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Inter-American System

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IV INTER-AMERICAN SYSTEM

CLAUDIA MARTIN*

During the period covered by this report, the Inter-American Court on Human Rights (hereinafter 'Court') issued several decisions on merits, including: *Apitz Barbera et al. vs Venezuela*, *Castañeda Gutman vs Mexico*, *Heliodoro Portugal vs Panamá*, *Bayarri vs Argentina*, *Tiu Tojín vs Guatemala*, *Ticona Estrada et al vs Bolivia*, and *Valle Jaramillo et al vs Colombia*. Also, the Court adopted several interpretation judgements clarifying aspects of previous decisions on the merits, including: *Miguel Castro-Castro Prison vs Peru*, *Albán Cornejo et al. vs Ecuador*, *Saramaka People vs Suriname*, *García Prieto et al. vs El Salvador*, and *Chaparro Álvarez and Lapo Íñiguez vs Ecuador*.

The present report will analyse the Court's interpretation decision in *Saramaka People vs Suriname*, complementing the Court's innovative approach in the judgement on the merits, which was reported in the first issue of 2008. Also, the report will discuss the Court's judgements in *Apitz Barbera et al. vs Venezuela* and *Castañeda Gutman vs United Mexican States*, concerning the destitution of judges in Venezuela and the scope of the right to political participation in Mexico, respectively.

Finally, the report will briefly describe the Advisory Opinion request recently submitted by Argentina regarding the appointment of *ad hoc* judges in proceedings before the Court.

The full text of the decisions mentioned in this report can be found in English on the website of the Court at: www.corteidh.or.cr.

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1. TRIBAL COMMUNITY AND PROPERTY RIGHTS: COURT'S INTERPRETATION OF THE SARAMAKA PEOPLE JUDGEMENT ON THE MERITS

In the case of the *Saramaka People vs Suriname*,¹ the Court responds to the State's request for an interpretation of several points on the judgement, merits, reparations and costs of the Court's previous judgement of 28 November 2007.

In that judgement, the Court held that the *Saramaka* people constituted a tribal community deserving special measures of protection similar to those afforded to other indigenous groups because of their distinct social, cultural and economic characteristics. In particular, the Court found that Suriname has a duty to recognise and protect the *Saramaka* people's right to collectively own the land they have traditionally used and occupied. Also, the Court concluded that the *Saramaka* tribe can claim ownership of the natural resources that lied in and within their ancestral territory because access to those resources is essential to their survival. The Court, however, stated that the right to property under the American Convention on Human Rights (hereinafter 'American Convention' or 'Convention') is not absolute and may, therefore, be subject to permissible restrictions. In addition to the legality, legitimacy, necessity and proportionality of a measure, the Court held that restrictions to the *Saramaka*'s right to property must not deny their survival as a tribal people. Thus, the Court articulated three safety measures that the State had to utilise when granting a concession for the exploration and extraction of a natural resource in *Saramaka* territory. First, the State had to consult the *Saramaka* people and ensure effective participation in regards to any development, exploration, or extraction plan. In cases of major developments or investment plans that could profoundly impact the *Saramaka* people's property rights and affect their traditional territory, the State also had to obtain the free, prior and informed consent of the *Saramakas* in accordance with their traditions and customs. Secondly, the State had to guarantee that the *Saramaka* people would receive a benefit from any activity that took place in and within their property. Thirdly, the State could not issue any concession unless it had consulted with an independent entity to assess the social and environmental impact of the requested project. Finally, the Court found that lack of recognition of this tribal community as a legal entity under domestic law violated Article 3 of the American Convention, which protects the right to juridical personality.

In its interpretation judgement, the Court clarifies: (1) questions regarding the establishment of a mechanism for the 'effective participation' of the *Saramaka* people and the determination of the beneficiaries of the 'just compensation' in cases that are

¹ Inter-American Court of Human Rights, *The Saramaka People vs Suriname*, Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs, Judgement of 12 August 2008, Series C, No. 185.

affected by development projects; (2) the circumstances in which the State may not execute a proposed developmental and investment plan in *Saramaka* territory and the concessions the State may grant in that territory; and (3) whether the State took into consideration the State's arguments related to the violation of Article 3 of the American Convention.

