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The Victim Requirement, the Fourth Instance Formula and the Notion of Person in the Individual Complaint Procedure of the Inter-American Human Rights System

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THE "VICTIM" REQUIREMENT, THE FOURTH INSTANCE FORMULA AND THE NOTION OF "PERSON" IN THE INDIVIDUAL COMPLAINT PROCEDURE OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

*Diego Rodríguez Pinzón**

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I. INTRODUCTION

The question of admissibility of human rights petitions involves a broad field of legal issues, which include exhaustion of domestic remedies, duplication of procedures and other technical procedural matters. I will, however, focus on three legal issues that have special importance in the inter-American system because of their impact on the individual petition system. These are: the "victim" requirement of individual communications, the so-called "fourth instance formula" and the notion of "person" in the individual complaint procedure of the Inter-American Commission on Human Rights (Commission). All these questions directly refer to the admissibility ground established in Article 47(b) of the Convention. I have decided to refer to these issues considering that rejection of a petition on these grounds is closely related to the merits of a case, and, consequently, those cases generally cannot be amended, completed or corrected by the petitioner if they are dismissed by the Commission.

The Commission has jurisdiction to review petitions that claim the violation of the rights of individuals guaranteed in the American Convention on

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Human Rights (American Convention or Convention). Additionally, the Commission has competence to review alleged violations of the rights recognized in the American Declaration on the Rights and Duties of Man (American Declaration or Declaration).¹ This competence *ratione materiae* of the Inter-American Commission is therefore broader than that of the European human rights supervisory bodies or the Human Rights Committee (HRC) which is limited to, respectively, the European Convention and the International Covenant on Civil and Political Rights (ICCPR).

The Commission examines petitions in accordance to the procedures established in the American Convention, the Commission's Statute and its Regulations.² The individual petition mechanism is gaining in importance in the inter-American system of promotion and protection of human rights. Under the petition system, the Commission can issue public reports on its findings of fact and law in each individual case and can file cases before the Inter-American Court. This Commission's individual complaint jurisdiction must not be confused with its authority to issue reports on the general human rights situation of a specific country or on a particular human rights issue or topic.³

Petitions before the Commission are filed through written submissions. Victims, other persons or group of persons as well as any nongovernmental entity⁴ have standing before the Inter-American Commission pursuant to Article 44 of the American Convention. States can also file petitions against another state, only if both states have expressly recognized the competence of the Commission to hear such cases.⁵ Once a petition is filed, the Commission will examine the formal admission requirements for the communication and will transmit it to the respondent state for its observations.

1. On admissibility in the Inter-American system see THOMAS BUERGENTHAL ET AL., *MANUAL INTERNACIONAL DE DERECHOS HUMANOS* 94, 95 (1990); THOMAS BUERGENTHAL & DINAH SHELTON, *PROTECTING HUMAN RIGHTS IN THE AMERICAS: CASES AND MATERIALS* 24-44 (1995); DANIEL O'DONNELL, *PROTECCION INTERNACIONAL DE LOS DERECHOS HUMANOS* 418, 419 (1989); Jo M. Pasqualucci, *Preliminary Objections Before the Inter-American Court on Human Rights: Legitimate Issues and Illegitimate Tactics*, 40 VA. J. INT. 'L L. 1 (1999); MONICA PINTO, *LA DENUNCIA ANTE LA COMISION INTERAMERICANA DE DERECHOS HUMANOS* 49 (1993); BERTHA SANTOSCOY, *LA COMMISSION INTERAMERICAINE DEL DE DROITS DE L' HOMME EL LE DEVELOPPEMENT DE SA COMPETENCE PAR LE SYSTEME DES PETITIONS INDIVIDUELLES* 31 (1995).

2. Current Statute and Regulations of the Commission can be found in *Basic Documents Pertaining to Human Rights in the Inter-American System*, Inter-Am. C.H.R., OAS/ser.L/V/I.4, rev. 7 (2000), available at <http://www.oas.org>.

3. These reports can be found in separate reports colloquially called "Special Reports" which usually follow an on site visit to a country, or in "General Reports" which are included in the Annual Report of the Commission.

4. It is a unique provision in international human rights systems. The European System and the UN Human Rights Committee only give standing to victims or their representatives.

