INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF LIAKAT ALI ALIBUX *V.* SURINAM

JUDGMENT OF JANUARY 30, 2014
(Preliminary Objections, Merits, Reparations and Costs)

In the case *Liakat Ali Alibux*,

The Inter-American Court of Human Rights (hereinafter "the Inter-American Court," "the Court," or "the Tribunal"), composed of the following judges:

Humberto Antonio Sierra Porto, President;
Roberto F. Caldas, Vice-President;
Manuel E. Ventura Robles, Judge;
Diego García-Sayán, Judge;
Alberto Pérez Pérez, Judge;
Eduardo Vio Grossi, Judge, and
Eduardo Ferrer Mac-Gregor Poisot, Judge;

Also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and Articles 31, 32, 42, 65, and 67 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), renders this Judgment, which is structured in the following manner:

CASE OF LIAKAT ALI ALIBUX V. SURINAM

Table of Contents

I
INTRODUCTION TO THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* – On January 20, 2012, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Inter-American Court of Human Rights Inter-American Court (hereinafter "brief submitting the case") the case of *"Liakat Ali Alibux"* against the Republic of Suriname (hereinafter "the State" or "Suriname"). According to the Commission, the case refers to the investigation and criminal proceedings brought against Mr. Liakat Ali Alibux – Former Minister of Finance and Former Minister of Natural Resources – who, on November 5, 2003, was convicted of the crime of forgery, in accordance with the procedures set forth in the Indictment of Political Office Holders Act (hereinafter "IPOHA").

2. *Proceedings before the Commission.* – The processing of the case before the Inter-American Commission was as follows:

a) *Petition.* – the initial petition dated July 20, 2003, was received by the Commission on August 22, 2003, from Liakat Ali Alibux;

b) *Admissibility Report.* - On March 9, 2007, the Inter-American Commission approved the Admissibility Report No. 34/07.[1]

c) *Report on the Merits.* – On July 22, 2011, the Commission approved the Merits Report No. 101/11[2] under the terms of Article 50 of the American Convention (hereinafter "the Merits Report" or "Report No. 101/11"), in which it made a number of recommendations to the State.

a. *Conclusions.* – The Commission concluded that the State was responsible for the violation of the following rights recognized in the American Convention:

i. the right to appeal the judgment to a higher court (Article 8(2)(h) of the Convention) to the detriment of Liakat Ali Alibux;
ii. the freedom from ex post facto laws (Article 9 of the Convention) to the detriment of Liakat Ali Alibux;
iii. the freedom of movement (Article 22 of the Convention) to the detriment of Liakat Ali Alibux; and
iv. the right to judicial protection (Article 25 of the Convention) to the detriment of Liakat Ali Alibux;

b. *Recommendations.* – As a consequence, the Commission issued a series of recommendations to the State:

i. order the necessary measures to nullify the criminal proceedings and conviction imposed on Mr. Alibux;
ii. provide appropriate reparations in favor of Mr. Alibux for the declared violations;
iii. adopt the necessary measures of non-repetition so that high officers prosecuted for acts committed within their official capacities have an effective remedy to request review of their convictions; and
iv. adopt the legislative or other measures that may be necessary to guarantee an effective mechanism of review of issues of a constitutional nature.

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[1] In that report, the Inter-American Commission declared the petition admissible with regard to the alleged violation of Articles 5, 7, 8, 9, 11, 22 and 25 of the American Convention, in conjunction with Article 1.1 thereof and denied the admissibility of the alleged violation of Articles 11 and 24. *Cf.* Admissibility Report No. 34/07, Petition 661-03, Liakat Ali Alibux, Suriname, March 9, 2007.

[2] *Cf.* Merits Report No. 101/11, Case No. 12.608, Liakat Ali Alibux v. Suriname, July 22, 2001 (f. 683, Tomo II).

d) *Notification to the State.* - On October 21, 2011, the State was notified of the Merits Report and granted two months to report on its compliance with the recommendations.

e) *Submission to the Court.* - On January 20, 2012, the Commission submitted to the jurisdiction of the Inter-American Court all of the facts and human rights violations that were described in the Merits Report, by virtue of the fact that "the violations of the right to a fair trial and judicial protection occurred as a result of the validity of the regulation that establishes the prosecution of high officers in a single instance, as well the lack of implementation of constitutional norms that regulate[d] constitutional review and contemplate[d] the creation of a Constitutional Court." The Commission further noted that "the case presents a novel aspect of the law as to the scope of the rule of freedom from ex post facto laws established in Article 9 of the American Convention when it comes to provisions that are of a procedural nature, but that can have substantive effects." The Commission appointed Commissioner Dinah Shelton and the Executive Secretary at the time, Santiago Canton, as delegates in this case, and Elizabeth Abi-Mershed, Deputy Executive Secretary, Silvia Serrano Guzmán, Mario López-Garelli, and Hilaire Sobers, as legal advisers.

3. *Requests of the Inter-American Commission.* – Based on the foregoing, the Commission requested the Court to declare the international responsibility of the State for the violation of: a) Article 8 of the Convention; b) Article 9 of the Convention; c) Article 22 of the Convention; and d) Article 25 of the Convention, to the detriment of Liakat Ali Alibux.

II
PROCEEDINGS BEFORE THE COURT

4. *Notification to the State and to the alleged victim.* – The State and the alleged victim were notified of the Commission's submission of the case on March 9, 2012.

5. *Brief of pleadings, motions, and evidence.* – The alleged victim did not submit his brief of pleadings, motions, and evidence (hereinafter "brief of pleadings and motions") before the Court. Instead, on May 2, 2012, he filed before the Inter-American Commission a statement in which he opted to adhere to the arguments formulated by the Commission. The Commission forwarded the statement to the Court on May 14, 2012. Moreover, in a separate communication on March 15, 2012, the alleged victim requested eligibility for the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights (hereinafter "Legal Assistance Fund"); the request was deemed time-barred and denied. On August 14, 2012, the alleged victim notified the Court that he had selected Mr. Irvin Madan Dewdath Kanhai to act as his legal representative during the proceedings before this Court.[3]

6. *Answer brief.* – On August 21 2012, the State submitted to the Court its brief containing preliminary objections and answer to the brief submitting the case (hereinafter "the answer brief"). The State appointed G.R. Sewcharan as its Principle Agent, and A.E. Telting as Deputy Agent.

7. *Observations to the preliminary objections*– On September 19 and 26, 2012, the alleged victim and the Inter-American Commission, respectively, presented their observations to the preliminary objections filed by the State.

8. *Public hearing and additional evidence.* – By Order of the President of the Court dated December 20, 2012,[4] the parties were summoned to appear at a public hearing to present their final oral arguments and observations on the preliminary objections and possible

[3] Nevertheless, the Court noted that the alleged victim signed some briefs presented before the Court.

[4] *Cf. Case of Liakat Ali Alibux V. Suriname.* Order of the President of the Inter-American Court of December 20, 2012. Available at: http://www.corteidh.or.cr/docs/asuntos/liakat_20_12_12_ing.pdf.

merits, reparations and costs, as well as to hear the testimony of Liakat Ali Alibux, convened by the President of the Court, and the expert opinion of Héctor Olásolo, offered by the Commission. In addition, the statement of witness S. Punwasi, offered by the State, was received through *affidavit*. The public hearing took place on February 6, 2013, during the 98th regular session of the Court, held at its headquarters.[5] At the hearing, the Court received the testimony of those summoned and the final oral arguments and observations of the Commission, the representative of the alleged victim, and the State. Following the hearing, the Court requested the parties to submit certain information and documentation to facilitate adjudication of the case.

9. *Final written arguments and observations*. – On February 27, 2013 and March 7, 2013, the representative and the State, respectively, presented their final written arguments. Furthermore, on March 7, 2013, the Commission presented its final written observations. Meanwhile, on March 26, the State submitted its observations to the documents presented by the representative, along with its final written arguments.

III
PRELIMINARY OBJECTIONS REGARDING THE LACK OF EXHAUSTION OF DOMESTIC REMEDIES

10. The State filed three preliminary objections regarding the lack of exhaustion of domestic remedies for the filing of the petition before the Commission on the following basis: i) the filing of the application before the Commission prior to the issuance of a conviction; ii) the lack of an appeal of the conviction; and iii) the lack of exhaustion of remedies related to the restriction of the right to leave the country. Nevertheless, given that the three objections are related to the lack of exhaustion of domestic remedies, the Court will consider them as a whole.

A. Arguments of the parties and of the Commission

11. The ***State*** argued that the alleged victim did not exhaust domestic remedies given that at the time of the submission of his petition before the Inter-American Commission on "July 20, 2003," no final judgment had been reached in the criminal proceedings brought against him. The State also noted that through the Law of August 27, 2007, the IPOHA was amended and a possibility was established for officials or former officials who had been convicted of crimes committed in the exercise of their functions, in accordance with the procedure set forth in Article 140 of the Constitution of Suriname of 1987 (hereinafter "the Constitution") to file an appeal within three months of the entry into force of the amendment. In this regard, the State indicated that Mr. Alibux had voluntarily decided to not exercise this right, such that domestic remedies had not been exhausted by the alleged victim in this case. Finally, the State argued that Mr. Alibux did not bring forth any type of action before the domestic tribunals regarding the impediment of his departure in January of 2003, such that the statement of admissibility is rendered incomprehensible, especially since the legislature of Suriname offered Mr. Alibux sufficient legal remedies with respect to said impediment.

12. The ***Commission*** stated that the assessment regarding the requirements set forth in Articles 46 and 47 of the American Convention must be made in consideration of the situation prevailing at the moment of the ruling on the admissibility or inadmissibility of the

[5] The following were present at the hearing: a) for the Inter-American Commission, Silvia Serrano Guzmán and Jorge H. Meza Flores; b) for the alleged victim, Irvin Madan Dewdath Kanhai and Mr. Alibux, and c) for the State of Suriname, G.R. Sewcharan and A.E. Telting.

petition, at which time the High Court of Justice had already issued a final judgment in the criminal proceedings against Mr. Alibux. In turn, it noted that the amendment to the IPOHA was approved more than five months after the adoption of the Admissibility Report in the case and almost four years after the final judgment of the High Court of Justice. Furthermore, it recognized that even when certain aspects of the case evolve with the passage of time, the Court should focus its attention on Mr. Alibux's situation at the time the alleged violations of human rights occurred. Lastly, regarding the restriction of the right to leave the country, the Commission argued that the preliminary objection filed by the State was not brought forth at the admissibility stage of the petition, but rather, it was raised for the first time during the proceedings before the Court. In this regard, it considered that, pursuant to the principle of estoppel, the State had the opportunity to challenge the admissibility of the point at issue, and in not doing so, the preliminary objection must be rejected.

13. The ***alleged victim*** stated that at the moment his petition was submitted to the Commission, the process had reached a "dead end" given that there was no legally valid resolution as to whether or not the criminal proceedings against him would continue, and, in addition, the proceedings had been unjustifiably delayed in regard to the issuance of the judgment. Moreover, he noted that it was a "travesty" in the name of justice that the State had amended the law more than three years after the High Court of Justice had handed down the conviction. Finally, the alleged victim did not specifically address the lack of exhaustion of domestic remedies in regard to the restriction of the right to leave the country.

B. Considerations of the Court

14. Article 46(1)(a) of the American Convention establishes that, in order to determine the admissibility of a petition or communication lodged before the Inter-American Commission in accordance with Articles 44 or 45 of the Convention, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law.[6] In this sense, the Court has held that an objection to its exercise of jurisdiction based on the supposed failure to exhaust domestic remedies must be filed at the appropriate procedural moment,[7] that is, during admissibility proceedings before the Commission.[8]

15. The rule of prior exhaustion of domestic remedies is established in the interest of the State, as it seeks to exempt the latter from responding before an international body for acts that are attributed to it, before it has had the opportunity to remedy them by its own means.[9] However, in order for a preliminary objection regarding the lack of exhaustion of domestic remedies to proceed, the State raising the objection must specify the domestic

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[6] *Cf. Case of Velásquez Rodríguez V. Honduras. Preliminary Objections.* Judgment of June 26, 1987. Series C No. 1, para. 85, and *Case of Mémoli V. Argentina. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 22, 2013. Series C No. 265, para. 46.

[7] *Cf. Case of Velásquez Rodríguez. Preliminary Objections, supra,* para. 88, and *Case of Mémoli, supra,* para. 47.

[8] *Cf. Case of Velásquez Rodríguez. Preliminary Objections, supra,* paras. 88 and 89, and *Case of Mémoli, supra,* para. 47.

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

remedies that must be exhausted, and prove that those remedies were available and are adequate, appropriate, and effective.[10]

16. In that sense, when alleging the failure to exhaust domestic remedies, the State must indicate, at the proper procedural moment, the remedies that must be exhausted and their effectiveness.[11] In this regard, it is not the duty of the Court, or the Commission, to identify *ex officio* the domestic remedies that have not yet been exhausted. The Court emphasizes that it is not up to the international bodies to remedy the imprecision in the State's arguments.[12]

17. With regard to the filing of the initial petition before the Commission, this Court finds that, indeed, the alleged victim sent the document on August 22, 2003, and that by that date, no final judgment had been issued in the criminal proceedings which had started against him, which was issued on November 5, 2003. On the other hand, although the initial petition was received on August 22, 2003, it was not until April 18, 2005, that the Commission forwarded the pertinent parts of the petition of the alleged victim to the State. On July 18, 2005, the State argued that the case had been submitted prior to the adoption of a final decision from the High Court of Justice.[13] Lastly, the Admissibility Report was issued on March 9, 2007.

18. The Court holds that the petitioner argued that the alleged violations to the right to appeal the conviction and the rule of freedom from ex post facto law before the High Court of Justice were unfavorably resolved by the Interlocutory Verdict of June 12, 2003 (*infra* para. 46) prior to submitting the petition to the Commission. Consequently, in the present case, the Court finds that, due to the absence of a mechanism by which to appeal the possible conviction, the issuance of said judgment was not a prerequisite for purposes of presenting the case before the Commission.

19. With respect to the lack of exhaustion of the appeal, the Court notes that this remedy was introduced in Suriname through the August 27, 2007, amendment to the IPOHA (*infra* para. 49). Moreover, during the proceedings before the Commission, the State did not make reference to the introduction of this remedy, nor did it indicate the requirement that the alleged victim exhaust it. On the contrary, it was the alleged victim who indicated the existence of this remedy during the proceedings before the Commission in a brief dated January 10, 2008.[14] It was not until the answer brief presented before this Court that the

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[10] *Cf. Case of Velásquez Rodríguez. Preliminary Objections, supra,* paras. 88 and 91, and *Case of Mémoli, supra,* paras. *46 and 47.*

[11] *Cf. Case of Velásquez Rodríguez. Preliminary Objections, supra,* para. 88, and *Case of Mémoli, supra,* para. 47.

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

[13] In this regard, it noted that: "It appears that the Petition of Liakat Ali Errol Alibux was filed on the 20th of July 2003, as is presentad in the facts. At that moment, the domestic remedies had not yet been exhausted as intended in Article 46 Paragraph 1 under a of the Convention. […]. The High Court of Justice did give an interlocutory judgment in respect of the objections raised by Petitioner during the Trial. This interlocutory judgment is not a final judgment and the Trial was still proceeding which appears also from the reasoning put forward by the parties and the judgment of the [High] Court in respect of the concept of judgment in the session of [said court] on the 12th of June 2003. […] Whether he could or could not appeal the judgment to be given is not relevant. Fact is that the domestic remedies were invoked and/or used, but they were not exhausted." *Cf.* Official Response of the State to the Brief of submission of the case before the Commission of July 18, (attachment to the report on the Merits, folio 122).

[14] *Cf*. Brief of Observations of Mr. Liakat Alibux in "response to the State of Suriname, on November 30, 2007," of January 10 and 11, 2008 (case file of processing before the Commission, folios 800 and 806).

State argued the requirement that the alleged victim exhaust the appeal which was implemented on August 27, 2007. In view of the foregoing, the Court concludes that at the moment Mr. Alibux was convicted, said remedy did not exist, and the argument regarding the requirement to exhaust this remedy was not raised at the appropriate procedural instance. As such, the preliminary objection is time-barred.

20. Lastly, regarding the lack of exhaustion of domestic remedies in regard to the restriction of the right to leave the country of January of 2003, the Court notes that the alleged victim did not file any remedy before the domestic tribunals. However, the State did not contravene its admissibility in the early stages of the proceedings before the Commission, nor did it indicate the remedies that the alleged victim should have exhausted, and this information was not provided to the Court (*infra* para. 26).

C. Conclusion

21. Based on the aforementioned, the Court rejects the preliminary objections raised by the State. Notwithstanding the foregoing, the assessments and evaluations of the remedies that were available will be evaluated on the merits of the matter.[15]

IV
JURISDICTION

22. Pursuant to the terms of Article 62(3) of the American Convention, the Inter-American Court has jurisdiction to hear this case given that Suriname has been a State Party to the American Convention since November 12, 1987, and accepted the contentious jurisdiction of the Court on that date.

V
EVIDENCE

23. Based on the provisions of Articles 46, 47, 48, 50, 51, 57, and 58 of the Rules of Procedure, as well as on its jurisprudence regarding evidence and assessment thereof,[16] the Court will examine and assess the documentary probative elements provided by the parties on different procedural opportunities, the statements, testimonies, and expert opinions rendered by sworn statements before a notary public (*affidavit*) and at the public hearing, as well as the helpful evidence requested by the Court. To this end, the Court will abide by the principles of sound judicial discretion, within the corresponding legal framework.[17]

A. Documentary, testimonial, and expert evidence

24. The Court received various documents presented as evidence by the Commission and the State, attached to their main briefs (*supra* paras. 2 and 6). Similarly, the Court received documentation presented by the representative as attachments to the brief of observations to the preliminary objections (*supra* para. 7). In addition, the Court received the sworn

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15 *Cf. Case of The Santo Domingo Massacre, supra*, para. 38.

16 *Cf. Case of the "White Van" (Paniagua Morales et al.)V. Guatemala. Merits.* Judgment of March 8, 1998. Series C No. 37, paras. 69 to 76, and *Case of J. V. Perú. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 27, 2013. Series C No. 275, para. 38.

17 *Cf. Case of the "White Van" (Paniagua Morales et al.), supra*, para. 76, and *Case of J., supra,* para. 38.

statement rendered before a notary public (*affidavit*) of the witness, S. Punwasi.[18] With regards to the evidence rendered at the public hearing, the Court heard the statements of the alleged victim, Mr. Liakat Alibux,[19] and the expert witness, Héctor Olasolo[20] (*supra* para. 8). Finally, the Court received documents offered by the representative of the alleged victim attached to the brief of final written arguments (*supra* para. 9).

B. Admission of the evidence

B.1 Admission of the documentary evidence

25. In this case, as in others, the Court grants probative value to those documents presented by the parties and the Commission at the appropriate procedural opportunity (*supra* paras. 2 and 6 to 9) that were not contested or opposed and the authenticity of which was not challenged.[21] The documents requested by the Court that were submitted by the parties after the public hearing are incorporated into the record of evidence pursuant to Article 58 of the Rules of Procedure.

26. By way of notes from the Secretariat of the Court dated February 22, November 12, and December 3, 2013, the State was asked to provide as evidence to facilitate adjudication the regulations governing the restriction of the right to leave the country by persons charged or accused of a criminal offense; copies of the Penal Code and Criminal Procedure Code of Suriname; the statutes regulating the organization and composition of the High Court of Justice; and the documentation related to the determination of the composition of the Court that heard the criminal proceedings against Mr. Alibux. The required regulations were not submitted in their entirety. However, the Court will take into consideration, where relevant, the articles that were mentioned in the briefs of the parties, and this will be assessed in the corresponding paragraphs.

27. As to the newspaper articles and press releases submitted by the Commission,[22] the Court has considered that they can be assessed when they refer to public and notorious facts or declarations made by State officials, or when they corroborate aspects related to the case. Thus, the Court decides to admit those documents that are complete or that, at the very least, allow their source and date of publication to be verified, and will assess them taking into account the body of evidence, the observations of the parties, and the rules of sound judicial discretion.[23]

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[18] Statement of S. Punwasi in regard to the application of the Penal Code, the Penal Code of Procedure, the Indictment of Political Office Holders Act, and related regulations, at the time of the facts, in the investigation, prosecution, and final judgment of Mr. Alibux.

[19] Statement of Liakat Ali Alibux on the procedure that led to his criminal conviction and its consequences.

[20] Statement of expert witness Héctor Olásolo, university professor, regarding the reach and scope of the rule of freedom from ex post fact laws under the international law of human rights and the background of the regulations, including the regulations governing procedure, that could substantially effect the exercise of the State's punitive power. He also analyzed how this matter has been handled in other systems of human rights protection in regard to the application of the test of forseability in a criminal trial.

[21] *Cf. Case of Velásquez Rodríguez. Merits*, *supra*, para. 140, and *Case of J., supra,* para. 40.

[22] Note published in the newspaper "De Ware Tijd" on August 13, 2001, entitled "Public Prosecutions Department wants indictment of Alibux" (attachments to the report on the Merits, folio 9), and note published in the "Caribbean NetNews" on January 10, 2009, entitled "Suriname exminister jailed for corruption", available at http://www.caribbeannewsnow.com/caribnet/archivelist.php?newsid=13443&pageaction=showdetail&news_id=13443&arcyear=2009&arcmonth=1&areday=1O=&ty.

[23] *Cf. Case of Velásquez Rodríguez. Merits, supra*, para. 146, and *Case of J., supra,* para. 41.

B.2 Failure to present the brief of pleadings and motions

28. Regarding the procedural opportunity to present documentary evidence, in accordance with Article 57 of the Rules of Procedure, it must be submitted, in general, along with the brief submitting the case, brief of pleadings and motions, or answer brief, as appropriate. The Court recalls that evidence submitted outside the adequate procedural opportunity is inadmissible, unless one of the exceptions set forth in Article 57(2) of the Rules of Procedures applies, to wit, *force majeure* or serious impediment, or if the evidence refers to an event which occurred after the procedural moments indicated.

29. In this regard, in relation to the effects of the failure to present the brief of pleadings and motions by the representative (*supra* para. 5), the Court may allow the parties to participate in certain procedural actions, taking into account the stages that have expired pursuant to the opportune procedural moment.[24] In that sense, the representative had the procedural opportunity to submit observations on the preliminary objections, to participate in the public hearing by questioning the declarants and was able to respond to the questions posed by the judges of the Court and to present the final oral and written arguments. Accordingly, the Court considers that, in view of the absence of the brief of pleadings and motions, it will not assess any arguments or evidence by the representative that add facts, rights, or alleged victims to the case, as well as any claims for reparations distinct from those requested by the Commission since they were not submitted at the appropriate procedural moment (Article 40(1) of the Rules of Procedure). Thus, the Court will only assess disputes regarding statements provided by affidavit and during the public hearing, the legal arguments presented during the hearing, and the final written arguments related to arguments made during the hearing, together with answers and evidence strictly related to the questions posed by the judges during the hearing and/or requested thereafter.[25]

30. On the other hand, the Court also notes that the representative forwarded with the final written arguments, receipts for expenses related to the litigation of this case. In this regard, it will only consider those expenses that relate to requests for costs and expenses incurred following the submission of the brief of pleadings and motions.[26]

B.3 Admission of the statements of the alleged victim, expert, and witness

31. As to the statement of the alleged victim, the expert witness, and the witness rendered at the public hearing and by way of affidavits, the Court considers these pertinent only insofar as they are consistent with the purpose defined by the President of the Court in the Order requesting them (*supra* para. 8). Similarly, pursuant to the jurisprudence of this Court, the statement of the alleged victim cannot be assessed on its own, but rather within the entire body of evidence of the proceedings, since it is useful only insofar as it can provide more information on the alleged violations and their consequences.[27]

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[24] *Cf. Case of Nadege Dorzema et al. V. Dominican Republic. Merits, Reparations and Costs*. Judgment of October 24, 2012. Series C No. 251, para. 19, and *Case of J., supra,* para. 32.

[25] *Cf. Case of Nadege Dorzema et al.*, *supra,* para. 20, and *Case of J., supra,* paras. 33 and 34. In particular, in their final written arguments, the representative forwarded documents in response to the specific questions from the judges as well as various other documents and judicial decisions. In view of the foregoing, with respect to such documents, only those documents that were sent in response to the questions made by the judges at the hearing or after it will be admitted.

[26] *Cf. Case of Nadege Dorzema et al., supra,* para. 24, and *Case of J., supra,* para. 33.

[27] *Cf. Case of Loayza Tamayo V. Perú. Merits.* Judgment of September 17, 1997. Series C No. 33, para. 43, and *Case of J., supra,* para. 49.

VI
FACTS

32. Liakat Ali Alibux was born in Paramaribo on November 30, 1948 and is a sociologist. He served as Minister of Natural Resources from September of 1996 to August of 2000. From December of 1999 to August of 2000, he was the Minister of Finances. Previously, he held several positions in public service.[28]

33. Between June and July 2000, Mr. Alibux, acting as Minister of Finance, purchased 1,292.62 m^2 of property located in *Grote Combéweg*, Paramaribo, valued at the equivalent of U.S. $900,000.00 (nine hundred thousand dollars of the United States of America), for the Ministry of Regional Development.[29] Mr. Alibux resigned from his ministerial post in August of 2000, when President Venetiaan replaced President Jules Wijdenbosch.

34. Between April and August of 2001, the police conducted a preliminary investigation against Mr. Alibux and three other persons in connection with the suspected commission of two counts of forgery for the alleged preparation of a proposal letter to the Council of Ministers concerning the purchase of the property because of the urgent need to expand the office space of the Ministry of Regional Development and the supposed elaboration of a decision of the Council of Ministers approving the sum of U.S. $ 900,000.00 (nine hundred thousand dollars of the United States of America) to purchase it;[30] the alleged commission of a crime of fraud[31] for the personal benefit or third-party benefit from the disbursement of U.S. $ 900,000.00 (nine hundred thousand dollars of the United States of America) by the Central Bank of Suriname, and one count of a violation of the Foreign Exchange Law for allegedly making a payment in foreign currency to a resident of Suriname through the sale of the property without the authorization of the Foreign Exchange Commission of Suriname.[32] During the preliminary investigation, Mr. Alibux testified on April 6, 2001 and August 6, 2001,[33] and stated, *inter alia*, that: a) he followed a suggestion of the Vice-

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[28] *Cf.* Provision of Record of Service of July 11, 2005 (case file of proceedings before the Commission, folios 280 to 284). Moreover, on January 14, 1974, he has named sociologist at the Ministry of Social Affairs; between October 22 1980 and March 30, 1982, he has Minister of Social Affairs and Public Housing; on October 27, 1982, he was named First class Senior Public Official at the Ministry of General Affairs; on June 26, 1985, he was named the Extraordinary and Pelinipotentiary Embassador to Brazil.

[29] *Cf.* Judgment of the High Court of Justice of November 5, 2003 (attachments to the report on the Merits, folio 167, and case file of proceedings before the Commission, folio 263-264).