The Court first addressed the issue of how the State should establish a consultation mechanism with the *Saramaka* people, and which tribe members must be involved in consultations designed to ensure that the State complies with *Saramaka* customs and traditions. The Court refers back to its original judgement in reminding the State of the issues on which the State is required to consult with the *Saramaka* people, including: (1) granting collective title over the territory of the *Saramaka* people; (2) legally recognising the *Saramaka* people's collective juridical capacity; (3) adopting measures to protect the *Saramaka* people's right to their territory, and obtaining consent from the *Saramaka* community before acting on development or investment plans that would affect *Saramaka* territory; (4) respecting and observing *Saramaka* culture and traditions; and (5) prior assessments of environmental and social impact. The Court reiterated that the State is not only required to consult with the *Saramaka* people regarding any proposed activity that would occur within *Saramaka* territory, but that the State must also obtain the free and informed consent of the *Saramaka* people before acting on any development or investment projects that could impact *Saramaka* land and natural resources. Implicit in the obligation to consult is the State's duty to convey the information in a comprehensible and accessible format, so that all in the *Saramaka* community know of the proposed activity. The Court deliberately did not identify specific members of the *Saramaka* community who must be consulted regarding proposed activity; instead, the Court leaves the designation of who will represent the *Saramaka* people up to the *Saramaka* community. In doing so, the Court explicitly places the burden of appointing these representatives, and of informing the State who they have selected, on the *Saramaka* people. To this point, the Court explains that the State must consult the *Saramaka* people when determining the beneficiaries from the award and future judgement project. Further, in the event of any conflict within the *Saramaka* community over who receives these benefits, the Court ordered that the State should allow the *Saramaka* community to resolve the conflict, in accordance with their own traditional customs and norms, amongst its own members. The Court's interpretation demonstrates clear respect for the autonomy of the *Saramaka* community in handling its own internal affairs, and holds the State responsible for respecting this autonomy by communicating its plans through the *Saramaka*-appointed representatives.

Next, the Court addressed the prior environmental and social impact assessments requirement of its judgement. Here, the Court imposes a positive obligation on the State to take special precautions to guarantee that the *Saramaka* people enjoy the full benefit of their territories. In holding the State to this duty, the Court embraces a

liberal definition of the term 'survival of a tribal people', and extends the meaning of this term far beyond 'not endanger[ing] the life of the victims', which is the definition the State supports. Instead, the Court guarantees 'social, cultural, and economic survival' for the *Saramaka* people. The Court also elaborates on the purpose and required content of the environmental and social impact assessments (hereinafter 'ESIAs'). The purpose of the ESIAs is to objectively assess the possible damage or risk a proposed development or investment project may have on *Saramaka* territory, and to allow the *Saramaka* community to make an informed decision regarding such development. Independent parties must perform the ESIAs in compliance with the relevant international standards and best practices. The independent parties must work with State supervision in undertaking the ESIAs. Although it recognised some flexibility in evaluating whether an ESIA shows an acceptable level of impact, the Court declared the potential for the *Saramaka* people to continue survival as a tribal people to be the determinative standard.

Third, the Court clarified that it expected the State and *Saramaka* people to work together to adopt legislative and administrative measures to 'recognize, protect, guarantee, and give legal effect' to the *Saramaka* people over their territory.² Although the Court does allow the State to restrict the *Saramakas'* use and enjoyment of their property, the Court clarified that the *Saramaka* people have the right to manage the land in accordance with their traditions and culture. In discussing the States' ability to grant limited concessions in relation to the *Saramaka* land, the Court reiterates that the 'State has a duty to comply with its obligations under the American Convention as interpreted by the [its] jurisprudence, particularly in light of the *Case of the Saramaka People* and other cases involving indigenous and tribal peoples' land rights.'³

The Court finds that the State's inquiry related to Article 3 of the Convention, which argues that the *Saramaka* people do not benefit from the Convention's guarantee of the right to recognition before the law for every 'person' since the tribe is a 'distinct people', is outside the scope of a request for interpretation. Nonetheless, the Court points the State to the portions of its judgement where it clearly states that, although the *Saramaka* people are a distinct tribal group, its members enjoy specific rights. It also refers to a subtle exception the Court creates, which allows it to apply Article 3 to the member of indigenous and tribal people who 'use and enjoy property collectively in accordance with their ancestral traditions'.⁴

² *Ibidem*, at para. 48.