5. INTER-AM. C.H.R. CHARTER arts. 45.1- 45.2.

II. ARTICLE 47(B) OF THE CONVENTION: GENERAL SCOPE

The Commission will declare inadmissible petitions that do not characterize a *prima facie* violation of the rights recognized in the Convention or Declaration.⁶ The Commission's Statute and Regulations have a set of rules that intend to differentiate between State Parties to the American Convention and other OAS member States subject to the Commission's jurisdiction under the American Declaration. For our purposes, a main conclusion is that the grounds for dismissal of a petition established in Article 47, paragraph b of the American Convention, applies in a very similar way to all Organization of American States (OAS) member States, under the Convention or the Declaration, by virtue of the authority recognized in Article 24 of the Statute,⁷ and Articles 26.1, 31, 35 b and c, and 41.b of the Regulations of the Commission (that basically reproduce the Article of the Convention in this matter). Consequently, inadmissibility of a claim can be declared if it is evident that the Commission lacks jurisdiction because the petition does not state facts that tend to establish a violation of the Convention.⁸

Questions under this provision are usually related to issues that can not be clearly characterized as rights protected in the Convention. For example, it remains to be seen to what extent environmental⁹ and labor claims,¹⁰ and in general, economic social and cultural rights, can be directly protected under the Convention. There are specific treaties in the universal system (*e.g.* International Labor Organization treaties or the United Nations International Covenant of Economic, Social and Cultural Rights) as well as in the regional system that recognize those rights. However, their protection through individual complaint procedures is still very limited. The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (known as the Protocol of San Salvador), which recently entered into force, only establishes two rights that can be subject to the Inter-American system's individual complaint procedure.

Another issue that falls under this provision is the "victim requirement." The Commission requires the petition to indicate a violation of the rights of a victim, in order to establish the Commission's jurisdiction under the individual

6. THOMAS BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* 201 (1995).

7. Article 24.1 of the Inter-American Commission on Human Rights states: "The Regulations shall establish the procedure to be followed in cases of communications containing accusations or complaints of violations of human rights imputable to states that are not Parties to the American Convention on Human Rights."

8. INTER-AM. C.H.R. CHARTER art. 47(b).

9. Which could be linked, in certain circumstances, to the right to life, personal integrity and judicial protection.

10. Which can be related to the right of association, free speech, and judicial protection, among others.

petition system. According to the Inter-American Court on Human Rights' jurisprudence, in order for the Commission to hear an individual case, it is necessary to lodge "a communication or petition alleging a concrete violation of the human rights of a specific individual."¹¹ Consequently, a case without a victim will be declared inadmissible by the Commission. Similarly, petitions claiming the violation of the rights of juridical persons (corporations, nongovernmental organizations, etc.) are reputed to be inadmissible by the Commission. We will explore some of the issues that these admissibility requirements raise in the Inter-American system.

III. THE "VICTIM" REQUIREMENT

As a consequence of the broad standing established by Article 44 of the American Convention, petitioners do not have to prove before the Commission that they, themselves, are victims, nor that they have the consent of the victim to present the petition on their behalf.¹² However, the Commission requires the petition to indicate a violation of the rights of a victim, in order to establish the Commission's jurisdiction under the individual petition system. According to the Court, in order for the Commission to hear an individual case, it is necessary to lodge "a communication or petition alleging a concrete violation of the human rights of a specific individual."¹³ A case without a victim will be declared inadmissible by the Commission.

The Court has further referred to what it calls "self-executing laws," as opposed to "non-self-executing laws," which require additional government implementation in order to affect the "legal sphere of specific individuals."¹⁴ In this regard, the Court stated that:

In the case of self-executing laws, as defined above, the violation of human rights, whether individual or collective, occurs upon their promulgation. Hence, a norm that deprives a portion of the population of some of its rights - for example, because of race automatically injures all the members of that race.¹⁵

As mentioned above, the Court considers that it is necessary to have a "concrete violation" of the rights of a "specific person," thereby permitting it to hear cases where a person or group of persons have been actually affected by

11. *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (Arts. 1 and 2 of the American Convention of Human Rights, Inter-Am. C.H.R., Advisory Opinion OC-14/94, ser. A, no. 14 (1994)), available at <http://www/oas.org> [hereinafter Advisory Opinion OC-14/94].

12. PINTO, *supra* note 1.

13. Advisory Opinion OC-14/94, *supra* note 11.

14. *Id.* ¶ 41.

