refusal to agree to late registration, and thus obtain judicial protection of their fundamental rights. The Commission observed that it follows from Article 8(1) of the American Convention, which recognizes the right of access to justice, that States are not to obstruct persons who turn to the courts or judges to have their rights determined or protected. Any domestic law or measure that imposes costs or in any way obstructs individuals' access to the courts and is not justified by what is reasonably needed for the administration of justice is understood to be contrary to Article 8(1) of the Convention. Therefore, it concluded that the rule that holds that only the District Attorney may bring a refusal to register a late declaration to the attention of the court of first instance is an unwarranted obstacle that denied Dilcia, Violeta and their mothers access to the courts, in violation of Article 8(1) of the American Convention.[119]

167. The IACHR also drew attention to the right of judicial review of the decisions of government authorities in its report on merits in the case of *Loren Laroye Riebe Star, Jorge Barón Guttlein, and Rodolfo Izal Elorz v. Mexico.*[120] In that case, the IACHR noted that the three priests should have had access to a judicial authority: a) to determine the lawfulness of their detention; b) to examine the validity of the evidence compiled against them; and c) to present evidence countering those charges and to allow them to mount a judicial challenge against the decision to expel them.[121] In that connection, the IACHR concluded:

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[118] Cf. Application of the IACHR in the *Case of the Girls Yean and Bosico*, paras. 132 to 139.

[119] See in this respect, Application of the IACHR in the *Case of the Girls Yean and Bosico*, para. 139. See note 40.

[120] Cf. *Loren Laroye Riebe Star, Jorge Barón Guttlein, and Rodolfo Izal Elorz,* cit.

[121] Cf. *Loren Laroye Riebe Star, Jorge Barón Guttlein, and Rodolfo Izal Elorz,* cit., para. 44.

> The above-mentioned provisions guaranteeing the right to due process are applicable to administrative as well as judicial procedures. This emerges from the text of Article 8(1), which refers to "…the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.[122]

168. In the aforementioned case of *Roger Herminio Salas Gamboa v. Peru,* the petitioner also claimed violation of Articles 8 and 25 of the American Convention because there was no possibility of judicial review of the decisions of the National Council of the Magistracy of Peru. As was mentioned, Mr. Salas Gamboa was not reconfirmed in his position as a full judge of the Supreme Court of Justice of the Republic following a review of his performance by said Council. The petitioner had no possibility of accessing the text of said review, nor of appealing the decision in judicial proceedings because that possibility is not provided by Peruvian law. Having examined this situation, the IACHR found that such allegations could characterize violations of Articles 8 and 25 of the American Convention.

169. We will return to the right of judicial review of administrative decisions in the following section of this report;[123] however, it is fair to conclude, in the light of the above-summarized precedents, that said right is regarded as an integral part of administrative due process in the framework of the Inter- American Human Rights System.

D. Conclusions

170. In their examinations of cases that concern, *inter alia*, economic, social and cultural rights, rights of indigenous peoples, rights of migrants, and environmental rights, both the IACHR and the Inter-American Court have developed a clear standard as regards the full applicability of the guarantee of due process of law in administrative proceedings.

171. Both organs have determined that due process of law must be observed in all proceedings for the determination of rights. As the Court has found, Article 8(1) of the American Convention is also applicable to any situation in which a nonjudicial government authority adopts decisions on obligations and rights.

172. In keeping with this notion, the IASHR has underscored the need to regulate and restrict state discretionary power. Thus, the Court and the IACHR have determined that the activities of administrations are subject to specific limits, among them respect for human rights. On this point, in cases that involve especially vulnerable groups, the Inter-American Court has identified the need to draw links between the scope of administrative due process and effective observance of the prohibition of discrimination.

173. The IASHR has begun to identify the elements that comprise the rights to a fair trial in administrative proceedings. In this connection, the Commission has considered that one of the elements that make up administrative due process is the guarantee of a hearing for the determination of the rights at issue. According to the IACHR, that guarantee includes: a) the right to legal assistance; b) the right to exercise

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[122] Cf. *Loren Laroye Riebe Star, Jorge Barón Guttlein, and Rodolfo Izal Elorz,* cit., para. 46.

[123] Part of the following section continues the examination of judicial review of administrative decisions in order to analyze the appropriate scope of said judicial review in accordance with the standards set by the IACHR and the Inter-American Court.

the right of defense; and, c) the right to a reasonable time in which to prepare and formalize arguments, as well as to seek and adduce the corresponding evidence. The Commission has also concluded that prior notification of charges is also a core component of that guarantee.

174. The *right to a reasoned decision on merits* and the need to ensure *publicity of administrative proceedings* have also pinpointed both by the IACHR and by the Court as integral components of due process.

175. In turn, both organs of the IASHR have emphatically drawn attention to the right to an administrative proceeding in a reasonable time as one of the components of the right to a fair trial. The Inter-American Court has established a clear standard in this respect. Thus, it has determined that a prolonged a delay in an administrative proceeding constitutes, in principle, a violation of Article 8 of the American Convention and that, in order to refute such a conclusion, it is up to the State to show that the delay in the proceeding was due to the complexity of the case or to the conduct of the parties therein.

176. Finally, another element of the guarantee of due process of law in administrative proceedings that has evolved in the framework of the IASHR is the right to judicial review of administrative decisions. On this point, the IACHR has determined that any law or measure that obstructs access to the courts and is not warranted by what is reasonably needed for the administration of justice must be regarded as contrary to Article 8(1) of the American Convention.

IV. DUE PROCESS OF LAW IN JUDICIAL PROCEEDINGS CONCERNING SOCIAL RIGHTS

177. The case law of the IASHR has recognized a close link between the scope of the rights embodied in Articles 8 and 25 of the American Convention. Accordingly, it has been determined that states have the obligation not only to design and adopt into law effective remedies for the comprehensive protection of human rights, but also to ensure proper implementation of said remedies by the courts. Concretely, the Inter-American Court has reiterated on numerous occasions that "remedies that must be substantiated in accordance with the rules of due process of law."[124] A third aspect encompassed by the right of access to justice in the area of economic, social and cultural rights is that of clear principles on due process of law in judicial proceedings, when the assurance of these rights is at stake.

178. Since there is a direct connection between the suitability of a judicial mechanism and the protection of economic, social and cultural rights, one way to ensure the enforceability of these rights is to establish a reasonable time in proceedings concerning social rights, effective equality of arms in proceedings, and proper judicial review of administrative decisions.

179. There are several precedents in the case law of both the IACHR and the Inter-American Court regarding the applicability of such judicial guarantees in cases involving social rights. Thus, the IASHR has recognized that setting clear principles in this area helps to steer judicial reform toward the enhancement of judicial guarantees of social rights and their observance.

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[124] *Cf.* I/A Court H.R., *Cases of Velásquez Rodríguez, Fairén Garbi and Solís Corrales,* and *Godínez Cruz. Preliminary Objections*. Judgments of June 26, 1987. Series C Nos. 1*, 2, and 3,* paras. 90, 90, 92, respectively; I/A Court H.R., *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 A No. 9, para. 24.

A. Due Process of Law as a Gurantee of the Right of Access of Justice

180. In keeping with the provisions of Article 8(1) of the American Convention, the IASHR has established numerous precedents underscoring the applicability of the right to a fair trial in any proceeding to determine the substance and scope of human rights, regardless of the subject matter concerned. By way of an example, it is appropriate again to cite here the Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere in which the IACHR stated the following:[125]

> Articles 8 and 25 of the American Convention on Human Rights are those traditionally cited in relation to the developing doctrine concerning judicial guarantees and protection. *These two articles cover any situation in which it becomes necessary to determine the content and scope of the rights of a person under the jurisdiction of a state party, be it in a criminal, administrative, tax, labor, family, contractual or any other kind of matter*.[126] (Emphasis added)

181. Echoing the foregoing, in its Report on Terrorism and Human Rights the IACHR mentioned that the requirements of a fair trial and due process of law are not limited to criminal proceedings;[127] they are also applicable to non-criminal proceedings for the determination of a person's rights and obligations of a civil, labor, fiscal or any other nature.[128]

182. The Inter-American Court, for its part, has also been clear on this point. In Advisory Opinion OC-18/03, "Juridical Condition and Rights of the Undocumented Migrants," the Court held that:

> The broad scope of the preservation of due process applies not only *ratione materiae* but also *ratione personae,* without any discrimination. [...] As this Court has already indicated, due legal process refers to [...] all the requirement that must be observed in the procedural stages in order for an individual to be able to defend his rights adequately vis-à-vis any [...] act of the State that could affect them. That it to say, due process of law must be respected in any act or omission on the part of the State bodies in a proceeding, whether of an administrative, punitive or jurisdictional nature. [...] Likewise, the Court has observed that the list of minimum guarantees of due legal process applies when determining rights and obligations of "civil, labor, fiscal or any other nature." This shows that due process affects all these areas and not only criminal matters.[129]

183. The reasoned concurring opinion of Judge Sergio García Ramírez in the aforesaid advisory opinion illustrates with even greater clarity the margins of application of the right to legal due process and. At the same time, he posits that an important link

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[125] Cf. *Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere*, cit.

[126] Cf. *Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere*, cit., para. 90.

[127] Cf. *Report on Terrorism and Human Rights*, cit.

[128]Cf. *Report on Terrorism and Human Rights*, cit, para. 240.

[129] Cf. Advisory Opinion OC-18/03, cit., paras. 122, 123, 124.

exists between effective access to justice and the right enshrined in Article 8(1) of the American Convention. Thus, on that occasion the Judge held that:

> Announcing rights without providing guarantees to enforce them is useless. It becomes a sterile formulation that sows expectations and produces frustrations. Therefore, guarantees must be established that permit: demanding that rights should be recognized, claiming them when they have been disregarded, re-establishing them when they have been violated, and implementing them when their exercise has encountered unjustified obstacles. This is what the principle of equal and rapid access to justice means; namely, the real possibility of access to justice through the means that domestic law provides to all persons, in order to reach a just settlement of a dispute; in other words, formal and genuine access to justice. [...]This access is facilitated by due process, which the Inter-American Court of Human Rights has examined fully in the exercise of its advisory and contentious competence. Strictly speaking, due process is the means to ensure the effective exercise of human rights that is consistent with the most advanced concept of such rights: a method or factor to ensure the effectiveness of law as a whole and of subjective rights in specific cases. Due process – a dynamic concept guided and developed under a guarantee model that serves individual and social interests and rights, and also the supreme interest of justice – is a guiding principle for the proper resolution of legal actions and a fundamental right of all persons. It is applied to settle disputes of any nature – including labor disputes – and to the claims and complaints submitted to any authority: judicial or administrative.[130]

184. Having established the framework for the observance of due process guarantees, it is appropriate to proceed with an individual examination of the elements that the IACHR and the Court have identified as fundamental components of those guarantees in cases involving economic, social and cultural rights.

B. Elements that Comprise Due Process of Law in Judicial Proceedings

1. The Principle of Equality of Arms

185. In a proceeding, the unequal economic or social status of the litigants frequently has the effect of rendering the possibility of defense unequal at trial. Procedural inequality can also arise in social-rights litigation with the State, like an unwelcome reminder of the traditional positions in administrative law under which the State usually enjoys advantages vis-à-vis those under its administration. Accordingly, the principle of equality of arms should be recognized as one of the integral elements of the guarantee of a fair trial.

186. In an action involving social rights, safeguarding this principle is, without question, an important aspect of any defense strategy. The IASHR has identified the principle of equality of arms as an integral part of due process of law and has begun to outline standards with a view to its observance and assurance.[131]

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[130] Cf. Reasoned Concurring Opinion of Judge Sergio García Ramírez in Relation to Advisory Opinion OC-18/03, *Juridical Condition and Rights of the Undocumented Migrants*. September 17, 2003. Series A No. 18, paras. 36 and 37.

[131] The case law of the European Court of Human Rights also regards the *principle of equality of arms* as part of the guarantee of a fair trial and has reiterated with respect to the adversarial nature of civil procedure, that it requires a just balance between the parties, even when

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one of the parties is the State. Thus, the European Court has ruled that "[e]very party to a case must be afforded a reasonable opportunity to present his or her case under conditions that do not place the party at a substantial disadvantage vis-à-vis the opponent." See in this respect, ECHR, *Kaufman v. Belgium*, N° 5362/72, 42 CD 145 (1972) and *Bendenoun v. France*, A 284, para. 52 (1994).

Accordingly, the ECHR considers this principle to include the idea of "a just balance" between the parties. Thus, the ECHR has said that the principle of equality of arms equates to the right to present the case to a court in equal conditions. In this way, in *Foucher v. France*, French justice denied a private citizen access to criminal files the and also refused to release copies of the documents in them. Consequently, the Court of Appeals in the case only based its conviction on official reports. In light of this situation, the European Court of Human Rights found that: "[a]ccording to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case in conditions that do not place him at a disadvantage vis-à-vis his opponent." Cf. ECHR, *Foucher v. France*, Judgement of March 18, 1997, para. 34.

The ECHR also considered that the possibility to present and answer arguments must be equal for both parties in a dispute. Thus, in *Ruiz Mateos v. Spain*, in which the applicants sought restitution of property expropriated by the Spanish State, the counsel for the State, an adversary in the civil proceeding, had the opportunity to present to the Constitutional Court of Spain written observations regarding the compatibility of law 7/1983 and Article 24.1 of the Spanish Constitution, whereas the applicants were not afforded the opportunity to do so. With respect to the latter the Constitutional Court only considered the arguments contained in the original complaint. In light of these circumstances, the ECHR found that "the principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that proceedings should be adversarial." The Court went on to add that, "within the context of proceedings on a civil right to which persons belonging to that circle are a party, those persons must as a rule be guaranteed free access to the observations of the other participants in these proceedings and a genuine opportunity to comment on those observations." Cf. ECHR, *Ruiz Mateos v. Spain*, Judgement of 23 June 1993, paras. 15, 61, 63 and 65.

In other cases, the ECHR upheld the *right of persons to challenge* the decisions of public agencies that, in one way or another, were under the supervision of the State, which was at the same time a party in an adversarial proceeding. Thus, in the *Bönisch* case, the applicant was convicted because his products contained more than the maximum quantity permissible or hazardous substances. The Federal Food Control Institute filed suit against Mr. Bönisch and its director was called as an expert. According to the Court, the expert acts as a witness against the accused and, in consequence, the principle of equality of arms requires equal treatment in the hearing of his testimony and the testimony offered by the persons called by the defense. That equal treatment was not present in this case because the expert played a dominant role. The ECHR stated that, "In principle, his being examined at the hearings was not precluded by the Convention, but the principle of equality of arms inherent in the concept of a fair trial and exemplified in paragraph 3 (d) of Article 6 (art. 6-3-d) required equal treatment as between the hearing of the Director and the hearing of persons who were or could be called, in whatever capacity, by the defence". The ECHR added, "The Court considers, as did the Commission, that such equal treatment had not been afforded in the two proceedings in issue. In the first place, the Director of the Institute had been appointed as "expert" [and, therefore,] formally invested with the function of neutral and impartial auxiliary of the court. In addition, various circumstances illustrate the dominant role that the Director was enabled to play. In his capacity of "expert", he could attend throughout the hearings, put questions to the accused and to witnesses with the leave of the court and comment on their evidence at the appropriate moment (see paragraph 21 above). As a mere witness, [the expert called by the defence] was not allowed to appear before the Regional Court until being called to give evidence; when giving his evidence, he was examined by both the judge and the expert" Cf. ECHR, *Bönisch* case, Judgement of 6 May 1985, para. 32.

Further to the foregoing, the *right to challenge* the decisions of public agencies that are under the supervision of the State, when the latter is a party in an adversarial proceeding, has been clearly established by the case law of the ECHR in matters concerning the determination of social rights. In *Lobo Machado v. Portugal,* the applicant was an engineer employed by an oil company that was nationalized by the Portuguese State in 1975. The applicant retired in 1980. In 1986 he instituted proceedings before the industrial tribunal alleging that, following his retirement, he had

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187. In this connection, in Advisory Opinion OC-16/99 The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law,[132] the Inter-American Court makes its position clear on the principle under discussion here:

> In the opinion of this Court, *for "the due process of law" a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants*. It is important to recall that the judicial process is a means to ensure, insofar as possible, an equitable resolution of a difference. The body of procedures, of diverse character and generally grouped *under the heading of the due process*, is all calculated to serve that end. [...]*To accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have,* thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination.[133] (Emphasis added)

188. Having recognized the significance of this principle, the Court posits that the presence of real disadvantages necessitates that the State adopt countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. The foregoing is based on the fact

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been erroneously classified in a lower occupational grade, affecting the amount of his social security benefits. Consequently, he sought payment of the sums that he considered he should have been paid. The complaint was dismissed at first instance and on appeal. The applicant appealed to the Supreme Court. In 1989, the Attorney General, in representation of the State, submitted an opinion to the Supreme Court suggesting that the case had already been considered and should be dismissed. The petitioner had not been afforded access to this opinion or the opportunity to contest the arguments therein. Ultimately the Supreme Court dismissed the appeal. Three judges, a registrar and a member of the Attorney-General's department were present at the deliberations. The applicant petitioned the European Commission and the ECHR, alleging violation of Article 6(1) of the European Convention on Human Rights and, insofar as is relevant here, argued that the Supreme Court of Portugal unfairly allowed a representative of the Attorney General's department to be present at the deliberations while the applicant was not given the opportunity to answer the allegations made by that government agency. The ECHR held, "Regard being had, therefore, to what was at stake for the applicant in the proceedings in the Supreme Court and to the nature of the Deputy Attorney-General's opinion, in which it was advocated that the appeal should be dismissed (see paragraph 14 above), the fact that it was impossible for Mr Lobo Machado to obtain a copy of it and reply to it before judgment was given infringed his right to adversarial proceedings. That right means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision." See, in this respect, Application N° 15764/89, 23 February 1996, par. 31. Finally, it should also be noted that in other cases involving the determination of social rights, the ECHR has indicated that the principle of "equality of arms" requires that parties in judicial proceedings be able to examine the witnesses for the opponent, be informed of the reasons for administrative decisions, be able to appeal them, and have the right to challenge decisions on equal terms. See, in this respect, ECHR, *X v. Austria*, N° 5362/72, 42 CD 145 (1972). v. Harris, D. J., O´Boyle, M. O. and Warbrick, C., cit., p. 209; ECHR, *Heinrich v. France*, A 269-A, para. 56 (1994).