[30] *Cf.* Order to initiate the preliminary inquiry of January 28, 2002 (processing before the Commission, folios 263 and 264) Article 278 of the Penal Code of Suriname 1910: "A person who falsifies or falsely produces a written document which establishes a right, an obligation or liberates any debt, or which is intended to constitute evidence of a fact, with intent to use or have it used by a third party as real and not falsified, shall be punished for forgery with a maximum prison sentence of five years, if the use of this document could cause a disadvantage. The same penalty shall be imposed on any person who uses false or forged documents as if real and not falsified, if such use could cause a disadvantage." (unofficial translation: http://www.wipo.int/wipolex/es/text.jsp?file_id=209840#LinkTarget_1694).

[31] *Cf.* Order to Initiate the Preliminary Inquiry of January 28, 2002 (case file of proceedings before the Commission, folios 263 and 264) Article 386 of the Penal Code of Suriname 1910: "A person who for personal benefit or a third party benefit in an unlawful manner – adopts a false name or condition by way of deceit or fabrications – leading someone to deliver property, to borrow funds, or to cancel a debt, shall be punished with a prison sentence of up to three years for the crime of fraud." (unofficial translation: http://www.wipo.int/wipolex/es/text.jsp?file_id=209840#LinkTarget_1694).

[32] *Cf.* Article 14 of the Act on Ecnomic Offenses. Order to Initiate a Preliminary Inquiry on January 28, 2002 (case file of proceedings before the Commission, folios 263 and 264); Official letter PG 1184/01. Letter sent to the Procurator General of the Republic to the President of Suriname on August 9, 2001 (case file of proceedings before the Commission, folio 268); Judgment of the High Court of Justice of November 5, 2003 (attachments to the report on the Merits, folios 172 to 179),

[33] *Cf.* Brief of the State filed before the Commission on July 18, 2005 (attachments to the report on the Merits, folio 104).

President for the purchase of the building and that the Ministry of Finance prepared a proposal to the Council of Ministers for such purpose, which was signed by Mr. Alibux;[34] and b) the proposal was discussed and approved during the June 23, 2000, meeting of the Council of Ministers.[35]

35. On August 9, 2001, the Prosecutor General wrote to the President of the Republic, requesting that the necessary arrangements be made for Mr. Alibux to be indicted by the National Assembly for crimes committed in 2000, and so that the Prosecutor (assigned to the case) could proceed with prosecution.[36] The President forwarded the letter to the Speaker of the National Assembly on August 15, 2001.[37]

36. On October 18, 2001, the President of the Republic, pursuant to approval of the Council of State and the National Assembly, ratified the Indictment of Political Office Holders Act (hereinafter "IPOHA") with the explicit purpose of implementing Article 140 of the Constitution and, in particular, "to lay down rules for indicting those who have held a political office, even after their retirement, for punishable acts committed in the discharge of their official duties."[38] Article 140 of the Constitution[39] provides that:

> Those who hold political office shall be liable to trial before the High Court of Justice, even after their retirement, for punishable acts committed in the discharge of their official duties. Proceedings are initiated against them by the Procurator General after they have been indicted by the National Assembly in a manner to be laid down by law. It can be determined by law that members of the High Councils of State and other officials shall be liable to trial for punishable acts committed in the exercise of their functions before the High Court.[40]

37. The IPOHA, among other things, establishes the individuals who hold political offices that are subject to liability for purposes of this Act, including certain former political office holders.[41] Moreover, this Act states that: a) the Prosecutor General has the authority to

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[34] *Cf.* Judgment of the High Court of Justice of November 5, 2003 (attachments to the report on the Merits, folios 174 and 175).

[35] *Cf.* Judgment of the High Court of Justice of November 5, 2003 (case file of attachments to the report on the Merits, folios 174-177).

[36] *Cf.* Official letter PG 1784/01 Letter of the Procurator General to the President of the Republic on August 9, 2001 (case file of Merits, folios 305 and 306).

[37] *Cf.* Official letter 2517/P/jc of August 15, 2001 (case file of Merits, folio 329).

[38] *Cf.* Indictment of Political Office Holders Act (hereinafter IPOHA) of October 18, 2001 (attachments to the report on the Merits, folio 159). Statement of Legal Reasons: "*It is necessary to lay down rules for indicting those who hold a political office, even after their retirement, for punishable acts committed by them in the discharge of their official duties*."

[39] Explanatory notes of the Act note, *inter alia,* that: "Pursuant to Article 140 of tlle Constltution, Polltlcal Office Holders shall be trled before the High Court of Justlce In respect of punishable acts commltted In the dlscharge of their dulies. In principie, each person should be trled before the judicial body laid down by law in general in that respect, as explicutly provided for In Artlcle 11 of the Constltution. That would entall any political offlce holder would have to be trued before the Distrlct Court, as indicated in the Act on the Organizatlon and Compositlon of the Surinamese Judiciary and the Code of Criminal Procedure." (case file of proceedings before the Commission, folio 1019).

[40] *Cf*. Official Response of the the State regarding Petition No. P-661-03, Liakat Ali Alibux, of February 28, 2006, para. 11 (attachments to the report on the Merits, folio 18), and official response of the State regarding Petition No. P-661-03, Liakat Ali Alibux, of July 18, 2005, para. 26 (attachments to the report on the Merits, folio 110-111).

[41] Pursuant to Article 1 of the Act, political office holders under the Act are: 1. the President of the Republic, 2. the Vice-President, 3. the Ministers, 4. the Under-Ministers, and 5. the persons who by or pursuant to the electoral act are members of the representative bodies, established as such by or pursuant to the Constitution. Moreover, the Act defined former political office holders as persons who have held the office or functions mentioned 1 to 5 inclusive of the former paragraph, (attachments to the report on the Merits, folio 159).

submit a petition with the National Assembly for the indictment of current or former political office holders for punishable acts under domestic or international treaties; b) the National Assembly is obligated to deliberate with regards to the petition within a period of 90 days, after conducting the investigations it deems necessary, as well as provide the official the opportunity to be heard; and c) if the National Assembly determines that there is sufficient evidence to indict the accused, it shall notify the Prosecutor General, who then has the power to refer the case to the High Court of Justice. Furthermore, Article 5 of the Act provides that "The National Assembly shall not assess the validity of considering the political office holder or the former political office holder concerned as a suspect within the meaning of Article 19 of the Code of Criminal Procedure, but shall assess only whether his or her prosecution must be deemed to be in the public interest from a political and administrative point of view."[42]

38. On November 27, 2001, the Speaker of the National Assembly responded to the Prosecutor General and informed him of the approval of the IPOHA. Moreover, under the new law, he asked that the letter of August 9, 2001 be withdrawn and that the request be resent to the National Assembly.[43]

39. On January 4, 2002, the Prosecutor General sent another communication to the Speaker of the National Assembly, in which he revoked the request made in August, 2001[44], and, in response to Articles 2, 3, and 6 of the IPOHA, requested that the National Assembly "indict" Mr. Alibux in order for the Prosecutor to continue with prosecution.[45] Mr. Alibux was notified of the request on that same date.[46]

40. Mr. Alibux filed his defense brief before the National Assembly on January 17, 2002, in which he denied that he had committed the punishable acts for which he had been accused of by the Prosecutor General.[47] That same day, the National Assembly decided to grant the request of the Prosecutor General to indict Mr. Alibux. The Prosecutor General was informed of this decision on January 22, 2002.[48]

41. On January 28, 2002, the Prosecutor General ordered the initiation of a preliminary inquiry against Mr. Alibux and three other individuals by an Examining Judge in charge of

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[42] Article 5: "The National Assembly shall not assess the validity of considering the political office holder or the former political office holder concerned as a suspect within the meaning of Article 19 of the Code of Criminal Procedure, but shall assess only whether his or her prosecution must be deemed to be in the public interest from a political and administrative point of view" (attachments to the report on the Merits, folios 159 to 163).

[43] *Cf.* Official letter No. 2138 of the President of the National Assembly of November 27, 2001, (case file of proceedings before the Commission, folio 403 and Official letter No. PG 009/02 of the Procurator General of the Republic of January 4, 2002, (Merits, folio 333 and Affidavit of S. Punwasi, February 1, 2013 (Merits, folio 291). It is noteworthy to mention that the date of document Official letter No. 2138 corresponds to an unofficial translation, stating the year as 2002 and not 2001 pursuant to the case file of this case.

[44] *Cf.* Official letter No. PG 009/02 of the Procurator General of the Republic on January 4, 2002 (Merits, folio 333).

[45] *Cf.* Official letter No. PG 008/02 of the Procurator General of the Republic on January 4, 2002 (case file of proceedings before the Commission, folios 404, 407 to 409).

[46] *Cf.* Notification from the Speaker of the National Assembly to Mr. Alibux on January 4, 2002 (case file of proceedings before the Commission, folio 404).

[47] *Cf.* Letter of January 17, 2002, from Mr. Alibux to the Committee of the National Assembly that handles matters on the Indictment of Political Office Holders (case file of proceedings before the Commission, folios 413 a 415).

[48] *Cf.* Letter of the Speaker of the National Assembly to the Procurator General of the Republic on January 21, 2002 (case file of proceedings before the Commission, folio 270).

Criminal Matters with the District Courts.[49] On March 27, 2002 and September 20, 2002, Mr. Alibux delivered his statement before the Examining Judge, in which he reiterated his previous statements, stating that he had not committed any of the offenses of which he had been accused.[50] On October 8, 2002, the Examining Judge concluded the preliminary inquiry.[51] On October 29, 2002, the Prosecutor General notified Mr. Alibux that he would be prosecuted before the High Court of Justice for the crimes of forgery, fraud, and a violation of the Foreign Exchange Act.[52]

42. On November 11, 2002, Mr. Alibux, by and through his attorney, submitted a brief to the High Court of Justice, alleging that the decision of the Prosecutor General was illegal as the Act had been applied retroactively, and he filed an objection requesting that continued prosecution be stopped immediately. Among his arguments, he indicated that:

> a) the indictment was contrary to law and applied retroactively because the first letter of the Prosecutor General with the request to indict him was on August 9, 2001 to the Minister of Justice and, subsequently, to the President of the Republic. The President thereafter forwarded such letter to the National Assembly on August 15, 2001; b) the IPOHA was published in the Bulletin of Acts and Decrees on October 25, 2001, and entered into force the following day; c) the Prosecutor General submitted a second or renewed request to the National Assembly to indict Mr. Alibux on January 4, 2002; d) the second or renewed request of the Prosecutor General is void and/or non-existent in virtue of the fact that the first request in 2001 was never decided upon. Therefore, the decision of the National Assembly with regards to the second or renewed request is also void and/or non-existent; e) the retroactivity is in reference to the fact that the IPOHA came into force after the first request to indict Mr. Alibux and, since a decision was never taken, the one presented subsequently should be considered non-existent; f) the Prosecutor General violated Article 3 of the above-referenced Act as he did not submit to the National Assembly a short and factual description of the offenses supposedly committed by the defendant, and instead, based the request on the complete criminal file, which contained third-party statements that the defendant was never informed of; g) the Prosecutor General, consciously or unconsciously, influenced the members of the National Assembly, who had to decide on the indictment of Mr. Alibux, as they were informed of matters of which they should not have had knowledge of prior to or during the decision-making process; and h) the National Assembly had no alternative in assessing the validity of the indictment against Mr. Alibux, which was expressly prohibited by Article 5 of the IPOHA. As a result, the National Assembly violated the law and produced gross disadvantages to the defense of Mr. Alibux, and for that reason a fair trial can never again be guaranteed.[53]

43. In this regard, on December 27, 2002,[54] the High Court of Justice declared Mr. Alibux's objection inadmissible on the grounds that the argument of an illegal act on the part of the Prosecutor General and the objection against the notice of continued prosecution

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[49] *Cf.* Order of the Procurator General to initiate a preliminiary inquiry on January 28, 2002 (attachments to the report on the Merits, folios 217 and 218).

[50] *Cf.* Judgment of the High Court of Justice of November 5, 2003 (case file of attachments to the report on the Merits, folios 179 a 182).

[51] *Cf.* Closing of preliminary inquiry of October 8, 2002 (case file of proceedings before the Commission, folio 288).

[52] *Cf.* Official letter P.G. 3915/02. *Notification of further prosecution* of October 29, 2002 (case file of proceedings before the Commission, folios 420 and 421).

[53] *Cf.* Petition against the notification of further prosecution of November 11, 2002, before the High Court of Justice (case file of proceedings before the Commission, folios 290 to 294).

[54] *Cf.* Decision of the Chamber of the High Court of Justice on the petition regarding Article 230 of the Code of Criminal Procedure of December 27, 2002 (case file of proceedings before the Commission, folios 591 to 593).

do not fall within the jurisdiction of the High Court of Justice, as set forth in the provisions of Article 230 of the Code of Criminal Procedure.[55]

44. On January 3, 2003, while the criminal proceedings against Mr. Alibux were underway, the alleged victim was prohibited from leaving the country when he was at the Paramaribo airport en route to St. Maarten for a four-day trip for personal reasons.[56] There is no indication that this decision was contested or challenged by any means.

45. Once the proceedings before the High Court of Justice had begun, Mr. Alibux's attorney presented the following objections:[57]

> i) Article 140 of the Constitution and the IPOHA were incompatible with Article 14(5) of the Covenant on Civil and Political Rights and Article 8(2)(h) of the American Convention for establishing a proceeding limited to a single instance before the High Court of Justice; ii) the indictment of the Prosecutor General should be declared inadmissible as the IPOHA was applied retroactively contrary to Article 136 of the Constitution; iii) the Order of the High Court of Justice of December 27, 2002, through which an objection filed by the attorneys of the alleged victim was declared invalid or non-existent because, pursuant to Article 230 of the Criminal Procedure Code, it did not have the power to rule on the admissibility of objections filed by them; iv) the Prosecutor General provided the National Assembly with the complete criminal investigation file, in contravention of the terms of Articles 3 and 5 of the IPOHA; and v) the Prosecutor General acted pursuant to the instructions of the Speaker of the National Assembly, contrary to the provisions of Article 2 of the IPOHA and Article 145 of the Political Constitution.

46. In this regard, this judicial body issued an Interlocutory Resolution on June 12, 2003, denying all objections raised by Mr. Alibux. In its reasoning, the High Court of Justice pointed out that:

> a) with respect to the retroactive application of the law, punishablllty should be based on a substantive law, which is anterior to the conduct that has been punished; b) the conduct for which the defendant was charged in the summons were punishable offenses prior to their alleged commission. This conduct is also prior to the approval of the IPOHA, which does not contain "stipulations concerning the penalization of conducts, but it is an implementation act, containing a regulation on the manner of

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[55] Article 230 of the Code of Criminal Procedure: "1. An objection can be filed with the Court against the notice of continued prosecution by the suspect of a crime within fourteen days, mentioned in that notice. The objection shall nullify the summons already filed by law. 2. The suspect shall be heard in the inquiry, i. e. summoned. 3. The Court, before ruling, may have an investigation instituted by the examining judge and have the documents in respect thereof submitted to him. This investigation shall be considered a preliminary inquiry and shall be conducted in accordance with the provisions of the second to the fifth sections of the Third Title of said Book. 4. If the fact does not fall within the Court's jurisdiction, it shall declare itself incompetent. 5. If the Prosecuting Officer is not entitled to accept the action, the fact to which the notice of continued prosecution related, or the suspect is not punishable, or there is insufficient indication of guilt, then he waives prosecution of the suspect. In the case, intended in Article 55 first Paragraph, of the Penal Code the order mentioned in the second paragraph of that Article may also be given. 6. In all other cases he refers the suspect in respect of a fact described in the order to which the notice of continued prosecution referred to trial." (attachments to the report on the Merits, folio 116).

[56] *Cf.* Official Response of the State on July 18, 2005 (attachments to the report on the Merits, folio 141 para. 108). It noted that "After the memorandum of continued prosecution was served upon the defendant, the prosecutions department heard that Petitioner was making preparations to leave the country. To prevent the person involved from trying to evade the criminal proceedings that were initiated against him, the Public Prosecutions Department, in charge of the prosecution of punishable acts in Suriname, informed him that he was not allowed to leave the country." Official letter No. 34/07, Petition 661-03, Admissibility of March 9, 2007 (case file of proceedings before the Commission, folio 878 para. 22).

[57] The Court notes that this document has no date (attachments to the final arguments of the representatives, folios 1278 to 1293).

> prosecution of the criminal offences committed by political office holders in the discharge of their official duties," and thus, no infringement was made on the principle of legality; c) the formal obligations stipulated by Article 140 of the Constitution have been met; d) the High Court of Justice did not have constitutional jurisdiction to assess the procedure carried out by the Parliament to adopt the document authorizing the indictment of Mr. Alibux.[58]

47. Subsequently, on November 5, 2003, the High Court of Justice, composed of three judges,[59] rendered its Judgment, in which it found Mr. Alibux guilty of one count of alleged forgery, in accordance with Article 278, in relation to Articles 72, 46 and 47 of the Penal Code; it ordered the immediate arrest of Mr. Alibux, sentencing him to one year's imprisonment and banned him from holding office as a cabinet minister for a period of three years.[60] Furthermore, the High Court stated that it lacked jurisdiction to rule on the remaining charges[61] for the offenses of forgery, fraud, and violation of the Foreign Exchange Act (*supra* para. 34). In addition, it is an undisputed fact that at the time the judgment was rendered, there was no judicial mechanim through which to appeal.

48. The petitioner served his sentence in the Santo Boma prison starting in February of 2004[62], and was released on August 14, 2004, by way of a Presidential Decree of November 24, 2003, granting a pardon to all convicted persons.[63]

49. On August 27, 2007, the IPOHA was amended so that persons indicted on the basis of Article 140 of the Constitution could be tried in the first instance by three judges of the High Court of Justice, and on appeal, by five to nine judges of the same court. Moreover, all persons convicted prior to the foregoing reform were given the right to lodge an appeal of their convictions within three months after the amendment came into force.[64] Mr. Alibux did not appeal his conviction.

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[58] *Cf*. Resolution 2003 No. 2 issued by the High Court of Justice, on June 12, 2003 (attachments to the report on the Merits, folios 224 to 227). Moreover, it noted that: " Furthermore that, since now a letter from the National Assembly, dated 21 January 2002, no. 138 is enclosed in the file of this suit at law, from which it is evident that the defendant has been indicted, the formal obligations according to the stipulation in article 140 of the Constitution has been met, and therefore, a further assessment as to whether or not the Parliament has followed the correct procedure upon the adoption of the document for the indictment, has passed over the High Court since it has no constitutional jurisdiction to assess this procedure."

[59] By way of the Notes of the Secretariat of the Court of November 12, 2013 and December 3, 2013, the State was asked to provide the statutes that regulate the organization and composition of the High Court of Justice and related documentation with the composition of the Court that heard the criminal proceeding against Mr. Alibux (case file of Merits, folios 497 and 500).

[60] *Cf.* Judgment of the High Court of Justice 2003 No. 2 A, of November 5, 2003 (case file of proceedings before the Commission folio 382).

[61] *Cf.* Judgment of the High Court of Justice 2003 No. 2 A, of November 5, 2003 (attachments to the report on the Merits, folio 209).

[62] *Cf.* Letter from Mr. Alibux's attorney to the Minister of Justice and Police of March 17, 2004 (attachments to the report on the Merits, folio 229), and Letter from Mr. Alibux's attorney to the Magistrate of the 1st Cantón of May 13, 2004 (case file of proceedings before the Commission, folio 439 to 441).

[63] *Cf*. Letter of the Ministry of Justice and Police to Mr. Alibux's attorney of August 12, 2004, (attachments to the report on the Merits, folio 232), and Letter of Mr. Alibux's attorney to the Ministry of Justice and Police of March 17, 2004 (attachments to the report on the Merits, folio 229). In this letter, the attorney stated: "My client has been sentenced to one-year imprisonment unconditionally. By the Presidential decree of 24 November 2003 all convicted persons were granted pardon in connection with 130 years of Hindustani immigration, 140 years [of] abolition of slavery and 150 years of Chinese settlement and such has also been processed at the Office of Public Prosecutor (Procurator-General). […] I request you to have my client made eligible for the granted pardon…"]

[64] *Cf*. Bulletin of Acts and Decrees of August 27, Articles I and II (attachments to the report on the Merits, folios 236 and 237). "Article I of the amendment provides for the insertion of the following provisions: Article 12 a 1. "Political office holders or former political Officer holders who have been indicted for punishable acts committed in the discharge of their official duties as Intended in Art. 140 of the Constitution are in the first instance as well as for appeal brought before the High Court of Justice by the Procurator General, irrespective of where the acts were

50. It is clear from the arguments of the parties that Mr. Alibux was the first individual indicted and convicted based on the procedure established in the IPOHA and Article 140 of the Constitution (*infra* para. 75).

51. Article 144 of the Constitution provides for the creation of a Constitutional Court.[65] Nevertheless, it has not been established to date.

VII
MERITS

52. Taking into consideration the rights of the Convention that have been argued in this case, the Court will carry out the following assessment: 1) the right to freedom from ex post facto laws; 2) the right to a fair trial [judicial guarantees] and in particular the right to appeal the judgment to a higher court; 3) the right to judicial protection, and 4) the right to freedom of movement, in particular the restriction of the right to leave the country of origin.

VII-1
THE RIGHT TO FREEDOM FROM EX POST FACTO LAWS

A. Arguments of the parties and of the Commission

53. The ***Commission*** stated that one of the main aspects of the norm established in Article 9 of the Convention is the predictability of the punitive response by the State in face of certain conduct. In this sense, the Commission noted that the European Court considers that to comply with the object and purpose of the norm, it is imperative to analyze if the existing legal framework complies with the requirements of forseeability and accessibility. Moreover, the Commission noted that the text of Article 9 of the Convention reflects that the objective of the principles of legality and non-retroactivity of the least favorable criminal

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committed or where the political officer holder or former political officer holder resides or is found. 2. The High Court of Justice decides in the first instance with three judges. 3. On appeal the High Court of Justice shall decide with an odd number of judges, however, at least with five at most with nine. Article 12 b. The provisions of the Code of Criminal Procedure in respect of the hearing of criminal cases shall be equally applicable to the proceedings of the criminal case in the first instance and on appeal of a political office holder or former political office holder. Article II of the amendment provides: An appeal can be lodged in accordance with the provisions of the Code of Criminal Procedures within three months after the coming into force of this act against a judgment given by the High Court of Justice prior to the coming into force of this Act in respect of punishable acts committed by a political office holder or former political office holder in the discharge of his official duties as intended in Article 140 of the Constitution."

[65] Article 144 of the Constitution of Suriname (attachments to the report on the Merits folios 139 and 140, and *See* http://www.thewaterfrontpress.com/grondwet.pdf):

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

norm apply, in principie, to the substantive norms that define criminal offenses. Nevertheless, the Commission considered that in certain circumstances the application of the procedural norms can have substantive effects relevant to the analysis of Article 9 of the Convention. The Commission cited the case of *Ricardo Canese V. Paraguay* in that: [the right to freedom from ex post laws] is designed to prevent a person being penalized for an act that, when it was committed, was not an offense or could not be punished or prosecuted."[66] The Commission concluded that the jurisprudence of the Court tends to apply an extensive interpretation of Article 9 of the Convention, not limiting its application to the norms that criminalize an act, but also to those norms that permit the actual possibility of prosecution. Moreover, it noted that the jurisprudence of the European Court of Human Rights and the Human Rights Committee in recent cases accepted the prohibition on non-retroactivity of the law in regard to procedural norms.[67]

54. In regard to the possibility of prosecuting high-ranking officials, the Commission highlighted that while Article 140 of the Constitution establishes criminal liability for punishable acts committed in the discharge of their duties, no high officer was prosecuted for crimes committed in their official capacities. Moreover, it noted that the State has confirmed that the adoption of IPOHA was necessary in order to proceed with the prosecution of high ranking officials. By virtue of the above, even if the Indictment of Political Officer Holders Act is procedural in nature, "it was not a mere change in procedural rules but a norm enacted with the purpose of allowing, for the first time, the prosecution of such officers." The Commission considered that in the instant case it was not foreseeable for the petitioner that the State could prosecute him before the regulation of Article 140 of the Constitution by means of the IPOHA. Also, the Commission considered that the change that was implemented by the enactment of that law was not only a procedural aspect but rather that it had wider and more substantive effects to the detriment of Mr. Alibux. Accordingly, the Commission concluded that the application of that norm to events that took place before it entered into force constitute a violation of the right guaranteed in Article 9 of the American Convention.

55. The ***Legal Representative***, in its oral arguments agreed with the Commission and argued that the State violated Article 9 of the Convention. The representative noted that although the acquisition of the building complex was completed in July 2000, the alleged victim could not have been accused without the implementation of Article 140 of the Constitution, and thus the application of the IPOHA was applied retroactively and contrary to Article 9. Moreover, the IPOHA was approved after the Prosecutor General filed his request before the National Assembly, and was thereby a retroactive application of this law. Likewise, the representative noted that only the alleged victim was prosecuted, although other people were involved in the crime of forgery.

56. The ***State*** expressed that the actions for which Mr. Alibux was prosecuted have been codified since 1947 in the Foreign Exchange Act and since 1910 in Articles 278 and 386 of the Penal Code. As such, the judgment of November 5, 2003 of the High Court convicted Mr. Alibux of punishable acts that at the time they were committed they were crimes under the legal code of Suriname. Therefore, according to the interpretation of the text, the State

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[66] *Cf. Case of Ricardo Canese V. Paraguay. Merits, Reparations and Costs*. Judgment of 31 de agosto de 2004. Series C No. 111, para. 175.

[67] The Commission cited the Organization of the United Nations (UN), Human Rights Committee, *Case of David Michael Nicholas V. Australia, Comunicación No. 1080/2002*, UN Doc. CCPR/C/80/D/1080/2002, March 24, 2004, para. 7(7), which establishes that: "changes in rules of procedure and evidence after an alleged criminal act has been committed, may under certain circumstances be relevant for determining the applicability of article 15, especially if such changes affect the nature of an offence." *Cf.* European Court of Human Rights (ECHR), *Case of Del Rio Prada V. Spain*, No. 42750/09. Judgment of July 10, 2012 (Judgment of the Third Section).

was not in violation of Article 9 of the Convention. The State noted that the IPOHA was not a new regulation, rather it was passed to implement Article 140 of the Constitution. Therefore, the Parliament only regulates the process for charging high-ranking officials. The State expressed that since Articles 278 and 386 of the Penal Code constitute substantive norms, "it must have been more than sufficiently clear to Mr. L.A. Alibux that he could be prosecuted for the criminal offences he committed." Specifically, the State noted that Mr. Alibux did not provide an argument in regard to his lack of knowledge that his actions constituted punishable acts under the legislation in force at that time. He also did not express his lack of knowledge about the possibility of being prosecuted upon retirement. Moreover, the State argued that, in any case, the prohibition of non-retroactivity does not apply to a law that benefits the accused, and in this case the IPOHA benefits the accused since it requires that a request be made first to the National Assembly in regard to the prosecution of public officials.