15. *Id.* ¶ 43.

an action or measure of the state.¹⁶ Consequently, the Court has rejected competence to review *in abstracto* claims regarding laws that have not affected the rights of individuals under the Convention.¹⁷ The European Convention requires the petitioner to be a victim, disallowing petitions *in abstracto* concerning national laws.¹⁸ However, the victim requirement has been expanded through a notion of "potential victim," which opens the possibility for the Commission and Court to examine laws that have not yet been enforced or applied. The European Court has developed the notion of "potential victim" in certain cases where, even though a measure has not been applied, the person is at risk by the mere existence of a law or certain administrative measures.¹⁹ In the *Klass Case*, the European Court considered that the existence of legislation in Germany that permitted the secret surveillance of mail and telecommunications of persons, even if such measures had not been applied in the case argued, satisfied the victim requirement.²⁰ The same approach was followed by the European Commission in the *Campbell and Cosans Case* where it considered that a system of corporal punishment in schools of Scotland violated the rights of children attending those schools, even though the alleged victims had not yet been punished.²¹ According to the Commission, to require that corporal punishment be applied to the boys so that they could be considered victims, would be too restrictive of the rights of the boys.

The Court's notion of victim, it argues, follows the European Court's jurisprudence.²² While it is true that the European Court rejects *in abstracto* claims, the Inter-American Court's approach is still not clear regarding the notion of potential victim. The Inter-American Court in Advisory Opinion OC-14 did not clearly address if the existence of a law or practice incompatible with the Convention, such as the corporal punishment law of Scotland in the *Campbell and Cosans Case*, would be a "self-executing law" or a "non-self-executing law." By developing these notions the Court did not give a clear indication on how the concept of victim would operate in such a case. According to the test of the Inter-American Court, a corporal punishment law could require additional Government action (the punishment itself) in order to affect the legal sphere of an individual, which would be a questionable

16. *Id.* ¶ 47-49.

17. Case 10.792, Inter-Am. C.H.R. 144, OEA/ser.L/VII.95, doc. 21 (1995) (Genie Lacayo Case).

18. DONNA GOMIENET AL., LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER 44 (1996).

19. P. VAN DIJK AND G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 52 (1998).

20. *Id.* at 52.

21. *Id.* at 53.

22. Advisory Opinion OC-14/94, *supra* note 11, ¶ 47.

conclusion. However, it remains to be seen how the Inter-American Court would approach such a case.

In the cases in which these questions has been raised, the Inter-American Court has adopted different approaches when requested to declare the incompatibility of domestic legislation with the Convention. For example, in its decision in the *Genie Lacayo Case*, the Court considered that it did not have jurisdiction to declare the incompatibility *in abstracto* of Decrees 591 and 600 with the Convention.²³ Following its previous views in Advisory Opinion OC-14/94, the Court considered that its competence was limited to the conduct of the state and the effects of applying such laws in the case before it. It further stated that such incompatibility *in abstracto* could be declared through its advisory jurisdiction. Later, in the decision on the merits of the *Genie Lacayo Case*, the Court found that even though the Decrees were in force at the time of the criminal proceedings, they were not entirely applied in the case, and consequently there was no violation of the Convention.²⁴ In the *Loayza Tamayo Case*, however, the Court declared that "Article 2(a), (b) and (c) of Decree-Law No. 25.659 (crime of treason) and Articles 2 and 4 of Decree-Law No. 25.475 (crime of terrorism)" were contrary to "Article 8(4) of the American Convention."²⁵ The Court fell short of explicitly ordering the Decree-Laws to be repealed, but stated "[t]hat the State of Peru shall adopt the internal legal measures necessary to adapt Decree-Laws 25,475 (Crime of Terrorism) and 25,659 (Crime of Treason) to conform to the American Convention on Human Rights."²⁶ A question remains as to what specific reparations the Court could order when finding that a law violates the Convention, considering that the repeal of incompatible laws could be an important remedy for the victims. More importantly, the repeal of incompatible laws can constitute satisfaction *vis-à-vis* the State Parties to the Convention by preventing future violations due to its application in other cases.