[132] I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law.* Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16. This Advisory Opinion is the result of a consultation submitted by Mexico to the Inter-American Court on the issue of minimum judicial guarantees and the requirement of due process when a court sentences to death foreign nationals whom the host State has not informed of their right to communicate with and seek assistance from the consular authorities of the State of which they are nationals. In this regard, see, *Ibid*., para. 1.

[133] *Ibid*., paras. 117 and 119.

that, absent those countervailing measures, widely recognized in various stages of the proceeding, "one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages."[134] Thus, we find that the principle that concerns us here is characterized as an integral part of the set of procedural guarantees that combine to comprise the right to a fair trial and to guarantee the right of effective access to justice.

189. The IACHR has also referred to the principle of equality of arms and underscored its importance with respect to observance of the right to a fair trial. In its "*Report on Terrorism and Human Rights*,"[135] the Inter-American Commission noted that there may be occasions in which, owing to the particular circumstances of a case, guarantees additional to those explicitly prescribed in the pertinent human rights instruments are necessary to ensure a fair hearing. In the opinion of the IACHR:

> This stipulation is drawn in part from the very nature and functions of procedural protections, which must in all instances be governed by the principle of fairness and which in their essence must be designed to protect, to ensure, or to assert the entitlement to a right or the exercise thereof. This includes recognizing and correcting any real disadvantages that persons concerned in the proceedings might have

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[134] *Ibid*., para. 119.

At the same time, the above-cited reasoned opinion of Judge Sergio García Ramírez in Advisory Opinion OC -18/03, also underscores the importance of the role played by the principle of equality of arms in any proceeding, as a means to reduce any factors of real inequality that may obstruct litigants in the effective exercise and enjoyment of their rights. The advisory opinion in which this reasoned opinion is contained is predicated on the need for respect, protection, and the assurance of the rights of a particularly vulnerable group (migrant workers), who in the majority of cases face a situation of real inequality vis-a-vis the rest of society. Thus, in his reasoned opinion, the Judge notes, "Due process, for the purpose that interests us in OC-18/2003, entails, on the one hand, the greatest equality – balance, "*equality of weapons*" – between the litigants, and this is particularly important when on one side of the dispute is the vulnerable migrant worker and on the other the employer endowed with ample and effective rights, an equality that is only obtained – in most cases that reflect the true dimension of the collective problem – when the public authorities incorporate the elements of compensation or correction that I have mentioned above, through laws and criteria for interpretation and implementation; and, on the other hand, clear and flexible compliance with the State's obligation to provide a service of justice without distinction, much less discrimination, which would entail the defeat of the weaker party at the very outset." (Emphasis added) Cf. Reasoned Concurring Opinion of Judge Sergio García Ramírez in Relation to Advisory Opinion OC-18/03, *Juridical Condition and Rights of the Undocumented Migrants*. September 17, 2003. Series A No. 18, para. 38.

It is also interesting in this connection to note the impressions of Judge García Ramírez with regard to the possible effects on the migrant worker (given his particular vulnerability) of going to court to demand his rights. On this point, the Judge says, "*Indeed, undocumented workers usually face severe problems of effective access to justice. These problems are due not only to cultural factors and lack of adequate resources or knowledge to claim protection from the authorities with competence to provide it, but also to the existence of norms or practices that obstruct or limit delivery of justice by the State*. This happens because the request for justice can lead to reprisals against the applicants by authorities or individuals, measures of coercion or detention, threats of deportation, imprisonment or other measures that, unfortunately, are frequently experienced by undocumented migrants. *Thus, the exercise of a fundamental human right – access to justice – culminates in the denial of many rights*. It should be indicated that even where coercive measures or sanctions are implemented based on migratory provisions – such as deportation or expulsion – *the person concerned retains all the rights that correspond to him for work performed, because their source is unrelated to the migratory problem and stems from the work performed" (*Emphasis added) Cf. *Ibid*., para. 39

[135] Cf. *Report on Terrorism and Human Rights*, cit.

and thereby observing the principle of equality before the law and the corollary principle prohibiting discrimination of any kind."[136]

2. The Scope of Judicial Review of Administrative Decisions

190. As was mentioned in section III of this report, the right to judicial review of administrative decisions is another of the protections afforded by the guarantee of a fair trial that is closely connected with the protection of economic, social and cultural rights. This review has already covered the recognition of this right as an integral part of due process of law.[137] Accordingly, it would be relevant to examine the scope that said judicial review should guarantee in the light of the standards sketched out by the IACHR and the Inter-American Court in this area.[138]

191. One precedent that should be mentioned in this connection is the Baena Ricardo et al. Case.[139] As noted in the third section of this report, this case constituted a milestone in the case law of the IASHR for several reasons. Having already drawn attention to the significance of the case with respect to observance of due process of law in administrative proceedings, it is appropriate to mention here the

[136] *Ibid*., para. 399.

[137] See, in this respect, Section III.c of this document.

[138] The European Court of Human Rights has developed abundant case law in this connection. Thus, the ECHR requires that states parties guarantee the right to appeal administrative decisions to a court that offers the guarantees outlined in article 6 of the ECHR. As regards the scope of review by the court of justice, the decisions of the ECtHR all indicate that a court reviewing administrative decisions should have broad jurisdiction, i.e., over both the law and the facts. This ensures the individual the opportunity to have a judge rule definitively on the merits of his or her claims, with the proper guarantees of independence and impartiality. Thus, for instance, in *Albert and Le Compte v. Belgium,* the applicants were medical practitioners who alleged the unavailability under domestic law of a suitable legal remedy to challenge decisions imposing disciplinary measures on them adopted by a professional association. The decisions of this administrative body could only be appealed before an organ of the same nature as the association, whose decisions, in turn, had to be appealed the before the Belgian Court of Cassation. The European Court held that, under the Convention, administrative bodies that impose disciplinary sanctions must either comply with the requirements of Article 6 or, if not, be subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1) of the European Convention. The European Court considered that there had been a breach of Article 6(1) in this case because the professional association, which exercised disciplinary powers and could decide the merits of the case, did not hear the case publicly, and because the Court of Cassation, which met the procedural requirements of Article 6(1), could only examine points of law within the limited scope of this appeal. (ECHR, *Albert and Le Compte v. Belgium*, A 58, par. 29 (1983). v. Harris, D. J., O´Boyle, M. O. and Warbrick, C., *Law of the European Convention of Human Rights*, London, (1995), p. 192).

At the same time, the pronouncements of the European Court on this issue suggest that, in addition to providing the guarantees set down in Article 6(1), tribunals that review decisions adopted in administrative proceedings should also have full appellate jurisdiction to control decisions as regards determination of facts and applicable law, at least in cases that do not involve questions of general policy.

The guarantee has been applied directly to social rights. In *Obermeier v. Austria*, for example, the applicant had been dismissed by a government agency based on the consideration that such a decision was "socially justified." Even though it was possible to appeal the decision to the Administrative Court of Austria, on the basis that the discretion that the government agency had exercised in the decision was incompatible with the object and purpose of the law, the ECHR held that such a limited review violated Article 6(1) of the European Convention (Cf. ECHR, *Obermeier v. Austria*, A 179 para. 70, (1990); v. Harris, D. J., O´Boyle, M. O. and Warbrick, C., cit., p. 193.)

[139] Cf. *Baena Ricardo et al. Case,* cit.

standards regarding the scope of judicial review that the Inter-American Court developed in its respective judgment.

192. In this case the petitioners were 270 government employees, who were dismissed from their positions in breach of the rules that governed the termination procedures of the state entities where they worked. As a result, the workers pursued various remedies in the courts to reverse the administrative decisions that ordered their termination. The Court found that, upon deciding the actions brought by the workers, the Panamanian courts omitted to perform an extensive review of the decisions adopted at the administrative level.[140] In particular, the Inter-American Court found that:

> Since Law 25 was considered constitutional and it derogated the rules in force at the time of the events, from its having a retroactive effect, the workers had to bring administrative conflicts actions before the Third Section of the Supreme Court. During these proceedings, the workers did not have broad possibilities to be heard in the search for clarification of the events. *In order to determine that the dismissals were legal, the Third Section based itself exclusively on the fact that it had been declared that Law 25 was not unconstitutional and that the workers had participated in the work stoppage contrary to democracy and the constitutional order. Nor did the Third Section analyze the real circumstances of the cases or whether or not the dismissed workers had committed the acts for which they were being punished. Thus, it did not take into consideration the reports on which the directors of the different institutions based themselves to determine the participation of the workers in the work stoppage, such reports not being even accounted for, according to the evidence submitted, in the internal records. In handing down a judgment on the basis of Law 25, the Third Section did not take into consideration that such Law did not establish which actions attempted against democracy and the constitutional order.* [...] The attitude of the Third Section is still more serious when taking into consideration that it was not possible to appeal its decisions, by virtue of the fact that its judgments were final and unappealable.[141] (Emphasis Added)

193. Accordingly, the Inter-American Court concluded that the courts did not observe the due process of law, or the right to an effective recourse and, therefore, "the recourses attempted were not appropriate to solve the problem of the dismissal of the workers."[142]

194. For its part, the IACHR has echoed the need to ensure judicial review of administrative decisions and has outlined certain guidelines in this area. Thus, in the aforementioned "*Report on Terrorism and Human Rights*,"[143] the Inter-American Commission said that "*[j]udges should maintain at least baseline oversight of the legality and reasonableness of administrative law decisions in order to comply with the*

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[140] It should be recalled that under "Law 25" (on which the dismissals were based) the only available recourse against dismissal was a motion for reconsideration to the same authority that ordered the dismissal followed by an appeal to the superior authority; the latter exhausted administrative remedies. Thereafter, the workers could institute contentious administrative proceedings before the Third Chamber of the Supreme Court.

[141] *Ibid*., para. 140.

[142] *Ibid*., para. 141.

[143] Cf. *Report on Terrorism and Human Rights*, cit.

guarantees provided for in Articles XVIII and XXIV of the American Declaration and Articles 1(1) and 25 of the American Convention."[144]

3. The Right to a Reasoned Decision on the Merits of a Matter

195. The IASHR has also established a position on the extent and scope of judicial decisions. Thus, it has referred to the right to a reasoned decision in judicial proceedings that reflects an analysis of the merits of a particular matter.

196. One precedent that reveals the this particular elements to be an integral part of the rights to a fair trial and judicial protection can be found in the *Mayagna (Sumo) Awas Tingni Community Case*.[145]

197. In its arguments to the Inter-American Court in this case, the IACHR indicated a violation of the right to effective judicial protection arising from the lack of a reasoned decision on merits in the action for constitutional relief (*amparo*) brought to prevent the State from allowing the foreign company SOLCARSA to destroy and exploit the land that had belonged to the Awas Tingni Community for years. In particular, the IACHR established the following standard:

> [T]he applicants resorted to the jurisdictional body established by law to seek legal remedy to protect them from acts which violated their Constitutional rights. *The jurisdictional body must give reasons to support its conclusions, and it must decide on the admissibility or inadmissibility of the legal claim which originates the judicial remedy, after a procedure in which evidence is tendered and there is debate on the allegation. The legal remedy was ineffective, since it did not recognize the violation of rights, it did not protect the applicants in the*

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[144] *Ibid*., para. 413.

The IACHR is at present processing three cases which it has already declared admissible. Given that the question at issue in these cases is the scope of the right to judicial review of administrative decisions, they could give rise to new considerations by the Commission in this area. The cases in question are: Yolanda Olga Maldonado Ordóñez v. Guatemala; Maria Salvador Chiriboga and Guillermo Salvador Chiriboga v. Ecuador; and Mario Alberto Jara Oñate *et al*. v. Chile. See, in this respect, the following reports of the IACHR: Report Nº 36/04 of March 11, 2004; Report Nº 76/03 of October 22, 2003; Report Nº 31/03 of March 7, 2003.

At the same time, it is worth drawing attention to Report Nº 51/01 adopted by the IACHR in the case of Rafael Ferrer-Mazorra *et al. v.* United States on April 4, 2001. In that report, the IACHR expounds on the right to judicial review in the area of administrative detentions. Insofar as is relevant for the purposes of this report, the Commission notes that, "…*the domestic courts have determined that their scope of review is not the traditional "abuse of discretion" standard, but rather is limited to ascertaining whether the Attorney General has advanced a "facially legitimate and bona fide reason" for his decision to deny parole and continue to detain a Mariel Cuban.* […] *The Commission cannot consider a review of this nature and scope to be sufficient to effectively and properly guarantee the rights under Articles I and XXV of the Declaration*. Rather, in respect of individuals falling within the authority and control of a state, effective judicial review of the detention of such individuals as required under Article XXV of the Declaration must proceed on the fundamental premise that the individuals are entitled to the right to liberty, and that any deprivation of that right must be justified by the state in accordance with the principles underlying Article XXV, as outlined above. In other words, *it must address not only compliance with the law, but the quality of the law itself in light of the fundamental norms under the Declaration.* […]Based upon the foregoing analysis, the Commission finds that the State has detained the petitioners in violation of their rights under Articles I and XXV of the American Declaration." (Emphasis added) See in this respect, IACHR, "Rafael Ferrer-Mazorra *et al. v.* United States, April 4, 2001, paras. 234-236.

[145] I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community Case.* Judgment of August 31, 2001. Series C No. 79.

> *rights affected, nor did it provide adequate reparation. The court avoided a decision on the rights of the applicants and hindered their exercise of the right to legal remedy pursuant to Article 25 of the Convention.*[146] (Emphasis added)

198. In second place, it is worth mentioning again another important case involving indigenous peoples' rights, namely the Yakye Axa Case.[147] In addition to mentioning the violations that occurred in the administrative proceedings which the community instituted to claim its ancestral territories, the IACHR, in its application to the Court, also argued that there had been a violation of the rights to a fair trial and to judicial protection as a result of the lack of any analysis of merits in the judicial remedies attempted by the Community. The IACHR noted that,

> The different resolutions handed down rejected the *amparo* action on procedural grounds, claiming that the remedy was not lodged within a period of 60 days following discovery of the clearly illegitimate act, omission, or threat. […] *The action initiated by the petitioners through the amparo remedy did not bear fruit because of merely procedural considerations, with no ruling being given on the merits of the case. The courts thus ignored an ongoing situation of fact: namely, the denial of the Community's access to its traditional, subsistence activities, even though Paraguayan law specifically recognizes them that right, even over areas that they do not occupy on an exclusive basis.* […]The Supreme Court's decision undermined the Yakye Axa Community's right to pursue their traditional and subsistence activities in their own habitat, thereby condemning them to slow starvation"[148] (Emphasis added)

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[146] *Ibid*., para. 104.b). It should be clarified that the Inter-American Court did not refer in its judgment to this particular point made by the IACHR in its arguments as regards violation of Article 25 of the American Convention. The Court did indeed find that said article had been violated in this case; however, on this point it only took into account the fact that, "Nicaragua has not adopted the adequate domestic legal measures to allow delimitation, demarcation, and titling of indigenous community lands, nor did it process the amparo remedy filed by members of the Awas Tingni Community within a reasonable time." *Ibid*., para. 137.

Another precedent in which the IACHR was emphatic with respect to the need for courts to return reasoned decisions on merits in cases they are called on to adjudicate, is the case of Mr. Gustavo Carranza v. Argentina. In its report on merits, the IACHR contrasted the scope of Articles 8 and 25 of the American Convention with the theory of so-called "non-justiciable political matters." The IACHR concluded that the way in which the Argentine courts had proceeded constituted a violation of Mr. Carranza's rights to a fair trial and judicial protection. Accordingly, *inter alia*, the IACHR reached the following conclusions: "…the Commission observes that Article 25(2)(a) expressly establishes the right of any person claiming judicial remedy to 'have his rights determined by the competent authority provided for by the legal system of the state.' To determine the rights involves making a determination of the facts and the alleged right--with legal force--that will bear on and deal with a specific object. This object is the claimant's specific claim. When in this case the judicial tribunal denied the claim and declared "the matters interposed to be non-justiciable" because "there is no legal jurisdiction with regard to the matters set forth and it is not appropriate to decide thereon," it avoided a determination of the petitioner's rights and analyzing his claim's soundness, and as a result prevented him from enjoying the right to a judicial remedy under the terms of Article 25." Cf. IACHR, Report Nº 30/97, Case 10.087, Gustavo Carranza, Argentina, September 30, 1997, para. 77.

[147] I/A Court H. R., *Case of the Indigenous Community Yakye Axa*. Judgment of June 17, 2005. Series C No. 125.

[148] IACHR, Application to the Inter-American Court in the *Case of the Indigenous Community Yakie Axa* v. Paraguay, paras. 106 and 107.

199. Accordingly, the IACHR requested that the Court find the State of Paraguay responsible for violating the right to a fair trial and to effective judicial protection set forth in Articles 8 and 25 of the American Convention, by "failing to provide the Indigenous Community and its members with an effective and efficient remedy for resolving the Yakye Axa Community's claim to its ancestral territory and thus preventing it from receiving a hearing with all due guarantees."[149]

200. In turn, the Inter-American Court gave particular attention to the right to a fair trial in its analysis in the Case of Claude Reyes *et al*.[150] Thus, it examined the conduct of the Chilean courts in judicial proceedings brought in an attempt to order the Foreign Investment Committee of Chile to respond to Mr. Reyes' request for information regarding a forestry exploitation project with potential environmental impact and that it release said information to him within a reasonable time.[151]

201. In this framework, the Court set an important standard in this area. It found that all State bodies which exercise functions of a substantially jurisdictional nature have "the obligation to adopt just decisions based on full respect for the guarantee of due process established in Article 8 of the American Convention,"[152] and "that the effective recourse mentioned in Article 25 of the American Convention must be processed in accordance with the rules of due process established in Article 8(1) thereof, in keeping with the general obligation of the States to guarantee the free and full exercise of the rights established in the American Convention to all persons subject to their jurisdiction (Article 1(1))."[153] The Court analyzed the decisions of the Santiago Court of Appeal in light of these parameters and concluded that,

> [T]he application for protection of rights filed before the Santiago Court of Appeal should have been processed respecting the guarantees embodied in Article 8(1) of the Convention. […] *the Santiago Court of Appeal failed to decide on the dispute resulting from the action of the Vice President of the Foreign Investment Committee by ruling on the existence of the right of access to the requested information in this specific case, since the judicial decision was to declare that the filed application for protection was inadmissible. […] [T]he Court finds that this judicial decision lacked sufficient justification.*[154] (Emphasis added)

202. Further to the foregoing, the Inter-American Court found that the Santiago Court of Appeal "did not make even the least reference to the reasons why it was "evident" from the 'facts' and 'background information' in the application that it was 'clearly without grounds.' Moreover, it did not asses whether the action of the administrative authority, by not providing part of the requested information, related to any of the guarantees that can be the object of the application for protection, or

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[149] *Ibid*., List of Demands, para. 3. It should be mentioned on this point that the Inter-American Court merely stated, "With regard to the amparo remedy and the motions to restrain innovation and register the complaint, the Court deems that these are ancillary proceedings, which depend on the administrative land claim proceeding that was already deemed ineffective by the Court. Therefore, it is unnecessary to enter into further details." Cf. Inter-American Court, *Case of the Indigenous Community Yakye Axa* v. *Paraguay*. Judgment of June 17, 2005. Series C No. 125, para. 105.