57. The State also considered that, contrary to that which was noted by the Commission, Mr. Alibux was not the only high-ranking official that was prosecuted. In this sense, it made reference to the prosecution of two officials in 1977 and 2008 for crimes committed in the discharge of their official capacities. Therefore, it concluded that if the Commission had taken this fact into account, it would not have declared the violation of Article 9 of the Convention. Moreover, it reasoned that even if it were true that the IPOHA was adopted only with the purpose of allowing, for the first time, the prosecution of political office holders, said law does not bring about substantive criminal effects. The State added that faults in procedural regulations should not prevent high-ranking officials from being prosecuted. Given the aforementioned, the State concluded that there was not a violation of Article 9 of the Convention.

B. Considerations of the Court

58. The Court notes that there is no dispute between the parties and the Commission regarding the procedural nature of the IPOHA upon regulating the procedure laid down in Article 140 of the Constitution, however, the Commission and the representative claim that it had substantive effects, and thus the legal dispute is in regard to whether the IPOHA violated the the right to freedom from ex post facto laws. In this regard, the Court will rule on a) the scope of the rule of freedom from ex post facto laws b) the temporal application of norms governing the procedure, and c) the application of the IPOHA in the case of Alibux, particularly if its implementation had substantive effects, that is, in regard to the offense or the severity of punishment.

B.1 Scope of the Right to Freedom from Ex Post Facto Laws

59. Article 9 of the Convention establishes that: "[n]o one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom."

60. In this regard, the jurisprudence of the Court on the matter has held that the definition of an act as an unlawful act, and the determination of its legal effects must precede the conduct of the subject being regarded as a violator. Otherwise, individuals would not be able to orient their behavior according to a valid and true legal order within

which social reproach and its consequences were expressed.[68] Moreover, the principle of the retroactivity of the most favorable criminal norm indicates that, if subsequent to the commission of the offense the law provides for the imposition of a more lenient punishment, the guilty person shall benefit therefrom.[69] The Court has also stated that the right to freedom from ex post facto laws is designed to prevent a person being penalized for an act that, when it was committed, was not an offense or could not be punished or prosecuted.[70]

61. The Court has expressed that when applying criminal legislation, the judge is obliged to adhere strictly to its provisions and observe the greatest rigor to ensure that the behavior of the defendant corresponds to a specific criminal codification, so that the defendant is not punished for acts that are not punishable by law.[71] The elaboration of a criminal codification implies a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment.[72] Moreover, this Court highlights that the punishable conduct implies that the scope of application of each of the criminal codifications be outlined in as clear a manner as possible;[73] that is, in an express, accurate, and restrictive manner.[74]

62. In the same sense, the European Court of Human Rights has ruled on the guarantee enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), equivalent to Article 9 of the American Convention[75]

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[68] *Cf. Case of Baena Ricardo et al. V. Panamá. Merits, Reparations and Costs.* Judgment of February 2, 2001. Series C No. 72, para. 106, and *Case of J., supra,* para. 279.

[69] *Cf. Case of Ricardo Canese, supra,* para. 178*, and Case of Mémoli, supra,* para. 155.

[70] *Cf. Case of Ricardo Canese, supra*, para. 175, and *Case of the Constitutional Court (Camba Campos et al.) V. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 28, 2013. Series C No. 268, para. 114.

[71] *Cf. Case of De La Cruz Flores V. Perú. Merits, Reparations and Costs*. Judgment of November 18, 2004. Series C No. 115, para. 82, and *Case of Mohamed V. Argentina. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 23, 2012. Series C No. 255, para. 132.

[72] *Cf. Case of Castillo Petruzzi et al. V. Perú. Merits, Reparations and Costs.* Judgment of May 30, 1999. Series C No. 52, para. 121, and *Case of J, supra,* para. 287.

[73] *Cf. Case of Castillo Petruzzi et al.. Merits, Reparations and Costs, supra, para. 121, and Case of Usón Ramírez V. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 20, 2009. Series C No. 207, para. 55.

[74] *Cf. Case of Kimel V. Argentina. Merits, Reparations and Costs.* Judgment of May 2, 2008. Series C No. 177, para. 63, and Case of Usón Ramírez, supra, para. 55. See also, Case of López Mendoza V. Venezuela. Merits, Reparations and Costs. Judgment of September 1, 2011, Series C No. 233, para. 199, wherein in reference to the period had by an authority to decide on the relevant penalty, the Court noted that "under the framework of due process laid down in Article 8(1) of the American Convention, legal certainty must safeguarded regarding the period in time in which a sanction may be imposed. In this regard, the European Court has held that the law should be: i) adequately accessible, ii) with sufficient precision, and iii) foreseeable."

[75] Article. 7(1) of the ECHR: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed." The European Court has interpreted this provision in the sense that said guarantee is an essential element of the Rule of Law and thus holds an important place in the system of protection of the European Convention. Article 7 is not limited to the prohibition of the retroactive application of the criminal law to the detriment of the accused, rather it incorporates, in a general manner, the principle that only the law can define and establish an offense (*nullum crimen, nulla pena sine lege*). Therefore, the offense and its penalty must be clearly defined by law. *Cf.* ECHR, *Case of Kononov V. Lithuania* [GS], No. 36376/04. Judgment of May 17, 2010, para. 185; *Case of Del Río Prada V. Spain* [GS], No. 42750/09. Judgment of October 21, 2013, paras. 77-79. In the same sense: *Case of Kokkinakis V. Greece*, No. 14307/88. Judgment of May 25, 1993, para. 52; *Case of Coëme and others. V. Belguim*, Nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96. Judgment of June 22, 2000, para. 145; *Case of Kafkaris V. Chipre* [GS], No. 21906/04. Judgment of February 12, 2008, para. 138; *Case of Cantoni V. France*, No. 17862/91. Judgment of November 11, 1996, para. 29. Moreover, said principle prohibits broadening the scope of the existing offenses to acts that do not constitute offenses; it also establishes that

(infra para. 68) and esablished in Article 22 of the Rome Statute of the International Criminal Court, which recognizes the principle of ex post facto laws.[76]

63. In view of the abovementioned, the Court has assessed in its jurisprudence the principle of the legality of criminal behavior and punishment, as well as favorability in the application of the punishment. In the present case, the Commission argued that this principle may also be applicable to regulations that govern the proceeding.

64. First, it is important to mention that, in relation to the arguments of the Commission, the Court notes an interpretation that there is a dissenting interpretation of the Court cases, which includes the citation of paragraph 175 of the case of *Ricardo Canese v. Paraguay,* rendered by this Court, which states that the term "enforceable"[77] (*supra* para. 53) made no reference to regulations governing the procedure, but rather to the prohibition regarding the retroactive application of provisions that increase punishment, as well criminal behavior which at the time the facts had not been provided for. In this case, the Court concluded that the failure to retroactively apply the more favorable criminal norm violated Article 9 of the Convention.

65. Similarly, the citations made by the Commission of the case of *Del Río Prada V. Spain* of the European Court of Human Rights,[78] are not relevant because in that case the application of the principle of legality referred to the scope of the punishment and its implementation, and not to the regulations on the procedure. In regard to the case of *David Michael Nicholas V. Australia* of the Human Rights Committee,[79] the Court notes that such a

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criminal law should not interpret in an extensive manner to the detriment of the accused. Moreover, the Court must verify, that at the time when the accused commited the act that led to his or her prosecution, a legal provision was in force that classified said act as punishable, and that the penality imposed did not exceed the limits established by said provision. *Cf.* TEDH, *Case of Del Río Prada* [GS], *supra*, para. 78 and 80, and *Case of Coëme and others, supra,* para. 145.

[76] Article. 22 ICC. Statute: "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."

[77] In Case of *Ricardo Canese V. Paraguay*, concerns the conviction to a term of imprisonment for defamation and slander. Subsequent legislation amended the criminal codification and decreased penalties for the crime of defamation and established a fine as an alternative penalty. The Court concluded that the principle of retroactivity of the most favorable norm did not apply in the case, thereby violating Article 9 of the Convention. In this regard, the Court stated that the principle of non-retroactivity prevents a person from being penalized for an act that was not a crime or could not be punished or prosecuted when it took place.

[78] *Cf*. ECHR, *Case of Del Río Prada V. Spain* [GS]*, supra,* paras. 117-118. The case involves the fact that a prison moved the release date forward of the petitioner because of a Spanish law that permitted the reduction of part of the sentence with work done in prison (Article 100 of Penal Code of 1973). Subsequently, however, the High Court delayed the release date due to a change in the case law of the Supreme Court on remission of sentences (the new jurisprudence of the Supreme Court 2006 called Parot doctrine). The European Court considered whether the change of law in question concerned only the execution or the enforcement of the penalty (to which it would be excluded from the scope of Article 7 of the European Convention) or a measure that in substance constitutes a penalty. The Court found that the jurisprudential turn of 2006 was not foreseeable and modified, in a manner unfavorable to the petitioner, the scope of the penalty itself, thereby violating Article 7 of the European Convention (equivalent to Article 9 of the American Convention). The Commission's arguments referred to the judgment rendered in the the Third Section, of July 10, 2012, which was appealed by the Spanish Government to the Grand Chamber under Article 43 of the ECHR.

[79] *Cf*. UN, Human Rights Committee, Case of *David Michael Nicholas V. Australia, supra* (2004). In this case, the Committee considered whether the introduction of an *ex post facto* law violated Article 15 of the Covenant (legality principle). The case concerns the introduction of a law that amended the previous case law on the exclusion of evidence in relation to trafficking offenses of controlled drugs. Subsequent legislation ordered that the evidence demonstrating illegal conduct be considered admissable by the courts. This led to procedures being implemented that had previously been suspended. The Committee noted that the perpetrator was convicted of offenses under the Customs Act, "whose provisions remained unchanged throughout the period in reference from the criminal conduct until the trial and conviction." The effect of the stay of proceedings was that the elements of

case is similar to this case, and contrary to the Commission's conclusion, the Human Rights Committee considered that the elements of the crime existed prior to the facts and were thus foreseeable.

B.2 Temporal application of the regulations governing procedure.

66. Below, the Court will assess the temporal application of the regulations governing procedure, in order to determine the purpose and scope for this case. It is important to note that in this case, prior to IPOHA which implemented Article 140 of the Constitution, there was no other law on the matter, thereby creating a normative gap, and thus an interpretation of the more favorable criminal regulation does not apply.

67. In regard to the application of regulations governing procedure, the Court notes that there is a tendency in the region to immediately apply the regulation (principle *of tempus regit actum*). That is to say, that the procedural regulation be applied as of its entry into force,[80] and in some countries, the exception is the application of the principle of the most favorable procedural regulation for the defendant.[81]

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the offense under section 233B of the Customs Act, could not be determined. However, the illegality had not been eliminated, rather the evidence was inadmissible. The Committee considered that in some cases, the changes in the rules of procedure and evidence may be relevant to the determination of the applicability of Article 15, "especially if such changes affect the nature of an offense." In the Committee's view, however, all elements of the offense in question existed at the time of the offense. Thus, it decided that there was no violation of Article 15 of the Covenant.

[80] In this sense and in a general manner, in States such as *Mexico, Brazil, Costa Rica, Peru and the United States,* as a general rule, norms are applied that regulate procedure in an immediate manner. *In Mexico,* case law has understood that in the case of procedural provisions, these are made up of acts that did not occur in a single moment; that are governed by rules in force at the time of their application, which grant legal possibility and empower the governed to participate in each of the stages of the judicial process. It follows that there cannot be retroactivity, since, if before a stage is carried out, the legislature amended the procedure, broadening a term, suppressing a recourse or modyfing the assessment of the evidence, such powers are not amended, are not affected, and therefore, the parties are not deprived of a power which they initially had within their reach. *Cf.* Supreme Court of Justice of the Nation (Mexico), Second Chamber, Thesis: 2a. XLIX/2009, Judicial Seminar of the Federation and its Gazette: Tome XXIX, May 2009, Ninth, p. 273, Isolated Thesis (Common). PROCEDURAL NORMS IN FORCE ARE APPLICABLE AT THE TIME THE RELATED ACTION IS CARRIED OUT, TO WHICH A RETROACTIVE APPLICATION CANNOT BE CLAIMED, available at en: http://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e1fcfc000000&Apendice=100000000000&Expresion=NORMAS%2520PROCESALES.%2520SON%2520APLICABLES%2520LAS%2520VIGENTES&Dominio=Rubro,Texto,Precedentes,Localizacion&TA_TJ=2&Orden=1&Clase=DetalleTesisBL&NumTE=4&Epp=20&Desde=100&Hasta=100&Index=0&ID=167230&Hit=3&IDs=2005282,161960,167230,173248&tipoTesis=&Semanario=0&tabla=; Collegiate Circuit Tribunal. THESIS VI.2º J/140. Judicial Seminar of the Federation and its Gazette: Tome VIII, July 1998, Ninth, p. 308, Jurisprudence (Penal). RETROACTIVITY OF PROCEDURAL LAWS. NON-EXISTENCE OF A GENERAL NORM. Available at: http://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?ID=195906&Clase=DetalleTesisBL. *In regard to Brazil*, see Article 2 of the Code of Criminal Procedure, Decree-Law Nº 3.689 of October 3, 1941, available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/del3689.htm, and see "Agravo de Instrumento em Recurso Especial", ante el Superior Tribunal de Justiça. AgRg no Recurso Especial No. 1.288.971 - SP (2011/0256261-9), inter alia, April 14, 2013 (Case of Nardoni). *In regard to Costa Rica* see Judgment of the Constitutional Chamber of the Supreme Court of Costa Rica, September 2, 2009, available at: http://sitios.poderjudicial.go.cr/salaconstitucional/Constitucion%20Politica/Sentencias/2009/09-14108.html. *In regard to Perú*, see Judgments of the the Constitutional Court, Inconstitutionality Proceeding, Exp. No. 0002-2006-PI/TC, Judgment of May 16, 2007; Hábeas Corpus Remedy, Binding Precedent, Exp. N.° 2496-2005-PHC/TC, Judgment of May 17, 2005: Hábeas Corpus Remedy, Exp. No. 1805-2005-HC/TC, Judgment of April 29, 2005; Hábeas Corpus Remedy, Exp. No. 02861-2008-PHC/TC, Judgment of September 15, 2008; Hábeas Corpus Remedy, Exp. N.° 05786-2007-PHC/TC, Judgment of September 24, 2009, and Hábeas Corpus Remedy, Exp. N.° 03754-2012-PHC/TC, Judgment of January 7, 2013, available at: http://www.tc.gob.pe. *In regard to the United States of America,* see United States Supreme Court, *Dobbert V. Florida*, 432 U.S. 282 (1977), June 17, 1977, and *Lindsey V. Washington*, 301 U.S 397 (1937), May 17, 1937.

[81] In this sense, see for example, *Colombia, Argentina, Chile, Nicaragua, Dominican Republic, Venezuela and Uruguay* governs the immediate application of the procedural norm with the exception of the retroactive application of the more lenient standard referring to either the substantive or procedural norm. In particular, in *Colombia* the

68. In addition, the Court notes that the European Court has held that the principle of legality does not establish any requirements as to the procedure in which those offences must be investigated and brought to trial.[82] For example, the absence of a regulation established by law for the prosecution of a criminal offense can be analyzed from the standpoint of the right to due process that is guaranteed by Article 6 of the ECHR, but this does not in itself affect the principle of legality.[83] On the other hand, the immediate application of regulations governing procedure (the principle of *tempus regit actum*) is not contrary to the right to freedom from ex post facto laws. However, the European Court in each case determines whether the legislation in question, regardless of its formal denomination, consists strictly of procedural or substantive criminal laws, in regard to the

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general rule is the immediate application of the adjective norm, with the exception of the procedural actions that have already been fulfilled in accordance with the prior law. Likewise, the Constitutional Court of Colombia, in its Judgment C-371-11 reiterated its case law on this matter and concluded that "[the principle of the most favorable norm] is an exception to the general rule that the laws govern into the future, the proper context of application is the succession of laws, and this cannot be ignored under any circumstances."*Cf.* Judgment of the Constitutional Court of Colombia, Judgment C-619/01 of June 14, 2001; Judgment C-371-2011 of May 11, 2011, paras. 32 to 36 of section VI. Grounds for the decision; Judgment C-252-2001 of February 28, 2001; Judgment C-200-2002 of March 19, 2002; Judgment T-272-2005 of March 17, 2005; Judgment T-091-2006 of February 10, 2006, para. 7 of section IV. Grounds of the decision, and Judgment C-633/12 of August 15, 2012, available at: http://www.corteconstitucional.gov.co. In regard to *Argentina*, see Judgments of the Supreme Court of Justice of the Nation (Argentina), Case of Fundación Emprender V. D.G.I, Judgment of March 5, 2013, and Case of Gardebled Brothers V. National Executive Power, Judgment of August 14, 2007. In regard to *Chile*, see Article 11 of the Code of Criminal Procedure of December 12, 2002, and Article 24 of the Law on retroactive application of laws, of October 7, 1861, available at: http://www.leychile.cl/Navegar?idNorma=225521&idVersion=1861-10.07&buscar=ley+sobre+efecto+retroactivo+de+las+leyes. Similarly, *Cf.* Supreme Court of Chile, Second Criminal Chamber. Cause of Action No. 1777/2005. Resolution No.28233 of November 2, 2006, available at: http://corte-suprema-justicia.vlex.cl/vid/-255231242. In regard to *Nicaragua* see Supreme Court of Justice, Judgment No. 14. Managua of February 16, 2011, available at: http://www.poderjudicial.gob.ni/pjupload/spenal/pdf/cpp11.pdf, as well as Law 745, Law on Implentation, Benefits and Control of Jurisdiction of the Criminal Penalty, available at: http://legislacion.asamblea.gob.ni/normaweb.nsf/9e314815a08d4a6206257265005d21f9/3c064227c5f969050625783f006a7563?OpenDocument. In regard to the *Dominican Republic* see Article 110 of the Political Constitution of the Republic, published in the Official Gazette No. 10561, on January 26, 2010. In regard to *Uruguay*, see Article 12 of the General Code of Procedure, Law 15,982, and the Judgments of the Supreme Court of Justice of Uruguay, Judgment of Decemeber 6, 2000, No. 517/2000, cassation recourse; Interlocutary Order of July 25, 2001, No. 685/2001 complaint, and Judgment of February 21, 1994, No. 38/1994, cassation recourse. In regard to *Venezuela*, see Article 24 of the Constitution of the Bolivarian Republic of Venezuela, published in the Extraordinary Official Gazette N. 36.860, of December 30, 1999; Article 2 of the Criminal Code of Venezuela, published in the Extraordinary Official Gazette Nº 5.49420, of October 20, 2000, and the Constitutional Chamber of the Supreme Tribunal of Justice, Judgment N.° 3467, of December 10, 2003, case fil 02-3169; Judgment N.° 35, of January 25, 2001, case file 00-1775, and Court of Appeals on Regular Criminal Matters, Principle Matter: WP01-P-2007-000374, Asunto: WP01-R-2013-000203, of May 14, 2013.

[82] *Cf.* ECHR, *Case of KhodorkoVkiy and Lebedev V. Rusia*, Nos. 11082/06 and 13772/05. Judgment of July 25, 2013, para. 789.

[83] Specifically, in the Case of *Coëme V. Belgium* (1999), in the decision on admissibility, the European Court examined if whether the lack of implementing a constitutional provision allowing the prosecution of ministers before the Court of Cassation infringed the principle of legality. The constitutional provision stated that a law would determine the cases of responsibility, the penalties and the manner to proceed against them. Although the constitutional provision was not implemented in Belgian law at the time the former Minister was prosected (unlike this case in which the IPOHA entered into force before the trial of the alleged victim), the European Court considered that the common crimes for which he was convicted were foreseable under the ordinary rules of Belgian criminal law. In this sense, it was clearly stated in the wording of "Article 103 of the Constitution that ministers should, like any defendant, be held accountable for their crimes." Therefore, the existing constitutional provisions, to the extent that they established the criminal responsibility of ministers, met the requirements of accountability and forseability of Article 7. Consequently, the European Court declared the complaint relating to Article 7 inadmissible, and discussed the lack of prior procedural rules from the standpoint of Article 6 of the ECHR (equivalent to Article 8 of the American Convention). *Cf.* ECHR, *Case of Coëme and others. V. Belguim*, No. 32492/96 et al. Decision of March 2, 1999 and Judgment of Merits of June 22, 2000.

manner in which they affect criminal classification or severity of the penalty.[84] In this sense, the principle of legality ("no penalty without law") established in Article 7 of the ECHR applies only to the regulations or measures that define criminal offenses and the penalties thereof.

69. This Court considers that the immediate application of regulations governing the procedure, do not violate Article 9 of the Convention because reference is drawn from the moment in which the procedural act took place and not in which the commission of the criminal offense took place, unlike the regulations establishing offenses and penalties (substantive regulations), where the pattern regarding application stems specifically from the moment in which the offense was committed. That is, the acts that make up the procedure are completed according to the procedural stage in which they originate and they are governed by the applicable regulation in force.[85] In light of this, and given that the procedure is comprised of a judicial sequence that is in constant movement, the application of a regulation governing the procedure after the commission of an alleged crime does not contravene *per se* the principle of legality.

70. Given the aforementioned, the principle of legality, in the sense that a law existed prior to the commission of a crime, does not apply to regulations governing procedure, unless they have an impact on the classification of acts or omissions that at the time of commission were not criminal pursuant to the applicable law or the imposition of a penalty that is more serious than the one in place at the time of the commission of the crime. As such, the Court will assess whether this occurs for purposes of this case.

B.3 Application of the IPOHA in the case of Liakat Alibux

71. Below, the Court will assess whether the crimes for which Mr. Alibux was charged and prosecuted were established by law, prior to the commission of the act in light of the principle of legality, as well as the nature and scope of the regulations governing the procedures for trial.

72. The Court notes that the prosecution of Mr. Liakat Alibux was carried out with respect to the purchase of a property, purchased between June and July 2000. The IPOHA was adopted for the purpose of implementing Article 140 of the Constitution (*supra* para. 36) on October 18, 2001. While preliminary investigations were carried out by the police between

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[84] *Cf. Scoppola V. Italy (N°2)* [GS], No. 10249/03. Judgment of September 17, 2009, paras. 110-113. The European Court considered it reasonable that national courts apply the principle of *tempus regit actum* regarding procedural laws. However, in said case, the European Court held that the applicable criminal procedure provision affected the penalty, since it allowed a reduced sentence in cases where the accused agreed to abbreviated procedure (from life imprisonment to 30 years imprisonment). It concluded that it involved a rule of substantive criminal law to which the legality principle established in Article 7 of the ECHR should apply. Moreover, *Cf.* ECHR, *Del Río Prada V. Spain* [GS], *supra,* para. 89. In the sense that the measures adopted by States (legislative, administrative or judicial) after the final sentence has been imposed or while the sentence is being served can be also included in the scope of the prohibition of the retroactive application of the penalties, if and when they result in an ex post facto redefinition or modification as to the scope of the penalty imposed by the trial court that rendered the sentence.

[85] *Cf.* Collegiate Circuit Tribunal, México. THESIS V. 1º. J/14. Judicial Seminary of the Federation, Tome IX, January 1992, Eigth, p. 111, Jurisprudence (Penal). RETROACTIVITY, INADMISSABLE APPLICATION, DEALING IN REGARD TO REFORMS TO THE FEDERAL CRIMINA PROCEDURE CODE. (IN FORCE AS OF THE FIRST OF FEBRUARY NINTEEN NINETY ONE), available at: http://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?ID=220701&Clase=DetalleTesisBL; Supreme Court of Justice of the Nation, México. TÉSIS VI.2º J/140 Judicial Seminary of the Federation and its Gazette: Tome VIII, July 1998, Ninth, p. 308, Jurisprudence (Penal). RETROACTIVY OF PROCEDURAL LAWS. DO NOT EXIST FOR GENERAL RULE, available at: http://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?ID=195906&Clase=DetalleTesisBL

April and September 2001, it was not until January 28, 2002, that the Procurator formally initiated criminal proceedings against Mr. Alibux (*supra* para. 41), once the IPOHA was in force. Mr. Alibux was tried and sentenced for the crime of forgery on November 5, 2003 in accordance with Article 278, in relation to Articles 46, 47 and 72 of the Penal Code,[86] and sentenced to one year of imprisonment and disqualification from holding the office of cabinet minister for a period of three years (*supra* para. 47).

73. In regard to the Commission's argument that the IPOHA had wider and more substantive effects, (*supra* para. 54), it is evident that the crime of forgery for which Mr. Alibux was charged and convicted, as well as the establishment of the corresponding penalty, were classified in Article 278 of the Penal Code of 1910, prior to the commission of the offense. Moreover, Article 140 of the Constitution established the applicable procedural provisions in the case, in the sense that political office holders would be subject to trial for punishable acts that were committed in the discharge of their duties. Moreover, this article established the way in which proceedings are initiated and that those who hold political office would be prosecuted before the High Court of Justice following indictment by the National Assembly. These regulations, particularly the constitutional provision, seek to expressly establish the responsibility of high-ranking officials for the commission of criminal acts. Mr. Liakat Alibux was a high-ranking government official during the period between September 1996 to August 2000 (*supra* para. 32). The Court finds that these provisions were established with sufficient notice and specification for Mr. Alibux to be fully aware of the behaviors that could entail criminal responsibility while in the discharge of their duties. Therefore, the crime for which Mr. Alibux was charged, was established by law, prior to the commission of the criminal act.

74. Furthermore, in relation to the content of the IPOHA, the Court finds that this regulation governed the preexisting procedure implemented in Article 140 of the Constitution regarding the trial of high-ranking officials. In this way, it defined the persons for whom the regulation applied (specific high-ranking officials), the power of the Procurator General to present a request before the National Assembly to assess whether prosecution should be considered in the public interest, from a political and administrative perspective (*supra* para. 37), and if sufficient evidence exists, provide the Procurator General with notice to initiate criminal proceedings. Therefore, in this case, being that the IPOHA governs the regulation of the procedure, the right to freedom from ex post facto laws does not apply, given that it did not affect the substantive nature of the crime that had been previously provided by law or the scope of the severity of the penalty (*supra* paras. 69 and 70). The applicable law was properly accessible and foreseeable as the criminal classification and the penalty were established by law in a clear, express, and prior manner, and thus there was no violation of the Convention when the law that regulated the procedure was applied immediately after its entry into force.