³ *Ibidem*, at para. 54.

⁴ *Ibidem*, at para. 64.

2. INDEPENDENCE AND IMPARTIALITY OF THE ADMINISTRATION OF JUSTICE IN VENEZUELA

*Apitz Barbera et al. vs Venezuela*⁵ is the first case in which the Court addresses the current situation of the judiciary in Venezuela. The Inter-American Commission on Human Rights (hereinafter 'Commission') and civil society organisations have expressed concerns over the Venezuelan system of the administration of justice in recent years, in particular regarding the continuing appointment of provisional judges and prosecutors.⁶ This situation affects the independence and impartiality of the judiciary, and consequently, Venezuelans' right to access to justice.

The Supreme Court of Tribunal Justice (hereinafter 'TSJ') appointed the petitioners to be provisional judges of Venezuela's First Court of Administrative Disputes (hereinafter 'First Court'). The First Court has jurisdiction over cases dealing with administrative acts adopted by organs of the Executive Branch, except those issued by the President and Ministers. Once the petitioners were appointed, the First Court ruled against several government policies and decided controversial cases. One decision in particular, which required foreign volunteer doctors to meet strict licensing requirements before practicing medicine in poor neighbourhoods in Venezuela, received significant criticism from the press and came under public attack from Venezuela's president who refused to enforce the decision.

The First Court also nullified an administrative act by the Subaltern Registrar of the First Circuit of the Public Registrar of the Municipality of Baruta of the State of Miranda (hereinafter 'Subaltern Registrar'). In turn, the Subaltern Registrar solicited the Chamber for Political and Administrative Matters (CPAM) of the TSJ to intervene in the First Court's holding and uphold the administrative act. CPAM requires a direct public interest or a threat of flagrant injustice before removing proceedings from a competent court. On 3 June 2003, the CPAM nullified the First Court's order, finding that the Court's decision was a 'grave and inexcusable error'. The CPAM sent a copy of its order to the Inspector General of Tribunals (IGT), who commenced an official investigation of the First Court's decision. The IGT is an ancillary body to the Commission for Operating and Restructuring of the Judicial System (hereinafter 'CORJS'), with powers to gather evidence for instituting disciplinary proceedings against judges. The CORJS has, *inter alia*, the power to act as a disciplinary tribunal. Both bodies were set up provisionally until new laws regulating the administration of justice in Venezuela were passed, pursuant to the new Constitution of 1999.

⁵ Inter-American Court of Human Rights, *Apitz Barbera. vs Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Judgement of 5 August 2008, Series C, No. 182.

⁶ See, *inter alia*, IACH, *Annual Report of the Inter-American Commission on Human Rights 2007*, OEA/Ser.L/V/II.130, Doc. 22, rev. 1, 29 December 2007, para. 278; and Human Rights Watch, *A Decade under Chavez: Political Intolerance and Lost Opportunities for Advancing Human Rights in Venezuela*, Chapter III, The Courts, p. 36, at: www.hrw.org.

When the IGT presented the results of its investigation to the CORJS, this organ issued an order making four of the five judges destitute. Of the five judges, one was exempt from the sanction and another subsequently pardoned. In both cases, the judges were protected because they had previously completed the requirements for retirement.

On 13 November 2003, two of the petitioners filed a hierarchical recourse with the TSJ, arguing that only that Court had disciplinary powers over the members of the First Court. The Court failed to file a timely response, which is ninety days after the filing under Venezuelan law. It finally responded after nine months and 26 days, rejecting the petition. On 27 November 2003, petitioners filed administrative actions for a protective injunction (*amparo*) against and nullification of the destitution order with the CPAM of the TSJ, alleging: 1) violation of the right to be judged by their natural judge; 2) the right to defence and due process; 3) a presumption of innocence; 4) independence of jurisdictional function; and 5) the existence of a misuse of power. The CPAM issued a decision on the protective injunction more than three years after the action was filed, but had not issued a decision on the solicitation for nullification of the destitution order by the time the Court issued its judgement.