[150] Cf., *Case of Claude Reyes et al.*, cit.

[151] An account of this case may be seen in Section III. A. of this report.

[152] Cf., *Case of Claude Reyes et al.*, cit., para. 126.

[153] Cf., *Case of Claude Reyes et al.*, cit., para. 127.

[154] Cf., *Case of Claude Reyes et al.*, cit., paras. 127, 134, 135.

whether any other recourse before the regular courts would be admissible."[155] The Court concluded that, in this case, Chile failed to guarantee an effective judicial recourse that was decided in accordance with Article 8(1) of the American Convention and which resulted in a ruling on the merits of the dispute concerning the request for State-held information; in other words, a ruling on whether the Foreign Investment Committee should have provided access to the information requested.[156]

4. Trial within a Reasonable Time

203. Finally, mention should be made of a component of the right to a fair trial that is widely recognized in the framework of the IASHR: the right to a trial within a reasonable time.[157]

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[155] Cf., *Case of Claude Reyes et al.*, cit., para. 136.

[156] In the *Baena Ricardo et al. Case*, the Court also adopted a position on the importance of this guarantee in terms of observance of the right to a fair trial in judicial proceedings. Thus, in this case, the Court weighed the decision of the Supreme Court of Panama on the amparo petitions [constitutional guarantee protection remedies] presented by the workers following their dismissal and concluded, "The reason to file the 49 constitutional guarantee protection remedies that were filed with the Full Supreme Court by the dismissed workers, was that Conciliation and Decision Board N° 5, the tribunal responsible for hearing cases of the workers dismissed from certain State institutions at the time of the events that occurred December 4 and 5, 1990, had decided not to admit such cases because of its being incompetent by virtue of Law 25. [...] In resolving about such civil rights protection remedies, the Supreme Court determined that Conciliation and Decision Board N° 5 had to admit the cases and support the reasons why it did not regard itself competent to hear them. *The constitutional rights protection remedies were, therefore, dealt with by the Supreme Court, but only to decide that Conciliation and Decision Board N° 5 had to demonstrate its incompetence, that is, in such a way that no decisions were being made on the problem of the dismissal, nor concerning the provisions in Article 25 of the Convention*." (Emphasis added) Cf. *Baena Ricardo et al. Case,* para. 138.

[157] For its part, the European System of Human Rights has had the opportunity to analyze the right to a trial within a reasonable time in cases such as "*Deumeland".* In that case, the applicant, as heir to his mother, continued the proceedings she had commenced for a widow's supplementary pension claiming that the death of her husband had been the consequence of an industrial accident on the way to or from work. *The time taken to process the claim after being heard by different social courts of the Federal Republic of Germany before it was finally dismissed (some 11 years) led to the filing of a petition with the European Commission, which charged the German State with a breach of Article 6(1) of the European Convention on Human Rights by its failure, according to the applicant, to resolve his case in a reasonable time*. The Commission declared the application inadmissible, with the conclusion that Article 6(1) did not apply to the instant case. For its part, the ECHR examined the application in the light of its previous case law, whereby it considered that the term "civil rights and obligations" does not cover only private-law disputes in the traditional sense. Accordingly, it considered the public-law and private-law aspects of the application and found the latter to be predominant. It attached particular importance to the fact that the widow of Mr. Deumeland senior was not affected in her relations with the public authorities as such, acting in the exercise of discretionary powers, but in her personal capacity as a private individual. Her right was a personal, economic and individual right, a factor that brought it close to the civil sphere. Furthermore, the cause of the obligation was linked with the fact that her husband was a member of the working population, having been an employee of the Land, which had been sued. The Court also found that German accident insurance bore a close affinity to insurance under the ordinary law. Specifically with regard to the right to a trial within a reasonable time, the ECHR, in considering the time taken by the German courts to dispose of a social security claim (more than 10 years), found that "*an interval of such length is abnormal for the circumstances, especially having regard to the particular diligence required in social security cases." Thus, for the reasons summarized above, the Court held by nine votes to eight, that Article 6(1) of the European Convention on Human Rights was applicable to the case and that the State had breached said provision.* Cf. ECHR, *Deumeland,* Judgement of May 29, 1986, (Pub.ECHR, Series A, No. 100).

204. One precedent that demonstrates the link between the right to a trial within a reasonable time and the observance of economic, social and cultural rights is the Case of Milton García Fajardo *et al.*,[158] which shall be reexamined in detail in the following section. As regards the relevance of this case for our purposes in this instance, in its report on merits the IACHR referred to the way in which the Supreme Court of Nicaragua had acted and considered that to have taken a year to decide the *amparo* petition brought by the dismissed workers constituted a violation of Article 8 of the American Convention. The IACHR drew special attention to the importance that proceedings be conducted within a reasonable time, in order to ensure effective protection for the social rights at issue in the case. Thus, the IACHR noted,

> Article 8 of the American Convention mentions the judicial guarantees whose compliance is required in all proceedings for determination of rights and obligations. Clause 1 provides that compliance is obligatory within a reasonable time established in order to avoid unnecessary delays that may lead to a deprivation or denial of justice. [...]Under Nicaraguan law, the Supreme Court was required to issue a decision on the petition for *amparo* within 45 days. [...] *However, it took a year to do so, which demonstrates clear negligence on its part, in breach of Article 8 of the Pact of San José. Regarding this, the Supreme Court failed to comply not only with this procedural deadline prescribed by domestic law, but also with international standards developed for determining a reasonable time, by issuing a ruling that was vital to the job and financial security of a large number of workers and to the effectiveness of other human rights long after the respective petition in question was filed*.[159] (Emphasis added)

205. Next, the IACHR referred to the case law that the Inter-American Court has taken into account in determining a reasonable time in a proceeding. Accordingly, the IACHR identified the three aspects to be examined: "a) the complexity of the matter; b) the judicial activity of the interested party; and c) the behavior of the judicial authorities,"[160] and it proceeded to assess their observance in this case. Thus, the IACHR found:

> With respect to the complexity of the matter, the Commission finds that the petition for *amparo* sought purely to obtain a ruling from the Supreme Court on a point of law: the supremacy of the Constitution over the inferior law insofar as the right to strike is concerned. The IACHR has noted that the judicial procedure followed in the case of this petition did not involve numerous steps or requests; on the contrary, the process was very straightforward, given that it consisted of presentation of the petition for *amparo*, followed by the procedure conducted before the Court of Appeals; the presentation of the opinion of the Office of the State's Attorney for Civil and Labor Matters; and the reply of the Director General of Labor. Accordingly, a large number of measures were not required, in view of the nature of the petition and the little activity with respect to discovery. [...]As to the judicial activity of the interested party, the petitioners filed a petition for *amparo* and always presented additional information whenever it was necessary. Both they and the government authorities against whom

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[158] IACHR, Report Nº 100/01, Case 11.381, *Milton García Fajardo et al. v.* Nicaragua, October 11, 2001.

[159] *Ibid*., paras. 51 and 53.

[160] *Ibid*., para. 54.

> the petition was filed met the deadlines and terms provided for presentation of their respective arguments. However, as a result of the delay of the Supreme Court of Justice in rendering a judgment, the petitioners repeatedly requested that it issue a decision. The Commission finds that the delay in rendering a judgment was not due either to negligence or lack of interest of the parties but, rather, to the inactivity and failure to meet deadlines of the Supreme Court of Justice itself.[161]

206. Having conducted this analysis, the Inter-American Commission concluded that there was no justification whatsoever why this Tribunal should have taken longer than the statutory time limit to deliver a ruling on a petition for *amparo*, which, by its very nature, entailed a prompt procedure. Accordingly, it considered that what had occurred was a "straightforward lack of activity by the court, which left the customs employees in a situation of legal defenselessness during a year and constituted a violation of Article 8(1) of the American Convention."[162] Therefore, the IACHR found that the delay of the Supreme Court of Justice of Nicaragua in pronouncing judgment on the petition for *amparo* also indicated the ineffectiveness of the courts in protecting the human rights enshrined in the American Convention.

207. The IACHR set another important standard regarding the right to a trial within a reasonable time in its admissibility report in the Case of Tomás Enrique Carvallo.[163] The petitioner had filed an action before the courts seeking a rendering of accounts and damages for the alleged confiscation of a bank that he owned by the Central Bank of Argentina. According to the petitioner, there was an unwarranted delay in rendering a final decision. The action had been brought in late 1986 and by 2001, the year in which the IACHR adopted the report, no decision had yet been reached. For the majority of this time the case remained at the discovery stage. In this framework, the IACHR noted that the case was admissible inasmuch as "While civil litigation necessarily has its own requirements: 'The rule of prior exhaustion must never lead to a halt or delay that would render international action in support of the defenseless [alleged] victim ineffective.' In this sense, the proceedings must be considered as a whole, with reference to the complexity of the case and the conduct of the complainant and the competent authorities."[164] In keeping with the foregoing, the IACHR found that although the State had argued that the case file was replete with documents showing action in the case, "it is not the quantity but the efficacy of that action which is at issue."[165] In this way, it established an important standard for determining a reasonable time in proceedings.

208. Finally, the IACHR found the fact that the initial stage of the proceedings had lasted 15 years to be grounds to conclude that the exception provided in Article 46(2) of the American Convention concerning undue delay was applicable and it declared the case admissible.

209. In October 2002, the IACHR issued another opinion on a petition involving labor rights and the right to a trial within a reasonable time when it examined

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[161] *Ibid*., paras. 55 and 56.

[162] *Ibid*., para. 58. Emphasis added.

[163] IACHR, Report Nº 67/01, Case 11.859, Tomás Enrique Carvallo Quintana, Argentina, June 14, 2001.

[164] *Ibid*., para. 74.

[165] *Ibid*., para. 75. Another admissibility report of the IACHR that may be considered on this point is Report Nº 82/01 in Case 12.000, *Anibal Miranda v. Paraguay*, October 10, 2001.

the Case of Finca La Exacta.[166] In that case, the organized workers of Finca La Exacta submitted a petition to institute proceedings in connection with a collective labor dispute, with a view to presenting their claims concerning working conditions to the Guatemalan courts. Under the Guatemalan Labor Code, such a petition may be submitted when a dispute that may lead to a strike arises at a workplace. According to the Labor Code of Guatemala, once a petition of this type if submitted, the competent judge for the case is required to convene a conciliation tribunal within 12 hours. The resulting conciliation procedure may not last more than 15 days. If no agreement is reached, the workers may request the court's permission to begin a strike. In this particular case the courts never issued a decision on the workers' petition.

210. The Commission concluded that the Government of Guatemala had violated Articles 8 and 25 of the American Convention with respect to the labor claims brought by the workers of Finca La Exacta before the Guatemalan courts. Consequently, in the opinion of the IACHR, "the organized workers who sought to obtain access to the courts for the determination of their rights and obligations as workers *vis-à-vis* the owners and administrators of Finca La Exacta were denied the possibility of a hearing within a reasonable time period, in violation of Article 8 of the Convention."[167] The IACHR found that the dismissed workers "were not given an opportunity to be heard nor were they given access to a prompt and effective remedy against the violations of the law that adversely affected their right to work and their right to freedom of association,[168] which are recognized both in the Guatemalan Constitution and in the American Convention."[169]

211. At the same time, the IACHR made it clear that the denial of justice to the workers in this case was not an isolated incident but a systematic practice of the labor courts in Guatemala. In this connection, the IACHR noted,

> The Commission has indicated above that the labor courts of Guatemala are not in a position to provide judicial protection in labor matters. [...] The Guatemalan authorities have also admitted that this case is part of a general tendency for the Guatemalan courts to fail to provide protection in labor-related matters.[170]

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[166] IACHR, Report Nº 57/02, Case 11.382, *Finca La Exacta v. Guatemala,* October 21, 2002.

[167] *Ibid*., para. 87.

[168] On this point, attention should also be drawn to the admissibility report adopted by the IACHR in the case of the *Workers Belonging to the "Association of Fertilizer Workers" (FERTICA) Union* v. Costa Rica. In that report, the IACHR stated: "The Commission is of the view that the allegations of the petitioners regarding the alleged violations of rights protected by the American Convention, if proven, could characterize a violation, to the detriment of the alleged victims, of the right to a fair trial, freedom of association, and the right to judicial protection, guaranteed in Articles 8, 16, and 25, considered in conjunction with Article 1(1) of the American Convention. [...] By virtue of the foregoing, *in examining the merits of the petition, the Commission will have to determine whether the unwarranted delay of 10 years in rendering a decision on the remedies pursued is a violation of judicial guarantees related to a reasonable period of time (Article 8.1 of the Convention), and whether the alleged victims had access to simple, prompt, and effective recourse to a competent court or tribunal, which would have guaranteed them the right to justice and judicial protection established in Article 25 of the Convention. It must further determine whether there was a violation of the right to freedom of association established in Article 16 of that international instrument, which occurred by way of the alleged unwarranted delay of the judicial authorities."* (Emphasis added) Cf. IACHR, Report 21/06, Petition 2893-02, Admissibility, *Workers Belonging to the "Association of Fertilizer Workers" (FERTICA) Union*, March 2, 2006, paras. 42 and 43.

[169] *Ibid*., para. 90.

[170] *Ibid*., para. 91.

212. In the Case of the Maya Indigenous Communities of the Toledo District,[171] which will be examined in detail in the following section of this report, the IACHR also considered that the unreasonable length of the judicial proceedings was framed by a "systemic delay inherent in the civil justice system generally."[172]

213. Briefly, it should be mentioned here that the judicial proceedings instituted by the community in question sought a court order declaring the existence and nature of Maya interests in their ancestral lands and the status of those interests as rights protected under the Constitution, as well as declarations of violations of those rights by the Government because of logging concessions granted on Maya traditional lands.

214. In keeping with the above-cited precedents, in its report the IACHR posited, "The jurisprudence of the inter-American system has also established that an essential element of effectiveness is timeliness. The right to judicial protection requires that courts adjudicate and decide cases expeditiously, particularly in urgent cases. The Commission has emphasized in this regard that there is no question but that the duty to conduct a proceeding expeditiously and swiftly is a duty of the organs entrusted with the administration of justice."[173] The IACHR again underscored the criteria to be taken into consideration in making a determination as to reasonable time in a proceeding. Thus, it noted that "it is well-established that three factors are to be taken into account in determining the reasonable time within which a judicial proceeding must be conducted: (a) the complexity of the case; (b) the procedural activity of the interested party; and (c) the conduct of the judicial authorities."[174] Under these guidelines, the IACHR stated,

> The Commission notes in this regard that, as of the date of this report, almost 8 years have passed since the motion for constitutional relief was initiated, and over 5 years have transpired since the motion for emergency interlocutory relief was lodged. Despite this considerable delay, no decision has been forthcoming in either proceeding. In evaluating these delays in light of the three factors cited above, the Commission acknowledges that the subject matter of the case raises complex matters of fact and law that may reasonably require some delay in litigating and deciding upon the issues. [...] It is also apparent that the lack of progress in the proceeding has also resulted from the State's failure to comply with certain procedural requirements established by the Court, with the result that the proceedings have not advanced beyond the initial stages of the filing of pleadings and evidence. Further, the State has admitted that progress in the case has been affected by systemic delay inherent in the civil justice system generally. In light of these circumstances, together with the lengthy period for which domestic proceedings have been outstanding, the Commission considered that unreasonable delay has been demonstrated in this case.[175]

215. Therefore, the Inter-American Commission found that there was an unwarranted delay in rendering judgment in the domestic proceedings commenced by

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[171] IACHR, Report Nº 40/04 Case 12.053, Merits, *Maya Indigenous Communities of the Toledo District*, Belize, October 12, 2004.

[172] *Ibid*., para. 185. Emphasis in the original.

[173] *Ibid*., para. 176. Emphasis added.

[174] *Ibid*., para. 176. Emphasis added.

[175] *Ibid*., para. 185.

the Maya people, and accordingly, that the State of Belize violated the right to judicial protection enshrined in Article XVIII of the American Declaration to the detriment of the Maya people.

216. It is also important to note here that the IASHR has begun to establish its position with regard to the moment from which the length of a proceeding might appropriately be calculated in order to determine its reasonableness. The Case of Menéndez, Caride *et al*.[176] afforded the Inter-American Commission an opportunity to state its position on this point.

217. In this case, the petitioners are retirees who filed claims with the Argentine National Social Security Administration (ANSES), with the aim of getting an adjustment to their retirement or pension payment or in its calculation (social security benefits). The victims said they had filed an administrative complaint with ANSES and that in response to the ensuing silence or decisions with which they disagreed, they filed an appeal before the corresponding court, demanding the readjustment or calculation, as appropriate, of their pension benefits. In several cases, a final decision remained pending on these remedies at the time the petition was lodged.