75. In regard to the Commission's argument that the IPOHA "was intended to regulate a constitutional provision with the purpose of allowing, for the first time, the prosecution of such officials," the Court notes that which was expressed by the State in regard to the prosecution of other political office holders in Suriname in 1977 and 2008, for crimes committed in the discharge of their duties (*supra* para. 57). Notwithstanding the foregoing,

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[86] Article 278 of the Act of October 14, 1910 established the Penal Code of Suriname (G.B. 1911 No. 1) defines the crime of *forgery*. Article 278 (forgery): "A person who falsifies or falsely produces a written document which establishes a right, an obligation or liberates any debt, or which is intended to constitute evidence of a fact, with intent to use or have it used by a third party as real and not falsified, shall be punished for forgery with a maximum prison sentence of five years, if the use of this document could cause a disadvantage. The same penalty shall be imposed on any person who uses false or forged documents as if real and not falsified, if such use could cause a disadvantage."

this Court does not have sufficient evidence to confirm the type of procedures and sanctions against high-ranking officials that have been carried out in Suriname or the law by which they were prosecuted. However, the Court considers that the fact that high-ranking officials be prosecuted and punished for the first time for a particular crime that is established in criminal legislation is not sufficient basis to consider that the resulting penalty is not foreseeable and contrary to the principle of legality.[87] Because of this, the existence of procedural obstacles cannot in itself be an impediment to the exercise of the State's punitive power in regard to criminal behavior that is specifically defined in the law, and is thereby foreseeable.

C. Conclusions

76. The Court found that at the time of commission of the crimes for which Mr. Alibux was charged, the conduct was established as a crime by Article 278 of the Penal Code, and thus said regulation complied with the principle of legality. Furthermore, in Article 140 of the Constitution the procedural regulations for prosecution were established. Meanwhile, the immediate application of IPOHA did not affect the classification nor the severity of the penalty, and thus the Court concludes that the State of Suriname did not violate, to the detriment of Mr. Alibux Ali Liakat, the right to freedom from ex post facto laws established in Article 9 of the American Convention.

VII-2. RIGHT TO A FAIR TRIAL[88]

A. Arguments of the parties and of the Commission

77. The ***Commission*** stated that Mr. Alibux's conviction was the result of a proceeding in a sole instance by a High Court given that, in accordance with the domestic law in effect at the time of the proceedings, there was no process of appeal available to high-ranking officials. It further noted that when an unfavorable decision is issued in the first instance, the State has an obligation to provide a mechanism by which to challenge it, in compliance with the minimum guarantees of due process. Similarly, it reiterated the standards already established by the Court in regard to this issue. The Commission indicated that in the case of high-ranking officials, although the State may create special courts for their prosecution, it must allow the defendant the opportunity to appeal a conviction.

78. The Commission signaled that the State recognized that there was no recourse available by which Mr. Alibux could have appealed the conviction imposed against him by the High Court of Justice until the amendment in 2007. Although the Commission appreciated such reform, it considered that the adverse effects of the lack of judicial review under Article 8(2)(h) of the American Convention at the time of the events had already occurred, thereby generating the violation of the right to appeal the judgment against Mr. Alibux. In view of the foregoing, the Commission concluded that the State violated the right enshrined in Article 8(2)(h) of the American Convention to the detriment of Mr. Alibux.

79. At the public hearing, the ***Legal Representative*** noted that the judicial system lacked legal mechanisms for the appeal of the conviction handed down against Mr. Alibux. The representative emphasized the fact that "Mr. Alibux was excluded, emphatically, from the right to appeal his sentence to a higher court […] even though the Convention was

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[87] *Cf.* ECHR, *Case of KhodorkoVkiy and Lebedev*, *supra*, paras. 785, 816-821, and Case of *Soros V. Francia*, 50425/06. Judgment of October 6, 2011, para. 58.

[88] Article 8(2) […] During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: h. the right to appeal the judgment to a higher court.

signed and ratified without reservation." During the public hearing, Mr. Alibux stated that as of the initiation of public hearings on the domestic jurisdiction, preliminary objections had been filed against the IPOHA of 2001 for violating Article 8(2)(h) of the American Convention; nevertheless, the authorities persisted in their failure to comply with international law.

80. The representative highlighted the fact that it was the State itself who unequivocally admitted the violation of Article 8(2)(h) when it noted, in the statement of the motives for the amendment of August of 2007, that "[the] special regulations for political officers set forth in Article 140 of the Constitution present a practical problem due to the absence of a recourse […]. Pursuant to this provision, a person found guilty of a crime has the right to have his conviction reviewed again by a higher tribunal, in accordance with the law." Nevertheless, the representative indicated that the State cannot allege that Mr. Alibux voluntarily decided to not make use of this recourse, since the amendment to the regulation came four years after the November 5, 2003 conviction, as well as after the completion of the one-year term of imprisonment and after the completion of the three-year sentence of ineligibility to serve in the capacity of cabinet minister. Based on the foregoing, the representative concluded that the State violated the right to appeal the judgment stipulated in Article 8(2)(h) of the Convention.

81. The ***State*** argued that Article 140 of the Constitution provided that, with respect to the commission of crimes, political office holders, active or retired, would be prosecuted by the highest body charged with the administration of justice, to wit, the High Court of Justice. The State indicated that Article 140 was based on the idea that such officials hold a certain immunity, which the average citizen does not enjoy, due to the status that these authorities possess. The State signaled that the absence of the right to appeal the judgment was inherent within the scope of Article 140 of the Constitution and that Mr. Alibux had knowledge of such regulation when he took office as Minister and swore allegiance to the Constitution; in other words, he knew he could not appeal a decision rendered by the High Court of Justice. Likewise, the State argued that the absence of the right to appeal was inherent in the administration of justice offered by the highest court, and that the prosecution of high government officials in a first, and only, instance was not, *per se*, a violation of the generally accepted principle of the right to appeal the judgment. In support of such assertion, the State relied on the terms of Article 2, paragraph 2 of Protocol 7 of the ECHR, since this international instrument establishes a series of exceptions to the right to appeal the judgment, among them, cases in which the individual was convicted in the first instance by the highest tribunal. Moreover, the State argued that the right to appeal the judgment could be regulated by law because such regulation is not only permitted by Article 2 of Protocol 7, *supra*, but also by Article 14, paragraph 5 of the International Covenant on Civil and Political Rights (ICCPR).

82. In addition, the State noted that, on August 27, 2007, an amendment to the IPOHA was introduced, which entered into force on August 28 of that same year. Article 12(a) of the Act established a process of appeal for current or past political officers who had been prosecuted for criminal offenses committed in the exercise of their functions, in accordance with Article 140 of the Constitution. Similarly, the State emphasized that the same article of the Act provided that the decision in the first instance would be adopted by the High Court, composed of three judges, and the appeal would be decided by a panel of five to nine judges different from those who heard the case in the first instance. The State argued that, based on such regulations, Mr. Alibux had the legitimate right to appeal the judgment of conviction handed down against him, since the August 27, 2007 amendment granted him a period of three months from the date of the reform coming into force to appeal said decision, despite it having been issued prior to the enactment of the regulation. The State,

however, noted that "it was the decision of [Mr. Alibux] to not exercise the right provided to appeal the sentence pronounced against him." In light of the foregoing, the State concluded that it had not violated Mr. Alibux's right to appeal the judgment set forth in Article 8(2)(h) of the Convention.

B. Considerations of the Court

83. In order to rule on the alleged violation of the right to appeal the judgment on the part of the State, the Court shall determine the following: a) the scope of Article 8(2)(h) of the American Convention; b) the establishment of jurisdictions different from ordinary criminal courts for the prosecution of political officers; c) the regulation of the right to appeal criminal convictions of political office holders within comparative jurisdictions; d) the prosecution of Mr. Liakat Ali Alibux in a sole instance and the right to appeal the judgment; and e) the subsequent adoption of the process of appeal.

B.1 Scope of Article 8(2)(h) of the Convention

84. The Court has, in its constant jurisprudence, referred to the scope and content of Article 8(2)(h) of the Convention, as well as the standards that must be observed to protect the guarantee of the right to appeal the judgment to a higher judge or court.[89] In this regard, the Court has indicated that such right consists of a crucial and minimum guarantee that "must be respected as part of the due process of law, in order to permit the review of an adverse decision by a different and higher judge or court […]."[90] Bearing in mind that judicial guarantees seek to ensure that anyone involved in a proceeding is not subject to arbitrary decisions, the Court interprets that the right to appeal a judgment cannot be effective unless it is guaranteed to all those who are convicted[91], since the judgment is a manifestation of the exercise of punitive power of the State.[92]

85. The Court has considered that the right to appeal the judgment is one of the minimum guarantees that must be afforded to every person who is subjected to a criminal investigation and proceeding.[93] In light of the foregoing, the Court has been emphatic in stating that the primary purpose of the right to challenge the judgment is to protect the right of defense, inasmuch as it affords the possibility of a remedy to prevent a flawed ruling, containing errors that are unduly prejudicial to a person's interests, from becoming final, which assumes that the remedy must be guaranteed before the judgment becomes *res judicata*.[94] The right to a review by a higher court allows for the correction of errors or injustices that may have been committed in the decisions in the first instance, confirms the rationale, gives greater credibility to the jurisdictional act of the State, and offers greater

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89 *Cf. Case of Castillo Petruzzi et al. Merits, Reparations and Costs*, *supra*, para. 161; *Case of Herrera Ulloa V. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107, paras. 157 to 168; *Case of Barreto Leiva V. Venezuela. Merits, Reparations and Costs.* Judgment of November 17, 2009. Series C No. 206, paras. 88 to 91; *Case of Vélez Loor V. Panamá. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 23, 2010. Series C No. 218, para. 179; *Case of Mohamed*, *supra,* paras. 88 to 117, and *Case of Mendoza et al. V. Argentina. Preliminary Objections, Merits and Reparaciones.* Judgment of May 14, 2013 Series C No. 260, paras. 241 to 261.

90 *Cf. Case of Herrera Ulloa, supra*, para. 158, and *Case of Mendoza* et al., *supra*, para. 242.

91 *Cf. Case of Mohamed, supra,* paras. 92 and 93.

92 *Cf. Case of Baena Ricardo et al.*, *supra*, párr. 107, and *Case of Mohamed, supra,* para.92.

93 Moreover, the Court applied Article 8(2)(h) in relation to the review of an administrative sanction that ordered a penalty of deprivation of liberty, noting that the right to appeal the ruling was a specific type of recourse that should be available to all persons sanctioned to a deprivation of liberty, as a guarantee of their right to defense. *Cf. Case of Vélez Loor, supra,* paras. 178 and 179.

94 *Cf. Case of Herrera Ulloa, supra*, para. 158, and *Case of Mendoza et al., supra,* paras. 243 and 244.

security and protection to the rights of the individual who has been convicted.[95] In accordance with the above, for purposes of the existence a review by a higher court, the Court has indicated that what matters is that the remedy guarantees a comprehensive examination of the judgment being challenged.[96]

86. Moreover, the Court has established that Article 8(2)(h) of the Convention refers to an ordinary remedy that is accessible and efficient;[97] in other words, it should not require complex formalities that would render this right illusory.[98] In this regard, the formalities required for the appeal to be admitted should be minimal and should not constitute an obstacle for the fulfillment of the remedy's objective of examining and resolving the grievances claimed by the appellant.[99] That is, it must obtain results or answers in relation to the purpose for which it was conceived.[100] "It should be understood that, regardless of the appeals system or regime adopted by the State Parties and the name given to the means of contesting a conviction, for it to be effective, it must constitute an appropriate means of obtaining the rectification of a wrongful conviction […]. Consequently, the reasons for which the remedy is admissible should allow for extensive control of the contested aspects of the sentence."[101]

87. Furthermore, "in the rules that States develop in their respective systems of appeal, they must ensure that this remedy against a conviction respects the minimum procedural guarantees that, under Article 8 of the Convention, are relevant and necessary to decide the grievances claimed by the appellant […]."[102]

B.2 The establishment of jurisdictions different from ordinary criminal courts for the prosecution of high-ranking officials

88. When dealing with the alleged commission of a crime, the ordinary criminal jurisdiction is activated in order to investigate and punish the alleged perpetrators through the ordinary criminal forums. However, with respect to certain high-ranking officials, some jurisdictions have established a system different from the ordinary courts as the one with jurisdiction to prosecute them, by virtue of the high-ranking office they hold and the importance of their investiture. In this sense, the Court established, in the *Case of Barreto Leiva v. Venezuela*, that "[t]he State may establish special judicial privileges for the prosecution of high-ranking government authorities […]."[103] As such, the designation of the highest body of justice for the criminal prosecution of high-ranking officials is not, *per se*, contrary to Article 8(2)(h) of the American Convention.

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95 *Cf. Case of Barreto Leiva, supra*, para. 89, and *Case of Mendoza et al., supra*, para. 242.

96 *Cf. Case of Herrera Ulloa, supra,* para.165, and *Case of Mendoza et al., supra,* para. 242.

97 *Cf. Case of Herrera Ulloa, supra*, paras. 161, 164 and 165, and *Case of Mendoza et al., supra,* para. 244.

98 *Cf. Case of Herrera Ulloa*, *supra,* para. 164, and *Case of Barreto Leiva, supra,* para. 90.

99 *Cf. Case of Mohamed, supra,* para. 99, and *Case of Mendoza et al., supra,* para. 244.

100 *Cf. Case of Herrera Ulloa*, *supra*, para. 161, and *Case of Mendoza et al., supra,* para. 244.

101 *Case of Mohamed, supra,* para. 100, and *Case of Mendoza et al., supra,* para. 245.

102 *Case of Mohamed, supra,* para. 101, and *Case of Mendoza et al., supra,* para. 246.

103 *Case of Barreto Leiva, supra,* para. 90.

B.3 Regulation of the right to appeal the judgment of high-ranking officials[104] within comparative jurisdictions

89. Based on the arguments of the parties and given the importance of the controversy for various other citizens and regional States, the Court will now refer to comparative law on the subject with the goal of clarifying the scope and content of the right to appeal the judgment, as applied to high-ranking officials, namely: a) the United Nations Human Rights Committee; b) the ECHR; and c) the practice of the States in the region on the matter.

B.3.1 The Human Rights Committee of the United Nations

90. The United Nations Human Rights Committee has expressly noted, in paragraph 47 of General Comment No. 32, that:

> "Article 14, paragraph 5[105] [of the International Covenant on Civil and Political Rights (hereinafter "ICCPR")] is violated not only if the decision by the court of first instance is final, but also where a conviction imposed by an appeal court or a court of final instance, following acquittal by a lower court, cannot be reviewed by a higher court. Where the highest court of a country acts as first and only instance, the absence of any right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned; rather, such a system is incompatible with the Covenant, unless the State party concerned has made a reservation to this effect."[106]

91. Similarly, the Human Rights Committee has stated in its decisions that the right to appeal the judgment must be guaranteed regardless of the rank of the accused person. Thus, "[a]lthough [a] State party's legislation provides in certain circumstances for the trial of an individual, because of his position, by a higher court than would normally be the case, this circumstance alone cannot impair the defendant's right to review his conviction and sentence by a court."[107]

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[104] The domestic regulations of each State define and determine who the authorities considered high-ranking public officials and/or politicians for that purpose. However, within these high-ranking authorities, the following are included in a general manner: high-ranking officials such as: the President of the Republic, the Vice-President, Representatives, Senators, Members of the National Congress, Supreme Court Justices, Judges of the Constitutional Court, the Electoral judges, Ministers, Secretaries of State, the Attorney General, Prosecutors, the Ombudsman, the Comptroller General of the Republic, among other officials of similar classification.

[105] UN, International Convenant on Civil and Political Rights, December 16, 1966, Article 14(5)"Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law," available at: http://www2.ohchr.org/spanish/law/ccpr.htm.

[106] UN, Human Rights Committee, General Comment No. 32, Article 14: *Right to equality before courts and tribunals and right to a fair trial*, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 47, available at: http://www1.umn.edu/humanrts/hrcommittee/S-gencom32.pdf. Nevertheless, it is important to note that the Human Rights Committee has noted that in paragraph 46, paragraph 5 of Article 14, does not apply to any other proceeding that does not form part of an appeal. Moreover, it is important to note that Suriname did not establish a reservation in regard to Article 14, subparagraph 5 of the ICCPR. *Cf.* UN, Declarations and Reservations of the International Covenant on Civil and Political Rights, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

[107] UN, Human Rights Committee, Case of Jesús Terrón c. Spain, Communication No. 1073/2002, UN Doc. CCPR/C/82/D1073/2002, November 15, 2004, para. 7(4). The Committee has ratified the same criteria in two other similar cases, where based on ancillary jurisdiction, judgments were carried out in a single instance before the Supreme Court of Spain and the Committee decided that such procedures were inconsistent with Article 14 paragraph 5 of the Covenant. Cf Case of Luis Hens Serean and Juan Ramón Corujo Rodríguez V. Spain, Communication No. 1351-1352/2005, U.N. Doc. CCPR/C/92/D/1351-1352/2005, March 25, 2008, paras. 9(2) and 9(3), and Case of Luis Oliveró Capellades V. Spain, Communication No. 1211/2003, U.N. Doc. CCPR/C/87/D/1211/2003 (2006), July 11, 2006, para. 7.

92. Furthermore, the Court considers it pertinent to refer to the State's arguments in the sense that the prosecution of high-ranking public officials in the first and only instance is not, by definition, a violation of the generally accepted principle of the right to appeal the judgment, with basis on the regulation permitted by law of such right, as set forth in Article 14, paragraph 5 of the International Covenant on Civil and Political Rights (*supra* para. 81).

93. In this regard, the Court considers it necessary to emphasize that Article 14, paragraph 5 of the International Covenant on Civil and Political Rights differs from Article 8(2)(h) of the American Convention in that the latter is very clear in referring to the right to appeal the judgment without mention of the phrase "according to law," as is set forth in the article of the ICCPR. Nevertheless, the United Nations Human Rights Committee has interpreted it in paragraph 45 of its General Comment No. 32, in the sense that:

> "The expression 'according to law' in this provision is not intended to leave the very existence of the right of review to the discretion of the States parties, since this right is recognized by the Covenant, and not merely by domestic law. The term according to law rather relates to the determination of the modalities by which the review by a higher tribunal is to be carried out, as well as which court is responsible for carrying out a review in accordance with the Covenant. Article 14, paragraph 5 does not require States parties to provide for several instances of appeal. However, the reference to domestic law in this provision is to be interpreted to mean that if domestic law provides for further instances of appeal, the convicted person must have effective access to each of them."[108]

94. As a result, although States have a margin of discretion in regulating the exercise of that remedy through their domestic legislation, they may not establish restrictions or requirements that violate the very essence of the right to appeal a judgment[109], or the existence thereof. In this regard, the Court does not consider that reference to domestic law constitutes a mechanism by which the existence of the right of political office holders to appeal the judgment may be affected, especially when such reference is not recognized in the American Convention.

B.3.2 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

95. The Court deems it appropriate to refer to the arguments of the State regarding the prosecution of officials that hold high-ranking public offices in a first, and only, instance is not, by definition, a violation of the generally accepted principle of the right to appeal the judgment, based on Article 2, paragraph 2 of Protocol 7[110] of the ECHR (*supra* para. 81). Notwithstanding the fact that the ECHR does not apply to the States in the region, the Court observes that it is highly influential and serves as a reference to European law in Suriname given its history.

96. In this regard, Article 2, paragraph 2 of Protocol 7 expressly provides an exception to the right to appeal the judgment in cases in which the person concerned is tried in the first instance by the highest tribunal. However, as established in the *Case of Mohamed v.*

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[108] UN, Human Rights Committee, *General Comment No. 32, supra,* para. 45.

[109] *Cf. Case of Herrera Ulloa, supra*, para. 161, and *Case Barreto Leiva, supra*, para. 90.

[110] Article 2 of Protocol 7 of the European Covenant for the Protection of Human Rights and Fundamental Freedoms establishes that: "1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law. 2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."

Argentina, "the Court does not agree with the scope [that is given to that] provision of the European System to interpret the corresponding provision of the American Convention, precisely because the latter did not provide exceptions as did the European System."[111] In this sense, the Court does not find that the exception continued in the European System can be applied to this case.

B.3.3 Practice of the States in the region in relation to the right to appeal the judgment of high-ranking officials

97. The Court finds that the practice of various State Parties of the Organization of American States (OAS) grant their highest authorities the possibility of challenging a condemnatory judgment in criminal proceedings brought against them. To a lesser extent, some States prosecute them in a single instance. This right is recognized by the States, either narrowly, that is, in favor of certain lower rank officials, excluding the President and Vice-President, or broadly, establishing this guarantee to a group of officials of diverse ranks. It should be noted that several States in the region guarantee the right to appeal the judgment notwithstanding the establishment of a court, separate from the ordinary criminal tribunals, as the one with jurisdiction to try their high political and/or public office holders, which, in many cases, is charged to the highest body of justice.[112]

98. Likewise, the Court notes that in such cases where there is no authority superior to the highest body that can perform a comprehensive review of the conviction, certain States in the region have adopted different judicial systems to ensure the right to appeal the ruling. In this regard, the Court notes that the foregoing has been achieved through various practices, such as: a) where a Criminal Chamber of the Supreme Court of Justice is the trier in the first instance, the whole body thereof then acts as the instance of appeal and reviews the action; b) where a certain chamber of the Supreme Court is the trier in the first instance, another chamber, of a different composition, resolves the appeal; and c) where a chamber made up of a certain number of judges is the trier in the first instance, another chamber comprised of a larger number of judges, none of whom participated in the proceedings in the first instance, decides the appeal. Moreover, the Court observes that the reviewing bodies are composed of members that did not hear the case in the first instance, and that the decision issued by the reviewing body may modify or revoke the judgment appealed.

99. Based on the aforementioned, the Court holds that the majority of the State Parties of the OAS allow high-ranking officials the possibility to appeal the judgment in the context of criminal proceedings. That is, the need for dual courts, expressed by the appealing of the judgment of conviction, has been recognized by their judicial systems. However, at this time, we will specifically evaluate the criminal proceedings in a sole instance brought against Mr. Alibux before the High Court of Justice of Suriname in light of Article 8(2)(h) of the Convention, without seeking to advance considerations regarding the compatibility of other legal systems, other than the one to be examined, with the Convention, which shall be analyzed in each specific case, taking into account their nature, particularities, and complexities.

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111 *Case of Mohamed, supra,* para. 94.

112 It should be noted that many other States do not prosecute their high-ranking authorities by way of a specialized criminal forum, but rather through an ordinary forum established for the average citizen, after the competent authority removes the prerogative of immunity and authorizes the initiation of an investigation and criminal proceeding.

B.4 The prosecution in a single instance of Mr. Liakat Ali Alibux and the right to appeal the judgment

100. The Court reiterates that Mr. Alibux served as Minister of Finance and Minister of Natural Resources between September of 1996 and August of 2000 (*supra* para. 32). Furthermore, he was subjected to proceedings before the National Assembly: a preliminary investigation and subsequent prosecution between January of 2002 to November of 2003 (*supra* paras. 34 to 47) for the criminal offenses committed in the discharge of his duties (*supra* para. 34), using Article 140 of the Constitution and the IPOHA as a legal basis. The trial was conducted in a single instance by three judges of the highest court in the judicial system of Suriname, namely, the High Court of Justice, and ended in a judgment of conviction against Mr. Liakat Alibux, sentencing him to one year of imprisonment and banning him from holding office as minister for a period of three years (*supra* para. 47). Similarly, the Court found that at the time that Mr. Alibux was convicted, the legal system did not provide any process of appeal by which to challenge the condemnatory judgment issued against him (*supra* para. 49).

101. As a result of the foregoing, the Court will examine the compatibility of the criminal proceedings conducted in a single instance by three judges of the High Court of Justice against Mr. Alibux, a high-ranking public official, with the right to appeal the judgment enshrined in Article 8(2)(h) of the American Convention.

102. The Court finds that, as Minister of the State, Mr. Alibux was subjected to a jurisdiction different from ordinary courts for purposes of his criminal proceedings due to the high-ranking public office he held. In this regard, pursuant to Article 140 of the Constitution, the criminal prosecution for the crime of forgery committed in the discharge of his duties was initiated by the Procurator General after being indicted by the National Assembly for the High Court of Justice to try him. The Court considers that the establishment of the High Court of Justice as the tribunal with jurisdiction for the prosecution of Mr. Alibux is compatible, in principle, with the American Convention.

103. However, the Court verifies that there was no appeal process against the highest body of justice that tried Mr. Alibux that could be brought in order to guarantee his right to appeal the conviction, contrary to the provisions of Article 8(2)(h) of the Convention. In this regard, the Court considers that although it was the High Court of Justice who prosecuted and convicted Mr. Alibux, the rank of the adjudicating tribunal cannot guarantee that a judgment in a sole instance will be delivered free of errors or defects. Based on the foregoing, even where criminal proceedings in a single instance were heard by a court with jurisdiction different from the ordinary, the State should have ensured Mr. Alibux had the possibility to appeal the adverse decision[113], based on the nature of the minimum guarantees of due process that such right holds. The absence of a remedy resulted in the sentence pronounced against him becoming final and, in turn, Mr. Alibux had to complete a term of imprisonment.

104. In this regard, the Court considers it pertinent to ratify the importance of the existence of a process allowing the review of a conviction, especially in criminal proceedings, where a separate group of rights may be limited, particularly the right to personal liberty of an individual; in other words, it signifies a guarantee for the individual in relation to the State.[114]

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[113] *Cf. Case of Barreto Leiva, supra*, paras. 88 and 90, and *Case of Mendoza et al., supra*, para. 243.

[114] *Cf. Case of Mohamed, supra,* para. 92, and *Case of Mendoza et al., supra*, para. 241.

105. Nevertheless, Article 8(2)(h) of the American Convention establishes the "right to appeal the judgment to a higher court." Mr. Liakat Alibux was tried by the highest court of justice in Suriname and, thus, there was no higher tribunal or judge to perform a comprehensive review of the condemnatory judgment. In this regard, in cases such as this, the Court interprets that in the absence of a higher court, the superiority of the court that reviews the conviction is considered fulfilled when the plenary or a chamber within the same superior body, but of a different composition than the one that originally heard the cause, decides the appeal filed with powers to revoke or amend the judgment of conviction, if it so deems it appropriate. In this sense, the Court has indicated that it can be established, "[...], for example, that the proceedings at first instance would be conducted by the president or a chamber of a superior tribunal, and the appeal would be heard by the whole tribunal, with the exception of those who already issued an opinion on the case."[115] The Court also affirms that this has been the practice of some States in the region (*supra* para. 98). Notwithstanding the foregoing, the Court considers that the State can organize itself in a manner that it deems appropriate in order to guarantee the corresponding right to appeal the judgment of high-ranking public officials.

106. Based on the foregoing, the Court finds that, in the instant matter, Mr. Alibux did not count on the possibility of appealing his conviction, thereby securing and protecting his rights, regardless of the rank or position held, and regardless of the jurisdiction established as competent for his trial. Moreover, the Court holds that the State failed to demonstrate how, in a trial by a panel of three judges of the highest court of justice, Mr. Alibux was afforded full due process, in particular, the right to appeal the judgment, in violation of Article 8(2)(h) of the Convention.

B.5 The subsequent adoption of a remedy of appeal

107. In regard to the arguments raised by the State in the sense that Mr. Alibux had the opportunity to challenge the conviction handed down against him (*supra* para. 82), the Court finds that, based on the evidence submitted in the present case, at the time of the November 5, 2003 judgment, there was no process of appeal available to Mr. Alibux. Such an action, referred to as "remedy of appeal," was subsequently established in 2007 through an amendment to the IPOHA (*supra* para. 49).