Before analysing the merits of the decision, it is worth noting a procedural aspect that the Court addressed for the first time. In their submission, petitioners argued the violation of a right of the American Convention that had been rejected by the Commission in its admissibility decision. The Court held that petitioners may allege violations not included in the Commission's petition even if those were declared inadmissible by that organ. The Court stated that it has the power to review those inadmissibility reports because the Commission only makes a *prima facie* analysis of the merits of the allegations. Though the Court has long accepted the victim's right to allege violations not included in the Commission's submissions, it had never decided before on a case in which the particular allegation was declared inadmissible by the Commission.

In the analysis on the merits, the Court's judgement in *Apitz Barbera* further developed and solidified individual due process rights, and contributed to strengthening the protection that judges – even provisional ones – must be afforded under the American Convention. The Court underlined that provisional judges should be ensured conditions to exercise their role independently; therefore, rules applicable to permanent tenured judges on promotion, transfer and distribution of cases, as well as suspension and/or removal from office should be equally applied to those provisionally appointed. The relevance of this decision, thus, must be underscored given the weaknesses of the judiciary in many of the States Parties to the American Convention.

In regard to the scope of Article 8, the Court reiterated its previous jurisprudence in *Yatama vs Nicaragua*,⁷ indicating that States must afford the minimum due process rights listed in paragraph 1 of that provision not only in judicial but also in administrative procedures, whenever the determination of a right is at issue.⁸ Since petitioners were afforded a procedure when removed from office, the Court next analysed whether such procedure respected minimum due process rights.

First, the Court concluded that Venezuela did not violate the petitioners' rights to be judged by a competent tribunal, as consecrated under Article 8(1) of the American Convention, because the CORJS was granted jurisdiction to hear disciplinary cases against Venezuelan judges and no alternative internal standard provided for the hearing of the case by a different judicial body. Moreover, the STJ, in a recourse submitted by the petitioners, upheld the CORJS jurisdiction to hear the disciplinary case against the judges of the First Court. The Court also found that the State did not violate petitioners' right to be heard by the CPAM when reviewing the First Court's decision, because the declaration of inexcusable error in a proceeding does not involve a determination of the rights of the judge who is under investigation, nor does it place the judge in an adversarial position. Additionally, it concluded that Venezuela did not violate petitioners' right to a hearing because Article 8(1) of the Convention does not require an oral representation in all proceedings. Though the Court may consider an oral hearing as a due process right, petitioners must justify the need for such a hearing in a particular case. Also, the Court held that it was incompetent to decide whether the five judges of the First Court were treated equally when three of them were sanctioned with destitution while the other two were granted retirement without being sanctioned. Therefore, the Court found no violations of Articles 24 and 23(1) of the Convention, protecting the rights to equal treatment before the law and access to public functions under general conditions of equality, respectively. Nor did Venezuela violate the general clause of non-discrimination under Article 1(1) of the American Convention in relation to the substantive right to be heard in a reasonable time as consecrated in Article 8(1) of the same treaty. Finally, the Court found that Article 29 of the Convention enshrines the interpretation principles to properly construe the scope of the rights protected in that instrument. Thus, this provision does not protect any individual right and consequently cannot be found independently violated.

The Court did, however, find that Venezuela had violated the petitioners' rights on several counts. First, the Court found that the State failed to provide sufficient grounds for the motivation of the order for destitution against the petitioners. Both the IGC's

⁷ Inter-American Court of Human Rights, *Yatama vs Nicaragua*, Preliminary Objections, Merits, Reparations and Costs, Judgement of 23 June 2005, Series C, No. 127, para. 149.

⁸ Article 8(1) provides: 'Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.'

accusation and the CORJS's removal order limited themselves to repeat the CPAM's declaration, without providing for an independent reasoning. The Court concluded that while an appeal procedure – such as the one in which the CPAM intervened – intends to review a lower court's decision, a disciplinary procedure assesses the conduct and performance of a judge as a public official. Consequently, both the IGC and CORJS should have decided the merits of the destitution request on the basis of the arguments and evidence submitted by the petitioners, and not merely on the CPAM's decision holding that the First Court's judgement constituted a grave and inexcusable error.