218. In other cases, a judgment favorable to them was rendered by the Chamber for Social Security (CSS), but then ANSES filed a special appeal with the Argentine Supreme Court, which had not issued a final decision at the time the petition was lodged. The petitioners also alleged violation of their rights to judicial guarantees and effective judicial protection by reason of the fact that Articles 5, 7, 16, 22 and 23 of Law 24.463 on Social Security Solidarity allow postponement of the enforcement of court judgments favorable to them on the basis of insufficient budgetary resources. The petitioners also maintain that the facts as outlined have led to the violation of other rights, including the rights to property, equality, health and well being, social security, life, and, in particular, the rights enshrined in Articles 8 and 25 of the American Convention, as a result of delays in securing final judgments determining the rights of the alleged victims; the adjustment or calculation of their social security income; postponement of enforcement of judgments, as well as inappropriate enforcement of same that resulted in confiscation of property and forced them to exhaust other resources in their attempts to secure what is owed to them.[177]

219. Accordingly, the IACHR declared the case admissible as regards alleged violation of rights provided in Articles 1(1), 2, 8(1), 21, 24 and 25(2)(c) of the American Convention. Furthermore, in its report, it noted the following:

> The Commission agrees with the petitioners that when examining the exception to the rule on exhaustion of domestic remedies set out in Article 46(2)(c), the date to be used as a starting point should be the date the administrative complaint was lodged. According to the notion of an overall analysis of the procedure, a case on rights, be it civil or administrative in nature, may be examined in the first instance by a body that is not a court, as long as the case can be presented in a reasonable period of time before a court with competence to try it in regard to both facts and law. In this case the IACHR notes that the State has pointed to the fact that it was mandatory to lodge the complaint with the administrative body, both under the system in place before the 1995 reform of Law 24.463 and after. Once the

[176] IACHR, Report Nº 3/01, Case 11.670, *Amilcar Menéndez, Juan Manuel Caride et al. (Social Security System)* Argentina, January 19, 2001.

[177] *Ibid*., para. 3.

> administrative body has determined if payment is in order and, if so, how much is to be paid, the petitioners could contest the decision before the corresponding chambers, which without a doubt are courts in the sense set out in Article 8(1) of the Convention. Thus the Commission concludes that in this case the administrative stage of proceeding shall also be taken into account when calculating the time period.

220. Accordingly, the IACHR established an important standard with respect to the guarantee of a reasonable time by finding that the length of a trial and should be calculated from the filing of the administrative complaint and not from the start of the ensuing judicial stage.

221. It would be appropriate to conclude our examination of this point with a reference to the reasoned opinions of Judges Antonio Cançado Trindade and Sergio García Ramírez, in the Case of Acevedo Jaramillo *et al.*,[178] which marks an important precedent with respect to the enforcement of judgments on social rights. We shall return to this case in the following section; however, it is worth drawing attention to the comments of the two judges regarding the right to a trial in a reasonable time and its impact on the judgment enforcement stage.

222. Judge Cançado Trindade observed the following in his separate opinion:

> It is my belief that judgment enforcement is part of the legal process — the due process of the law— and, hence, the States must ensure that said enforcement is carried out within a reasonable time. It would neither be beside the point to recall that, contrary to what traditional legal scholars specializing in procedural matters tend to think or assume, the procedure is not an end in itself, but a means to do justice. There is a big gap between formal and actual justice, the latter being the one I keep in mind at all times when reasoning out my arguments. Moreover, I contend that compliance with the judgment is part and parcel of the right to a fair trial (lato sensu), which is to be understood as the right to be furnished the full span of jurisdiction, wherein the faithful enforcement of the judgment is included [...] The enforcement of judgments is, then, an essential element of the right to a fair trial itself, thus conceived in a broad sense, in which it expresses the relation between the right to a fair trial and the right to judicial protection under Articles 8 and 25, respectively, of the American Convention.[179]

223. The judge finds that enforcement of the judgment is also part of due process of law and that, therefore, states should ensure that said enforcement is completed within a reasonable time. Accordingly, the right of access to justice requires that final settlement of the dispute be accomplished within a reasonable time.[180]

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[178] I/A Court H. R., *Case of Acevedo Jaramillo et al*. Judgment of February 7, 2006. Series C No. 144.

[179] Cf. Separate Opinion of Judge A. A. Cançado Trindade, paras. 3 and 4, in I/A Court H. R., *Case of Acevedo Jaramillo et al*. Judgment of February 7, 2006. Series C No. 144.

[180] See in this respect, Separate Opinion of Judge A. Cançado Trindade, paras. 3, 4 and 6, in I/A Court H. R., *Case of Acevedo Jaramillo et al*. Judgment of February 7, 2006. Series C No. 144.

224. It is also appropriate to mention here the opinion of Judge García Ramírez, in which he suggests that a possible fourth element for the determination of a reasonable time is the "actual infringement caused by the process on the individual's rights and duties –that is, his judicial situation."[181] Elaborating on this concept, the judge notes,

> It is possible that the latter could have little relevance in this situation; if this is not so, that is, if the relevance increases, up to intense, it would be necessary, for the sake of justice and security, both seriously threatened, that the process be more diligent so that the subject's situation, which has begun to seriously affect his life, may be decided upon in a short time –'reasonable time.[182]

C. Conclusions

225. The IASHR has determined that states should design and adopt into law effective remedies for the protection of the rights of individuals and also ensure the proper implementation of said remedies by the courts. The organs of the IASHR have developed abundant case law on observance of the judicial guarantees in all proceedings in which the substance and scope of economic, social and cultural rights is at issue. Thus an important connection has been identified between the real possibility of access to justice and respect, protection, and assurance of the right to a fair trial in social-rights proceedings.

226. Both the Inter-American Court and the IACHR have begun to define the principles and rights that domestic courts needs must protect in order to comply with the mandate contained in Article 8(1) of the American Convention with regard to social rights.

227. Both organs have stressed the need that courts ensure observance of the principle of equality of arms. On this point, the Court has found that real inequality between the parties in a proceeding engages the duty of the State to adopt all the necessary measures to lessen any deficiencies that thwart effective protection of the rights at stake. The Commission has also expressed its opinion in this regard. Thus, it has noted that the particular circumstances of a case may determine that guarantees additional to those explicitly prescribed in the pertinent human rights instruments are necessary to ensure a fair hearing. For the IACHR this includes recognizing and correcting any real disadvantages that the parties in a proceeding might have, thereby observing the principle of equality before the law and the prohibition of discrimination.

228. Another of the elements of the rights to a fair trial that the IASHR has identified as important for the protection of economic, social and cultural rights, is the right to judicial review of administrative decisions and, in particular, the appropriate scope of such review. The IACHR has expressly stated that there should be at least a basic judicial supervision of the lawfulness and reasonableness of administrative decisions, in order to ascertain that they are compatible with the guarantees enshrined in the Convention.

229. The right to a reasoned decision on the merits of a matter has also been recognized by the IACHR and the Court as an integral element of due process of law in judicial proceedings. Thus, the Commission has found that after the stages in

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[181] Concurring Opinion of Judge Sergio García Ramírez, para. 36, in I/A Court H. R., *Case of López Álvarez*. Judgment of February 1, 2006. Series C No. 141.

[182] *Ibid*.

which the evidence and arguments are presented, the jurisdictional organs should provide a reasoned basis for their decisions and so determine the admissibility or not of the legal claim on which the complaint is founded. The Court, too, has established an important standard in this regard: it has held that states should also ensure that effective judicial remedies are decided in accordance with Article 8(1) of the American Convention, for which reason, the courts should adopt decisions that address the merits of suits brought before them.

230. The right to a trial within a reasonable time is another of the components of the guarantee of a fair trial in judicial proceedings that is particularly relevant as regards protection of social rights. The IACHR and the Inter-American Court have identified certain criteria for determining a reasonable time in a proceeding. These are: a) the complexity of the matter; b) the judicial activity of the interested party; and c) the behavior of the judicial authorities.

231. In various precedents dealing with economic, social and cultural rights, the Commission has emphasized the need to ensure expedition in proceedings on petitions for constitutional relief (*amparo*). The IACHR has determined that timeliness is critical to the effectiveness of a remedy and that the right to judicial protection requires that courts act with due dispatch in issuing opinions and decisions, particularly in urgent cases. Accordingly, the Commission has stated that the organs responsible for dispensing justice unquestionably have the obligation to conduct proceedings quickly and promptly.

232. In this way, the IACHR has pointed out that the main criteria in making a determination as to reasonable time in proceedings is not the quantity of actions, but their efficacy.

233. In regard to this right, it should also be mentioned that the IACHR has found that the length of a trial should be counted from the start of the administrative proceedings, not when the case reaches the judicial stage. While it cannot be said that a definitive standard yet exists on this issue, the case law of the IACHR denotes that the IASHR has begun to adopt a position in this respect.

234. Finally, it should be noted that the organs of the IASHR have begun to indicate that judgment enforcement should also be considered an integral part of the proceeding and that, consequently, should also be taken into account in examining if the length of a trial is reasonable. The reason for the foregoing is that the right of access to justice requires that all disputes be settled within a reasonable time.

V. THE SUBSTANCE OF THE RIGHT TO EFFECTIVE JUDICIAL PROTECTION AGAINST VIOLATION OF SOCIAL RIGHTS

235. A fourth significant obstacle to the effectiveness of economic, social and cultural rights is the lack of adequate judicial mechanisms for their protection. The traditional judicial remedies on the law books were conceived for the protection of conventional civil and political rights. A lack of adequate and effective remedies in the domestic law of a state for the protection of economic, social and cultural rights is an infringement of the rules contained in international human rights instruments, which enshrine the right of access to such remedies and, consequently, to those rights. Without question, these standards entitle the holder of a right to a remedy for its protection.

236. Recognition of rights imposes the obligation to create judicial or other remedies that enable their holders to invoke their protection in court or before another similarly independent authority when a person required to observe them fails to do so. Accordingly, to recognize rights is also to recognize powers to their holders and, in that

sense, can act as a means to restore equality in the context of profoundly unequal social situations. Therefore, the recognition of economic, social and cultural rights leads to the recognition of the need for suitable and effective mechanisms to invoke these individual and collective rights.

237. One important aspect is the issue of judicial remedies of a collective nature or class actions on social rights. These rights have a clear collective dimension and their breach usually affects more or less established groups or collectives. The collective nature of the majority of economic, social and cultural rights creates problems with respect to standing that are not confined to the filing stage but also extend throughout all the other stages of the proceeding, owing to the absence of adequate participation mechanisms for collective persons or large groups of victims in different procedures and jurisdictions.[183] This circumstance shows that remedies and procedures are designed for the settlement of individual disputes.

238. It should be noted that the various collective mechanisms for access to justice enable public policy monitoring by various social actors, in particular groups or communities affected by structural situations that violate their rights. Thus, collective *amparo* actions, writs for protection (*acciones de tutela*), *mandados de seguranca or injuncao* in Brazil, class actions, declaratory judgment actions, unconstitutionality actions, and public civil actions act as mechanisms for societal oversight of policies and at the same time serve to activate accountability processes and systems of checks and balances among government organs. In these actions, environmental groups, users organizations, indigenous peoples, women's groups and human rights organizations, or, occasionally, public officials with standing to represent collective stakeholders --such as the Attorney General or the Ombudsman-- have managed, through the institution of judicial proceedings, to influence the direction of social policy in many different ways. Actions of this type have led to debate on public policy in a variety of areas, such as guidelines for social security reform; mass pension and wage reduction programs; HIV/AIDS drugs provision policy; education quota systems for Afro-descendent populations; distribution of public education budget appropriations; exclusion of social sectors from food assistance programs; discriminatory practices against immigrants in access to social services and housing schemes; and non-fulfillment of social policy for displaced persons in armed conflicts. These remedies have also contributed to monitoring of companies that provide public services, in order to protect the rights of users, or private groups and companies which engage in economic activities that have an environmental impact. They have also served to secure the disclosure of information and demand participation mechanisms in processes prior to the design of policy or the award of concessions for potentially harmful economic activities.[184]

239. Therefore, the enforceability of adequate mechanisms to claim social rights is a core item for the judicial reform agenda in the region, in order to strengthen access to jurisdictional organs and social and political participation in the area of justice,

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[183] On this point, in dealing with hearings with multiple parties, it is appropriate to compare rules of procedure on issuing notices, joinder of actions, or conceivable practical difficulties, based on legal experience.

[184] See Provoste, p. and Silva, P., "*Acciones de interés público por la no discriminación de género*", in F. Gonzalez and F. Viveros (eds.), *Ciudadanía e Interés Público. Enfoques desde el Derecho, la Ciencia Política y la Sociología*, cuadernos de análisis jurídicos, Universidad Diego Portales Law School, Santiago, 1998, pp. 9/61; Jorge Correa Sutill, "*Reformas Judiciales en América Latina*. *¿Buenas Noticias para los Pobres?*, in J. Mendez, G. O´Donell and P.S. Pinheiro (comp), *La (in)efectividad de la Ley y la Exclusión en América Latina*, Paidos, Buenos Aires, Mexico, Barcelona, 2002, pp. 257/278. B. Londoño Toro (editora), *Eficacia de las Acciones Constitucionales en Defensa de los Derechos Colectivos*, *Colección Textos de Jurisprudencia*, Universidad del Rosario, Bogotá, 2003.

as well as for monitoring government policy and the performance of private players whose activities impact on the exercise of basic rights. In this framework, the IASHR has recognized the critical importance of developing effective judicial remedies suitable for the protection of economic, social and cultural rights and has begun to draw up guidelines for the design and implementation of appropriate mechanisms to ensure the effectiveness of these rights.

A. The Right to Effective Judicial Protection in the American Convention on Human Rights

240. The American Convention recognizes the right to a specific judicial guarantee designed to provide effective protection for persons against violation of their human rights. Basically, Article 25 of said treaty enshrines the right to simple, prompt, and effective recourse against infringement of fundamental rights.

241. The American Convention, a) creates the obligation for States to create a simple and prompt recourse, in particular of a judicial nature, although other recourses are admissible provided they are effective, for the protection of "fundamental rights" contained in the Convention, the Constitution, or the law; b) requires that the recourse be effective; c) stipulates the requirement that the victim of the violation be able to invoke it; d) requires the State to ensure that the recourse shall be heard; e) mentions that such recourse must be possible even against violations committed by public officials (it follows, therefore, that it is also possible against acts committed by private persons); f) obligates the State to develop the possibilities of judicial remedy; and, g) establishes the obligation for state authorities to enforce such remedies when granted.

242. The duties of States in this connection flow from the combined the scope of Articles 2, 25, and 1(1) of the American Convention.[185] The reason for the foregoing is that Article 2 of the American Convention requires states to adopt measures, including legislative measures to give effect to any of the rights contained in that instrument that are not already ensured. This includes the right to an effective remedy against individual or collective violations of economic, social and cultural rights.

243. In this connection, it has been noted that states parties are obliged, by Articles 25 and 1(1) of the American Convention, to establish a system of simple and prompt local remedies, and to give them effective application. If *de facto* they do not do so, due to alleged lacunae or insufficiencies of domestic law, they incur into a violation of Articles 25, 1(1) and 2 of the Convention.[186]

244. The foregoing demonstrates that the American Convention creates the obligation to provide simple, prompt, and effective remedies against violations of human rights. It would be seemly, therefore, briefly to examine the scope of those aspects of the right to due process.

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[185] It is important here to mention that such treaty-based obligations are reinforced, in turn, by other standards. Thus, for example, the "obligation to apply due diligence" that emanates from Article 7(b) of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belem Do Para." In this regard, see *Access to Justice for Women Victims of Violence in the Americas*, cit., Section I. B.

[186] Dissenting Opinion of Judge A. Cançado Trindade, para. 21 in I/A Court H.R., *Genie Lacayo Case. Application for judicial review of the Judgment of January 29, 1997*. Order of the Court of September 13, 1997. Series C No. 45.

B. The Obligation to Provide Simple, Prompt, and Effective Remedies

245. According to the case law of the IASHR,[187] the "effectiveness" of a remedy has two aspects: one is *normative*, the other *empirical*.[188]

246. The first of these aspects has to do with these so-called "suitability" of the remedy. A remedy's "suitability" is represented by its potential "to determine whether a violation of human rights had been committed and do whatever it takes to solve it,"[189] and its capacity to "yield positive results or responses to human rights violations." The Inter-American Court analyzed among its first judgments. Thus, in the Velázquez Rodríguez Case,[190] the Court found that, according to generally recognized principles of international law, judicial remedies must not also exist formally but also be effective and adequate. The Court held:

> Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. [...] A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable. [...]A remedy must also be effective - that is, capable of producing the result for which it was designed.[191]

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[187] In the European system, the case law on effective judicial remedies has also developed significantly. Thus, in *Mahmut Kaya v. Turkey*, judgment of March 28, 2000, the ECHR held that "Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State." See also, in this respect, *Aksoy v. Turkey*, Judgment of December 18, 1996; Aydin v. Turkey, Judgment of September 25, 1997; Kaya v. Turkey, Judgment of February 19, 1998.

[188] See, in this regard, Courtis C., *El derecho a un recurso rápido, sencillo y efectivo frente a afectaciones colectivas de derechos humanos*, in Víctor Abramovich, Alberto Bovino and Christian Courtis (comp.) "*La aplicación de los tratados de derechos humanos en el ámbito local. La experiencia de una década* (1994-2005)", Buenos Aires, CELS and Del puerto, at printers.

[189] See, *inter alia*, I/A Court H.R., *Durand and Ugarte Case.* Judgment of August 16, 2000. Series C No. 68, para. 102; *Cantoral Benavides Case.* Judgment of August 18, 2000. Series C No. 69, para. 164; *Ivcher Bronstein Case.* Judgment of February 6, 2001. Series C No. 74, para. 136; *The Mayagna (Sumo) Awas Tingni Community Case.* Judgment of August 31, 2001. Series C No. 79, para. 113; *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 A No. 9, para. 24.

[190] I/A Court H.R., *Velásquez Rodríguez Case.* Judgment of July 29, 1988. Series C No. 4.

[191] *Ibid*, paras. 64 and 66. In turn, on this point see, *inter alia*, I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community Case.* Judgment of August 31, 2001. Series C No. 79, para. 111; *Case of Cantos*. Judgment of November 28, 2002. Series C No. 97, para. 52; *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003. Series C No. 99, para. 121; *Case of Maritza Urrutia*. Judgment of November 27, 2003. Series C No. 103, para. 117.