108. Furthermore, according to that legislative amendment, all persons convicted prior to its implementation, among them, Mr. Alibux, had the *right* to appeal their convictions within three months of its enactment. Mr. Alibux, however, did not invoke this amendment to appeal his conviction.

109. In this regard, the process set out in Article 8(2)(h) must be an efficient mechanism by which to appeal the judgment that effectively protects the right to review the conviction handed down against Mr. Alibux, in order to allow for the possibility to contest the conviction. Nevertheless, in this case, the process of appeal was created in 2007, after Mr. Alibux had already complied with the term of imprisonment on August 14, 2004[116] (*supra* para. 48), as well as the penalty of ineligibility to serve as minister for a period of three years.

110. In this sense, by not having access to a remedy at the time of his conviction, Mr. Alibux was unable to file a request for review of the judgment. By contrast, the process was

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[115] *Case of Barreto Leiva, supra*, para. 90.

[116] Mr. Alibux completed six months of the year in prison ordered in the judgment and was released on August 14, 2004 (*supra* para. 48).

created when the conviction had already become *res judicata* and after the sentence had been fulfilled. For Mr. Alibux, the possibility to file an appeal in 2007 against a penalty that had already been served meant nothing more than the mere formal existence of the process of appeal because the effects of the judgment had already materialized. Pursuant to the foregoing, the Court considers that the creation of a remedy of appeal in 2007 was insufficient to cure the legal situation infringed and incapable of obtaining the result for which it was conceived. Therefore, in the present case, it was neither adequate nor effective.[117]

C. General conclusion

111. Based on the foregoing, the Court concludes that, in the present case, due to the absence of an effective judicial remedy to guarantee Mr. Liakat Ali Alibux his right to appeal his judgment of conviction, as well as the fact that the moment of the establishment of the process in 2007, the violation of the right to appeal the judgment of Mr. Alibux had already materialized, so that such remedy could not alleviate the juridical situation infringed, the State of Suriname violated Article 8(2)(h) of the American Convention.

VII-3
JUDICIAL PROTECTION

A. Arguments of the parties and Commission

112. The ***Commission*** argued that in its June 12, 2003 Order, the High Court of Justice declined to exercise jurisdiction over the constitutionality of several interlocutory objections raised by the alleged victim, including the constitutionality of the IPOHA. In this regard, the Commission stated that the absence of a sitting Constitutional Court implied the lack of a judicial mechanism to review the constitutionality of the use of the IPOHA. As such, the Commission considered that the State is responsible for the violation of Article 25 of the American Convention.

113. The ***Legal Representative*** coincided with the statements made by the Commission; he indicated that it had been necessary to resort to a Constitutional Court, which should have as one of its powers the authority to review laws and international treaties in light of the Constitution, but that this had not been possible because such judicial mechanism had not been established. Moreover, the representative added that the High Court of Justice did not hesitate to dismiss the objections raised for the sole purpose of continuing the proceedings to issue the conviction and penalty of imprisonment against Mr. Alibux.

114. For its part, the ***State*** acknowledged the importance of a sitting Constitutional Court, as was provided for in Article 144 of the Constitution. However, it argued that: i) pursuant to the amendment to the IPOHA on August 27, 2002, Mr. Alibux should have filed an appeal regarding the decision of the High Court of Justice; 2) Mr. Alibux did not indicate which fundamental right had been violated by the IPOHA; and 3) a Constitutional Court could not be considered an instance of appeal nor could it determine if the High Court of Justice applied the law in contravention to the Constitution.

B. Considerations of the Court

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[117] *Cf. Case of Velásquez Rodríguez. Merits, supra*, paras. 64 and 66 and *Case of Mendoza et al., supra*, para. 244.

115. In the instant chapter, the Court will determine if the June 12, 2003 Interlocutory Resolution of the High Court of Justice, in which it ruled on a number of interlocutory objections raised by the representatives of the alleged victim regarding its jurisdiction, constituted an autonomous violation of the judicial protection contemplated in Article 25 of the Convention, in accordance with the case law of this Court.

116. In this sense, the Inter-American Court has indicated that Article 25(1) of the Convention establishes the obligation of the States Parties to guarantee, to all persons subject to their jurisdiction, an effective judicial remedy against acts that violate their fundamental rights.[118] In addition to the formal existence of remedies, such effectiveness supposes that these provide results or responses to the violations of rights provided for in either the Convention, Constitution, or by law.[119] Moreover, the Court has established that for a remedy to be effective, it is not sufficient that it be established by the Constitution or by law, or that it be formally admissible; rather, it requires that it be truly appropriate to determine whether a human rights violation has been committed and ensure what is necessary to provide redress. Remedies that, owing to the general situation of the country or even the particular circumstances of a given case, result illusory, and cannot be considered effective.[120] Based on the foregoing, the State has an obligation to not only draft and enact an effective remedy, but to also ensure the due application of this remedy by its judicial authorities.[121]

117. In the present case, during the initial phase of the trial before the High Court of Justice, the representatives of Mr. Alibux launched five interlocutory objections challenging its jurisdiction to continue hearing the criminal case brought against him (*supra* para. 45). In this regard, two of the objections were related to the constitutionality and conformity with the Convention of Article 140 of the Constitution and the IPOHA, to wit: i) that Article 140 of the Constitution and the IPOHA were inconsistent with Article 14(5) of the Covenant on Civil and Political Rights and Article 8(2)(h) of the American Convention for creating a proceeding in a sole instance before the High Court of Justice; and ii) that the indictment by the Prosecutor General should be declared inadmissible for retroactively applying the IPOHA, contrary to Article 131 of the Constitution.

118. In relation to the two objections described above, by Order dated June 12, 2003 (*supra* para. 46), the High Court of Justice ruled that: i) despite having binding effects on the State, the provisions of the Covenant on Civil and Political Rights and the American Convention on Human Rights had no direct legal effect, since a domestic court could not establish processes of appeal that are not recognized by the law, and therefore, had to abide by the terms set forth in Article 140 of the Constitution; and ii) that the IPOHA did not contain any stipulations related to the criminalization of behavior, but rather, consisted of a regulatory mechanism to implement a constitutional provision of a procedural nature and, thus, there would have been no violation of the principle of legality.

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[118] *Cf. Case of Velásquez Rodríguez. Preliminary Objections, supra,* para. 91, and *Case of the Displaced Afrodescendant Communities of the Cuenca of the Río Cacarica (Operation Génesis) V. Colombia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 20, 2013. Series C No. 270, paras. 404 and 405.

[119] *Cf. Case of Bámaca Velásquez V. Guatemala. Merits.* Judgment of November 25, 2000. Series C No. 70, para. 191, and *Case of the Constitutional Court (Camba Campos et al.), supra,* para. 228.

[120] *Cf. Case of Velásquez Rodríguez. Preliminary Objections, supra,* para. 93, *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, and *Case of the Constitutional Court (Camba Campos et al.), supra,* para. 228.

[121] *Cf. Case of the "Street Children" (Villagrán Morales et al.) V. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 237, and *Case of the Constitutional Court (Camba Campos et al.), supra*, para. 229.

119. Regarding the first objection raised by the representatives of the alleged victim and resolved by the High Court of Justice, notwithstanding that each of the rights contained in the Convention has its own sphere, meaning, and scope,[122] the Court considers that the alleged damages suffered by Mr. Alibux are encompassed within the aforementioned violation of the right to appeal the judgment.[123] As a result, the Court does not consider it necessary to make additional determinations with respect to the violation of the right to judicial protection set forth in Article 25 of the Convention, as the consequences of the damages described in his allegations are subsumed in the considerations in chapter VII-2 of this Judgment.

120. In relation to the issues arising from the second preliminary objection, the Court notes that the High Court of Justice ruled on the objection filed. Furthermore, the Court reiterates that the IPOHA consisted of a regulatory instrument that, in this case, did not represent a violation of Article 9 of the Convention (*supra* para. 76).

121. Meanwhile, the three other interlocutory objections related to the jurisdiction of the High Court of Justice referred to: i) the invalidity of the December 27, 2002 Order of the High Court of Justice, in which a brief submitted by the attorneys of the alleged victim was ruled inadmissible, as Article 230 of the Code of Criminal Procedure did not grant it the power to determine the inadmissibility of briefs presented by the alleged victim; ii) the Prosecutor General submitted the case file of the criminal investigation in its entirety to the National Assembly, which was inconsistent with the provisions of Articles 3 and 5 of the IPOHA; and iii) the Prosecutor General acted pursuant to the instructions of the Speaker of the National Assembly, contrary to the terms established in Article 2 of the IPOHA and Article 145 of the Constitution.

122. In regard to the three formal objections detailed above, the High Court of Justice stated that, due to the fact that the request for the indictment was approved by the National Assembly, it considered it inappropriate to render additional decisions in this regard in consideration that the Constitution did not grant it jurisdiction for such purposes (*supra* para. 46).

123. In this sense, according to the information provided by the parties, the Court considers that the interlocutory objections that were filed (*supra* para. 121) consisted of questions on the proceedings that occurred before the National Assembly, and were not specifically related to any arguments regarding the constitutionality of the IPOHA. Through the Resolution of June 12, 2003, the High Court of Justice held that the Constitution did not grant it jurisdiction to review the actions performed by the National Assembly with regards to the approval process for indictments of political office holders. In light of the foregoing, this Court finds that the High Court of Justice did not state that it lacked jurisdiction to hear matters of a constitutional nature, and that the questions posed were answered by the High Court of Justice, with attention to their character as preliminary objections.

124. Finally, in relation to the arguments of the representative and the Commission (*supra* paras. 112 and 113) on the violation of the right to judicial protection due to the absence of a Constitutional Court, although the Court recognizes the importance of such bodies as protectors of constitutional mandates and fundamental rights, the American Convention does not impose a specific model for the regulation of issues of constitutionality and control

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[122] *Cf. Case of Manuel Cepeda Vargas V. Colombia. Preliminary Objections, Merits and Reparaciones.* Judgment of May 26, 2010. Series C No. 213, para. 171 and *Case of García and Family V. Guatemala. Merits, Reparations and Costs.* Judgment of November 29, 2012. Series C No. 258, para 122.

[123] *Cf. Case of Barreto Leiva, supra*, para. 102, and *Case of Mohamed, supra*, paras. 118 and 119.

for conformity with the Convention. In this sense, the Court recalls that the obligation to monitor the compliance between domestic legislation and the American Convention is delegated to all bodies of the State, including its judges and other mechanisms related to the administration of justice at all levels.

C. Conclusion

125. Based on all the foregoing, the Court concludes that the State of Suriname did not autonomously violate the right to judicial protection set forth in Article 25 of the American Convention, to the detriment of Mr. Liakat Ali Alibux.

VII-4
THE RIGHT TO FREEDOM OF MOVEMENT[124]

A. Arguments of the parties and of the Commission

126. The ***Commission*** argued that while it is true that it is the State's prerogative whether to impose legal restrictions on the exercise of freedom of movement under certain circumstances, it also has an obligation to rely on clearly defined law when establishing the exceptional circumstances that justify the restriction to travel abroad on Mr. Alibux, which was not demonstrated. Moreover, the State also did not establish that the restriction was necessary to prevent the alleged victim from fleeing while the legal proceeding took place. Lastly, the State did not demonstrate that the restriction was imposed in a proportionate manner, that is, that the measure was the most appropriate and least restrictive means of ensuring that Mr. Alibux would not abscond during the course of the criminal proceedings. Therefore, the Commission found that the State violated the right to freedom of movement of the alleged victim in accordance with the provisions of Article 22 of the American Convention.

127. The ***Legal Representative*** agreed with the Commission and added in the public hearing that he was unaware that the restriction had been imposed.

128. The State argued that under Article 146[125] of the Political Constitution; 3,[126] 134,[127] and 136[128] of the Code of Criminal Procedure, the Procurator General was authorized to prevent Mr. Alibux from leaving the country in January 2003. This restriction was not established for an indefinite period of time and its purpose was to prevent the alleged victim

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[124] Article 22(1). Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.

[125] Article 146 Paragraph 2 of the Constitution reads as follows: "The Prosecutor General represents the Republic of Suriname in court. He is the head of the Public Prosecutions Department and is at the same time in charge of the court police. He has the powers to give the officers who are entrusted with police tasks instructions for the prevention, detection and investigation of punishable acts, if he deems that necessary in the interest of good justice" (case file of Merits, f.452).

[126] Article 3 of the Code of Criminal Procedure reads: "The Prosecutor General watches over the appropriate prosecution of criminal offences. For that purpose he gives instructions to the members of the Public Prosecutions Department" (case file of Merits, f. 452).

[127] Article 134 of the Code of Criminal Procedure reads: "With the investigation of criminal offences is charged: 1. The Prosecutor General and other members of the Public Prosecutions Department; 2. The District Commissioners; 3. The police officers; 4. The extraordinary police officers, if and insofar as they have been designated to do so by the Minister of Justice and Police" (case file of Merits, f. 452).

[128] Article 136 of the Code of Criminal Procedure reads: "The Prosecutor General and other members of the Public Prosecutions Department shall give instructions to other persons charged with the investigation" (Merits, f. 453).

from fleeing from the criminal investigation against him. Moreover, the State argued that Mr. Alibux did not file an appeal in regard to the restriction of the right to leave the country.

B. Considerations of the Court

129. In this section, the Court will examine the alleged restriction of the right to leave the country imposed on Mr. Alibux on January 3, 2003, in accordance with Article 22 paragraphs 2 and 3 of the American Convention.

130. The Court found that on January 3, 2003, while he was at the airport in Paramaribo, Mr. Alibux was restricted from leaving the country for a four-day trip for alleged personal reasons. As reported by the representative of the alleged victim during the hearing before the Court, while in the departure gate, military police informed Mr. Alibux that by way of a phone call they had been ordered by the Procurator General to assure that he not leave country. In regard to the restriction, the Court finds that Mr. Alibux did not appeal this in domestic courts (*supra* para. 44).

131. In this regard, Article 22(2) provides that "[e]very person has the right lo leave any country freely, including his own," and Article 22(3) states that:

> "the exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others."

132. In this sense, the Court has established that the right to movement and residence, including the right to leave the country, may be restricted, in accordance with the provisions of Articles 22(3) and 30 of the Convention.[129] Notwithstanding, to establish such restrictions, State's must comply with the requirements of legality, necessity, and proportionality.[130]

133. Moreover, the Court considered that "In order to guarantee human rights, it is therefore essential that state actions affecting basic rights not be left to the discretion of the government but, rather, that they be surrounded by a set of guarantees designed to ensure that the inviolable. Perhaps the most important of these guarantees is that restrictions to basic rights only be established by a law passed by the Legislature in accordance with the Constitution."[131]

134. In particular, the Court has noted that the State must define specifically and establish by law the exceptions by which a measure such as the restriction from leaving a country can exist. As such, "the lack of legal regulation prevents such restrictions from being applied, because neither their purpose nor the specific circumstances under which it is necessary to apply the restriction to comply with some of the objectives indicated in Article 22(3) of the Convention have been defined. It also prevents the defendant from submitting any arguments he deems pertinent concerning the imposition of this measure. Yet, when the restriction is established by law, its regulation should lack any ambiguity so that it does not

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[129] *Case of Ricardo Canese V. Paraguay. Merits, Reparations and Costs.* Judgment of August 31, 2004. Series C No. 111, para. 117. Moreover, *Cf*. The Word "Laws" in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6.

[130] *Case of Ricardo Canese, supra,* para. 123.

[131] The Word "Laws" in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 22.

create doubts in those charged with applying the restriction, or the opportunity for them to act arbitrarily and discretionally, interpreting the restriction broadly."[132]

135. In regard to the standard of legality of the restriction, the State established before the Court that it was based on Articles 146 of the Political Constitution; 3, 134, and 136 of the Penal Code of Procedure noted by the State (*supra* para. 128). However, the Court has found that these relate, in general, to the powers or functions of the Procurator General and they do not clearly and precisely define the exceptional circumstances that warranted the restriction imposed on Mr. Alibux. Similarly, no legislation was provided to determine the procedure for applying a restriction nor the procedure that would have allowed the alleged victim to challenge the restriction.[133]

C. Conclusion

136. Taking into account that which is established in Article 22 of the Convention and the information provided by the State, the Court concludes that based on the aforementioned regulations, there is not a clear and specific reguation that establishes the legality of the restriction on the freedom of movement in this case. Therefore, the Court concludes that the State applied a restriction on the right of Mr. Alibux to leave the country without establishing the requirement of legality, in violation of Article 22, sections 2 and 3 of the American Convention.

VIII
REPARATIONS
(Application of Article 63(1) of the American Convention)

137. Based on the provisions of Article 63(1) of the American Convention,[134] the Court has indicated that any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation, and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.[135]

138. Based on the violations of the Convention declared in the preceding chapters, the Court will proceed by analyzing the claims submitted by the Commission, in light of the criteria established in its case law in regards to the nature and scope of the obligation to make reparations, in order to decide measures designed to redress the damage caused to the victim.[136]

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[132] *Cf. Case of Ricardo Canese*, *supra* para. 125.

[133] In this sense, in the public hearing, as well as through various requirements of this Court (*supra* para. 26) a request made made upon the State to provide the domestic regulations that govern the restriction on leaving the country imposed on those charged or under investigation for the commission of a crime. However, this information was not provided. Communications of the Secretariat of the Inter-American Court on February 22 and November 12, 2013 (REF.: CDH-12.608/061 and 071) (case file of Merits, folios 406 and 495).

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

[135] *Cf. Case of Velásquez Rodríguez V. Honduras. Reparations and Costs.* Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of J., supra*, para. 383.

[136] *Cf. Case of Velásquez Rodríguez. Reparaciones, and Costas, supra,* paras. 25 a 27, and *Case of J., supra*, para. 385.

139. Given that the Court has established that the reparations should have a causal nexus with the facts of the case, the violations declared, the damages proven, and the measures requested to redress the respective damage, it must observe that the co-existence of these factors in order to rule appropriately and in accordance to the law.[137]

140. The Court notes that the alleged victim did not submit his brief of pleadings, motions and evidence, but, rather, by declaration of May 1, 2012, decided to adhere to the proposals formulated by the Commission (*supra* para. 5). Likewise, the Court notes that the representative made reference to measures of reparation in his final written arguments, that is, outside the relevant procedural deadline. In this regard, the Court reiterates that, pursuant to Article 40(2)(d) the Rules of Procedure of this Court, the claims of the representatives, including those related to reparations, must be contained in the initial brief of pleadings and motions (*supra* para. 29). Consequently, with the exception of those requests for costs and expenses incurred after the filing of the brief of pleadings and motions brief (*supra* para. 30), these requests are time-barred and it is not appropriate to admit them or make any additional considerations in this regard.[138]

A. Injured Party

141. The Court reiterates that, under Article 63(1) of the American Convention, the injured party is considered to be whoever has been declared a victim of the violation of a right recognized in the Convention. As such, the Court considers the "injured party" to be Mr. Liakat Ali Alibux, who, as victim of the violations declared in the present Judgment, will be considered the beneficiary of the reparations the this Court now orders.

B. Request for measures to nullify the criminal proceedings and conviction imposed on Mr. Alibux

142. The ***Commission*** requested that the State take the steps necessary to nullify the criminal proceedings and subsequent conviction imposed on Mr. Alibux by the High Court of Justice.

143. The ***State*** indicated that the annulment of a judgment rendered by a domestic court in the context of criminal proceedings can only be the result of new investigation on the part of a higher tribunal than the one that issued the judgment in question. Similarly, the State alleged that to nullify an investigation, proceeding, and judgment, carried out and substantiated at the domestic level, which suffered from no defect, is contrary to its sovereignty. Furthermore, the State emphasized that, after all, Mr. Alibux was unable to demonstrate that the judgment of the High Court of Justice contained any procedural or substantive errors.

144. In accordance with its jurisprudence, the Court reiterates that it is not a criminal court in which the criminal responsibility of individuals can be analyzed.[139] The application of criminal law to those who commit crimes corresponds to the national tribunals. In this sense, the instant case does not refer to the assessment of the innocence or guilt of Mr. Alibux with regard to the acts attributed to him, but instead, to the conformity with the

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[137] *Cf. Case of Ticona Estrada V. Bolivia. Merits, Reparations and Costs.* Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of J., supra*, para. 384.

[138] *Cf. Case of Forneron and daughter V. Argentina. Merits, Reparations and Costs.* Judgment of April 27, 2012 Series C No. 242, para. 186, and *Case of Mohamed, supra,* para. 160.

[139] *Cf. Case of Suárez Rosero. Merits.* Judgment of November 12, 1997. Series C No. 35, para. 37, and *Case of J., supra*, para. 123.

American Convention of the regulations that governed the proceeding and the application thereof in this case.[140]

145. However, based on the specific circumstances of this case and that the Court did not establish the international responsibility of the State for the violation of the principle of legality and freedom from ex-post facto law, enshrined in Article 9 of the American Convention, this Court does not consider it appropriate to order the State to nullify the criminal proceedings and sentence imposed on Mr. Alibux.[141] As such, the Court does not order any reparation in this regard.

C. Measures of satisfaction and guarantees of non-repetition

C.1 Measures of satisfaction

C.1.1 Publication and dissemination of the Judgment

146. Neither the ***Commission*** nor the ***State*** referred to this measure of reparation.

147. International case law and, in particular, that of the Court, has repeatedly established that the judgment can constitute *per se* a form of reparation.[142] Nevertheless, in light of the violations declared in the present Judgment, the Court finds it pertinent to order, as it has in other cases[143], that the State must, within six months of notification of this Judgment, publish the following: a) the official summary of the present Judgment developed by the Court in English, which must be translated to Dutch at the expense of the State[144], published in both languages, once in the official gazette and once in a national newspaper with widespread circulation; and b) the present Judgment, in its entirety in English, on an official website of the State, and remain available for a period of one year.

C.2 Guarantees of non-repetition

C.2.1 Request to adopt measures under domestic law

148. The ***Commission*** requested that the State adopt the measures necessary to ensure that high-ranking officials prosecuted for acts committed in the discharge of their official capacity have access to an effective remedy to challenge the sentence imposed upon them. Similarly, the Commission asked that the State take the legislative or other type of measures necessary to guarantee that an effective mechanism exist to review issues of a constitutional nature.

149. The ***State*** noted that since August 28, 2007, there has existed a process of appeal for persons who were convicted in the first instance and sentenced for criminal offenses committed during and in the discharge of their capacity as political office holders. The State further alleged that the provisions set forth in the Code of Criminal Procedure are applied

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140 *Cf. Case of Fermín Ramírez V. Guatemala. Merits, Reparations and Costs*. Judgment of June 20, 2005, para. 63.

141 *Cf. Case of Barreto Leiva*, *supra*, paras. 129 and 130, and *Case of Mohamed, supra*, paras. 151 and 152.

142 *Cf. Case of Neira Alegría et al. V. Perú. Reparations and Costs.* Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of J., supra*, para. 394.

143 *Cf. Case of Cantoral Benavides, supra,* para. 79, and *Case of Osorio Rivera and family V. Perú. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 26, 2013. Series 274, para. 260.

144 *Cf.* Case of *Nadege Dorzema et al. V. Dominican Republic. Merits, Reparations and Costs*. Judgment of October 24, 2012. Series C No. 251, para. 263.

mutatis mutandis during the substantiation of a process of appeal, and that this judicial mechanism constitutes a sufficient guarantee for a fair trial. Regarding the establishment of a Constitutional Court, the State indicated that Article 144 of the Constitution provides the constitutional basis for the creation of a Constitutional Court and that the State has already furnished the instructions necessary to make the Constitutional Court an operational institution.

150. Notwithstanding the violations declared in this Judgment, the Court considers that it has been demonstrated that the domestic regulations in Suriname were amended on August 27, 2007, and that, since its entry into force on August 28 of the same year, high-ranking officials have a process by which to file an appeal, thereby annulling the criminal proceedings in the first instance brought against high-ranking officials for crimes committed in the discharge of their official capacity which had previously existed. The Court takes note of and values the adoption of the foregoing amendment and, as such, does not deem it appropriate to order any measure of reparation in this regard.

151. Furthermore, the Court has not established the international responsibility of the State for the violation of the right to judicial protection under Article 25 of the Convention (*supra* para. 124) due to the reason that, to date, the Constitutional Court is not in operation. In light of this, the Court will not order any measure of reparation in this regard. Nevertheless, as the State itself recognized (*supra* para. 149), the Court considers it noteworthy to highlight the importance of the operation of such institution, the creation of which is set forth in Article 144 of the Constitution. Such importance lies in the role that a court of that nature plays in the protection of constitutional rights of the citizens subject to its jurisdiction. Notwithstanding the foregoing, the Court reiterates the obligation to exercise an *ex officio* "control for conformity with the Convention" between domestic law and the American Convention. This obligation is delegated to all bodies of the State, including its judges and other bodies involved in the administration of justice at all levels (*supra* para. 124).

D. Compensation

152. The Court takes into consideration that, in general, the ***Commission*** requested the "[d]isposition of adequate reparations in favor of Mr. Alibux for the violations declared in the [R]eport [on the Merits]." The ***State*** noted that Mr. Alibux is not entitled to any type of reparation because Suriname did not violate any of the rights alleged. Moreover, it indicated that in the event the Court decided to recognize the violation of any of the rights allegedly violation, under no circumstances should it declare a monetary compensation to the petitioner.

D.1 Pecuniary damage

153. The Court has stated in its jurisprudence on the concept of pecuniary damages and the circumstances under which compensation is appropriate. This Court has established that pecuniary damages involve "the loss of or detriment to the victims' income, the expenses incurred as a result of the facts, and the monetary consequences that have a causal nexus with the facts of the case *sub judice*."[145]

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[145] *Cf. Case of Bámaca Velásquez V. Guatemala. Reparations and Costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of García Cruz and Sánchez Silvestre. Merits, Reparations and Costs.* Judgment of November 26, 2013. Series 273, para. 212.

154. In this case, the Court notes that, due to the failure to submit the brief of pleadings and motions, the representative requested, for the first time, in the final arguments, under the concept of loss of earnings, a series of items corresponding to various sources of income of the victim. In other words, no specific arguments were raised, nor were sufficient evidentiary elements presented to establish whether they were directly caused by the facts of this case[146] and the violations declared in this Judgment, nor were they presented at the first procedural opportunity that is granted for this purpose.[147]

155. In virtue of the foregoing, the Court does not have the evidentiary elements to prove the causal nexus of the facts of this case in relation to the violations declared in this Judgment. Similarly, the Court has not established the international responsibility of the State in regard to the manner in which the criminal proceedings against Mr. Liakat Alibux were conducted, but rather, because of the absence of a remedy that impeded the review of the conviction. As such, it considers that it cannot grant any compensation for pecuniary damages. In addition, the Court has not determined the State's responsibility for the violation of the principle of legality and freedom from ex-post facto laws, guaranteed in Article 9 of the American Convention. Accordingly, it is inappropriate for the Court to order measures of reparation in relation to the alleged pecuniary damage.