The HRC also considers that it does not have competence under the Optional Protocol of the ICCPR to review *in abstracto* national legislation.²⁷ The Committee requires the alleged victim to be "actually and personally affected."²⁸ The approach of the Committee, as in the Inter-American Court's jurisprudence, is also rather restrictive. However, some scholars consider that

23. Case 10.792, *supra* note 17, ¶¶ 48-51 (preliminary objections).

24. Case 10.792, *supra* note 17.

25. Case 11.154, Inter-Am. C.H.R. 144, OEA/ser.L/VII. 97, doc. 33 (1997).

26. *Id.*

27. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS, CCPR COMMENTARY 660 (1993). DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE 175 (1994).

28. MCGOLDRICK, *supra* note 27, at 175.

it would be instructive for the Committee to follow the European system experience in this area.²⁹

In *Morales de Sierra v. Guatemala*,³⁰ regarding the notion of victim, the Commission received a petition claiming that several provisions of the Guatemalan Civil Code that granted the husband more conjugal rights than to the wife violated the Convention.³¹ Initially, the petitioners requested the Commission to render a decision finding such provisions incompatible *in abstracto* with the Convention. The Commission was reluctant to consider the case without a victim.³² Later, the petitioners provided the Commission with the name of a victim, Mrs. Morales de Sierra. This allowed the Commission to focus the discussion on a specific victim regarding the existence and effects of the provisions of the Civil Code by identifying an affected person.

The Commission examined the nature of the existence of the provisions of the Civil Code and considered that the demonstrated direct effect in the daily life of the victim was sufficient to provide the Commission with competence *ratione materiae* to hear the case. The Commission additionally stated that the “relevance” and “impact” of the provisions of the Civil Code were to be studied in the merits phase. This case can constitute an important precedent to further understand the “self-executing” or “non-self-executing” character of a law. Moreover, it will contribute to a better understanding of the notion of “potential victim” regarding a “norm that deprives a portion of the population of some of its rights,” as stated by the Court in Advisory Opinion OC-14, which it considers to be a “self-executing law.”

In *Montoya González v. Costa Rica*,³³ a confusing inadmissibility decision, the Commission appears to restrict the access of petitioners to the Inter-American system by rejecting the claim *ratione personae* on the basis of lack of standing. The Commission considered that the petitioner did not have standing because she had to be a victim in order to have access to the Commission. Presumably the Commission was attempting to develop the notion of “potential victim” in order to establish its competence *ratione materiae*. The substance of the claim argued that the rules of a competition discriminated against women by assigning lower awards to the winners of that gender. The petitioner, an athlete, decided not to participate in the competition

29. *Id.* at 177.

30. Case 11.625, Inter-Am. C.H.R. 144, OEA/ser.L/VII.98, doc. 7 (1998).

31. Under the Guatemalan Civil Code, wives are given the right and obligation of taking care of the children and the home, and, therefore, they can only work if such activity does not interfere with these obligations. The husband can stop his wife from working if he can demonstrate that he is supporting the family. The Civil Code further states that the husband has primary responsibility in representing the children of the marriage and administering their assets.

32. See *supra* note 30, ¶¶ 4-18.

33. Case 11.553, Inter-Am. C.H.R. 119, OAS/ser.LV/II.95, doc.7 (1997).

for this reason. The Commission decided that, by not participating in the race, she could not be considered a victim. From our perspective, the facts of the petition presented enough elements to constitute an arguable claim for purposes of admissibility. However, the Commission, apparently trying to protect its jurisdiction from *in abstracto* petitions, rejected the case as inadmissible.

IV. THE FOURTH INSTANCE FORMULA

Based on Article 47(b) the Commission developed the so-called "fourth instance formula,"³⁴ by which it considers that decisions of impartial and independent domestic courts are not subject to scrutiny under the American Convention. In *Marzioni Case v. Argentina*, it stated:

50. The nature of that role also constitutes the basis for the so-called "fourth instance formula" applied by the Commission, consistent with the practice of the European human rights system. The basic premise of this formula is that the Commission cannot review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees, unless it considers that a possible violation of the Convention is involved.

51. The Commission is competent to declare a petition admissible and rule on its merits when it portrays a claim that a domestic legal decision constitutes a disregard of the right to a fair trial, or if it appears to violate any other right guaranteed by the Convention. However, if it contains nothing but the allegation that the decision was wrong or unjust in itself, the petition must be dismissed under this formula. The Commission's task is to ensure the observance of the obligations undertaken by the States parties to the Convention, but it cannot serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction. Such examination would be in order only insofar as the mistakes entailed a possible violation of any of the rights set forth in the Convention.³⁵

The Commission developed the formula pursuant Article 47(b) of the Convention, to dismiss any claim that would argue exclusively a judicial error.³⁶ However, the formula does not apply when there is violation of due process,

34. The "fourth instance formula" was developed initially in Case 9260, Inter-Am. C.H.R. 154, OEA/ser. L/V/II.74, doc. 10, rev. 1 (1988).