247. As regards its normative design, the remedy should offer the possibility of addressing human right violations and of providing adequate redress for such violations. On this specific point, the Inter-American Court has reiterated the following:

> [F]or the State to comply with the provisions of this Article [25], it is not enough that the recourses exist formally, but that they must be effective; in other words, the persons must be offered the real possibility of filing a simple and prompt recourse in the terms of Article 25 of the Convention.[192]

248. The IACHR, for its part, has also identified standards by which a remedy is deemed to be "effective", with particular emphasis on its normative aspect. Thus, in its report on merits in the Case of Loren Riebe *et al.*[193] --which was examined closely in the third section of this report-- the Commission found that the simplicity, promptness, and effectiveness of the writ of *amparo* presented by the three priests against the decision of the Mexican state to expel them from its territory should be measured on the basis of: a) the possibility of verifying the existence of such violations; b) the possibility of remedying them; and, c) the possibility of making reparation for the damage done and of punishing those responsible.[194] Bearing these parameters in mind, the IACHR concluded,

> It is clear that the legal remedy did not comply with the above-mentioned requirements. On the contrary, the final decision of the Mexican courts found, without sufficient legal grounds, that government officials had acted legally. Thus, that decision consolidated the violations of the human rights of the complainants and allowed the violators to go unpunished. In other words, *the priests were denied the protection of Mexican justice against transgressions of their fundamental rights, in violation of the right to judicial guarantees* [...] *On the basis of all the above, the Commission concludes that the Mexican State violated the right to judicial protection established in Article 25 of the American Convention in the case of Fathers Loren Riebe Star, Jorge Barón Guttlein, and Rodolfo Izal Elorz.*[195] (Emphasis added)

249. It should be noted that in the aforesaid case the IACHR concluded that there had been a violation of Article 25 of the American Convention, bearing in mind, among other things, the scope of the judicial review of the administrative decision to expel the priests. However, as mentioned in the third section of this report, on other occasions the IACHR has analyzed this issue in reference also to the implicit nature of Article 8 of the American Convention. Thus, we detect a certain difference between violations that fall within the framework of Article 8 and those that concern Article 25 and, in particular, the close link that the IACHR and the Inter-American Court have

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[192] *Cf.*, *inter alia*, I/A Court H.R., *The "Panel Blanca" Case (Paniagua Morales et al)*. Judgment of March 8, 1998. Series C No. 37, para. 164; *Cesti Hurtado Case.* Judgment of September 29, 1999. Series C No. 56, para. 125; *Bámaca Velásquez Case.* Judgment of November 25, 2000. Series C No. 70, para. 191; *Constitutional Court Case.* Judgment of January 31, 2001. Series C No. 71, par. 90; *The Mayagna (Sumo) Awas Tingni Community Case*. Judgment of August 31, 2001. Series C No. 79, para. 114.

[193] Cf. *Loren Laroye Riebe Star, Jorge Barón Guttlein, and Rodolfo Izal Elorz,* cit.

[194] Cf. *Loren Laroye Riebe Star, Jorge Barón Guttlein, and Rodolfo Izal Elorz,* cit., para. 81.

[195] Cf. *Loren Laroye Riebe Star, Jorge Barón Guttlein, and Rodolfo Izal Elorz,* cit. paras. 81 and 82.

determined to exist between the rights and guarantees recognized in these two articles of the American Convention.

250. Furthermore, and still with respect to the *normative* aspect of the remedy, it cannot be overlooked that the Inter-American Court, in referring to the concept of "effective remedy" enshrined in Article 25 of the Convention, has drawn attention to the significance of two procedural institutions in particular. Thus, the Court has reiterated that the procedural institutions of *amparo* and *habeas corpus* meet "the necessary characteristics for the effective protection of the fundamental rights; in other words, [they are] simple and brief."[196] With respect to this situation, it should be noted that Article 25 of the American Convention allows for "effective remedies" that are not simple or prompt. It may be surmised that said article refers to remedies for situations in which the facts or evidence are highly complex, or situations that require a complex remedy.

251. As noted, the second aspect of an "effective" remedy is of an *empirical* nature. This refers to the political or institutional conditions that enable a legally recognized remedy to "fulfill its purpose" or "produce the result for which she was designed." On this latter point, a remedy is not effective when it is "illusory", excessively onerous for the victim, or when the State has not ensured its proper enforcement by the judicial authorities. Thus, the Inter-American Court has consistently held that,

> A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy.[197]

252. It is not necessary to resort to extreme examples --such as, for instance, a particular country in the region where genuine rule of law might not be in force-- to find precedents that offer a clear illustration of the empirical aspect of an effective remedy.

253. For example, the Case of Maria Da Penha Maia Fernandes offers an account of structural circumstances that may cause remedies provided for human rights violations to be ineffective.[198] At issue in this case was the way in which the courts

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[196] Cf., *inter alia*, I/A Court H.R., *Cantoral Benavides Case.* Judgment of August 18, 2000. Series C No. 69, para. 165*; Constitutional Court Case.* Judgment of January 31, 2001. Series C No. 71, para. 91*; 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 A No. 8, paras. 32, 33, and 34; *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 A No. 9, para. 23.

[197] Cf., *inter alia*, I/A Court H.R., *Ivcher Bronstein Case.* Judgment of February 6, 2001. Series C No. 74, para. 137; *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 A No. 9, para. 24.

[198] IACHR, Report Nº 54/01, Case 12.051, *Maria Da Penha Maia Fernandes*, Brazil, April 16, 2001.

acted with regard to the prohibition of discrimination in cases that involved particularly vulnerable groups.

254. Mrs. Da Penha complained to the IACHR that the Brazilian State for years condoned domestic violence perpetrated against her by her husband during their marital cohabitation, culminating in attempted murder. As a result of the aggression to which she was subjected during her marriage, the petitioner suffered irreversible paraplegia. The petition basically alleges that the State has condoned this situation, since, for more than 15 years, it has failed to take the effective measures required to prosecute and punish the aggressor, despite repeated complaints.

255. In its report on merits, the Commission concluded that the State violated Mrs. Maria da Penha Maia Fernandes' rights to a fair trial and judicial protection recognized in Articles 8 and 25 of the American Convention, in conjunction with the general obligation to respect and ensure rights established in Article 1(1) of said instrument, as well as in Articles II and XVIII of the American Declaration of the Rights and Duties of Man, as well as Article 7 of the Convention of Belém do Pará. The IACHR concluded that this violation formed a pattern of discrimination evidenced by the condoning of domestic violence against women in Brazil through ineffective judicial action.[199] Thus, the IACHR found,

> Furthermore, as has been demonstrated earlier, that tolerance by the State organs is not limited to this case; rather, it is a pattern. *The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women* [...] Given the fact that the violence suffered by Maria da Penha is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors, it is the view of the Commission that this case involves not only failure to fulfill the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices. *That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts* [...] [I]n this case, which represents the tip of the iceberg, ineffective judicial action, impunity, and the inability of victims to obtain compensation provide an example of the lack of commitment to take appropriate action to address domestic violence.[200] (Emphasis added)

256. Thus, in this case, the IACHR identified a pattern of discrimination associated with toleration of domestic violence against women in Brazil that resulted in the complete ineffectiveness of the judicial mechanisms available to the victims to remedy their violated rights.

257. However, there is another type of case that also serves to illustrate the empirical aspect of a so-called "effective remedy." Thus, as mentioned, ineffectiveness may also result from an unwarranted delay in rendering a decision.

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[199] *Ibid*., paras. 2 and 3.

[200] *Ibid*., paras. 55 to 58.

258. The analysis of the IACHR in the case of *Jorge Odir Miranda Cortez et al v. El Salvador*, illustrates such circumstances.[201] In this case, the petitioners alleged violation of their right to life, health, and well being because they were not provided with the triple therapy needed to treat HIV/AIDS. Insofar as is relevant here, they alleged that the State also violated the right to a fair trial and judicial protection by its failure to observe the principle of reasonable time in reaching a decision on the merits of an *amparo* action that they had brought with a view to safeguarding their fundamental rights. Accordingly, it was argued that the *amparo* action demonstrated a total lack of effectiveness for the protection of fundamental rights. In light of this situation, in its analysis of admissibility in the case, the Commission found,

> In fact, the petitioners filed a petition for *amparo* proceedings on April 28, 1999 with the Supreme Court of that country seeking the provision of anti-retroviral medication for seropositive patients. According to the information furnished by the petitioners (which was not disputed by the Salvadoran State), on June 15, 1999, the Constitutional Division of the Supreme Court decided to accept the petition. However, as of the date of this report, it had not handed down a final ruling on the merits of the claim [...] *In the view of the IACHR, the petitioners had access to amparo proceedings, the remedy offered by the domestic legal system in this case, and they filed for these proceedings within the time period and in the manner required. However, to date, this remedy has not proven effective in responding to the claims of alleged violation of human rights. Almost two years have elapsed since the petition was filed and no final decision has been handed down by the Salvadoran Supreme Court*.[202] (Emphasis added)

259. The foregoing precedents, leads to the conclusion that the notion of effectiveness of a remedy that flows from Article 25 of the American Convention, in terms of both its normative and its empirical aspect,[203] is associated with the suitability

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[201] IACHR, Report Nº 29/01, Case 12.249, *Jorge Odir Miranda Cortez et al.*, El Salvador, March 7, 2001. On this point, it is interesting to note that the decision of the IACHR also reflects the fact that a basic principle for measuring *reasonableness* of time in judicial proceedings has to do with the analysis of the particular facts as well as the consideration of the rights at issue in a case. These criteria should be borne in mind together with those examined in section v. B. iv of this report.

[202] *Ibid*., See paras. 38 to 40. It should be clarified that while the IACHR found this case to be admissible, it decided to defer its examination of the alleged violation of Article 25 of the Convention until its analysis of merits.

It is worth mentioning here that another interesting case submitted to the IASHR involving HIV/AIDS is that of *Luis Rolando Cuscul Pivaral et al. (Persons Living with AIDS) v. Guatemala*, which the IACHR declared admissible. In this case the petitioners claimed that the State ignored the rights of 39 alleged victims. In its admissibility report, the IACHR concluded that the circumstances of the case could constitute violations of the rights to life and effective judicial protection. However, it postponed its analysis of the alleged violation of these rights until the merits stage of the proceeding. See, in this respect, IACHR, Report Nº 32/05, Petition 642/03, Admissibility, *Luis Rolando Cuscul Pivaral et al. (Persons Living with AIDS)*, Guatemala, March 7, 2005.

[203] For its part, the Human Rights Committee, the monitoring body of the International Covenant on Civil and Political Rights, has also contributed a number of interesting observations in interpreting the notion of "effectiveness" of a remedy. Thus, in General Comment No. 31, the Committee suggests certain guidelines for weighing the "effectiveness" of a remedy: appropriate to take account of the special vulnerability of certain categories of person; appropriate judicial and administrative mechanisms for addressing claims of rights violations, and, in particular, adequacy of the remedy to: a) *avoid continuing violations;* b) *provide material and moral reparation to the victim;* c) *punish those responsible, as appropriate; and,* d) *prevent a recurrence of the violation*.

Continued...

of the remedy to prevent, halt, curb the effects of, and repair the infringement of the human right in question. For that reason, the Inter-American Court has consistently concluded that "the inexistence of an effective recourse against violations of the acknowledged rights by the American Convention constitutes a transgression thereof by the State Party."[204]

C. Judicial Remedies for Effective Protection of Rights

260. Having briefly sketched out the general framework on which the right to effective judicial protection rests, it is appropriate now to refer to the standards of the IASHR that are of particular relevance to the effectiveness of economic, social and cultural rights. Accordingly, we shall examine considerations expressed by the IACHR and the Inter-American Court on the requirements for judicial actions and remedies for protection of fundamental rights to be considered suitable and effective, such as actions of a precautionary or preventive nature, as well as other actions and procedures for protection of both an individual and a collective nature.

1. Provisional Protection of Rights

261. The IASHR has recognized that the notion of effectiveness in the sense of Article 25 of the Convention, requires that available judicial remedies include procedural measures, such as preventive, provisional, or precautionary measures and, in general, simple and prompt remedies for the protection of rights in order to prevent violations from continuing over time;[205] the foregoing notwithstanding that the determination on the merits of the matter might take longer.

262. Particularly relevant in this connection are two recent reports of the Inter-American Commission in which it expressly refers to the importance of ensuring provisional protection for rights: the "*Report on the Situation of Human Rights Defenders in the Americas*"[206] and "Access to Justice for Women Victims of Violence in the Americas."[207]

263. In the former, the IACHR notes that "the right to judicial protection creates an obligation for states to establish and guarantee appropriate and effective judicial remedies for the precautionary protection of rights."[208] The Commission then

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...continuation
See, Human Rights Committee, General Comment No. 31, "Nature of the General Legal Obligation on States Parties to the Covenant," 26/05/2004, CCPR/C/21/Rev.1/Add.13, paras. 15 to 20.

[204] Cf., *inter alia*, I/A Court H.R., *Durand and Ugarte Case.* Judgment of August 16, 2000. Series C No. 68, para. 102; *Cantoral Benavides Case.* Judgment of August 18, 2000. Series C No. 69, para. 164; *Ivcher Bronste Case", cit.* para. 136; *The Mayagna (Sumo) Awas Tingni Community Case*. Judgment of August 31, 2001. Series C No. 79, para. 113.

[205] In General Comment No. 31, the Human Rights Committee noted the following: "*The Committee further takes the view that the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations."* (Emphasis added) See, Human Rights Committee, General Comment No. 31, "Nature of the General Legal Obligation on States Parties to the Covenant," 26/05/2004, CCPR/C/21/Rev.1/Add.13, para. 19.

[206] IACHR, *Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II.124, March 7, 2006.

[207] Cf. *Access to Justice for Women Victims of Violence in the Americas*, cit. Other aspects of this report have been discussed in the second section of this document.

[208] *Ibid*., p. 35.

goes on to refer to certain conditions that these remedies should meet, as well as certain features that should be present in their processing.

264. Given the special nature of these remedies, and the urgency and necessity in which they must operate, the IACHR pointed out certain basic characteristics that they required in order to be considered "suitable". Such characteristics include: a) that the remedies be simple, urgent, informal, accessible, and processed by independent bodies; b) that individuals have the opportunity to approach federal or national legal entities when bias is suspected in the conduct of state or local bodies; c) that the such remedies enjoy broad, active legitimacy; d) that they can be processed on an individual basis or as collective precautionary actions (to protect a particular group or one that is identifiable based on certain parameters as affected or at imminent risk); and, e) that provision be made for the implementation of protective measures in consultation with the affected parties.[209]

265. As regards, the processing of these remedies, the IACHR mentions in its report that due to the fact that,

> [S]uch actions are designed to protect fundamental rights in urgent cases, the evidentiary procedures should not be the same as that required in ordinary proceedings; the idea is that measures be adopted within a brief time period for the immediate protection of the threatened rights.[210]

266. At the same time, in Access to Justice for Women Victims of Violence in the Americas, the IACHR identifies the right to seek effective precautionary protection as a specific dimension of the right to judicial protection under Article 25 of the American Convention; it also mentions various elements of the type of remedies that states are required to provide in cases of violence against women.[211] In particular, the Commission notes:

> One specific dimension of the right to judicial protection is the right to seek effective precautionary protection. Article 8.d of the Convention of Belém do Pará indicates spells out some of the elements of the type of protective measures that States are required to provide in cases of violence against women, such as appropriate specialized services, including shelters, counseling services for all family members, care and custody of the affected minors. These specialized services are in addition to court restraining orders or other precautionary measures compelling the assailant to cease and desist and protecting the physical safety, freedom, life and property of the aggrieved women.[212]

267. As the foregoing shows, particularly in recent times, the precautionary protection of rights --and the different remedies that ensure that protection-- has been accorded an important function within the scope of the right to effective judicial protection.

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[209] *Ibid*., pp. 35 and 36.

[210] *Ibid*., p. 36.

[211] Cf., *Access to Justice for Women Victims of Violence in the Americas*, cit., para. 57.

[212] *Ibid*., para. 57

2. The Right to Effective Judicial Protection against Collective Violations of Human Rights

268. As mentioned, social rights indubitably have a collective dimension and, therefore, their breach usually affects more or less established groups or collectives. The same applies to government measures that affect excluded social sectors and usually take the form of widespread practices that generate situations of a structural nature and require collective remedies, such as impairment of the civil, political, and social rights of an indigenous community or a group of displaced persons.[213]

269. Thus, a component of the enforceability of rights in the courts is the possibility of access to actions of this type in representation of public or collective interests, regardless of their procedural design. This right is covered in Article 25 of the American Convention and closely linked to freedom of association and the right to participate in government. Accordingly, the relevant judicial remedies are those that are suitable for the protection of rights of this type. Such judicial remedies are often limited or subject to procedural rules or restrictive case law in reference to standing, evidence, litigation costs, and enforcement mechanisms for decisions. By placing actions of this type within the framework of the collective dimension of the right to effective judicial protection for human rights it is possible to develop clearer guidelines on the type of rules and regulations that states may or may not enact.

270. In this framework, the IASHR has begun to outline standards on judicial protection mechanisms to guarantee collective litigation and, in particular, on the scope of the obligation of states to ensure grievance procedures of this type in domestic judicial systems.

271. The aforesaid situations necessarily require the design and implementation of collective litigation mechanisms are those in which the ownership of a right corresponds to a plural or collective person, or in which the right must be exercised in a collective manner. In such cases, in order to invoke judicial protection it is necessary for someone to claim a group or collective violation and not simply an individual violation. By the same token, it is necessary for someone in these circumstances to demand a collective remedy and not simply one of a purely individual scope, since otherwise the remedy could not be considered effective.

272. In keeping with the foregoing, a clear example of collective rights ownership is the right of indigenous communities to ancestral land. This right is meaningless if is subdivided into individually assigned portions of property; the condition for the preservation of the people's identity is their communal ownership and enjoyment of the right to the land. Both the IACHR and the Inter-American Court have outlined standards in this area.