D.2 Non-pecuniary damage

156. In its jurisprudence, the Court has developed the concept of non-pecuniary damage and has established that it "may include both the suffering and distress caused to the direct victims and their next of kin, and the impairment of values that are highly significant to them, as well as changes of a non-pecuniary nature in the living conditions of the victims or their family."[148]

157. In chapter VII-2, this Court determined that the State did not guarantee Mr. Alibux's right to appeal the judgment and, thus, violated Article 8(2)(h) of the American Convention by subjecting him to criminal proceedings in a sole instance without the possibility of appealing the sentence imposed upon him, effectively serving seven months in prison[149] and a penalty of ineligibility to serve in the post of cabinet minister for three years. Likewise, the Court concluded, in chapter VII-4, that the State violated the right to freedom of movement and residence established in Article 22, subsections 2 and 3, of the American Convention, by virtue of imposing a restriction on Mr. Alibux of the right to leave the country without proof that it had complied with the requirement of legality. Under the circumstances, the Court determines that Mr. Alibux suffered damage in his moral sphere and, therefore, fixes, in equity, the sum of U.S. $10,000.00 (ten thousand dollars of the United States of America) by way of compensation for non-pecuniary damage suffered by Mr. Alibux.

E. Costs and expenses

158. In the final written arguments, the ***Legal Representative*** indicated that a number of expenses during the pendency of the proceedings were incurred, to wit: translations and

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146 *Cf. Case of Tristán Donoso V. Panamá. Preliminary Objection, Merits, Reparations and Costs.* Judgment of January 27, 2009. Series C No. 193, para. 184, and *Case of Chitay Nech et al. V. Guatemala. Preliminary Objections, Merits, Reparations and Costs.* Judgment of May 25, 2010. Series C No. 212, para. 270.

147 *Cf. Case of Chitay Nech et al., supra, para. 270*, and *Case of Pueblo Bello Massacre V. Colombia. Judgment of January 31, 2006,* para. 225.

148 *Cf. Case of de los "Street Children" (Villagrán Morales et al.) V. Guatemala. Reparations and Costs.* Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of J., supra,* para. 415.

149 The deprivation of liberty that was ordered was a year in prison (supra para. 47).

courier shipments, a total amount up to the sum of US$ 6,044.92 (six thousand forty-four dollars of the United States of America and ninety-two cents),[150] and professional fees and expenses in the amount of US$ 9,018.87 (nine thousand eighteen dollars of the United States of America and eighty-seven cents).[151] The representative further noted that, by virtue of the participation of Mr. Alibux and his representative at the public hearing in the case, a series of costs were incurred in addition to those already mentioned, namely: travel and lodging expenses for the trip from Paramaribo to San José for both of them estimated at the sum of US$ 3,364.00 (three thousand three hundred sixty-four dollars of the United States of America)[152], as well as living expenses in the span of their four-day stay in Costa Rica up to the sum of U.S. $4,564.00 (four thousand five hundred sixty-four dollars of the United States of America).[153] The representative requested reimbursement of the enumerated amounts, plus 3% of their total as payment for annual interest.

159. The ***Commission*** did not make specific reference to this measure of reparation.

160. For its part, the ***State*** argued that there is no reason to order the payment of costs and expenses in the present matter. Moreover, by way of its brief of observations to the attachments to the final written arguments of the representative, the State contested certain evidence related to the costs and expenses provided.

161. In relation to the evidence provided concerning expenses incurred by the victim prior to the time at which he should have submitted the brief of pleadings and motions, the Court reiterates that it has been determined to be time-barred[154] (*supra* para. 30), and, thus, will not make additional findings in this regard.

162. However, as the Court has indicated, the costs and expenses form part of the concept of reparations[155] whenever the activities undertaken by the victims to obtain justice at both the national and international levels implicate expenditures which should be compensated when the international responsibility of a State is established in a condemnatory judgment.

163. Notwithstanding the foregoing, the Court reiterates that it is not sufficient to remit probative documents; rather, the parties are required to develop arguments relating the evidence with the fact under consideration and, when dealing with alleged financial disbursements, the items and justification thereof must be clearly described.[156]

164. The representative, in his final arguments brief, updated his claim of expenses subsequently incurred with regard to the costs sustained due to his participation in the public hearing, for which he provided a statement from the travel agency Ridusa Worldwide

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150 *Cf*. Various receipts (attachments to the final arguments, folios 1194-1203).

151 *Cf*. Receipts issued by the attorney Irvin Madan Dewdath Kanhai (attachments to the final arguments, folios1184 – 1186).

152 *Cf*. Qoute from travel agency Ridusa Worldwide Travel N.V (case file of attachments to the final arguments of the representatives, folio 1204).

153 The Court notes that no evidence was provided in regard to the amount indicated by the legal representative.

154 *Cf.* The claims of the victims or their representatives in relation to costs and expenses, and the evidence supporting them, must be submitted to the Court on the first procedural opportunity at which they are required, that is, in the brief of pleadings and motions, notwithstanding that such claims may be updated at a later time, pursuant to new costs and expenses being incurred during the proceedings before this Court.

155 *Cf. Cf. Case of Garrido and Baigorria V. Argentina. Reparations and Costs.* Judgment of August 27, 1998. Series C No. 39, para. 79 and *Case of J., supra,* para. 418.

156 *Cf. Case of Chaparro Álvarez and Lapo Iñiguez V. Ecuador*, *supra*, para. 277, and *Case of J. V. Perú, supra*, para. 421.

Travel N.V for travel and lodging.[157] In this regard, the State indicated that the costs enumerated do not correspond to Mr. Alibux because he was found responsible for the crime of fraud.

165. In consideration of the abovementioned, the evidence presented by the representatives and the corresponding arguments related to the costs and expenses incurred after the filing of the brief of pleadings and motions does not allow for a complete justification of the amounts requested. Nevertheless, certain other expenses were indeed proven during the litigation of the case, in particular, those related to expenses incurred to attend the public hearing held at the seat of the Court. On those grounds, the Court awards the sum of U.S. $3,364.00 (three thousand three hundred sixty-four dollars of the United States of America), based on probative elements provided. Such amount must be delivered to Mr. Liakat Alibux within one year from notification of the present Judgment; he, in turn, will distribute it accordingly. During the monitoring of compliance with this Judgment, the Court may order the State to reimburse the victims or their representatives for subsequent expenditures that are reasonable and properly proven.[158]

F. Methods of compliance with ordered payments

166. The State must pay compensation for non-pecuniary damage and reimbursement of costs and expenses established in this Judgment directly to Mr. Alibux, within one year, from the date of notification of this judgment, in the terms of the following paragraphs.

167. The State must comply with its pecuniary obligations by payment in dollars of the United States of America. If for reasons attributable to the beneficiary of the compensation or their beneficiaries, it is not possible to make the payment of the amounts determined within the period established for this, the State shall deposit the amount in his favor in an account or deposit of certificate in a solvent financial institution in Suriname, in U.S. dollars and in the most favorable financial conditions allowed by law and banking practices. If the compensation is not claimed within ten years, it shall revert to the State with the accrued interest.

168. The amounts awarded in this Judgment as compensation and reimbursement of costs and expenses shall be delivered to the beneficiary in full, pursuant to the provisions hereof, free of any tax deductions.

169. Should the State fall into arrears, it shall pay interest on the outstanding amount at the banking default interest rate applicable in the Republic of Suriname.

IX
OPERATIVE PARAGRAPHS

170. Therefore,

THE COURT

DECIDES

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[157] *Cf.* Qoute from the travel agency Ridusa Worldwide Travel N.V (case file of attachments to the final arguments of the representatives, folio 1204).

[158] *Cf. Case of Ibsen Cárdenas and Ibsen Peña V. Bolivia. Merits, Reparations and Costs.* Judgment of September 1, 2010. Series C No. 217, para. 291, and *Case of J. V. Perú, supra,* para. 423.

By five votes in favor and two dissenting, to

1. Dismiss the preliminary objections filed by the State in regard to the exhaustion of domestic remedies, pursuant to the terms of paragraph 21 of this Judgment.

DECLARES,

By six votes in favor and one dissenting, that:

2. The State is not responsible for the violation of the right to freedom from ex post facto laws established in Article 9 of the American Convention on Human Rights in the terms of paragraph 76 of this Judgment.

3. The State is not responsible for the violation of the right to judicial protection, established in Article 25 of the American Convention on Human Rights in the terms of paragraph 125 of this Judgment.

4. The State is responsible for the violation of the right to appeal the judgment to a higher court established in Article 8(2)(h) of the American Convention on Human Rights, to the detriment of Liakat Ali Alibux, in the terms of paragraph 112 of this Judgment.

5. The State is responsible for the violation of the right to freedom of movement and residence established in Article 22, sections 2 and 3 of the American Convention on Human Rights, to the detriment of Liakat Ali Alibux, in the terms established in paragraph 136 of this Judgment.

AND ORDERS

By six votes in favor and one dissenting, that:

6. This Judgment constitutes *per se* a form of reparation.

7. The State shall issue the publications indicated in paragraph 147 of this Judgment, within a period of six months as of notification of this Judgment.

8. The State shall pay the amounts stipulated in paragraphs 157 and 165 of this Judgment, as compensation for pecuniary damages as well as for reimbursement of costs and expenses, in the terms of said paragraphs in this Judgment.

9. Within one year as of notification of this Judgment, the State shall submit to the Court a report describing the measures adopted in compliance thereof.

10. In exercise of its authority and in compliance with its duties under the American Convention on Human Rights, the Court shall monitor full compliance with this Judgment, and shall consider this case concluded once the State has fully complied with the measures ordered therein.

Judges Alberto Pérez Pérez, Eduardo Vio Grossi, and Eduardo Ferrer Mac-Gregor Posiot informed the Court of their Separate Opinions, which accompany this Judgment.

Issued in Spanish and English, the Spanish text being authentic, in San Jose, Costa Rica, on January 30, 2014.

Humberto Antonio Sierra Porto
President

Roberto F. Caldas

Manuel E. Ventura Robles

Diego García-Sayán

Alberto Pérez Pérez

Eduardo Vio Grossi

Eduardo Ferrer Mac-Gregor Poisot

Pablo Saavedra Alessandri
Secretary

So ordered,

Humberto Antonio Sierra Porto
President

Pablo Saavedra Alessandri
Secretary

SEPARATE OPINION OF JUDGE ALBERTO PÉREZ PÉREZ
IN THE CASE OF LIAKAT ALI ALIBUX v. SURINAME

171. My disagreement is based solely on the rejection of the objection regarding the lack of exhaustion of domestic remedies with respect to the restriction of the right to leave the country that occurred on January 3, 2003, which was subsumed in the overall decision that dismissed all of the objections that had been raised (paragraph 21 and operative para. 1).

172. The Court found that "regarding the lack of exhaustion of domestic remedies in regard to the restriction of the right to leave the country of January of 2003 […], the alleged victim did not file any remedy before the domestic tribunals," (para. 20) and that "[t]here is no indication that this decision was contested or challenged by any means." (para. 44) It further held that "the alleged victim did not specifically address the lack of exhaustion of domestic remedies in regard to the restriction of the right to leave the country," (para. 13) and that "Mr. Alibux did not appeal this in domestic courts." (para. 130) Moreover, for the record, of the five objections raised by the alleged victim before the High Court of Justice, which were dismissed in the Interlocutory Order of June 12, 2003, none of them referenced the restriction of the right to leave the country (para. 46).

173. The Commission argued that the objection should be rejected because "[it had not been] brought forth at the admissibility stage of the petition, but was instead raised for the first time during the proceedings before the Court," and it "considered that, pursuant to the principle of estoppel, the State had the opportunity to challenge the admissibility of the point at issue, and in not doing so, the preliminary objection must be rejected." (para. 12)

174. The Court based its decision on the grounds that "the State did not contravene its admissibility in the early stages of the proceedings before the Commission, nor did it indicate the remedies that the alleged victim should have exhausted, and this information was not provided to the Court." (para. 20) As is indicated later on, when the State was asked to provide "as evidence to facilitate adjudication," *inter alia*, "the regulations governing the restriction of the right to leave the country by persons charged or accused of a criminal offense," "[t]he required regulations were not submitted in their entirety. However, the Court will take into consideration, where relevant, the articles that were mentioned in the briefs of the parties, and this will be assessed in the corresponding paragraphs." (para. 26)

175. Notwithstanding the foregoing, let it be known that the State invoked domestic provisions contained in the Constitution and the Code of Criminal Procedure (that the Court transcribed), pursuant to which the measures adopted were within the jurisdiction of the Procurator General. A reading of the Constitution shows that "Everyone shall have, in case of infringement of one's rights and freedoms, a claim to an honest and public treatment of his complaint within a reasonable time by an independent and impartial judge,"[1] and that "Interested parties shall have the right to submit to the court for reassessment any final and enforceable act by agencies of public administration, which is believed to be unlawful."[2] The lack of arguments in this regard on the part of the alleged victim does not allow this Court to ascertain whether in domestic law there were exceptions that would render the provisions on the restriction of the right to leave the country inadmissible.

176. Given these circumstances, I consider that the procedural arguments set forth in the Judgment are insufficient to justify the dismissal of this preliminary objection.

Alberto Pérez Pérez
Judge

Pablo Saavedra Alessandri
Registrar

[1] Article 10: Everyone shall have, in case of infringement of one's rights and freedoms, a claim to an honest and public treatment of his complaint within a reasonable time by an independent and impartial judge.

[2] Article 158, paragraph 2: "Interested parties shall have the right to submit to the court for reassessment any final and enforceable act by agencies of public administration, which is believed to be unlawful."

DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI,
INTER-AMERICAN COURT OF HUMAN RIGHTS,
CASE OF LIAKAT ALI ALIBUX *V.* SURINAME,
JUDGMENT OF JANUARY 30, 2014
(Preliminary objections, merits, reparations and costs)

INTRODUCTION

This dissenting opinion is emitted[1] with regard to the Judgment indicated above (hereinafter, and interchangeably, "the Judgment"), because the undersigned considers, contrary to the decision made in this case, that it was in order to admit the preliminary objections filed by the Republic of Suriname (hereinafter, and interchangeably, "the State") concerning the rule of prior exhaustion of domestic remedies; particularly when this was founded on the lodging of the petition before the Commission prior to the delivery of a guilty verdict, and before the exhaustion of remedies relating to the restriction of the right to leave the country[2] and, consequently, that a ruling should not have been delivered on the merits or the case. All of this for the following reasons.[3]

I. RULE OF PRIOR EXHAUSTION OF DOMESTIC REMEDIES

A. Provisions of the Convention directly related to this rule

Article 25(1) of the American Convention on Human Rights (hereinafter, interchangeably, "the Convention") indicates:

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[1] Art. 66(2) of the Convention: *"If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment."*

Art. 24(3) of the Court's Statute: *"The decisions, judgments and opinions of the Court shall be delivered in public sessions and the parties shall be given written notification thereof. In addition, the decisions, judgments and opinions shall be published, along with judges' individual votes and opinions and with such other data or background information as the Court may deem appropriate."*

Art. 65(2) of the Court's Rules of Procedure*: "Any Judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting. These opinions shall be submitted within a time limit to be fixed by the Presidency so that the other Judges may take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment."*

[2] Para. 10 of the Judgment. Hereinafter, each time that "para." is indicated, this will correspond to the respective paragraph of the Judgment.

[3] *These are the reasons that, as in another case (Dissenting opinion of Judge Eduardo Vio Grossi, Case of Díaz Peña v. Venezuela, Judgment of June 26, 2012 (Preliminary objection, merits, reparations and costs), required the undersigned to consider that since, in his opinion, it was not in order to rule on the merits, he should vote, as in fact he did, negatively on all the declarative and operative paragraphs of the Judgment. This position differs from the one adopted in a non-contentious case by another judge who, although believing that the consultation submitted to the Court was inadmissible and, therefore, that it was inappropriate to examine its merits, considered that, despite this and interpreting a regulatory provision, he should rule of it and proceeded to do so (Dissenting and concurring opinion of Judge Thomas Buergenthal, Inter-American Court of Human Rights, Advisory Opinion OC-7/86, of August 29, 1986, Enforceability of the Right to Reply and Correction (Arts. 14.1, 1.1 and 2 American Convention on Human Rights), requested by the Government of Costa Rica.). The undersigned hopes that, in future, the Court's Rules of Procedure will deal with this situation explicitly, in keeping with one of the two positions described.*

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

In addition, Article 46(1)(a) of the Convention establishes:

> *"Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: … that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law."*

Meanwhile, Article 46(2) of the Convention adds:

> *"The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:*
>
> *a. the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;*
>
> *b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or*
>
> *c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies."*

Then, Article 47(1)(a) of this instrument stipulates:

> *"The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if: … any of the requirements indicated in Article 46 has not been met."*

Lastly, Article 61(2) of the Convention states:

> *"In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 shall have been completed."*[4]

Moreover, these provisions are closely related to the contents of the second paragraph of the Preamble to the Convention, which indicates the following:

> *"Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states."*

B. General considerations

The above-mentioned provisions reveal that the rule of prior exhaustion of domestic remedies was established in the Convention as an essential element of the whole inter-American system for the promotion and protection of human rights, because they establish the obligation of the alleged victim of the human right that has presumably been violated, or that of his representatives, to allege this violation before the corresponding domestic judicial bodies before doing so before the inter-American System, thus permitting or enabling these bodies to proceed in consequence, re-

[4] Articles that, together with Article 51, are to be found in Section 4 the Convention entitled "Procedure" of Chapter VII: "Inter-American Commission on Human Rights," of Part II: "Means of Protection."

establishing the effective exercise and respect for the human rights in the State concerned as soon as possible,[5] which is the object and purpose of the Convention, and thus making it unnecessary for the inter-American jurisdiction, whose main purpose is precisely this re-establishment, to intervene.[6]
In other words, the rule of the prior exhaustion of domestic remedies operates in those situations in which the object and purpose of the Convention has not been achieved because the State concerned has failed to comply with its undertakings in this regard[7] and, therefore, the intervention of the international jurisdictional organ is necessary so that, if appropriate, it can order the State to comply with the international obligations it has breached, to guarantee that it will not violate them again, and to make reparation for the consequences of such violations.[8]

This is why the Court indicates that *"[t]he rule of prior exhaustion of domestic remedies was conceived in the interests of the State, because it seeks to exempt it from responding before an international organ for acts attributed to it, before it has had the opportunity to remedy them by its own means."*[9]

However, this assertion must be nuanced or complemented because, on the one hand, this rule is not included among the rights guaranteed by the Convention,[10] but rather among the norms of the Convention concerning the mechanisms for the protection of those rights[11] – in other words, among the provisions of a procedural nature – and, on the other hand, the rule was not solely and exclusively, or even mainly, conceived in order to serve the interests of the State, but fundamentally in order to achieve, as a practical effect, the most prompt and effective re-establishment of respect for human rights by the State. Consequently, this rule has also been established, perhaps primarily, for the benefit and use of the victim of a human rights violation. This is even more evident if the provisions of Article 25(1) of the Convention, transcribed above, are recalled concerning the right of everyone to judicial protection.

In other words, since the rule of prior exhaustion of domestic remedies is of a procedural nature and, especially, since it is not among the rights recognized by the Convention, it cannot be understood, *per se* or *prima facie,* as a restriction to the enjoyment and exercise of those rights or, in any case, that this is not established in

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[5] Art. 1(1) of the Convention: "*The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.*"

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

[7] Art. 33 of the Convention: *"The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention: (a) the Inter-American Commission on Human Rights, referred to as "the Commission;" and (b) the Inter-American Court of Human Rights, referred to as "the Court."*

[8] Art. 63(1) of the Convention, transcribed above.

[9] Para. 15.

[10] *Part I of the Convention*, "State Obligations and Rights Protected."

[11] *Part II of the Convention*, "Means of Protection."

the Convention.[12] In other words, the *pro homini* principle will not always be applicable with regard to this rule, especially the aspects of it that are regulated by the organs of protection themselves[13] because, on the one hand, it is not truly a human right, but rather an obligation of the individual and, on the other, its eventual violation could prevent the opportune and prompt achievement of the aforementioned practical effect, which is, let me repeat, the re-establishment of respect for the human rights presumably violated by the State concerned.

What said rule seeks, then, is, insofar as possible, to make recourse to the inter-American jurisdiction unnecessary, by requiring that, in the first place, the respective State is called on directly to comply, if it has not already done so, with the international commitments that it has assumed in the area of human rights, and this, in less time than would be taken to obtain the same effect by the intervention of the inter-American System.

Certainly, the Convention includes the logical exceptions to the general rule of prior exhaustion of domestic remedies. Thus, it indicates that it is not necessary to exhaust these remedies previously if the domestic legislation of the state concerned does not provide them; if access to them has been denied, or they have been exhausted or, lastly, if there has been unwarranted delay in the decision regarding their exercise. In other words, these exceptions can be argued in situations in which the said remedies are clearly inexistent, ineffective, useless or unavailable.

Undoubtedly, the said exceptions provide the rule of prior exhaustion of domestic remedies with the necessary flexibility in its application, by eliminating a strictly formal meaning and scope, especially, although not exclusively, in those cases in which, in the State concerned, the rule of law or the effective exercise of representative democracy is absent, or human rights are generally and systematically violated, or periodic, free and fair elections based on universal, secret suffrage are not held, or a multi-party system and political parties are inexistent, or the public powers are not separate and independent; in sum, when the provisions of the Inter-American Democratic Charter are violated in the respective State.[14]

Nevertheless, it should be noted that this means that applying these exceptions as a regular or general practice could lead to annulling the rule in question and, consequently, to further delaying effective, prompt and final compliance by the State concerned, especially if it is a democracy, with its international obligation to respect and ensure respect for the human rights that have presumably been violated, which is the object and purpose of the Convention.

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[12] Art. 29 of the Convention: *"Restrictions regarding Interpretation. No provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; (c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."*

[13] Both the Court's Rules of Procedure and those of the Commission have been approved by the said organs.

[14] Adopted by the General Assembly of the Organization of American States by Resolution AG/RES 1 (XXVIII-E-1) at the first plenary session held on September 11, 2001, during its special session in Lima Peru.

In addition, attention should be called to the fact that the said rule entails conciliation, compatibility or an adequate balance between the domestic jurisdiction, exclusive to the respective State, and the inter-American human rights jurisdiction. From this perspective, respecting these elements evidently constitutes, as regards the Court, an expression of the impartiality and objectivity that should reign in its actions as an organ responsible for imparting justice in the area of human rights.

Based on the foregoing, breaching or ignoring the rule of prior exhaustion of domestic remedies would not only run counter to what was agreed on by the States Parties to the Convention as established in it, but would also call into question the whole of the said inter-American system, affecting the legal certainty that it provides and guarantees.

II. COMPLIANCE WITH THE OBLIGATION CONCERNING THE PRIOR EXHAUSTION OF DOMESTIC REMEDIES IN THIS CASE

Now the question arises of whether, in this case, it was appropriate to comply with the obligation to exhaust domestic remedies previously and, if the answer is affirmative, when this should have taken place. Indeed, it is necessary to distinguish between the preliminary objection raised by the State concerning the lodging of the petition before the Commission prior to the delivery of the guilty verdict,[15] and the one relating to the failure to exhaust remedies relating to the restriction of the right to leave the country.

A. The failure to exhaust domestic remedies based on submission of the petition to the Commission prior to the delivery of the guilty verdict

1. Pertinence of the obligation of prior exhaustion of domestic remedies

Regarding the rule of the prior exhaustion of domestic remedies, the Judgment asserts "*… that the petitioner argued the presumed violation of the right to appeal the judgment convicting him and the principle of legality before the High Court of Justice, which had been decided unfavorably in an interlocutory decision of June 12, 2003, before the respective complaint was submitted to the Commission,"* so that "*consequently, the Court finds that, in this case, owing to the inexistence of an appeal against the possible guilty verdict, the delivery of this verdict was not an essential requirement for the submission of the case to the Commission.*"[16]

In this regard, it must be recalled that, by affirming the above, it is being accepted that the mere possibility that the judgment of the State's High Court of Justice, which could not be appealed, would convict the petitioner, was sufficient reason for not requiring compliance with the requirement of prior exhaustion of domestic remedies. The grounds for this determination are, therefore, a decision that had not been taken when the petition was lodged before the Commission. Moreover, there was no certainty that this decision – the said judgment with a guilty verdict – would be taken.

In addition, in this regard, the considerations in the Judgment were based only on the inexistence of a remedy of appeal against this possible judgment, in the circumstances

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15 Paras. 10 and 17.

16 Para. 18.

that there is no record in the case documentation of whether other remedies, such as the remedy of reconsideration, were admissible before the same court.

But, in addition to the foregoing, it should be considered that the said inexistence of the remedy of appeal, which was the grounds for what was decided in the Judgment in this regard, was not asserted or alleged in the initial petition lodged before the Commission, or even subsequently in the instant case. Thus neither the Commission nor the petitioner indicated during the proceedings what was decided in the Judgment and transcribed above.

It should also be emphasized that the Judgment's ruling on the preliminary objection concerning the prior exhaustion of domestic remedies was not made with regard to the State's final decision, which therefore could not be amended or changed and which, consequently, could give rise to international responsibility, but rather with regard to a prior decision that was not final – the said interlocutory decision. Hence, the preliminary objection was rejected based on a decision of the State that, by its very nature, did not have the effects of *res judicata* and did not refer to the merits of the matter examined in the corresponding proceeding.

The foregoing reveals that the Judgment deviates considerably from the meaning of the above-mentioned rule and, consequently, from the essential requirements or conditions for the petition in this case to be admitted by either the Commission or the Court.

Indeed, to the contrary, it would seem that in order to decide as it did in the Judgment, the Court tacitly turns to the exception to the rule of the prior exhaustion of domestic remedies established in Article 46(2)(a) of the Convention: that is, the inexistence in the domestic legislation of the State of due process of law for the protection of the rights that had allegedly been violated or that the said remedies were not available or were not adequate, suitable, useful, effective and valid.

However, if the contents of the Judgment could be interpreted in this way, it would be necessary to consider, first, that it was for the petitioner, rather than the Court, to assert this exception. This is even established in the Commission's Rules of Procedure and, consequently, represents how the Commission interprets the corresponding provisions of the Convention.[17]

Therefore, it could be affirmed that, by rejecting the preliminary objection of prior exhaustion of domestic remedies, the Judgment is inconsistent with the general principle of public law that it is only possible to do what the norm establishes, because it is evident that there is no norm that confers on the Court – nor has this been established in its Rules of Procedure, as, to the contrary, occurs in the case of the Commission – the authority to request that what has been required of it be amended and, above all, to make the amendment itself.