The Court also found that Venezuela violated the petitioners' rights to be judged by an impartial and independent tribunal, as conforms to Article 8(1), in relation to Articles 1(1) and 2 of the American Convention. On the first ground, the Court concluded that State's legislation prohibiting the parties from challenging the members of the CORJS violated the right to an impartial tribunal. Furthermore, the *ad hoc* nature of the CORJS failed to provide sufficient guaranty of the independence of its members from undue influence. Though the Court was not able to prove that the removal of the petitioners in the present case was the result of pressure exerted by the Executive Branch, it concluded that there was no established procedure to appoint and remove the members of the CORJS, and that these functions were carried at the sole discretion of the STJ. Petitioners also argued that the case at issue reflected a practice of lack of independence of Venezuela's judiciary on the whole due to influence from the executive branch or as a result of the 'ideological purification' of judiciary members. The Court, however, was unable to prove such allegation and rejected it.

Moreover, the Court found that Venezuela violated petitioners' rights to be heard in a timely manner, under Articles 8(1) and 1(1) of the American Convention, by the delay of the TSJ and CPAM in response to the requests for nullification of the destitution order. The State also violated the rights of petitioners to have a simple and prompt recourse for their complaints, under Articles 25(1) and 1(1) of the Convention, by the delay of the CPAM in response to the request for a protective injunction (*amparo*) against the destitution order.

The Court issued several reparations, designed to require the State to remedy the injury caused to the petitioners' careers and reputations. First, the Court declared that due to the material damages, including loss of income and economic prejudice due to destitution, the State owed each plaintiff USD 48,000. In addition to this amount, the Court ordered the State to pay each plaintiff another USD 40,000 for immaterial damages, including the injury of suffering moral prejudice and the delay in proceedings of their legal recourse. Furthermore, the State must reimburse each of the petitioners for the sum of USD 5,000 for costs and expenses incurred in the litigation of this case, which includes payment of their legal representative and future related expenses. In total, the State would pay damages amounting to USD 279,000.

In terms of the measures of satisfaction and guarantees of non-repetition, the Court required the State to reassign the petitioners, if they so wish, to judiciary offices which are comprised of the remuneration, social benefits and all other equitable elements that would correspond to their position had they not suffered the destitution. If such a reassignment is untenable, with good cause, after six months, then Venezuela must pay each of the petitioners in equity USD 100,000 within 18 months of this decision. Second, the Court ordered the State to publish specific sections of their decision in the Official Gazette and one other newspaper of broad circulation. Third, the Court demanded that the State adopt a legislative course to approve the Ethical and Disciplinary Code of Venezuelan Judges within one year, which must guarantee both the impartiality of the disciplinary organ, as well as its independence, by regulating an adequate process of nominating members and assuring its stability in performance. Finally, the Court ordered the State to issue a public apology to the petitioners.

3. THE RIGHT TO BE ELECTED AS AN INDEPENDENT CANDIDATE

In *Castañeda Gutman vs Mexico*,⁹ the Court decided for the first time whether electoral laws prohibiting individuals to run for political office as independent candidates breached Article 23 of the American Convention consecrating the right to participate in government. The Court acknowledged the relevance of this issue when it mentioned that about half of the State parties to the Convention recognised the monopoly of political parties to nominate candidates for elections.

On 5 March 2004, Jorge Castañeda Gutman submitted to the Federal Electoral Institute (hereinafter 'IFE') a petition for the 2006 presidential elections of the United Mexican states as an independent candidate. In response to the request, the IFE authority informed Mr Castañeda that his request could not be met, because the registration period for presidential candidacy was not until a year and a half later – between 1–15 January 2006. Furthermore, the IFE concluded that, in accordance with Article 175 of the Federal Code of Electoral Institutions and Procedures (hereinafter 'COFIPE'), only candidates registered under a national political party could run for presidency.

On 29 March 2004, Castañeda challenged that decision by filing a writ on *amparo* at the federal level. The federal court proceeding concluded with the ruling of the Mexican Supreme Court Justice. The Supreme Court refused to hold a trial on *amparo* stating that it had no jurisdiction with respect to electoral matters. Therefore, the issue on Article 175 of COFIPE rests with legislation and Castañeda had no form of redress.

⁹ Inter-American Court of Human Rights, *Castañeda-Gutman vs Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgement of 6 August 2008, Series C, No. 184.