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[213] The case of *Persons Deprived of Liberty at Urso Branco Prison, Rondônia*, is an example of a structural situation that calls for remedies of a collective nature. At the heart of the case is the serious situation of violence, unsanitary conditions, and insecurity in which persons deprived of liberty live at the so-called "Urso Branco" Prison in Brazil. As to what is relevant here, in its admissibility report, the IACHR, by virtue of the principle of *iura novit curiae*, decided "to examine whether the facts denounced might also demonstrate non-compliance with the obligation enshrined in Article 2 of the American Convention [because] when examining the domestic remedies, the Commission decided to admit the petition *because in its view Brazilian law may not make provision for an effective legal procedure by which to make Brazilian prisons conform to standards of dignity*." (Emphasis added) IACHR, Report Nº 81/06, Petition 394-02, Admissibility, *Persons Deprived of Freedom at Urso Branco Prison, Rondônia*, Brazil, October 21, 2006.

273. In the Awas Tingni Case,[214] the Court analyzed the scope of Article 21 of the American Convention, which enshrines the right to private property. The case involved, among other relevant facts, the allegation that the State of Nicaragua failed to demarcate and title indigenous communal land and that it granted concessions for private exploitation of natural resources on said land. The Court found the following in its judgment:

> [I]t is the opinion of this Court that Article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property... [...] Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[215]

274. Thus, the Court considered that Article 21 should be interpreted in the sense that it also protects the collective property of an indigenous community. Collective ownership of land necessarily entails the possibility of treating that property as a collective asset and not simply a cluster of individual assets. While the Court did not refer in this case to the specific need to introduce mechanisms to ensure protection of the right to collective litigation, it ordered the State to adopt the legislative, administrative, and any other measures necessary to create an effective mechanism for delimitation and titling of the property of the members of the Awas Tingni Mayagna Community, in accordance with the customary law, values, customs and mores of that Community. Based on the foregoing, the Court concluded that the State violated Article 25 of the American Convention, to the detriment of the members of the Mayagna (Sumo) Awas Tingni Community, in connection with Articles 1(1) and 2 of the American Convention. In this way, it took the initial steps along a path that the Commission would rejoin.

275. In the Case of the Maya Indigenous Communities of the Toledo District,[216] the petitioners alleged that the State of Belize violated the rights of the Maya people by awarding logging and oil concessions on Maya lands without meaningful consultations with the Maya people and in a manner that has caused substantial environmental harm and threatens long term and irreversible damage to the natural environment upon which the Maya depend. The petition also contended that the State failed to recognize and provide adequate protection for the rights of the Maya people to

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[214] I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community Case.* Judgment of August 31, 2001. Series C No. 79.

[215] I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community Case.* Judgment of August 31, 2001. Series C No. 79, paras. 148 and 149.

[216] IACHR, Report Nº 40/04 Case 12.053, Merits, *Maya Indigenous Communities of the Toledo District*, Belize, October 12, 2004.

those lands and failed to ensure adequate judicial protection of their rights and interests due to delays in court proceedings instituted by the community.

276. The purpose of these proceedings was to secure a court order declaring the existence and nature of Maya interests in the land and resources and the status of those interests as rights protected under the Constitution of Belize, as well as declarations of violations of those rights by the Government because of the licenses to log within Maya traditional lands. The motion also requested that the Government be ordered to cancel or suspend the logging licenses and any other licenses for resource extraction within the lands held by Maya aboriginal rights, and an injunction was requested to restrain the Government from granting further concessions except pursuant to an agreement negotiated with and entered into by the Maya leadership. In its report on merits, the IACHR underscored the collective dimension of the rights in contention:

> Among the developments arising from the advancement of indigenous human rights has been recognition that rights and freedoms are frequently *exercised and enjoyed by indigenous communities in a collective manner, in the sense that they can only be properly ensured through their guarantee to an indigenous community as a whole. The right to property has been recognized as one of the rights having such a collective aspect.* […] It is also apparent to the Commission that despite its recognition of the property right of the Maya people in their traditional lands, the State has not delimited, demarcated and titled or otherwise established the legal mechanisms necessary to clarify and protect the territory on which their right exists. In this regard, *the record indicates that the present system of land titling, leasing and permitting under Belizean law does not adequately recognize or protect the communal rights of the Maya people in the land that they have traditionally used and occupied*. According to the information provided by the Petitioners, which has not been refuted by the State, the regime governing the ownership of private property does not recognize or take into account the traditional collective system by which the Maya people use and occupy their traditional lands. […] [I]t is apparent that under domestic legislation, ownership of the reservation lands lies with the State as "national lands" and *there are no provisions recognizing or protecting Maya communal land interests in the lands* […] [T]he State has failed to delimit, demarcate and title *or otherwise establish the legal mechanisms necessary to clarify and protect the territory on which their right exists*. Accordingly, the Commission finds that the State of Belize violated the right to property enshrined in Article XXIII of the American Declaration to the detriment of the Maya people.[217] (Emphasis added)

277. In keeping with the judgment of the Inter-American Court in Awas Tingni Case, the IACHR concluded here that the State of Belize failed to comply in full with its obligations by not having established the necessary legal mechanisms to ensure effective recognition and protection for the right to communal property of the indigenous community, in patent disregard of the collective aspect of the community's rights over their lands.

278. The IASHR took another important step toward recognition of the need to safeguard the collective dimension of rights in the Yakye Axa Case, which is addressed in the third section of this report. In said case, the IACHR argued before the

[217] *Ibid*., paras. 113, 133, and 135.

Inter-American Court that the State of Paraguay was responsible for violation of the rights to a fair trial and effective judicial protection recognized in Articles 8 and 25 of the American Convention, by failing to provide the indigenous community and its members with an effective and efficient remedy for resolving the Yakye Axa Community's claim to its ancestral territory.

279. The IACHR held that "Paraguayan law does not provide an effective judicial remedy for protecting the legitimate territorial claims of the indigenous peoples of Paraguay. If efforts made before the executive branch (land claim) or the legislative branch (expropriation) are not effective, the persons affected, in this case the Yakye Axa Community and its members have no judicial recourse by which to uphold their rights, and the ineffectiveness of these procedures has essentially entailed the failure of the State to guarantee the property right of the Yakye Axa Community to its ancestral territory."[218] For its part, the Court took up this claim in its judgment and established as a measure of just satisfaction and guarantee of non repetition the obligation for the State to adopt measures to create an effective land claim mechanism for indigenous communities in Paraguay.[219]

280. The Case of 12 Saramaka Clans v. the Republic of Suriname also deserves mention here. In keeping with the foregoing precedents, in its recent application to the Inter-American Court in this case, the IACHR requested that the Court order the State to "remove the legal provisions that impede protection of the right to property of the Saramaka people and adopt, in its domestic legislation, and through effective and fully informed consultations with the Saramaka people, legislative, administrative, and other measures needed to protect, through special mechanisms, the territory in which the Saramaka people exercises its right to communal property, in accordance with its customary land use practices, without prejudice to other tribal and indigenous communities; [...] *take the necessary steps to approve, in accordance with Suriname's constitutional procedures and the provisions of the American Convention, such legislative and other measures as may be needed to provide judicial protection and give effect to the collective and individual rights of the Saramaka people in relation to the territory it has traditional occupied and used*."[220]

281. As to what is particularly relevant in this instance, in its application the IACHR held that:

> In accordance with Article 25 of the American Convention, the State has the duty to adopt positive measures to guarantee the judicial protection of the individual and collective rights of indigenous communities. With respect to the right to collective property, the State should provide in its judicial regime, suitable and effective judicial remedies, which should provide some special guarantee/compensation depending on/in accordance with the social dimension of the violated right. These remedies should offer an adequate procedural framework to deal with the collective dimension of the conflict, conferring on the

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[218] Arguments on merits of the IACHR to the Inter-American Court in the *Case of the Indigenous Community Yakye Axa*. Judgment of June 17, 2005. Series C No. 125, para. 52.

[219] I/A Court H. R., *Case of the Indigenous Community Yakye Axa*. Judgment of June 17, 2005. Series C No. 125, para. 222. In the same sense, see Application of the IACHR to the Inter-American Court of Human Rights, Case 12.419, *Sawhoyamaxa Indigenous Community of the Enxet-Lengua People and its Members* v. Republic of Paraguay, paras. 2, 6, 68, 118, 119, 120, 123, 154, 177, 178, 179, 180, 193, 194, 195, 196, 197, 207, 219, and List of Requests.

[220] IACHR, Application to the Inter-American Court in the *Case of 12 Saramaka Clans* (Case 12.338) v. Republic of Suriname, June 23, 2006, para. 7.

> affected group the possibility of claiming, through its representatives or authorized persons, the guaranteed right to participate in the process and to obtain compensation. […] Based on the foregoing considerations, the Commission requests the Court to declare, that there are no effective domestic remedies available to the Saramaka people for the protection of their rights under Article 21 of the American Convention and, consequently, the State of Suriname violated the right to judicial protection established in Article 25 of this instrument. […] In the instant application, the question of making amends acquires a special dimension on account of the collective nature of the rights infringed by the State to the detriment of the Saramaka people. […] The Commission submits that the violation to the Saramaka people's rights will continue until there is an adequate legal framework in place to ensure their protection. Therefore, given developments in property law, as the organs of the inter-American human rights system have recognized, the State must eliminate the legal and regulatory impediments to the protection of the Saramaka people's property rights or adopt the necessary legal provisions to ensure protection. […] As a result of the abovementioned, the Inter-American Commission requests that the Court order the State to […] take the necessary steps to approve, in accordance with Suriname's constitutional procedures and the provisions of the American Convention, such legislative and other measures as may be needed to provide judicial protection and give effect to the collective and individual rights of the Saramaka people in relation to the territory it has traditional occupied and used."[221]

282. The position that the IACHR has adopted in the case is an indication of how the IASHR has evolved in terms of recognition of the collective dimension of certain rights and the need to design and implement legal mechanisms to ensure that dimension in full. Thus, there is a discernible widening of the traditional scope of the guarantee provided in Article 25 of the American Convention, in order also to accommodate effective judicial protection for collective rights in its framework.

3. The Right to Effective Judicial Protection against Individual Violations in the Area of Social Rights

283. In recent years, the case law of the IASHR has tended to confirm the enforceability of the right to effective judicial protection in the area of social rights in their individual dimension.

284. Advisory Opinion OC-18/03, Juridical Condition and Rights of the Undocumented Migrants,[222] is a good example of that tendency. As mentioned in the second section of this report, in May 2002, Mexico submitted to the Inter-American Court a request for an advisory opinion, *inter alia*, on the deprivation of the enjoyment and exercise of certain labor rights of migrant workers, and its compatibility with the obligation of the American States to ensure the principles of legal equality, non-discrimination and the equal and effective protection of the law embodied in international instruments for the protection of human rights.

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[221] *Ibid*., paras. 174, 175, 194, 208 and 222.

[222] Cf. Advisory Opinion OC-18/03, cit.

285. In its advisory opinion the Court set important standards on the assurance of core social rights, such as the rights of workers. Specifically, the Court held that:

> States must ensure strict compliance with the labor legislation that provides the best protection for workers, irrespective of their nationality, social, ethnic or racial origin, and their migratory status; therefore they have the obligation to take any necessary administrative, legislative or judicial measures to correct *de jure* discriminatory situations and to eradicate discriminatory practices against migrant workers by a specific employer or group of employers at the local, regional, national or international level. […]On many occasions, undocumented migrant workers are not recognized the said labor rights. For example, many employers engage them to provide a specific service for less than the regular remuneration, dismiss them because they join unions, and threaten to deport them. Likewise, at times, *undocumented migrant workers cannot even resort to the courts of justice to claim their rights owing to their irregular situation*.[223](Emphasis added)

286. Thus, the Court finds that an undocumented migrant worker should always have the right to be represented before a competent body so that he is recognized all the labor rights he has acquired as a worker. In this way, the Court considers that undocumented migrant workers, who are in a situation of vulnerability and discrimination with regard to national workers, possess the same labor rights as those that correspond to other workers of the State of employment, and the latter must take all necessary measures to ensure that such rights are recognized and guaranteed in practice. Workers, "as possessors of labor rights, must have the appropriate means of exercising them."[224]

287. It is appropriate to cite here the reasoned concurring opinion of Judge Sergio García Ramírez in the framework of this Advisory Opinion:

> OC-18/2003 focuses on rights arising from employment and thus concerning workers. Such rights belong to the category of "economic, social and cultural rights. […] [W]hatever their status, bearing in mind their subject matter and also the moment in which they were included, first in constitutional and then in international texts, the truth is they have the same status as the so-called "civil and political" rights. Mutually dependent or conditioned, they are all part of the contemporary statute of the individual; they form a single extensive group, part of the same universe, which would disintegrate if any of them were excluded. […]Among these rights, the only difference relates to their subject matter, the identity of the property they protect, and the area in which they emerge and prosper. They have the same rank and demand equal respect. They should not be confused with each other; however, it is not possible to ignore their interrelationship, owing to circumstances. For example, let us say that, although the right to work cannot be confused with the right to life, work is a condition of a decent life, and even of life itself: it is a subsistence factor. *If access to work is denied, or if a worker is prevented from receiving its benefits, or if the jurisdictional and administrative channels*

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[223] Cf. Advisory Opinion OC-18/03, cit., paras. 149, 159.

[224] *Ibid*., para. 160.

> *for claiming his rights are obstructed, his life could be endangered and, in any case, he would suffer an impairment of the quality of his life, which is a basic element of both economic, social and cultural rights, and civil and political rights*.[225] (Emphasis added)

288. The Court thus the recognized --both in its majority opinion and in the opinion of Judge García Ramírez-- that states should provide migrant workers with effective judicial remedies to enable them to realize their labor rights. These rights require the design of legal mechanisms to claim them, ensure that they are effectively observed, and safeguard them in practice.

289. Another interesting precedent in this respect is the Yean and Bosico Case. The petition in this case complained, inter alia, of the absence of a judicial review mechanism or procedure to challenge the decision of the Dominican Registry Office to refuse late registration of the girls' births. The IACHR mentioned in its arguments to the Court that the situation constituted a violation of Article 25 of the American Convention.[226] Specifically, the Commission held,

> The State has not established a mechanism or procedure for appeal before a competent judge or court against a decision not to register an individual. Despite several reasonable attempts by the mothers of the children Dilcia and Violeta, the negative decision of the Civil Status Registrar was never reviewed by a competent and independent court. […] There are two procedures for reviewing the decisions of a civil status registrar: (1) the review established in Act No. 659, and (2) review by the administrative authority responsible for recording the registrations, in this case the Central Electoral Board. The Central Electoral Board is not regulated by formal procedures and has not published regulations or issued procedures that applicants may use to request a review of the adverse decisions of the civil status registrars. *Consequently, the State does not offer an effective remedy that would allow the children Dilcia and Violeta to contest the Civil Status Registrar's refusal*. […] *The resolution of remedies of amparo and unconstitutionality can take up to two years; accordingly, in the Dominican Republic, there is no simple recourse, and this constitutes a violation of Article 25 of the Convention.*(Emphasis added)

290. Another important case in this area is that of Damião Ximenes Lopes. In said case, both the IACHR and the Inter-American Court drew attention to the need to ensure effective recourse to judicial inspection and control of the situation of persons interned in health care facilities. In its application to the Court the IACHR emphasized that,

> The importance of this case has to do, first, with the need to do justice by Mr. Damião Ximenes Lopes and to provide adequate reparations to his next of kin. However, it is also important because it offers an

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[225] Reasoned Concurring Opinion of Judge Sergio García Ramírez, I/A Court H. R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, paras. 27 and 28.

[226] It should be clarified that the Inter-American Court did not rule on this alleged violation because it found that "it lacks jurisdiction to express an opinion on possible violations committed in incidents or acts that occurred before March 25, 1999, the date on which the Dominican Republic accepted the contentious juridiction of the Inter-American Court." See in this respect, Inter-American Court, *Case of the Girls Yean and Bosico*. Judgment of September 8, 2005. Series C No. 130, paras. 199 to 201.

> opportunity to the inter-American system for protection of human rights to develop its case law regarding the rights and special situation of persons with mental disability, the cruel, inhumane or degrading treatment to which they are vulnerable, *the obligations of the State vis-à-vis the health care centers that act in their name and representation and the judicial guarantees in respect of the patients interned therein*, as well as the need to conduct effective investigations into cases of this type. […] The Commission notes in the instant case that Mr. Damião Ximenes Lopes, a person with mental disability, not only had fewer opportunities to defend himself from the humiliating treatment or violations to which he may have been subjected, *but also fewer possibilities to invoke the remedies in place or to present and pursue a complaint that might lead to an investigation of the facts*. He was in an especially vulnerable situation. […] Guarantees of non repetition […] As a fundamental component of non-repetition measures, the Commission believes that the Court should order the Brazilian State to adopt measures to ensure that it effectively performs its legal obligation to supervise the conditions of internment of persons with mental disability who are confined in hospitals, *including adequate judicial inspection and control systems*.[227] (Emphasis added)

291. The IACHR, thus, drew attention to the particular vulnerability in which persons interned in health facilities find themselves and considers it necessary to put in place effective remedies to permit judicial control of such facilities. In its ruling, the Court concurred with the Commission's findings:

> [T]he Court considers that *the States are responsible for regulating and supervising at all times the rendering of services and the implementation of the national programs regarding the performance of public quality health care services so that they may deter any threat to the right to life and the physical integrity of the individuals undergoing medical treatment. They must, inter alia, create the proper mechanisms to carry out inspections at psychiatric institutions, submit, investigate, and solve complaints and take the appropriate disciplinary or judicial actions regarding cases of professional misconduct or the violation of the patients´ rights*.[228] (Emphasis added)

292. The Inter-American Court thus established the duty of the State to monitor public health services. This duty includes the obligation to ensure the existence of legal grievance mechanisms against threats to the physical well-being of persons undergoing treatment at facilities where said services are provided.

293. Finally, we should mention a case in which the IACHR centered in particular on the individual dimension of the right of indigenous peoples to their ancestral lands. The case in question is that of Mary and Carrie Dann v. United States.[229] In this case, the Dann sisters lodged a petition with the IACHR in which they alleged that a claim to their ancestral lands was pursued by a band of the Western Shoshone people with no apparent mandate from the other Western Shoshone bands or

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[227] Application to the Inter-American Court in the Case of *Damião Ximenes Lopes v.* Federative Republic of Brazil, paras. 4, 177, and 211.