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[17] Article 28(8) of the Commission's Rules of Procedure*: "Requirements for the Consideration of Petition"… "Petitions addressed to the Commission shall contain the following information: … Any steps taken to exhaust domestic remedies, or the impossibility of doing so as provided in Article 31 of these Rules of Procedure*;"

Art. 29(3) of these Rules: "*Initial Processing*". …"*If the petition does not meet the requirements of these Rules of Procedure, the Commission may request that the petitioner or his or her representative complete them in accordance with Article 26.2 of these Rules.."*

In this case and on this aspect, what was required was to accept or to reject the said preliminary objection based on the legal and factual grounds asserted in the proceedings, which relate to the moment at which it was considered that the requirement of prior exhaustion of domestic remedies was or was not complied with, and not that it was not essential to comply with this. On this basis then it could even be considered that the Judgment distanced itself from the spirit of the Court's case law, in the sense that, just as "… *it is not for the international organs to rectify the lack of precision in the State's arguments,*"[18] nor should this be done, based on the principle of procedural balance or equality, with regard to those presented by the petitioners or by the Commission.

It could also be affirmed that, by proceeding in this way, the Judgment establishes the precedent that, in some cases, the rule of the prior exhaustion of domestic remedies could be rendered meaningless or excessively relativized. Thus, this would occur to the extent to which, by allowing the petitioner to lodge a petition with the Commission even before the pertinent proceedings in the domestic jurisdiction had ended, based on the presumption that its final judgment would be a conviction, not only would this be accepting the coexistence of the proceedings of the said jurisdiction and of the inter-American jurisdiction with regard to the same case, but also, it could cause this to happen in other cases, and even that the latter jurisdiction be used to exert pressure of some kind on the former.

In this way, the Judgment would be inconsistent with the reinforcing, complementary or subsidiary nature of the inter-American jurisdiction in relation to the domestic jurisdiction established in the second preambular paragraph of the Convention transcribed above because, instead, it would be substituting the latter.

In short, since accepting what is affirmed in the Judgment and transcribed above creates a high level of legal uncertainty with regard to the requirement of prior exhaustion of domestic remedies, I am unable to share the decision to reject the preliminary objection filed by the State in this regard, particularly when it is evident that this requirement was not met.

2. Moment at which the requirement of prior exhaustion of domestic remedies should be complied with

As mentioned above, in these proceedings, the dispute relates to when the requirement of the prior exhaustion of domestic remedies should be met. And, as also indicated, there is no ruling, at least directly and legally, on this point in the Judgment. In other words, it did not rule between the State's claim that this requirement must be met before the pertinent petition is lodged[19] and the Commission's claim that this should occur before its decision on the admissibility of the petition.[20]

To the contrary, as grounds for the decision taken on the obligation of prior exhaustion of domestic remedies, the Judgment states that *"[r]egarding the lodging of the initial petition before the Commission, it has been verified that the alleged victim sent this document on August 22, 2003, and that, at that date, the final judgment in the criminal proceedings against him had not yet been delivered, but was handed down on*

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18 Para. 16.

19 Para. 11.

20 Para. 12.

November 5, 2003," that *"[i]n addition, although the initial petition was received on August 22, 2003, it was not until April 18, 2005, that the Commission forwarded the pertinent parts of the alleged victim's petition to the State,"* that *"[o]n July 18, 2005, the State argued that the petition had been lodged prior to the final decision of the High Court of Justice,"* and that *"[l]astly, the Admissibility Report was issued on March 9, 2007."*[21]

Nevertheless, it may be understood from the above that, since the Judgment does not include what was expressly and directly indicated by the Commission, it would appear that its position was accepted; this was that it is at the moment at which the Commission decides on the admissibility of the pertinent petition or communication lodged before it that the obligation of prior exhaustion of domestic remedies should be complied with.

In this case, this interpretation would not be in keeping with either the words of the above-mentioned Articles 46(1)(a) and 47(1)(a) of the Convention or their spirit.

Indeed, regarding the text of the norms, it should be indicated, first, that although it is true that the Convention does not expressly and directly indicate that, at the time of its presentation, the respective petition or communication must comply with the requirement of prior exhaustion of domestic remedies, it is also true that it does not indicate, either tacitly or indirectly, that it is sufficient that this requirement is complied with when the Commission rules on its admissibility for the said petition or communication to be admitted. Doubtless, if this had been the intention, it would have been expressly stated in the Convention, but this did not happen.

Similarly, it should be recalled that it is undeniable that the Convention does not include a time frame for the Commission to rule on whether or not the petitions or communications lodged before it are admissible; and, consequently, the Convention did not anticipate the situations arising from a delay in this ruling. However, it may be supposed that the wording of the articles cited tacitly considered a certain simultaneity or, at least, a relatively short lapse between the lodging of the petition or communication and the decision on its admissibility.

Based on the foregoing, attention may also be drawn to the fact that the said provisions expressly refer to "*a petition or communication lodged*;" in other words, they refer to a procedural action carried out at a certain moment that reveals its author's intention. That is to say, it cannot be modified by the latter, unless the author requests that it be considered that the action has not been taken. Second, it should also be considered that, it is with regard to that action, the "*petition or communication lodged*" that the Commission's decision on whether or not it is admissible should be made. That is, the Commission must refer to this exactly as it was lodged or completed; the latter at the request of the Commission itself. From all the foregoing, it can be inferred that the said petition or communication is only admissible if, at the time it is lodged or has been completed, the domestic remedies relating to the presumed violation of the human rights that it alleged have been exhausted.

Furthermore, this is revealed by the provisions of the Commission's Rules of Procedure which were adopted by the Commission itself and that, therefore, reflect how it has interpreted the pertinent norms of the Convention.

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[21] Para. 17.

Reference has already been made to these Rules of Procedure,[22] indicating that they leave no doubt that the person obliged to previously exhaust domestic remedies is the person who lodges the pertinent petition or communication before the Commission, and that it is also this person, therefore, who must prove that this requirement has been met at that time, or when the Commission requests that the petition or communication be completed during its initial processing.

However, these Rules of Procedure also indicate that it is the petitioner who may allege the impossibility of proving compliance with the requirement of prior exhaustion of domestic remedies,[23] which can only be done in the respective petition, or with the information completing it.

Furthermore, attention should also be drawn to the fact that, according to the said Rules of Procedure, only "*the petitions*" that meet the pertinent requirements will be processed, including the one relating to the prior exhaustion of domestic remedies, which should obviously have occurred before the petitions were lodged or when they were completed at the request of the Executive Secretariat.[24]

Lastly, it appears undeniable that, as established by the Commission's Rules of Procedure,[25] when a petition is lodged before it, the exact date on which the domestic remedies have been exhausted is necessarily known, or should be known, and that is the day on which the alleged victim has been notified of the decision that exhausted those remedies, or that is not necessary to exhaust them, all of which must be indicated in the said petition.

Regarding the spirit of the said provisions of the Convention, it should be reiterated that if it were not compulsory to have exhausted the domestic remedies before lodging the pertinent petition, it would be permissible that, at least for a certain time, that is, between the moment at which the corresponding petition or communication was lodged and the moment at which the Commission issued the decision on its admissibility (a lapse that in many situations may be considered overlong), the same case could be processed simultaneously by the domestic jurisdiction and by the international jurisdiction, which would evidently make the provisions of the second paragraph of the Preamble, and even the rule of prior exhaustion of domestic remedies, meaningless. In other words, the inter-American jurisdiction would not be subsidiary and complementary to the domestic jurisdiction, but rather would substitute it or, at the very least, could be used as an element to exert pressure on the latter.

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[22] Arts. 28(8) and 29(3) of the Commission's Rules of Procedure, transcribed above.

[23] Art. 31(3) of the Commission's Rules of Procedure: *"When the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this article, it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record."*

[24] Art. 30(1) of the Commission's Rules of Procedure: *"The Commission, through its Executive Secretariat, shall process the petitions that meet the requirements set forth in Article 28 of these Rules of Procedure."*

[25] Art. 32 of the Commission's Rules of Procedure: *"1. The Commission shall consider those petitions that are lodged within a period of six-months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies. 2. In those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case."*

But, in addition, if it is accepted that compliance with the said requirement may take place at a time subsequent to the lodging of the pertinent petition or its completion, this could constitute an incentive to lodge petitions or communications before the Commission even when the said requirement has not been met, in the hope that it will be possible to comply with it prior to the Commission's ruling on their admissibility, which, evidently, could not have been the intention of, or foreseen by, the States Parties to the Convention or, at least, there is no record in the relevant documentation that they considered this.

Also, as regards the spirit that inspired the provisions in question, it should be noted that, if the principle that the said requirement must be met when lodging or completing the petition concerned is not followed and, to the contrary, the thesis is adopted that this time frame would be determined by the moment when the Commission rules on the admissibility of the corresponding petition, this could lead to overtly unfair and arbitrary situations. Indeed, since the time limit for the petitions or communications lodged before the Commission to comply with the requirement of prior exhaustion of domestic remedies would then depend, not on the petitioner or applicant, but on the Commission's decision on their admissibility or inadmissibility, it is clear that this time limit would not be the same in all cases and would not be known in advance as is essential. It is evident that this possibility could not have been the intention of the States Parties to the Convention, nor can the said provisions be interpreted in a sense that makes this feasible.

All things considered, logically, for the petition to be admitted it is the petitioner who must prove that the petition or communication complies with the requirement of prior exhaustion of domestic remedies or, otherwise, ask to be exempted from this obligation. And, obviously, this issue must be broached in the petition itself.

In the instant case, this did not occur because, according to the Judgment itself, "*[r]egarding the lodging of the initial petition before the Commission, …* [the Court] *has verified that, indeed, the alleged victim forwarded this document on August 22, 2003, and that, at that time, the final judgment in the criminal proceedings against him had not been delivered, as this was handed down on November 5, 2003.*"[26]

3. Objection based on non-compliance with the requirement of prior exhaustion of domestic remedies.

Now, according to the applicable provisions, if the petitioner fails to comply with the obligation to first exhaust the domestic remedies, the State may file the corresponding objection.

In this regard, "*the Court has stated that an objection to the exercise of its jurisdiction based on the supposed failure to exhaust domestic remedies must be presented at the appropriate procedural moment; that is, during the proceeding on admissibility before the Commission*."[27] Also, in the Judgment it is affirmed that "*[n]evertheless, for a preliminary objection on the failure to exhaust domestic remedies to be admissible, the State that presents this objection must describe the domestic remedies that have not yet been exhausted and show that these remedies were available and adequate,*

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[26] Para. 17.

[27] Para. 14.

suitable and effective,"[28] and that *"when alleging the failure to exhaust domestic remedies, the State must indicate on that occasion the remedies that must be exhausted and their effectiveness."*[29]

However, the considerations in the Judgment must be complemented by the provisions of the Commission's Rules of Procedure, that: *"[w]hen the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this article, it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record."*[30] In other words, only if the petitioner contends that he or she has been unable to exhaust the domestic remedies previously, must the State demonstrate that this has not been done, unless this is clearly evident from the case file.

In the instant case, the Judgment records that, after the pertinent parts of the alleged victim's petition had been forwarded to the State on April 18, 2005, granting it two months, later extended for one month more, to present its answer, *"[o]n July 18, 2005* [in other words, within the said time frame], *the State argued that the case had been submitted before the final decision of the High Court of Justice."*[31] That is to say, the State indicated that the domestic remedies had not yet been exhausted, a requirement that, as indicated above, was not mentioned and, above all, not explained, in the corresponding petition.

4. Admissibility of the pertinent petition or communication

The time at which the Commission rules on the admissibility of a petition or communication differs entirely from the time that this is presented or completed.

This is evident when it is recalled that the Commission's Rules of Procedure provide for an initial review of the petition,[32] its initial processing,[33] and a proceeding on its admissibility,[34] all of the foregoing carried out by the Executive Secretariat of the Commission, acting on its behalf.

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[28] Para. 15.

[29] Para. 16.

[30] Art. 31(3) of the Commission's Rules of Procedure.

[31] Para. 17.

[32] Art. 26(1) of the Commission's Rules of Procedure: "*The Executive Secretariat of the Commission shall be responsible for the study and initial processing of petitions lodged before the Commission that fulfill all the requirements set forth in the Statute and in Article 28 of these Rules of Procedure."*

Art. 30(1) of the Commission's Rules of Procedure: "*The Commission, through its Executive Secretariat, shall process the petitions that meet the requirements set forth in Article 28 of these Rules of Procedure."*

[33] Art. 29(1) of the Commission's Rules of Procedure: "*The Commission, acting initially through the Executive Secretariat, shall receive and carry out the initial processing of the petitions presented. Each petition shall be registered, the date of receipt shall be recorded on the petition itself and an acknowledgement of receipt shall be sent to the petitioner*."

[34] Art. 36(1) and 2 of the Commission's Rules of Procedure: "*Decision on Admissibility: 1. Once it has considered the positions of the parties, the Commission shall make a decision on the admissibility of the matter. The reports on admissibility and inadmissibility shall be public and the Commission shall include them in its Annual Report to the General Assembly of the OAS. 2. When an admissibility report is adopted, the petition shall be registered as a case and the proceedings on the merits shall be initiated. The adoption of an admissibility report does not constitute a prejudgment as to the merits of the matter."*

Now, and as indicated previously, the latter should make the decision on the admissibility of the pertinent petition in the terms in which it was expressed at the time of its presentation or, at most, of its completion at the request of the Commission's Executive Secretariat, and not in the terms in which it is expressed at the time at which the decision on its admissibility is made. In particular, and in addition to what has been said previously, this is because it is the initial petition that is forwarded to the State for the latter to answer,[35] and because the decision on its admissibility is adopted after considering the respective positions of the parties.[36]

The preceding assertion that the Commission must rule on the petition is consistent with other provisions of its Rules of Procedure which stipulate that, during the initial processing of the petition, if the petition does not meet the pertinent requirements, including the prior exhaustion of domestic remedies, the Commission's Secretariat is authorized to request the petitioner to "*complete*" it.[37] To this end, during the above-mentioned initial processing – in other words, when the corresponding petition has been lodged – the said Secretariat must evidently "*study"* whether it meets the said requirements,[38] and, during the proceedings on the admissibility of the petition, the Commission itself "*verifies*" whether the domestic remedies have been pursued and exhausted;[39] in other words, it examines the petition and ensures that this is true.[40]

Hence, these Rules of Procedure do not establish that it is at the time the Commission decides on the admissibility of the petition that the said remedies must be pursued and exhausted, but rather that, at that time, they should already have been pursued and exhausted. Logically, therefore, they must have been pursued and exhausted before the petition was lodged before the Commission.

Now, it has been indicated that the Convention did not determine a time limit, following the lodging of the corresponding petition, for the Commission to rule on its admissibility. It should be added that, in this case, considering that "*the Admissibility Report was issued on March 9, 2007,*"[41] the lapse between the latter and the date of the petition – "*August 22, 2003"*[42] – was slightly more than three years and six months.

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35 Art. 30(2) of the Commission's Rules of Procedure: "*For this purpose, it shall forward the relevant parts of the petition to the State in question. The request for information made to the State shall not constitute a prejudgment with regard to any decision the Commission may adopt on the admissibility of the petition."*

36 Art. 36(1) of the Commission's Rules of Procedure: *"Once it has considered the positions of the parties, the Commission shall make a decision on the admissibility of the matter. The reports on admissibility and inadmissibility shall be public and the Commission shall include them in its Annual Report to the General Assembly of the OAS."*

37 Art. 29(3): "*If the petition does not meet the requirements of these Rules of Procedure, the Commission may request that the petitioner or his or her representative complete them in accordance with Article 26.2 of these Rules."*

38 Art. 26(1) of the Commission's Rules of Procedure, transcribed above.

39 Art. 31(1) of the Commission's Rules of Procedure: "*In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law."*

40 *Diccionario de la Lengua Española, Real Academia Española*, 22nd edition, Madrid, 2001.

41 Para. 17.

42 *Idem.*

B. The failure to exhaust domestic remedies in relation to the restriction of the right to leave the country

Regarding the second justification for the preliminary objection filed by the State, the Judgment indicates, as grounds to reject it, that "*regarding the failure to exhaust domestic remedies in relation to the January 2003 restriction of the right to leave the country, the Court observes that the alleged victim did not file any remedy before the domestic courts,"* and that *"[h]owever the State did not contest its admissibility at the first stages of the proceedings before the Commission and did not indicate which remedies the alleged victim should have exhausted; moreover, it did not do so before this Court either."*[43]

When indicating the above, the Judgment did not consider that, since the alleged victim had not filed any remedy before the domestic courts owing to the 2003 restriction of the right to leave the country, and had not argued that he did not have to do so, the State did not have the opportunity to file a specific preliminary objection in this regard during the admissibility proceedings before the Commission. Thus, attention should be drawn to the fact that the preliminary objection filed by the State in this regard does not refer to the petition lodged before the Commission, but to the admissibility decision that the Commission adopted on the petition. It is perhaps for this reason that it is asserted in the Judgment that *"the alleged victim made no specific mention regarding the failure to exhaust domestic remedies in relation to the restriction of the right to leave the country."*[44]

Consequently, by rejecting this justification for the objection filed by the State, the Judgment appears merely to consider that it did not negate the admissibility of the petition. However, the Judgment fails to mention that the petitioner not only failed to exhaust any remedy in this regard, but, in addition, he failed to allege that it was impossible to do this. Thus, in fact, it could be deemed that, regarding the rule of prior exhaustion of domestic remedies, the Judgment considered that the only entity with an obligation is the State, which evidently is not in keeping with the provisions of the Convention. Moreover, if this view is accepted, it would reduce the meaning and scope of this rule to a minimum, affecting the essential procedural balance in the case in question.

CONCLUSION

In short, this dissenting opinion indicates a disagreement with what was decided in the Judgment, because, in the opinion of the undersigned, it is not in keeping with the provisions of Articles 46, 47 and 48 of the Convention, in conjunction with Article 61(2) of this instrument.

In other words, by taking the position it did, the Judgment disregarded the principle of subsidiarity and complementarity that inspires the inter-American human rights system; the legal certainty and security with which the provisions of the Convention should be interpreted and applied, and the procedural balance and equality between the parties that should be ensured in the processing of "*petitions or communications lodged"* before the Commission and submitted to the consideration of the Court.

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[43] Para. 20.

[44] Para. 13.

Consequently, it is in this sense that I agree with what the Court itself has stated, as regards "*the tolerance of 'evident infringements of the procedural rules established in the Convention* [and I would add of the Rules of Procedure of the Court and of the Commission], *results in the loss of the essential authority and credibility of the organs responsible for administering the system of human rights protection.*"[45] And this is because it is precisely these rules that ensure the legal certainty and equality of treatment of those who appear before the Court, as well as the Court's own impartiality and independence when imparting justice in the area of human rights.

Evidently, this opinion is issued, as in the case of other opinions issued by the undersigned,[46] based on one of the particular imperatives that a tribunal such as the Court has to take into consideration, which is that it must act with full awareness that, as an autonomous and independent entity, it has no superior authority controlling it, which means that, in honor of the extremely important functions assigned to it, it must strictly respect the limits to its functions, and remain and act within the specific sphere of a jurisdictional entity. Clearly, acting in this way is the best contribution that the Court can make to the consolidation of the inter-American institutional framework for human rights, a requirement *sine qua non* for the due safeguard of those rights and, to this end, the Commission has the responsibility to promote and defend them,[47] the Court is responsible for interpreting and applying the Convention in the cases submitted to its consideration,[48] and the States are responsible for amending the Convention if they find this necessary.[49]

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[45] *Case of Díaz Peña v. Venezuela, Judgment of June 26, 2012 (Preliminary objection, merits, reparations and costs, para. 43.*

[46] Record of complaint submitted to the Court on August 17, 2011, and Dissenting opinion, Case of Barbani Duarte et al. v. Uruguay, Judgment on merits, reparations and costs of October 13, 2011.

[47] First sentence of Art. 41of the Convention: "*The main function of the Commission shall be to promote respect for and defense of human rights. …".*

[48] Art. 62(3) of the Convention: "*The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.."*

[49] Art. 76 of the Convention: "*1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General. 2. Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification."*

Art. 39 of the Vienna Convention on the Law of Treaties: "*General rule regarding the amendment of treaties. A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide."*

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Registrar

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

INTRODUCTION

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

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

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

4. The second aspect is in regard to a new dimension that has barely been explored in Inter-American jurisprudence on the right to judicial protection as an *integrating element of the fundamental rights* of national and conventional sources, established by Article 25 of the American Convention.[2] Traditionally, the Inter-American Court of Human Rights ("Inter-American Court of HR" or "Inter-American Court") has widely developed in its jurisprudence the dimension of the *obligation to guarantee access to a judicial remedy that is effective, adequate, prompt and simple* considering any recourse or as a challenge as a dimension of the right of access to justice in general.

5. However, there is a particular dimension, which to my understanding is of great substantive importance to the protection of rights, which is expressly provided in Article

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

[2] "Art. 25. *Judicial Protection.*

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

2. The States Parties undertake:

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

b. to develop the possibilities of judicial remedy; and

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

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

6. In this sense, had the Inter-American Court developed this dimension of Article 25(1) of the American Convention, most likely it would have declared a violation of that provision autonomously, attempting not to subsume the consequences in the violation of Article 8(2)(h) as done in the Judgment[3] declaring that the State did not violate Article 25, which in turn affects the reparations and just compensation to the victim,[4] in terms of Article 63(1) of the Pact of San José.[5]

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

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

9. In this case, the current Constitution of Suriname includes a Constitutional Court, which had not been established at the time of the facts (and which has still not been established), and thus the relevant recourses under its jurisdiction have not been developed, which obviously, generated legal uncertainty about the mechanism and the body that effectively protects the fundamental rights in regard to the proposals on constitutionality and control for conformity with the convention, which may have led the Inter-American Court to declare the failure to conform with the Convention by omission by

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[3] Para. 119 of the Judgment.

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

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

violating Article 25 of the American Convention, in connection with Articles 1(1) and 2 thereof, given that the body and the recourses that constitutionally are necessary for the protection of fundamental rights of national and conventional sources were not established. And this is without acknowledging the powers and specific functions of the High Court of Justice of Suriname, which in this case did not protect the rights established in the Convention that Mr. Alibux alleged had been violated, which warranted international intervention and protection. Also, there was no proper response in regard to the failure to conform to the Convention that was alleged by the victim, in that the mere reply of the High Court judges was that the judges could not implement an action that was not provided for in the legislation.

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

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

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

12. The brief submitting the case was received by the Commission on August 22, 2003, being that the final judgment issued by the High Court of Justice was issued on November 5, and it was not until April 18, 2005, that the Commission transmitted the pertinent parts of the petition of the alleged victim to the State. Moreover, the State argued as of July 18, 2005, that the case had been submitted prior to the adoption of a final decision on the merits from the High Court of Justice and that the Admissibility Report was issued on March 9, 2007.[7]

13. The Inter-American Court dismissed the preliminary objection because it essentially considered that "the petitioner argued that the alleged violations to the right to appeal the conviction and the rule of freedom from ex post facto law before the High Court of Justice were unfavorably resolved by the Interlocutory Verdict of June 12, 2003 […] prior to submitting the petition to the Commission. Consequently, in the present case, the Court finds that, due to the absence of a mechanism by which to appeal the possible conviction,

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6 *Cf*. para. 11 of the Judgment.

7 *Cf.* para. 17 of the Judgment.

the issuance of said judgment was not a prerequisite for purposes of presenting the case before the Commission."[8]

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

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

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

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

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

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

19. It was necessary to interpret Article 46(1) in relation to the procedure in question; thus, while the inter-American system is subsidiary and complementary, the integrative nature of the system requires that a distinction be established between the time in which the initial petition is filed by the petitioner, and the preliminary inquiry (initial processing) which the Inter-American Commission carries out in response to the petition.[11] In the latter procedural stage, the admissibility is assessed of the relevant parts that are to be forwarded

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[8] Para. 18 of the Judgment.

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

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

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

to the State, after a preliminary study of the admissibility requirements is carried out. That is, if the petition is not "manifestly unfounded," the Commission decides to pursue the matter and inform the State of that decision, which does not mean that the case is admissible for the purposes of Articles 46 or 47 of the American Convention.

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

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

21. Indeed, it has been consistently held by the Inter-American Court that an objection to the exercise of its jurisdiction based on the alleged failure to exhaust domestic remedies must be filed at the appropriate procedural moment,[16] that is, during the first stages of the

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

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

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

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

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

admissibility procedure carried out before the Commission,[17] and thus it is understood that after that opportune procedural moment, the principle of legal *estoppel* comes into effect;[18] in addition it befalls upon the State, upon arguing the non-exhaustion of domestic remedies, to note which remedies have not been exhausted and their effectiveness.[19] The Inter-American Court has held that the interpretation given to Article 46(1) of the American Convention for more than two decades is in conformity with international law.[20] The Inter-American Court has held that the interpretation it has given to article 46.1.a of the American Convention for more than two decades is in conformity with international law.

22. In this case, we must distinguish between three stages, namely: (i) receipt of the initial petition of the victim before the Commission (August 22, 2003); (ii) the submission of the relevant parts of the initial petition to the State (April 18, 2005); and (iii) the Commission's Report on Admissibility (March 9, 2007). The Inter-American Court, in its judgment, considered it reasonable that the petitioner not wait until the issuance of the judgment of the High Court of Justice of Suriname, being that an adequate remedy to challenge said decision did not exist and that the victim's objections had already been rejected by Interlocutory Resolution of the High Court of Justice of June 12, 2003.[21] If the Commission had determined the non-exhaustion of domestic remedies *prima facie* —using the moment when the petition was filed as the point at which the question of exhaustion would be evaluated — it would have forgone the opportunity to evaluate the situation, one which warranted waiting for the issuance of the judgment and subsequently transmitting the case to the State. It must not be overlooked, as stated in this Judgment, and following the jurisprudence of the Inter-American Court itself,[22] that "it is not the duty of the Court, or the Commission, to identify *ex officio* the domestic remedies that have not yet been exhausted. The Court emphasizes that it is not up to the international bodies to remedy the imprecision in the State's arguments."[23]

23. It is true that the principle of prior exhaustion of domestic remedies is designed in the interest of the State, because it seeks to exempt the latter from responding before an international body for acts that are attributed to it, before it has had the opportunity to remedy them by its own means.[24] The foregoing is established in the preamble of the American Convention which establishes that international protection is "reinforcing or

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

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

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

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

[21] *Cf.* para. 18 of the Judgment.

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

[23] *Cf*. para. 16 of the Judgment.

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

complementing the protection provided by the domestic law of the American states." However, as noted, in general, it is with the transfer of the petition to the State, that adversarial stage begins and the State's ability to file preliminary objections takes effect, and the admissibility stage begins, wherein equality before the law and adequate defense must be guaranteed at all times, in particular in regard to each of the actions and subsequent briefs.