In its decision on the merits, the Court analyses the alleged violations of Articles 25 (right to judicial protection), 23 (right to participate in government) and 24 (right to equal protection), together with the general duties to respect and ensure as well as to adopt domestic measures set in Articles 1(1) and 2 of the American Convention. The Court held that it had jurisdiction to review the alleged violation of Articles 23 and 24 even though the Commission had looked into this issue and found it inadmissible under Article 47 of the Convention. As in *Apitz Barbera et al.*,¹⁰ the Court declared that individuals have the right to invoke additional rights to those submitted by the Commission, even if the latter rejects the alleged violations to those rights at the admissibility stage.

The Court found that, at the time this case transpired, the existing legislation in Mexico failed to afford the petitioner the right to an effective remedy as consecrated in Article 25 of the Convention. The State argued that petitioner should have availed himself of the ‘action for protection of the political and electoral rights of the citizen’ (hereinafter ‘action for protection of political rights’) before the Federal Tribunal on Electoral Matters to challenge IFE’s resolution not to register him as an independent candidate; however, the Court found that the alleged remedy did not effectively address Castañeda’s complaints. First, the Court evaluated the accessibility of the remedy for the petitioner and concluded that the Law on Contesting Electoral Matters (LCEM), which regulates the action for protection of political rights, prevented Mr Castañeda from filing the action. Article 80 of LCEM requires that only a candidate nominated by a political party can file an action for protection. The action for protection of political rights was not an available remedy for Castañeda, because he intended to run as an independent candidate. Second, the Court concluded that, additionally, the action for protection of political rights is an ineffective remedy because the LCEM asserts that such an action is inapt to challenge the constitutionality of federal or local electoral laws. Moreover, the Mexican Supreme Court, through its case-law, ruled that the Federal Tribunal on Electoral Matters has no jurisdiction to decide on the constitutionality of laws. In the instant case, upholding the petitioner’s right to run for President would have required him to challenge the constitutionality of the existing legislation prohibiting the participation of independent candidates. Such a challenge directly contradicts the Mexican legislation, which in turn, interferes with the action for the protection of political rights – rendering the action ineffective to address Castañeda’s complaints.

Third, the Court considered whether the writ on *amparo* was the effective remedy under Mexican domestic legislation to protect the rights of the petitioner. The application of *amparo*, a simple and prompt remedy that protects against violations of constitutional rights, is specifically banned under Mexican legislation to resolve claims of violations of electoral rights. Furthermore, according to Article 105 of

¹⁰ *Supra* note 5.

the Constitution, the only available procedure to challenge the constitutionality of electoral laws is through an unconstitutionality remedy that may be filed solely by a percentage of members of the Federal House of Representatives, the Senate, the Attorney General, or the political parties registered with the IFE. Thus, the Court concluded that there was no available constitutional remedy in Mexico that would provide the petitioner with an effective remedy to protect against the alleged violation of his electoral rights and therefore held Mexico in breach of Articles 25, 1(1) and 2 of the American Convention.

In regards to the political rights of the petitioner, the Court found that the prohibition of independent candidates running for office in the Mexican electoral system is not a breach of Article 23 of the American Convention, which consecrates, *inter alia*, the right to vote and be elected. After underscoring the core importance of the right to political participation in a democratic society, the Court reasoned that Article 23(1)(b) of the Convention requires States to hold 'genuine period elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the voters'. However, the Convention does not require States to adopt any particular electoral system in order to ensure respect of those principles.

The Court also analysed the scope of Article 23(2) stating that electoral laws may establish restrictions to the right to be elected 'only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings'. The petitioner's argued that 'only' should be strictly interpreted as setting the exclusive grounds according to which the right to be elected can be restricted. In contrast, the Court adopted a flexible approach reasoning that the organisation of the electoral process may require the establishment of additional limitations to ensure the protection of political rights. Those limitations are permissible, however, if they are established by law, pursue a legitimate aim, and are proportional to the ends they intend to meet. In assessing the Mexican legislation banning independent candidates from running for political office, the Court concluded that the measure is established by law in Article 175 of COFIPE and is appropriately designed to organise the political process while ensuring accessibility, under equal conditions, for all citizens exercising their political rights. Furthermore, the measure is necessary to respond to social needs that are imperative on various historical, political and social reasons, including: the need to build and strengthen the party system in response to a political and historical reality; the need to organise effectively the electoral process in a society of 75 million voters; the need for a predominantly public financial system to ensure free and genuine elections; and the need to effectively monitor the funds used in the elections. Additionally, the Court found that the measure is not disproportionate because the petitioner had other avenues to run for office, specifically by joining a political party and obtaining a nomination; becoming an external candidate of a political party without officially joining the party; setting up his own political party; or creating a national political

group that reaches a participation agreement with a political party. In sum, the Court found that Mexico's system of candidacy registration neither constitutes an unlawful restriction of the right to be elected under Article 23(1)(b) of the Convention nor is it in violation of Article 23 in general.