[228] I/A Court H. R., *Case of Ximenes Lopes*. Judgment of July 4, 2006. Series C No. 149, para. 99.

[229] IACHR, Report Nº 75/02, *Mary and Carrie Dann v. Unites States,* Case 11.140, Merits, December 27, 2002.

members. The IACHR concluded that there was no evidence on the record that appropriate consultations were held within the Western Shoshone at the time that certain significant determinations were made in the processing of the claim to the community's ancestral lands. The IACHR stated the following in its report on merits:

> Specifically with regard to the adequacy of the Danns' participation in the process by which title to the Western Shoshone ancestral lands was purported to be determined, *the Commission considers it important to emphasize [...] that the collective interests of indigenous peoples in their ancestral lands is not to be asserted to the exclusion of the participation of individual members in the process. To the contrary, the Commission has found that any determination of the extent to which indigenous peoples may maintain interests in the lands to which they have traditionally held title and have occupied and used must be based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole. And as the Commission concluded on the circumstances of this case, the process by which the property interests of the Western Shoshone were determined proved defective in this respect*. That only proof of fraud or collusion could impugn the Temoak Band's presumed representation of the entire Western Shoshone people, and that Western Shoshone General Council meetings occurred on only three occasions during the 18 year period between 1947 and 1965, fails to discharge the State's obligation to demonstrate that the outcome of the ICC process resulted from the fully informed and mutual consent of the Western Shoshone people as a whole."[230] (Emphasis added)

294. The IACHR noted in its report that the State should afford the Dann sisters "resort to the courts for the protection of their property rights, in conditions of equality and in a manner that considers both the collective and individual nature of the property rights that the Danns may claim in the Western Shoshone ancestral lands."[231]

295. The precedents summarized here, concerning provisional, as well as collective and individual, protection of rights, indicate that the IASHR has recognized the need to develop the scope of the right to effective judicial protection beyond the classical or traditional formulae for that right. In this way it is possible to attain a stronger frame of protection for the effective observance no longer only of so-called civil and political rights alone, but also of economic, social and cultural rights.

D. The Right to an Effective Judicial Remedy and Development of Adequate Judgment Enforcement Mechanisms

296. As mentioned in reference to the scope of Article 25, the Convention requires the State to design and embody in legislation an effective recourse, and also to ensure the due application of the said recourse by its judicial authorities.[232] However, that obligation is not met simply through the enactment of an effective remedy that leads to a proceeding with due guarantees, but includes the duty to design and implement mechanisms that ensure effective enforcement of the judgment handed down by the judiciary in each State.

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[230] *Ibid*., para. 165.

[231] *Ibid*., para. 171.

[232] *Cf.* I/A Court H.R., *The "Street Children" Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, para. 237.

297. If a judgment is rendered inoperative due to the absence of adequately designed judicial procedures, then that constitutes a classic case of lack of an adequate and effective judicial remedy for the protection of a right. Thus, a remedy may prove ineffective to protect a social right if a suitable judgment enforcement mechanism is not provided to overcome the kind of problems that usually occur at this procedural stage in judgments that impose an obligation on the State to take certain actions. In addressing situations of this type, both the IACHR and the Inter-American Court have recognized the importance of developing this aspect of the effective judicial remedy.

298. In the Case of César Cabrejos Bernuy the petitioners alleged that the Peruvian State had violated the right to effective judicial protection enshrined in Article 25 of the American Convention by failing to carry out rulings of the Supreme Court of Justice and the Second Civil Chamber of the Supreme Court Justice of Lima. On two occasions said rulings ordered Mr. César Cabrejos Bernuy's reinstatement to the position of Colonel of the National Police of Peru, and the authorities twice reinstated the petitioner in his position only to then immediately force him into retirement, reproducing in each case the respective administrative.

299. Having analyzed the merits of the case, the IACHR concluded that Peru violated Articles 25 and 1(1) of the Convention in respect of Mr. Cabrejos Bernuy,[233] and in no uncertain terms set out the scope of the right to effective judicial protection. In particular, the IACHR held,

> The corollary of the jurisdictional function is that judicial decisions must be carried out, in either a voluntary or coercive manner, with the assistance of the forces of public order if necessary [...] Failure to carry out judicial rulings not only affects juridical security but also threatens the essential principles of the rule of law. Ensuring the execution of judicial judgments thus constitutes a fundamental aspect that is the very essence of the rule of law [...] The effectiveness of the remedy, as a right, is precisely what is enshrined in the final clause of Article 25 of the Convention, which establishes the obligation of the State to guarantee the enforcement of decisions when such remedies are granted. This obligation is the culmination of the fundamental right to judicial protection.[234]

300. In this case, the IACHR also drew attention to the singular characteristics of a judgment enforcement proceeding in which it is the State that is required to carry out the judgment. Thus, it noted that the obligation of the State to guarantee the enforcement of judicial rulings takes on special importance when it is the State itself that must carry out the ruling, whether this is to be done through the executive, legislative or judicial branch, at the provincial or municipal level, through the central administration or the decentralized structure, through public enterprises or institutes, or any similar body, since such bodies are part of the State and generally enjoy procedural privileges, such as freedom from embargo for their assets. According to the IACHR, these bodies may be inclined to use their power and their privileges in an effort to ignore judicial rulings that go against them. In this connection, according to the Commission, "when an organ of the State does not wish to carry out a judicial ruling that has gone against it, it may try to ignore the ruling by simply failing to observe it, or it may opt for more or less elaborate methods that will lead to the same objective of

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[233] IACHR, Report Nº 110/00, Case 11.800, *César Cabrejos Bernuy.* Peru, December 4, 2000.

[234] *Ibid*., paras. 24, 25, and 30.

rendering the ruling ineffective, while trying to maintain a certain appearance of formal validity in its proceedings."[235] Thus, the IACHR concluded as follows:

> The Commission considers the facts of the present case to constitute a clear violation by the Peruvian State, to the prejudice of Mr. César Cabrejos Bernuy, of the right to judicial protection enshrined in Article 25(c) of the American Convention, whereby Peru undertook to "ensure that the competent authority shall enforce such remedies when granted". In fact, although Mr. César Cabrejos Bernuy had access to a remedy that resulted in a ruling by the Supreme Court of Justice on June 5, 1992, ordering his reinstatement as a colonel in the National Police of Peru, the State failed to guarantee the enforcement of the decision. [...]Although subsequent to the ruling of the Supreme Court Justice the National Police of Peru issued two supreme resolutions reinstating Mr. César Cabrejos Bernuy, that reinstatement never materialized in practice, because he never returned to his position. The continued reproduction of resolutions of removal issued by the administration has constituted continuous evasion of the judicial ruling. [...] *This attitude on the part of the National Police of Peru constitutes an affront to the judicial branch and makes it absolutely unnecessary to insist that the victim continue with judicial proceedings that, as already demonstrated, have failed to remedy his situation.*[236](Emphasis added)

301. In turn, in the framework of its admissibility report in the aforementioned Case of Amilcar Menéndez, Juan Manuel Caride *et al.*,[237] the IACHR again made clear its position as regards the scope of the guarantee recognized in Article 25 of the Convention. On that occasion, the IACHR noted that,

> [I]n regard to cases in which the petitioner has made an administrative or judicial appeal based on the way the judgment was enforced and on which judgment has been pronounced, [...] the rule on exhaustion of domestic remedies as provided for in Article 46(1)(a) of the Convention shall be applied. *The IACHR esteems that in these cases the principle [...] that "Failure to enforce a final judgment is an on-going violation by States that persists as an infraction of Article 25 of the Convention," is applicable.* [238](Emphasis added)

302. Another notable precedent in the area of judgment enforcement is the IACHR's report on merits in the Case of Milton García Fajardo *et al*.[239] In this case, the petitioners, customs service workers, went on strike after trying unsuccessfully to negotiate a number of petitions with the Ministry of Labor. Said petitions were for, *inter alia*, nominal reclassification of the specific and common positions in the General Directorate of Customs, job stability, 20% indexing of wages pegged to devaluation, and others. The Ministry of Labor found that the workers' strike was illegal on the ground that the Labor Code did not extend the right to strike to public or social service

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[235] *Ibid*., paras. 31 and 33.

[236] *Ibid*., paras. 45 to 47.

[237] IACHR, Report Nº 3/01, Case 11.670, *Amilcar Menéndez, Juan Manuel Caride et al. (Social Security System).* Argentina*,* January 19, 2001.

[238] IACHR, Report Nº 3/01, Case 11.670, *Amilcar Menéndez, Juan Manuel Caride et al. (Social Security System).* Argentina*,* January 19, 2001, para. 57.

[239] IACHR, Report Nº 100/01, Case 11.381, *Milton García Fajardo et al.* Nicaragua, October 11, 2001.

workers. In response, the customs service workers filed a petition for *amparo* with the Court of Appeals against the Ministry of Labor's declaration of illegal strike, seeking a ruling from the Supreme Court of Justice declaring the supremacy of the Constitution over the labor laws. The Court of Appeals issued an interlocutory decision ordering the custom service to suspend its dismissal of employees. Despite this, the authorities still dismissed 142 employees, most of whom were local labor leaders. For its part, the Supreme Court of Justice issued a ruling on the petition for *amparo* one year after it was filed, confirming the Ministry of Labor's resolution with respect to the illegality of the strike.

303. The IACHR concluded in this case that the State violated, to the detriment of Milton García Fajardo and the 141 workers named in the complaint, the right to a fair trial, the right to judicial protection, and the economic, social, and cultural rights protected by Articles 8, 25, and 26 of the same international instrument, in connection with the general obligation to respect and ensure those rights set forth in Article 1(1) thereof.

304. This case is different from the other aforementioned cases on enforcement of judgments and effective judicial recourse. The IACHR determined in its report on merits that the right to effective judicial protection had been violated by the failure to implement court-ordered provisional measures that required the workers to reinstated. In particular, the Commission held that,

> The State violated Article 25(2)(c) of the American Convention by ignoring the precautionary measures ordered by the Appeals Court for Civil and Labor Matters of the Third Region, which required the suspension of all dismissals while the petition for *amparo* was being heard. [...] It has been demonstrated that the decisions issued by the Court of Appeal ordering precautionary measures as a remedy to prevent future violations of the customs workers' rights proved ineffective and illusory. In that connection, the Inter-American Court has found that for such a remedy to exist, "... it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. [...] In the instant case, the remedies did indeed prove illusory and their uselessness was demonstrated in practice when the State refused to comply with the judicial decisions ordering precautionary measures. Despite the existence of those decisions, which sought to avert further violations, the customs workers were dismissed.[240]

305. In keeping with the foregoing, in its analysis of the admissibility in the Case of Jesús Manuel Naranjo Cárdenas *et al*. (Pensioners of the Venezuelan Aviation Company – Viasa),[241] the IACHR expressly found that there had been a violation of the economic, social and cultural rights recognized in Article 26 of the American Convention. The petition alleged that Venezuela violated to the detriment of 17 retired former workers of the Venezuelan International Aviation Corporation (VIASA) the rights to social security, private property, and judicial protection, all recognized in the American Convention and the American Declaration of the Rights and Duties of Man.

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[240] *Ibid*., paras. 73, 81 and 82.

[241] IACHR, Report Nº 70/04, Petition 667/01, Admissibility, *Jesús Manuel Naranjo Cárdenas et al. (Pensioners of the Venezuelan Aviation Company – Viasa),* Venezuela, 2004.

306. The petitioners argued that the state-owned company VIASA was partially privatized in 1992 and the State agreed with the buyers that all the workers would lose their status as government employees, and that they would therefore also lose the benefits of the retirement plan established for them. This clause was agreed despite the fact that under domestic law, labor rights are considered irrevocable. When the company was privatized, the alleged victims continued to be dependent on VIASA. That company paid its pension obligation up to 1997, when it unilaterally stopped payment of these benefits. Faced with this situation, the retired workers filed a petition for *amparo*, in which they alleged violation of their right to work, irrevocable labor rights, and the right to social security. The judicial remedy was accepted at first and second instance. However, at the time the petition was lodged, after more than five years had gone by since the *amparo* ruling was pronounced, the court's decisions had not been complied with. Therefore, the petitioners alleged that the noncompliance with the judicial orders entailed the continued violation of the labor rights of the retired workers.

307. What sets this case apart is that in addition to finding that the facts described by the petitioners could constitute, *prima facie*, a violation of Articles 21 and 25 of the American Convention, the IACHR noted in its report that, "the nonperformance of the judicial judgment dictated in the internal order guaranteeing the right to social security, alleged by the presumed victims as entitlement, might characterize a violation of the Article 26 of the American Convention."[242]

308. The Case of the "*Five Pensioners*" also concerned the right to social security.[243] As mentioned in the second section, the matter at issue was the reduction in the amount of the pension benefits of five pensioners who had served in the public administration of Peru, as well as a failure to abide by court decisions that ordered the payment of those benefits in accordance with the original rules for their calculation. Accordingly, this case was a fresh opportunity for the IACHR to express its position on the connection between failure to abide by court decisions and the scope of the right to effective judicial protection.[244] In its application to the Inter-American Court, the IACHR held that:

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[242] *Ibid*., para. 61.

[243] It should be clarified that this title was assigned to the case by the Inter-American Court. The IACHR processed the case using the names of the victims. See in this respect I/A Court H.R., *Case of the "Five Pensioners"*. Judgment of February 28, 2003. Series C No. 98.

[244] It should be mentioned that in its judgment, the Inter-American Court found in this case that Article 25 of the American Convention had been violated only with respect to the failure to comply with a number of the judicial decisions charged. Accordingly it did not concur with all of the IACHR's arguments on this point. See in this respect, Inter-American Court, *Case of the "Five Pensioners"*. Judgment of February 28, 2003. Series C No. 98, paras. 122 to 141.

At the same time, as regards violation of Article 26 of the American Convention, in spite of the arguments presented by the IACHR and the representatives of the victims and their families, the Court took the view that there was no violation of this provision in this case. It ruled in that regard that "Economic, social and cultural rights have both an individual and a collective dimension. This Court considers that their progressive development, about which the United Nations Committee on Economic, Social and Cultural Rights has already ruled, should be measured in function of the growing coverage of economic, social and cultural rights in general, and of the right to social security and to a pension in particular, of the entire population, bearing in mind the imperatives of social equity, and not in function of the circumstances of a very limited group of pensioners, who do not necessarily represent the prevailing situation. [...] It is evident that this is what is occurring in the instant case; therefore, the Court considers that it is in order to reject the request to rule on the progressive development of economic, social and cultural rights in Peru, in the context of this case." Cf., Inter-American Court, *Case of the "Five Pensioners"*. Judgment of February 28, 2003. Series C No. 98, paras. 147 and 148.

> The Peruvian State violated [...] the right to effective judicial protection set forth in Article 25 of the American Convention, on failing to abide by what was ordered by final and firm judgments handed down by the Peruvian courts ordering that the victims be paid a retirement pension progressively equalized with the remuneration of the Superintendency of Banking and Insurance employee who holds the same post as or performs duties analogous to those held or performed by them at the time of their retirement. [...] Article 25 of the Convention alludes directly to the criterion for effectiveness of the judicial remedy, which is not exhausted with the judgment on the merits, but with the enforcement of that decision. [...] [I]n in this case [...] state organs attributed to themselves, de facto, the power to decide that they were no longer under a duty to enforce the decisions of the highest court in the country, and assumed on their own that a 1992 Decree-Law authorized their failure to enforce 1994 judgments. In so doing, those state organs not only breached the rule of law generally, but also, in particular, the right to effective judicial protection for the victims, elderly persons whose dignified and decorous existence, from the material standpoint, depended precisely on the enforcement of the judgments which they had obtained from the Supreme Court of Justice of their country, upholding their acquired rights.[245]

309. In this case, the IACHR forged an important standard regarding the obligations of the state with respect to the enforcement of judgments and the lengths to which victims should have to go to bring about their compliance. Thus, the IACHR considered that,

> [T]he right to effective judicial protection set forth in Article 25 of the American Convention, and specifically, the obligation referred to at Article 25(2)(c), with respect to the states' obligation "to ensure that the competent authorities shall enforce such remedies when granted," implies that the *states should enforce such decisions in good faith and immediately, without allowing for a situation in which the persons affected have to bring additional actions to secure enforcement, for criminal, administrative, or other liability, or any other similar actions that clearly represent delays in the immediate enforcement of a judgment upholding fundamental rights*.[246] (Emphasis added)

310. The circumstances of this case, therefore, led the IACHR to request that the Court order the Peruvian State to undertake a thorough, impartial, and effective investigation into the facts, for the purpose of determining responsibilities for the failure to comply with the above-mentioned judgments handed down by the Supreme Court of Justice of Peru and by the Constitutional Court. The IACHR also requested that, by means of criminal, administrative, or other appropriate proceedings, the persons

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[245] See Application to the Inter-American Court in Case 12.034, *Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro, Guillermo Álvarez Hernández, Reymert Bartra Vásquez, and Maximiliano Gamarra Ferreyra* v. Republic of Peru, paras., 75, 85, 98. In this connection, it is worth mentioning that the ECHR has also ruled on cases involving disputes over the failure to pay or a reduction of pension benefits after final judicial decisions have been issued thereon. See, for example, ECHR, *Pravednaya v. Russia*, Judgment of 18 November 2004.

[246] *Ibid*., para. 99.

responsible be subjected to the pertinent sanctions commensurate with the gravity of the violations mentioned.[247]

311. For its part, the Case of the Community of San Mateo de Huanchor and its Members is also worthy of mention in this context.[248] The petition alleged that the State was responsible for violation of the rights to life, humane treatment, personal liberty, a fair trial, protection of honor and dignity, freedom of association, protection of the family, rights of the child, property, freedom of movement and residence, to participate in government, equal protection before the law, judicial protection, and progressive development of economic, social, and cultural rights of the members of the Community of San Mateo de Huanchor, owing to the effects sustained by the members of the community as a result of the environmental pollution produced by a toxic tailings dump next to the community, which has not been removed despite an administrative order to that effect.