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

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

26. In addition, the provision of Article 46 of the American Convention must be interpreted in accordance with Article 29(a) thereof, which establishes that "no provision" of the Pact of San José can be interpreted in the sense that it "[…]suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein." This means that the inter-American system should be the functional and effective protector of human rights, and thus it is not reasonable to state that if the requirement of exhaustion of domestic remedies was reached during the course of the original proceedings before the Commission, before the adoption of Report on Admissibility, or even before the State receive the petition, once it goes before the Inter-American Court, the Court shall decide whether to fully or partially admit the case, notwithstanding the existence of alleged violations. This standard would obviously be contrary to an interpretation that is favorable in regard to the alleged victim, and thus, contrary to the principle *pro persona,* highlighting that the right of access to justice is at stake—in the broad sense. Similarly, a stance of this nature would lead to a lack of acknowledgment of the need for the prevalence of substantial over procedural rights.

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

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

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

28. It should be noted that the European Court of Human Rights also has not considered that the exhaustion of domestic remedies is necessary at the time of the filing of the petition. Indeed, the Strasbourg Tribunal has held that this exhaustion can be achieved shortly after the presentation of the petition, but before the admissibility is determined.[28] This standard was also shared, at the time, by the same Tribunal in the operations stage before the European Commission of Human Rights, before the entry into force of Protocol 11 to the European Convention for the Protection of Fundamental Rights and Freedoms.[29] In this sense, the similarity of the provisions of the American Convention (Art. 46(1))[30] and the European Convention (Article 35(1))[31] on Human Rights should be noted; moreover, the differences and functional realities between the two systems of protection must be

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

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

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

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

[30] Art. 46. Admission by the Commission of to petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: a). that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law; b). that the petition or communication is lodged within to period of six months from the date on which the party alleging violation of his rights was notified of the final judgment; c). that the subject of the petition or communication is not pending in another international proceeding for settlement; and d). that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.

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

considered, since the Inter-American System has a Commission which acts as an initial instance, which is the channel through which the Convention gives the individual the right to move forward with an initial impetus that gets the wheels spinning before the international system of protection of human rights, a procedure that must be exhausted.[32] The dynamics and reality of the operation of the Inter-American Commission has meant that, to date, relatively few cases before the Inter-American Tribunal continue to be filed.

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

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

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

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

30. Article 25(1) of the American Convention guarantees the existence of a simple, prompt, and effective remedy before a competent court or tribunal.[33] The Inter-American Court has established that, in accordance with the Pact of San José, States Parties are obliged to provide effective judicial remedies to victims of human rights violations (Art. 25),[34] remedies that must be substantiated in accordance with the rules of due process of law (Article 8(1)),[35] all within the general obligation, responsibility of the States, to guarantee the free and full exercise of the rights recognized by the Pact of San José to all persons under its jurisdiction (Article 1(1)).[36]

31. The effectiveness means that, in addition to the formal existence of remedies, these provide results or responses to the violations established in either the American Convention, the Constitution, or in the legislation.[37] That is, the Inter-American Court has established

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

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

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

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

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

that for an effective remedy to exist, it is not enough that it be established by the Constitution or in legislation or that it be formally recognized, but rather it is required that it be truly effective in establishing whether there has been a violation of human rights and that it provide a means to remedy the violation. Those remedies that, due to the general conditions of the country or even the particular circumstances of a given case, are illusory cannot be considered effective.[38]

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

33. The right established in Article 25 is closely linked to the general obligation established in Article 1(1) of the American Convention, as it attributes protective functions to the domestic law of the States Parties.[40] In view of the aforementioned, the State has a responsibility not only to design and adopt into law an effective remedy, but also to guarantee the proper application of that remedy by its judicial authorities.[41] The process should lead to the materialization of the protection of the right recognized in the judicial ruling in the proper application of the ruling.[42] Therefore, the effectiveness of judgments and judicial decisions depends on their implementation. Otherwise, the denial of the right is implied.[43] This implies, in accordance with Article 25(2)(b)) of the American Convention, that States commit themselves to develop the possibilities of judicial remedy.[44] As a consequence of the aforementioned, the lack of effective domestic remedies renders a person in a state of defenseless.[45]

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

[38] *Cf. Case of Ivcher Bronstein V. Perú*. *Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74, para. 136; and *Case of García and Family V. Guatemala. Merits, Reparations and Costs.* Judgment of November 19, 199. Series C No. 63, para. 142.

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

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

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

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

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

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

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

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

36. It is important to note that the Inter-American Court has established that in all domestic legal systems there are multiple remedies, but not all are applicable under all circumstances. If in a specific case the remedy is not appropriate, it is thereby evident that it cannot be exhausted.[49] The foregoing, without detriment to the possibility that all available remedies within domestic law may, in certain circumstances, satisfy in a collective manner the requirements established in Articles 8 and 25 of the American Convention, even if none of them, individually, fulfill those provisions in a comprehensive manner.[50]

37. The Inter-American Court has established that the remedy of *amparo* due to its nature is a "simple and prompt remedy designed for the protection of all of the rights recognized by the constitutions and laws of the States Parties and by the Convention."[51] Moreover, it also considered that such a remedy falls within the scope of Article 25 of the Pact of San José, and thus it has to meet several requirements, including adequacy and

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

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

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

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

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

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

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

effectiveness.[52] However, the Inter-American Court has considered that it is not in itself incompatible with the American Convention that a State limit its remedy of *amparo* to specific matters, as long as it provides another remedy of similar nature and scope for those same human rights that are not governed by the jurisdiction of *amparo*.[53] In any case, what matters is that the legal remedy be suitable to combat the violation, and that its implementation by the competent authority be effective,[54] as everyone should have access to a simple and prompt remedy before competent courts or tribunals that protect their fundamental rights.[55]

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

39. The Inter-American Court has also understood that for a criminal investigation to constitute an effective remedy that ensures the right of access to justice for the alleged victims, and guarantees the rights that were affected, it must be carried out in a *serious manner* and *not as a mere formality* preordained to be ineffective; it must have a purpose and be assumed by the States as a legal obligation in itself and not as a measure taken by private interests that depends upon the initiative of the victim or his or her next of kin or the private provision of evidentiary elements.[57] Similarly, the Inter-American Court in certain circumstances has examined the effectiveness of appeals filed within the administrative jurisdiction.[58] In such cases, it has been analyzed whether the decisions therein have effectively contributed to put an end to a situation that violates rights, to

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

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

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

[55] *Cf. Case of the Mayagna (Sumo) Awas Tingni Community V. Nicaragua. Merits, Reparations and Costs.* Judgment of August 31, 2001. Series C No. 79, para. 112; *Case of Cantos V. Argentina. Merits, Reparations and Costs.* Judgment of November 28, 2002. Series C No. 97, para. 52; and *Case of Juan Humberto Sánchez V. Honduras. Preliminary Objections, Merits, Reparations and Costs.* Judgment of June 7, 2003. Series C No 99, para. 121.

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

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

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

ensure non-repetition of the wrongful acts, and to ensure the free and full exercise of the rights protected by the American Convention.[59]

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

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

42. In an important part of the jurisprudence of the Inter-American Court itself, it was determined that Article 8 together with Article 25 of the American Convention affirms the *right of access to justice*.[63] As such, the Inter-American Court determined that Article 8(1) of the Pact of San José has a direct relation to Article 25 in relation to Article 1(1), both of the same treaty, which ensures everyone a prompt and simple remedy to obtain, among other results, that those who are responsible for human rights violations be prosecuted and that reparation to those who suffered harm is provided.[64] As stated by the Inter-American Court, Article 25 "is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention," since it contributes decisively to ensure access to justice.[65] In the *Case of La Cantuta,* the Inter-American Court determined that *access to justice* constitutes a peremptory norm of International Law (*jus cogens*) and, as such, generates *erga omnes* obligations for States to adopt the measures necessary to avoid leaving such violations unpunished, whether exercising their jurisdiction to apply domestic law and International Law to prosecute and, if

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

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

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

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

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

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

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

applicable, punish those responsible for such acts, or collaborating with other States aiming in that direction, in what constitutes "a collective guarantee mechanism."[66]

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

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

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

45. In the *Advisory Opinion 9/87*, the Inter-American Court has established that the Pact of San José provides some evidence to clarify the fundamental characteristics that are to be had by the guarantees of rights. In this respect, at that time, the Inter-American Court noted that the assessment must stem from the obligation in the American Convention of the States Parties to "respect the rights and freedoms recognized (in the Convention) and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms" pursuant to the provisions of Article 1(1) of the American Convention. From this general obligation is derived the right of every person, set out in Article 25(1), "to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention."[69]

46. Thus, it is in this manner that Article 25(1) of the Pact of San Jose provides that the guarantee established therein applies not only to the rights contained in the American Convention, but also to those that are recognized by the Constitution or by law.[70] While this

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

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

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

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

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

standard at the time was applied in this Advisory Opinion when interpreting what rights that are not subject to derogation in a state of emergency, since then, on rare occasion has this standard been used by the Inter-American Court and has not been developed in regard to all possible implications.

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

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

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

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

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

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

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

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

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

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

criminal proceeding is a single proceeding in various stages,[75] including the processing of the ordinary challenges filed against the judgment.[76]

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

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

53. While States have a margin of discretion in regulating the exercise of that remedy, they may not establish restrictions or requirements that violate the very essence of the right to appeal a judgment.[82] As such, the Inter-American Court has stated that it should be understood that, regardless of the regimen or system of appeals adopted by States Parties and of the name given to a means for challenging the conviction, in order for it to be *effective*, it must constitute an appropriate means for attempting to correct a wrongful conviction. This requires it to *analyze questions of fact, evidence, and law* upon which the contested judgment is based, since in judicial activity there is interdependence between the factual determinations and the application of law in such a way that an erroneous finding implies a wrong or improper application of law. Consequently, the reasons for which the remedy is admissible should allow for extensive control of the contested aspects of the sentence.[83]

54. Furthermore, the Inter-American Court has considered that "the regulations that States develop in their respective systems of review, must ensure that an appeal against a conviction respects the minimum procedural guarantees that are relevant and necessary

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

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

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

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

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

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

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

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

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

under Article 8 of the Convention to resolve grievances raised by the appellant, which does not necessarily imply a new trial […]."[84]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

60. As has already been mentioned, Article 25 of the Convention guarantees the existence of a simple, prompt, and effective remedy before a judge or competent tribunal.[93] Owing to this, the State Parties are obliged to provide effective judicial remedies to the victims of human rights violations (Article 25),[94] remedies that must be substantiated in accordance with the rules of due process of law (Article 8(1)),[95] all within the general obligation of those same States to guarantee the free and full exercise of the rights recognized in the American Convention to all persons subject to their jurisdiction (Article 1(1)).[96] The Inter-American Court has considered that the meaning of the protection granted by Article 25 of the Convention is the *real possibility* of access to a judicial remedy so that the competent authority, with jurisdiction to issue a binding decision, determines whether there has been a violation of a right claimed by the person filing the action, and that the remedy is useful to restitute to the interested party the enjoyment of his right and to repair it, if it finds there has been a violation.[97]

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

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

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

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

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

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

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

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

question. This is part of a criminal proceeding, including the processing of the ordinary challenges filed against the judgment.[99]

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

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

64. The distinction between each of the remedies in relation to the provisions of Article 25 of the American Convention has not always been clear. In fact, in the beginning of Inter-American jurisprudence, formulas combining remedies with Article 25 of the American Convention were accepted, as was the case with respect to Article 7(6) of said international instrument in regard to the writ of habeas corpus.[103] However, the recent jurisprudential trend is clear in that it tends to separate and confine them to their specific domains of application. It should be noted that this task is still incomplete in various respects and, in many cases, it is very difficult to realize these differentiations with absolute precision due to the natural interaction or overlap of the substantive or qualifying rights, and to the different configurations of judicial remedies in each State against which the Inter-American Court is competent to hear cases.

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

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

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

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

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

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

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

67. Moreover, in the case of *Velez Loor* and in the recent case of *Mendoza et al.*, although the standard in the above mentioned cases consisting of the non-declaration of a violation of Article 25 of the Pact of San José for the inexistence of a remedy by which to appeal the judgment to a higher court was ratified,[107] the Inter-American Court did find other sorts of circumstances that had affected the right of Article 25 of the Convention in relation to the absence of an effective judicial remedy to enforce the right to consular assistance,[108] and regarding the lack of due diligence in the investigations,[109] respectively.

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

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

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

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

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

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

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

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

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

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

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

71. Despite being cited by the Inter-American Court on multiple occasions, as is the case in the present Judgment,[111] these criteria have not been sufficiently developed with respect to all of their implications, especially in regard to the fact that this recourse must *protect* the people against acts that violate their rights recognized not only by domestic legislation, but by the American Convention as well. Taking the provisions of Article 25 seriously would lead us to establish the obligation that effective judicial remedies be provided, and that these remedies monitor compliance not only with the laws, but also with the Constitution of the State concerned and the American Convention itself. This is what the *right to the guarantee of fundamental rights* is about.[112]

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

73. In this sense, Article 25 of the American Convention possesses an integrative dimension of the sources of law (domestic and of the Convention) that serve as the basis for guaranteeing judicial protection. This *normative integration* can result, in turn, through the judicial institution responsible for implementing the recourse that has been put into action

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

111 Para. 116 of the Judgment.

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

113 See *supra*, previous footnote.

by the person who claims to have been the subject of a violation of human rights from various sources both domestic and international.

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

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

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

77. The Inter-American Court has recognized that, in conformance with Article 29(b) of the American Convention – which precludes a restrictive interpretation of rights – an *evolutionary interpretation* of the American Convention, in relation to the international instruments on the protection of human rights, is evident,[116] which, in turn, leads to the affirmation that human rights treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions[117] The Inter-American Court has found that such an evolutionary interpretation is consistent with the general rules of interpretation set forth in Article 29 of the American Convention, as well those set forth in

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

[115] Supreme Court of Justice of the Nation (México). Contradiction Thesis 293/2011, resolved on September 3, 2013 (pending more). It is useful to understand the dimension of the "constitutional block/conformity with the Convention" in Mexico, the works of Caballero Ochoa, José Luis, *The interpretation in conformity. The Constitutional model under international treaties on human rights and the control of conformity with the Convention, [La interpretación conforme. El modelo constitucional ante los tratados internacionales sobre derechos humanos and el control de convencionalidad*], México, Porrúa-IMDPC, 2013, p. 184 and ss.

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

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

the Vienna Convention on the Law of Treatises.[118] In this regard, when interpreting the American Convention, the alternative that is most favorable to protection of the rights enshrined in said treaty must always be chosen, based on the principle of the rule most favorable to the human being.[119]

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

79. For instance, in analyzing the content and scope of Article 21 of the American Convention in relation to the communal property of the members of indigenous communities, the Inter-American Court has taken into account Convention No. 169 of the ILO in the light of the general interpretation of rules established under Article 29 of the Convention, in order to construe the provisions of the aforementioned Article 21 in accordance with the evolution of the Inter-American system considering the development that has taken place regarding these matters in international human rights law.[120] In another recent example, in a case on the rights of immigrants and refugees, the Inter-American Court considered[121] that:

> 129. In response to the special needs of protection for migrant persons and groups, this Court interprets and warrants substance to the rights recognized under the Convention, in accordance with the evolution of the international *corpus juris* applicable to the human rights of migrants.[122]
> (...)
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> 143. In accordance with Article 29(b) of the Convention, in order to interpret and apply the norms of the Convention specifically in order to determine the scope of State obligations in

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

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

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

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

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

relation to the facts of this case,[123] the Court takes into account the important evolution of the regulations and principles of International Refugee Law, also established in the guidelines, standards and other authorized decisions of bodies such as the UNHCR.[124] In this sense, although the obligations contained in Articles 1(1) and 2 of the Convention constitute the basis for determining a State's international responsibility for violations thereof,[125] the Convention itself expressly refers to the rules of general International Law for its interpretation and application. [126] Thus, upon determining the compatibility of the actions and omissions of the State or of its norms, with the Convention or other treaties applicable to its jurisdiction, the Court can interpret the rights and obligations contained therein in light of other treaties and relevant norms. In this case, using the sources, principles, and standards of international refugee law and special applicable regulations[127] to situations that determine refugee status of a person and their correlative rights, in a manner that is complimentary to the norms of the Convention, the Court is not assuming the existence of a hierarchy between the normative orders.

80. If the Inter-American Court were to ignore the plethora of existing approaches with respect to a single topic, emanating normatively from different international treaties and functionally from different international mechanisms, it would not only be impossible to speak of a jurisprudential dialogue – which constitutes an integrative element of rights itself, - it would also make it extremely complicated for the States to comply with their international obligations, if such duties were downright contradictory with norms of a

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

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

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

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

126 In this sense, the preamble itself of the American Convention refers expressly to the principles reaffirmed and developed in international instruments, "both in the universal as well as regional sphere" (para. 3) and Article 29 requires its interpretation heeding to the American Declaration "and other international acts of the same nature." Other norms refer to obligations imposed by international law in relation to the suspension of guarantees (Article 27), as well as to "generally recognized principles of International Law" in definition of the exhaustion of domestic remedies (Article 46(1)((a).

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

distinct order, with whose application they coincide, or completely devoid of connection to them. The foregoing is based on the assumption that many States with whom this Court relates with actively participate both in the Inter-American System, as well as the Universal System of Human Rights, and that, naturally, have their own constitutional procedural systems for the protection of fundamental rights.

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

82. As a result, Article 25 of the American Convention establishes the right to an effective judicial remedy, which may be the remedy of *amparo* or another remedy of a similar nature and equal scope for those rights that cannot be heard by the courts using the *amparo* remedy;[129] on the other hand, by virtue of Article 29 of the Convention, which requires a more favorable or extensive interpretation, based on the *pro persona* principle, the rights protected by Article 25 are those included in the *corpus juris*. Of course, this protection should be executed taking into consideration the different powers of each judicial organism, which requires that the control for conformity with the Convention that is exercised be of varying intensity.[130]

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

84. It is important to note here that, just as is stated in the Judgment in the present case, "*the American Convention does not impose a specific model for the regulation of issues of constitutionality and control for conformity with the Convention*."[131] In any event, the Inter-American Court has repeatedly held that the important thing is that the treaty be granted a "useful purpose." That is, that it be respected and guaranteed in the manner in which the State Parties consider it most pertinent. The integrative dimension of

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

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

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

[131] Para. 124 of the Judgment.

constitutional and conventional fundamental rights, which may result through the exercise of the right to judicial protection, is, in sum, an element of fundamental integration in a model of exercise of control for conformity with the Convention.

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

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

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

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

88. Throughout the jurisprudential development in the shaping of the concept of control for conformity with the Convention, an aspect that has resulted more important is the role that the judges have, in their respective spheres of competence, to apply this scheme of control in the exercise of their duties. Since the origin of the legal doctrine of control for conformity with the Convention, it has been established that "domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the

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

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

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

Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception."[135]

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

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

91. While control for conformity with the Convention has the characteristic that it may be exercised by authorities and courts in various degrees of intensity (depending on their competencies and legal powers), Article 25 of the American Convention clearly establishes the right of all persons to have access to an effective judicial remedy so that a competent authority, with jurisdiction to issue a binding decision, may determine whether or not there has been a violation of a fundamental right claimed by the person filing the action, and that the remedy is useful to restitute to the interested party the enjoyment of his right and to repair it, if it finds there has been a violation.[136] As was previously mentioned, the existence of these guarantees, and by extension, of a model of exercise of control for conformity with the Convention "constitutes one of the basic pillars, not only of the American Convention, but also of the rule of law in a democratic society as per the Convention."[137]

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

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

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

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

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

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

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

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

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

IV. THE RIGHT TO JUDICIAL PROTECTION IN THIS CASE

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

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

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

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

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

143 Para. 119 of the Judgment.

judgment of conviction, which propitiated and enabled the situations alluded to by the Commission and the representatives."[144]

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

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

98. As I mentioned at the beginning of this opinion, I agree with the decision adopted by the Inter-American Court. However, I consider it appropriate to comment on certain aspects related to the integrative dimension of rights (an under-developed facet in Inter-American jurisprudence) and its implications in a model of exercising control for conformity with the Convention. If the Court had developed this view of Article 25 of the American Convention, its differences with the right to appeal the judgment to a higher court under Article 8(2)(h) of the Convention would have been brought to light, and hence, "the consequences of the damages" caused by the violation of Article 8(2)(h) would not have necessarily been encompassed in the alleged affectations of Article 25 of the American Convention.

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

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

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

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

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144 *Cf.* Para. 106 of the Judgment.

145 Para. 124 of the Judgment.

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

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

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

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

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

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

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

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

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

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

[152] *Cf.* Para. 51 of the Judgment.

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

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

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

108. Personally, I find it peculiar that in the Interlocutory Resolution of June 12, 2003, the High Court of Justice of Suriname analyzed and answered only some of Mr. Alibux´s allegations, such as those related to the right to freedom from ex post facto laws, yet it did not answer those arguments related to the need for conformity with the Convention. More specifically, the arguments regarding the actions of the Procurator General were answered

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153 *Cf.* Para. 112 of the Judgment.

154 *Cf.* Para. 113 of the Judgment.

155 *Cf.* Para. 114 of the Judgment.

156 *Cf.* Para. 149 of the Judgment.

157 *Cf.* Para. 50 of the Judgment.

to the effect that the Constitution did not grant it "jurisdiction for such purposes."158 It is clear that any state institution had to possess such jurisdiction in terms of Article 25 of the Convention, if in the end, the authorities of Suriname eventually determine that the High Court or the Constitutional Court or the ordinary tribunals has jurisdiction, this is a decision that is in its power. Nevertheless, what is not permissible is the inexistence of any such body that could have taken care of these allegations.

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

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

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

111. On another note, Mr. Alibux argued to the High Court of Justice of his country, among other things, that Article 140 of the Constitution and the Indictment of Political Office Holders Act were inconsistent with Article 14(5) of the Covenant on Civil and Political Rights and Article 8(2)(h) of the American Convention for creating a process in a single

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158 Para. 122 of the Judgment.

159 *Cf.* Para. 151 of the Judgment.

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

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

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

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

instance before said High Court of Justice.[164] In this regard, in the Judgment, the Inter-American Court found that the alleged damages suffered by Mr. Alibux were encompassed within the aforementioned violation of the right to appeal the judgment and that it should be declared as violated. As a result, the Inter-American Court did not deem it necessary to make additional determinations with respect to the violation of the right to judicial protection set forth in Article 25 of the American Convention, as the consequences of the damages described in his allegations were subsumed in the considerations in the Judgment in relation to Article 8(2)(h),[165] regarding the right to appeal the judgment to a higher court or judge.

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

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

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

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

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164 *Cf.* Para. 117 of the Judgment.

165 *Cf.* Para. 119 of the Judgment.

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

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

comparison with the diverse claims that can be substantiated in domestic jurisdictions. In my opinion, the case of *Liakat Ali Alibux* is situated on that assumption.

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

117. In controversies of this sort, to subsume such recourses within the sphere of Article 8(2)(h) denies, from the get-go, the need of access to a judicial remedy of control that can deal with constitutional and conventional questions when the absence of certain specific recourse provided for in the American Convention is anticipated. Moreover, this can also result in ignoring the need to adopt accurate practices of control for conformity with the Convention, such as those performed by tribunals in various countries in the region, as has been observed, for instance, in the cases of Argentina and the Dominican Republic.

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

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

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

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

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

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

120. With the foregoing examples, I do not intend to demonstrate that the High Court of Justice of Suriname should have necessarily followed the same steps of these Latin American tribunals, but rather that, in any case, the American Convention should have been given practical effect, specifically in regard to the arguments of the violation of Article 8(2)(h), which was flagrantly violated. In this regard, it is important to note that, on occasion, the Inter-American Court has ordered that control for conformity with the Convention be exercised to remedy these situations. Surely, the law should have facilitated the operation of the High Court of Justice or, if applicable, created the Constitutional Court and given it jurisdiction to resolve matters of this sort. Therefore, the turning to an instance to claim the unconstitutionality and non-conformity with the Convention of the absence of a specific recourse should have translated into some response on the part of the judiciary, in this case, perhaps by the High Court of Justice. However, the same omissions in the full implementation of the model of constitutional control compromised the ability of the High Court to do more and, without doubt, left Mr. Alibux in a situation of defenselessness, thereby violating his right to judicial protection embodied in Article 25 of the American Convention, in relation to Article 1(1) and 2 of such international instrument, in such a way that, in the case at hand, the Inter-American System had to act in the alternative.

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

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

123. In this case, Mr. Alibux argued before the High Court of Justice of his country that Article 140 of the Constitution and the Indictment of Political Office Holders Act were inconsistent with Article 14(5) of the Covenant on Civil and Political Rights and Article 8(2)(h) of the American Convention for creating a process in a sole instance before such High Court of Justice;[175] that is, he presented in a precise manner an argument of non-

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

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

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

[175] *Cf*. Para. 117 of the Judgment.

conformity with the Convention of the Constitution itself and the law that was applied. The response of the High Court of Justice was to mention that "*despite having binding effects on the State, the provisions of the Covenant on Civil and Political Rights and the American Convention on Human Rights had no direct legal effect, since a domestic court could not establish processes of appeal that are not recognized by the law, and therefore, had to abide by the terms set forth in Article 140 of the Constitution*."[176] As can be appreciated, the response of the High Court of Justice did not properly study the problem of conformity with the Convention raised, rather it simply limited itself to express the reasons why domestic courts were not able to establish processes not regulated by law, so that they had to apply the constitutional article, whose lack of conformity with the Convention was precisely challenged by the now victim, consequently subtracting any useful effect of the treaty provisions.

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

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

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

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176 Para. 118 of the Judgment.

177 Para. 124 of the Judgment.

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

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

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

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

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

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

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

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

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

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

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

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

132. This logic even has its origins in the preparatory work of the American Convention, which, pursuant to an interesting debate and a proposal by the government of Chile, it was included that judicial protection should not only refer to fundamental rights provided for within the domestic sphere, but also those embodied in the American Convention.[184] The foregoing allows us to note that, through judicial protection from this integrative perspective of the rights provided for in Article 25(1), in relation to Articles 1(1), 2, and 29(b) of the Convention, an authentic *integration is forged at a normative and interpretative level on the matter of fundamental rights*, allowing for a view of an integrated Inter-American System and promoting *jurisprudential dialogue* for the creation of regional standards on the subject that effectuate the full enjoyment thereof.

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

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

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[184] In this regard, Chile stated that *"Article 23 [(currently Article 25) of the American Convention was] insufficient, since it is limited in that it provides that 'all persons have the right to an effective, prompt, and simple remedy before competent domestic courts or tribunals, that protect against acts that violate fundamental rights recognized by the Constitution or legislation. [To which][this] provision of the project did not refer to the rights recognized specifically in the Convention. [Therefore, the government of Chile suggested that] it would be best to insert in this Article a provision similar to that in paragraph 3 of Article 2° of the International Pact on Civil and Political Rights […]".* Specialized Conference on Human Rights, San José, Costa Rica, November 7 to 22, 1969, Acts and Documents, OEA/Ser.K/XVI/1.2, pages. 41 and 42.

an integrative element of fundamental rights of both a domestic sources and the convention.

Eduardo Ferrer Mac-Gregor Poisot
Judge

Pablo Saavedra Alessandri
Registrar