35. Case 11.673, Inter-Am. C.H.R. 76, OEA/ser.L/V/II/95. Doc. 7 (1997); Case 11/472, Inter-Am. C.H.R. 302, OEA/ser.L/V/II.95, doc. 6 (1998); Rep. No. 34/97, Inter-Am. C.H.R., OEA/ser.L/V/II., doc. 6 (1997).

36. See *supra* note 35, ¶ 53.

discrimination, or a violation of other rights recognized by the Convention.³⁷ In *Marzioni v. Argentina*, a former worker that was seeking compensation from his employer for a work related disability claimed that Argentina's tribunals wrongly applied the laws governing damages in labor disputes. The Commission considered that it could not review the alleged judicial error and consequently the petition was inadmissible. In explaining the fourth instance formula, the Commission also relied upon jurisprudence of the European Court and Commission on Human Rights.

Both the HRC and the European system have develop similar mechanisms to ensure that the supervisory bodies of the corresponding human rights treaties do not act as an appellate courts. The European Commission consistently rejects communications that claim that a domestic court erroneously interpreted domestic law or that it failed to make appropriate finds of fact and evidence, unless such errors could constitute a violation of the ECHR.³⁸ Similarly, the HRC considers that it is not competent to review findings of fact or law by a domestic court, unless the domestic proceedings are manifestly arbitrary or constitute denial of justice.³⁹

The *Marzioni v. Argentina* case plays an important role in the evolution of the standards of the system, considering the current trend in the hemisphere of transition to democracy. The case clearly shows that states with functioning judiciaries in the framework of a democratic society will benefit from a degree of deference that the Commission gives to domestic courts. Conversely, in authoritarian regimes or states where the judiciary's independence or impartiality is in question, the decisions of domestic courts will be subject to closer scrutiny by the Commission.

It is important to note that the fourth instance doctrine is directly related to the existence of a functioning judiciary and to the level of discretion to be afforded to a domestic court in, for example, estimating the value of evidence or establishing the domestic law applicable to a case. Therefore, to override the threshold set by the Commission, a petitioner would have to prove that there is a manifest arbitrariness that violates a right protected by the Convention in the domestic judicial proceedings.⁴⁰

From an exclusively legal point of view, the fourth instance formula simply recognizes that if agents of the state in the judiciary act in such a way that they violate the Convention, the Commission will review the case and declare their international responsibility. This reasoning is also valid when the Commission

37. *Id.* ¶ 40, 63.

38. TOM ZWART, THE ADMISSIBILITY OF HUMAN RIGHTS PETITIONS 150 (1994).

39. *Id.* at 151.

40. Case 11.671, Inter-Am. C.H.R. 193. OEA/ser.L/VII.98, doc. 7 (1998); Case 11.673 *supra* note

reviews petitions that claim the violation of the Convention by agents of any organ of the state. However, the basic difference relies in the fact that the violation must be “manifestly arbitrary” signaling to certain states with problems in their judiciaries that it is clearly in their interest to improve the independence and impartiality of the administration of justice.

Interestingly, in *Narciso Palacios v. Argentina*,⁴¹ the Commission examined a petition that involved a judicial decision by Argentina’s Supreme Court in a case in which the alleged victim was dismissed from his official job as municipal accountant and filed a suit against the decision of the Mayor of the city. The issue in question before the Commission referred to the interpretation of domestic law by the Supreme Court on whether Argentinean law required exhaustion of administrative remedies before a person could resort to judicial remedies. The petitioner argued that the Supreme Court arbitrarily changed its jurisprudential interpretation, requiring him to exhaust administrative remedies before being able to file a judicial complaint (a contentious administrative suit), requirement that was not mandated by the same Court at the time he filed the judicial suit. The Commission found that “at the time the petitioner filed his contentious administrative suit, on August 23, 1985, against the administrative decree of June 11, 1985, issued by the Mayor of Daireaux, mandating his dismissal from the post of municipal accountant, it was not necessary to exhaust the administrative process in order to accede to contentious administrative proceedings.” Furthermore, the Commission considered that “the petitioner was denied access to this proceeding [the judicial remedy], by virtue of the retroactive application of a jurisprudential criterion that altered the interpretation of a legal provision applicable to his case.” Presumably the Commission considered that the petition was admissible because the violation was closely related to due process guarantees, one of the exceptions to the application of the fourth instance formula.