312. In order to bring an end to the environmental pollution that was harming the community, its members instituted an administrative procedure to have the toxic tailings dump removed and a halt put to the activities of the mining company that owns the dump. After the proceeding had dragged on for several years, the Ministry of Energy and Mines finally ordered the permanent closure of the toxic waste dump. However, this order was never put into effect. At the same time, criminal proceedings were instituted against the manager of the mining company on charges of crimes against the environment and natural resources; those proceedings were still pending at the filing the petition.

313. In this framework, the IACHR found in its admissibility report that there was an unwarranted delay in complying with the administrative resolutions that were issued to remove the tailings as well as the unwarranted delay in processing the criminal complaint. The IACHR, therefore, concluded that the requirements set forth in the American Convention regarding exhaustion of domestic remedies were not applicable in said case and held that the exception provided for in Article 46(2)(c) of that instrument applied. The Inter-American Commission reached this conclusion based on the following analysis:

> *Regarding the adequate remedy, the Commission observes that the petitioners filed existing administrative and judiciary remedies which led to criminal proceedings; nevertheless, these remedies have not been effective as they have not provided the juridical protection that the petitioners seek under domestic law for the violation of the fundamental rights of the Community of San Mateo de Huanchor as a result of the pollution stemming from a mining activity. The administrative decisions that were taken were not observed,* more than three years have elapsed, and the toxic waste sludge of the Mayoc field continues to cause damage to the health of the population of San Mateo de Huanchor, whose effects are becoming more acute over time. *In view of the repeated failure to comply with the administrative order, only administrative sanctions of pecuniary nature have been*

[247] *Ibid.*, para. 156. The Inter-American Court took up this request and decided in its judgment that "…the State must conduct the corresponding investigations and apply the pertinent punishments to those responsible for failing to abide by the judicial decisions delivered by the Peruvian courts during the applications for protective measures filed by the victims". See in this respect, Inter-American Court, *Case of the "Five Pensioners"*. Judgment of February 28, 2003. Series C No. 98, Sixth Operative Paragraph.

[248] IACHR, Report Nº 69/04, Petition 504/03, Admissibility, *Community of San Mateo de Huanchor and its Members*, Peru, October 15, 2004.

> *imposed, which has not made it possible to remedy the events on which the petition is based.* As for the summary criminal proceedings aimed at punishing the crimes committed against the environment, more than three years have elapsed since they were filed, and as yet no definitive verdict has been pronounced [...] *The Commission considers that the remedies that were filed with the administrative and judicial authorities for the purpose of legally safeguarding the rights that were violated to the detriment of the inhabitants of the San Mateo de Huanchor have turned out to be ineffective*. [...] The Court has pointed out that the State's responsibility does not end when competent authorities issue a decision or judgment, *because the State is also bound to guarantee the means whereby these judgments can be definitively implemented.* [...] The Commission considers that the events that were denounced with regard to the effects of the environmental pollution of the Mayoc sludge, which has created a public health crisis in the population of San Mateo de Huanchor, if proven, could be characterized as a violation of the right to personal security, right to property, rights of the child, right to fair trial and judicial protection and the progressive development of economic, social, and cultural rights enshrined in Articles 4, 5, 8, 17, 19, 21, 25, and 26 of the American Convention, related to Articles 1(1) and 2 of the same instrument.[249] (Emphasis added)

314. On this occasion, the IACHR set out its position on the failure to enforce administrative decisions to the detriment of the enjoyment and exercise of fundamental human rights, since it believed that this situation constituted a violation of the guarantee provided in Article 25 of the American Convention. At the same time, it is noteworthy that the Commission made express reference to the ineffectiveness of the methods used by the State authorities to enforce compliance with the administrative orders --a fine-- and, in that connection, to the responsibility of the State for ensuring effective mechanisms for enforcing final judgments.

315. Finally, it is necessary to mention here the Case of Acevedo Jaramillo *et al*. In December 1992 Decree-Law 26093 was promulgated, instructing ministers and public officials in charge of ministries and decentralized state agencies to implement half-yearly staff assessments, by which any staff who did not pass the assessment could be dismissed on grounds of redundancy. In light of this situation, on December 29, 1992 the Metropolitan Municipality of Lima and the Lima Municipality Workers Union (SITRAMUN) entered into a collective labor agreement, whereby the Municipality agreed to respect the job stability and the administrative career of its members; that undertaking was reiterated in a memorandum signed by the same parties in October 1995.

316. However, in December 1995, the 1996 Public Sector Budget Act (Law 26553) was enacted, which included local governments within the scope of Law No. 26093; in other words, municipal governments were authorized to start assessment and classification of their employees and workers. The Municipality of Lima made use of the powers afforded by this law and proceeded to lay off a large number of workers.[250] In

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[249] *Ibid*., paras. 59, 61, 62, 63, 66.

[250] It should be noted that everyone who worked for the Municipality of Lima, except for management officials and trusted appointees was a member of the union (SITRAMUN). Accordingly, the victims in this case were the 1,734 workers who were members of SITRAMUN when their rights were infringed and who brought various actions against the Municipality of Lima in April 1996.

response, the workers attempted numerous judicial remedies to secure their reinstatement or payment of an appropriate indemnity. The vast majority of these decisions were not complied with.

317. At the same time, as a result of the measures adopted by the Municipal Government, SITRAMUN called a general strike of its members. The stoppage was declared illegal by resolution R.A. No. 575 of April 1, 1996, which warned the workers not to participate on pain of administrative penalties. In the wake of the strike the Municipality of Lima proceeded to institute disciplinary administrative proceedings against the workers who took part in the stoppage. Accordingly, by means of various resolutions, 418 workers were dismissed. Following said decision, the workers again sought judicial remedies and obtained judgments that ordered the Municipality of Lima to reinstate them. These decisions were also not properly complied with.

318. At the same time, the Municipality of Lima, to the detriment of its workers, also failed to carry out court judgments that concerned the payment of wages, bonuses, allowances, incentives, and other benefits; the surrender of the union premises to the workers; and the failure to adjudicate plots of land for a union-administered worker housing program.

319. In this framework, in its application to the Inter-American Court,[251] the IACHR requested the Court to find that the Peruvian State had engaged its international responsibility by its failure to perform its obligations under Article 25 of the American Convention, in connection with Article 1(1) of the same instrument, to the detriment of Julio Acevedo Jaramillo *et al.,* workers of the Municipality of Lima and members of SITRAMUN, by reason of its failure to enforce the "judicial rulings issued by judges of the city of Lima, the Superior Court of Justice of Lima in second instance, and the Constitutional Tribunal of Peru, in response to appeals for constitutional protection lodged since 1997, in proceedings in which the rights of the workers of the Municipality of Lima belonging to SITRAMUN were recognized."[252] Thus, in keeping with the aforementioned precedents, in its application the IACHR noted that,

> The respect and enforcement of judgments of the judicial branch is intimately linked, therefore, with the very concept of the judicial function of the State, which has powers both of coercion and of execution. *A material right confirmed by a judicial ruling would have little force if it were not backed by the real power of the State to make it effective.* The court's power is limited to its ability to make a decision, based on law, and to the moral force binding society to its duty (legality and legitimacy), and that juridical and moral force will succumb in the face of physical resistance by those who disagree with the decision, which means that *the judiciary must rely on the State administration to overcome physical resistance and to impose the decision if it is not voluntarily accepted*. [...] If the judicial branch is to serve effectively as an organ for the control, guarantee and protection of human rights, it must not only be constituted formally, but it also has to be independent and impartial, and its rulings must be carried out. [...] *A fundamental premise of the administration of justice is the binding nature of the decisions adopted in the judicial determination of citizens' rights and obligations, which must be carried out, recurring to*

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[251] Application to the Inter-American Court in the *Case of Acevedo Jaramillo Julio et al. v. Peru,* June 25, 2003.

[252] *Ibid*., para. 2.

> *the security forces if necessary, even though they entail the liability of the State organs.*[253] (Emphasis added)

320. In its judgment, the Inter-American Court accepted the observations of the IACHR in the case and emphatically set out the scope of the rights enshrined in Articles 25(1) and 25(2)(c). In this respect, the Court developed relevant standards on the question of effective judgment enforcement mechanisms. Specifically, the Court held that,

> States have the responsibility to embody in their legislation and ensure due application of effective remedies and guarantees of due process of law before the competent authorities, which protect all persons subject to their jurisdiction from acts that violate their fundamental rights or which lead to the determination of the latter's rights and obligations. *However, State responsibility does not end when the competent authorities issue the decision or judgment. The State must also guarantee the means to execute the said final decisions*. […] *[T]he Court has asserted that "the effectiveness of judgments depends on their execution. The process should lead to the materialization of the protection of the right recognized in the judicial ruling, by the proper application of this ruling.* […] *The right to judicial protection would be illusory if a Contracting State's domestic legal system were to allow a final binding decision to remain inoperative to the detriment of one party.*[254] (Emphasis added)

321. According to the Court, the case shows that to satisfy the right to access to an effective remedy it is not sufficient that final judgments be delivered on the appeal for legal protection proceedings, ordering protection of plaintiffs' rights, but that "it is also necessary that there are effective mechanisms to execute the decisions or judgments, so that the declared rights are protected effectively."[255] Accordingly, the Court held, "The enforcement of judgments should be considered an integral part of the right to access to the remedy, encompassing also full compliance with the respective decision,"[256] and that "insofar as these judgments decide on guarantee remedies, on account of the special nature of the protected rights, the State must comply with them as soon as practicable, adopting all necessary measures to that end."[257] Therefore, "[d]elay in executing a judgment may not be such as to allow that the very essence of the right to an effective recourse be impaired and, consequently, that the right protected by the judgment be adversely affected. Budget regulations may not be used as an excuse for many years of delay in complying with the judgments."[258]

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[253] *Ibid*., paras. 134, 135, 139.

[254] Cf. I/A Court H. R., *Case of Acevedo Jaramillo et al*. Judgment of February 7, 2006. Series C No. 144, paras. 216, 217, and 219. It should be mentioned that the Inter-American Court cites the following in relation to this point: "*Cf. Antoneeto v. Italy,* No. 15918/89, para. 27, CEDH, July 20, 2000; *Immobiliare Saffi v. Italy* [GC], No. 22774/93, para. 63, EHCR, 1999-V; and *Hornsby v. Greece,* Judgment of 19 March 1997, ECHR, Reports of Judgments and Decisions 1997-II, para. 40." The ECHR has also referred to the connection between effective judicial protection and proper enforcement of judgments in cases such as *Taskin et al. v. Turkey*. Cf. ECHR, *Taskin et al. v. Turkey*, Judgment of 10 November 2004.

[255] *Ibid*., para. 220.

[256] *Ibid*., para. 220.

[257] *Ibid*., para. 225.

[258] *Ibid*., para. 225. The Court cites the followign case law here: "*Cf. Case of "Amat-G" LTD and Mebaghishvili v. Georgia*, EHCR; Judgment of September 2005, para. 48; *Popov v. Maldova*, No. 74153/01, para. 54; Judgment of January 18, 2005; and *Shmalko v. Ukraine*, No.

Continued…

322. Thus, the Court ruled that the State violated the right to the judicial protection established in Articles 25(1) and 25(2)(c) of the American Convention and failed to comply with the general obligation to respect and guarantee the rights and freedoms established in Article 1(1) of said Convention. The Court further found that such violations "are particularly serious as they implied that during many years the labor rights guaranteed by said judgments have been impaired."[259]

323. Accordingly, the standards set out in this case are clearly of critical importance as regards the design and implementation of mechanisms to guarantee effective enforcement of judgments that deal with economic, social and cultural rights.

E. Conclusions

324. Article 25 of the American Convention establishes the duty of states parties to provide a simple, prompt, and effective recourse for the protection and assurance of rights. Thus, the organs of the IASHR have set about drawing up standards on the scope of that obligation in the area of economic, social and cultural rights.

325. Both the IACHR and the Inter-American Court have identified the need to provide procedural measures by which to ensure immediate protection of social rights even though the merits of the matter in question may require more prolonged analysis.

326. The Inter-American Commission has identified certain basic characteristics that such measures should meet in order to be considered suitable by the standards of the American Convention. Thus, it has found that such remedies should be simple, urgent, informal, accessible, and processed by independent bodies; that they can be processed on an individual basis or as collective precautionary actions to protect a particular group or one that is identifiable; that the such remedies enjoy broad, active legitimacy; that individuals have the opportunity to approach federal or national legal entities when bias is suspected in the conduct of state or local bodies, and, finally, that provision be made for the implementation of protective measures in consultation with the affected parties.

327. The IACHR has noted that inasmuch as such actions are designed to protect fundamental rights in urgent cases, the evidentiary procedures should not be the same as that required in ordinary proceedings; the idea is that measures be adopted within a brief time period for the immediate protection of the threatened rights. The reason for this is that the fundamental idea of this precautionary protection is to adopt

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...continuation
60750/00, para. 44, Judgment of July 20, 2004." In *Burdov v. Russia*, the ECHR also made clear the unacceptability of citing budgetary reasons as grounds not to carry out judicial decisions. See in this respect, ECHR, *Burdov v. Russia*, Judgment of 7 May 2002.

[259] *Ibid*., para. 278. Here the Court noted that it would take account of the seriousness of the labor rights infringements in this case in its decision on reparations. Thus, as regards reparations, the Court ordered, "The State must comply by guaranteeing the injured parties, within one year, the enjoyment of their rights, through the actual enforcement of the orders of *amparo* the partial or total non-compliance with which has been declared by this Court, taking into account that domestic courts seized with the enforce[ment of] judgments must make certain determinations. In the case of the enforcement of the orders directing reinstatement of the workers to their jobs or to similar positions the State must, within one year, reinstate the living victims to said positions; should this not be possible, it must provide employment alternatives where the conditions, salaries and remunerations that they had at the time they were dismissed are respected. In the event that reinstatement of the workers to their jobs or to similar positions would not be possible, the State must proceed, within one year, to pay them compensation for termination of employment without just cause." Cf. *Ibid*. para. 318.

necessary measures in the short term for the immediate protection of the rights at stake.

328. In recent times, the Inter-American Court and the IACHR have recognized the need for protection of economic, social and cultural rights, no longer simply in their individual dimension, but also in their collective aspect. In this framework, the IASHR has begun to outline standards on judicial protection mechanisms designed to ensure access to collective litigation and, in particular, on the scope of the obligation of states to make available grievance procedures of this type.

329. The IASHR has clearly evolved in this area insofar as it has expressly recognized the collective dimension of certain rights and the need to draw up and put into practice legal mechanisms in order fully to ensure that dimension. Thus, the greater scope that the organs of the IASHR have recognized to the guarantee provided in Article 25 of the American Convention, in order to include effective judicial protection of collective rights in its framework, is plainly visible.

330. At the same time, of late the case law of the IASHR has also been firmer and more robust in demanding effective observance of the right to effective judicial protection for economic, social and cultural rights in their individual dimension. Thus, for example, the Inter-American Court has recognized the need for states to design and implement effective judicial grievance mechanisms to claim protection of basic social rights, such as the rights of workers.

331. Finally, it should be mentioned here that in recent years, the System has made significant strides in setting standards on the obligation of states to have in place mechanisms to ensure the effective enforcement of judgments handed down by the judiciary in each state.

332. The Inter-American Commission has taken it upon itself to underscore certain distinctive features of the judgment enforcement process when it is the State that is required to carry out the judgment. It has noted that the obligation of the State to guarantee the enforcement of judicial rulings takes on special importance when it is the State itself that must carry out the ruling, whether this is to be done through the executive, legislative or judicial branch, at the provincial or municipal level, through the central administration or the decentralized structure, through public enterprises or institutes, or any similar body, since such bodies are part of the State and generally enjoy procedural privileges, such as freedom from attachment of their assets. According to the IACHR, these bodies may seek to use their power and privileges in an effort to ignore judicial rulings that go against them. In this connection, according to the Commission, when an organ of the State is unwilling to carry out an unfavorable judgment, it may try to ignore the ruling simply by failing to observe it, or it may opt for more elaborate methods also with the aim of rendering the ruling ineffective, while trying to maintain a certain appearance of formal validity in the way in which it acts.

333. The IACHR has reiterated on several occasions that there exists within the IASHR a principle that holds that failure to abide by a binding judicial decision constitutes a continuing violation by states parties that persists as a permanent breach of Article 25 of the American Convention. In this regard, the IACHR has also outlined an incipient standard whereby it has held that non-compliance with judicial rulings that protect social rights, such as the right to social security, may also amount to a violation of Article 26 of the Convention.

334. At the same time, the IACHR has determined that the right to effective judicial protection requires the implementation of court-ordered provisional measures. Failure to implement such measures may also entail violation of this right.

335. The Inter-American Commission has also established an important standard regarding the lengths to which victims should have to go in seeking compliance with judicial rulings in their favor. Accordingly, the IACHR considered that states should enforce such judicial decisions immediately, without making it necessary for the persons affected to bring additional actions of a criminal, administrative, or any other nature, in order to secure their enforcement.

336. Likewise, the IACHR has been emphatic with regard to the need to ensure enforcement of administrative decisions. In that connection, it considers it necessary for the Administration to have effective mechanisms to ensure compliance with orders issued by administrative authorities.

337. For its part, the Inter-American Court has started to develop important standards on the design and implementation of effective judgment enforcement mechanisms. In this connection, the Court has found that State responsibility does not end when the system of justice issues a final judgment and it becomes binding. In the view of the Inter-American Court, from that point forward the State must also guarantee the necessary means to enable effective execution of said judgment. In the words of the Court, the right to judicial protection would prove illusory if the State's domestic legal system were to allow a final binding decision to remain inoperative to the detriment of one party.

338. In keeping with the foregoing, the Court has considered that to speak of "effective judicial remedies" it is not sufficient for final judgments to be delivered that protect the rights at issue, since the enforcement of judgments should be considered an integral part of the right to effective judicial protection. At the same time, the Court has held that in the case of judgments on guarantee remedies, due to the special nature of the protected rights, states should comply with them as soon as possible, adopting all necessary measures to that end. On that score, the Court has emphatically stated that budget regulations may not be cited as an excuse for a protracted delay in complying with the judicial decisions that protect human rights.

339. Thus, the Court has found that delay in executing a judgment may not be such as to cause greater impairment of the rights protected in the decision and, so, undermine the right to effective judicial protection.