Noteworthy is that the Court distinguished the holding in the instant case from that of *Yatama vs Nicaragua*.¹¹ In *Yatama*, the Court held that the restrictions imposed upon candidates of indigenous and ethnic communities of the Atlantic Coast of Nicaragua, which required electoral participation only through a political party, were alien to their practices, customs and forms of organisation and, thus, constituted a violation of their right to political participation. The Court justified its holding in *Yatama* on the bases of the vulnerable and marginal role that these communities played in Nicaragua's political process. Unlike the candidates in *Yatama*, Castañeda is a mainstream candidate who did not face any disadvantage as to his opportunities to run for office.

Lastly, the Court found no violation of the right to equality under the law recognised in Article 24 of the Convention. In this regard, the Court concluded that differences between the local and federal legislation regarding the nomination of independent candidates were not sufficient to prove the existence of an unlawful distinction, because local and federal elections were not comparable.

In terms of reparations, the Court concluded that since the petitioner based his claim for damages on the alleged violation of Article 23 of the Convention, there was no need to rule on this matter. The Court, nevertheless, declared that Mexico must introduce in its internal laws the necessary modifications to abide by its international obligations. On 11 November 2007, Mexico passed a constitutional reform awarding jurisdiction to the Federal Tribunal on Electoral Matters to decide on the constitutionality of electoral laws. The Court pointed out that within a reasonable time the new reform must be adapted to coincide with the regulations stipulated in the Convention. Also, the Court ordered the State to publish the judgement of the Court in the Official Gazette and in another widely circulated national news within six months from the notification of the sentence. Finally, the State must pay USD 7,000 dollars as costs and expenses incurred in the litigation of this case.

¹¹ Inter-American Court of Human Rights, *Yatama vs Nicaragua*, *supra* note 7.

4. ADVISORY OPINION REQUEST SUBMITTED BY ARGENTINA

On 14 August 2008, Argentina filed an Advisory Opinion request asking the Court to interpret the scope of Article 55 of the American Convention, which states:

1. If a judge is a national of any of the States Parties to a case submitted to the Court, he shall retain his right to hear that case.
2. If one of the judges called upon to hear a case should be a national of one of the States Parties to the case, any other State Party in the case may appoint a person of its choice to serve on the Court as an *ad hoc* judge.
3. If among the judges called upon to hear a case none is a national of any of the States Parties to the case, each of the latter may appoint an *ad hoc* judge.
4. An *ad hoc* judge shall possess the qualifications indicated in Article 52.
5. If several States Parties to the Convention should have the same interest in a case, they shall be considered as a single party for purposes of the above provisions. In case of doubt, the Court shall decide.

In its request to the Court, Argentina raises two issues it would like the Court to consider and address. First, the State argues that the possibility of appointing an *ad hoc* judge should be limited to cases between States, and not extended to cases where one of the parties is an individual. Argentina urges the Court to re-examine Article 55(3) of the American Convention and reasons that the legal rationale of appointing an *ad hoc* judge only applies when the Court must decide a case where one State accuses another State of failing to comply with its international obligations. When this rationale is applied to a case that does not arise from an inter-State dispute, the State argues that the legal justification falls apart because allowing the appointment of an *ad hoc* judge where one of the parties is an individual would create an inequality in the proceedings between the presumed victim, the Commission, and the defendant State. The second issue the State raises is whether a judge who is national of the defendant State should disqualify himself from the case when the case arises from an individual petition. The State argues that adopting such a rule is necessary to protect the Court from potential bias or influence, arguing that allowing a judge who shares the nationality of a presumed individual victim to decide a case is an 'unnecessary risk' which could easily be eliminated through that judge's recusal. Argentina argues that interpreting Article 55(1) of the Convention, in harmony with Article 29 clarifies that the right of a judge to remain on a case where one of the parties shares his nationality is limited to cases that arise from inter-State petitions, and does not extend to cases arising from individual petition.