In another interesting case, *Carranza v. Argentina*,⁴² the Commission found that the refusal of the courts of that country to hear the case in the merits violated several provisions of the American Convention. The Superior Court of Chubut heard the case in which a former judge claimed the illegality of his dismissal as judge during the *de facto* military regime. The Chubut Court found it was “non-justiciable” based the inappropriate application of the “political question doctrine.” The case was then filed in “extraordinary appeal” before the Supreme Court of Argentina (a recourse similar to the United States Supreme Court *certiorari*) and this court rejected hearing the case. The Commission considered that the lack of review of the case in the merits by the Superior Court

41. Case 10.194, Inter-Am. C.H.R. 106, OEA/ser.L/V/II, doc. 3, rev. 1 (1999).

42. Case 10.087, Inter-Am C.H.R. 254, OEA/ser.L/VII, doc. 7, rev. 1 (1998).

of Chubut and the Argentinean Supreme Court could characterize a violation of the Convention.

Interestingly, the Argentinean courts, particularly the Superior Court of Chubut, interpreted and applied domestic law and appeared to have afforded all due process guarantees in the case, which could have justified the application of the fourth instance formula by the Commission. However, the exception to the fourth instance formula was triggered, arguably, by the existence of a clear and manifest violation of the American Convention due to the “utter disregard” for constitutional procedure when dismissing the judge. The Commission stated:

It is not for the Commission to pass judgment on the wisdom or efficacy of a judicial doctrine *per se*, unless its application results in a violation of any of the rights protected by the American Convention [T]he Commission notes that the effect of the political question doctrine has been to preclude a decision on the merits of the petitioner’s claims.

The removal of magistrates by order of the competent body and in accordance with established constitutional procedure is one thing, but the “dismissal of a magistrate” by an illegitimate authority without competence, with utter disregard for the procedure prescribed by the Constitution, is quite another. The first under internal legislation, might well be non-justiciable, but the second would be unconstitutional and unlawful, and it is up to the Courts to review it and declare so.

This precluded any decision on the merits of the petitioner’s claim that in 1976 the military authorities had unlawfully dismissed him from his position as a judge.⁴³

Some authors consider that this “formula” establishes a “double standard.”⁴⁴ I partially agree with such a characterization (although I prefer to call it a differential standard). Usually adjudicatory bodies have legal doctrines that allow for certain levels of discretion and margin of appreciation for the local authorities being supervised. The Commission focused such level of deference on the judiciaries, based on accepted principles and practice of international law: 1) interpretation of domestic law is, in general, reserved to the national courts; and 2) international human rights supervisory bodies are complementary or subsidiary to the domestic mechanisms of human rights

43. *Id.* at ¶¶ 45, 58, 64.

44. See paper presented by Andrés Gil Domínguez to the Argentinean Association of Constitutional Law Professors (Sept. 1998) (on file with author).

protection. These doctrines, therefore, permit different state practices to coexist regarding the protection of the same right. Similarly, the Commission has signaled that it will exercise a closer scrutiny of domestic judicial decisions depending on the right involved (the right to life or to personal integrity require closer scrutiny). This presumably also allows for a differential standard depending on the right affected.

Additionally, the mandate of the Commission has a dual dimension: political and judicial. In a hemisphere where States with different levels of democratic development coexist and there are certain states that still have gross and systematic violations of human rights in their jurisdiction, the Commission must use its mechanisms in a creative and effective way to induce progress in the general human rights situation. This means that all states that have independent and impartial judiciaries will be treated with more deference than those states where such independence or impartiality is compromised. The later will receive closer scrutiny by the Commission. In a way, we believe that the Commission is creatively resorting to legal presumptions similar to those used by the Inter-American Court in the *Velásquez Rodríguez Case*⁴⁵ when documenting the practice of forced disappearance of persons in Honduras as way to shift the burden of proof to the State.

V. THE NOTION OF "PERSON" IN THE INTER-AMERICAN SYSTEM

Article 1.2 expressly states that, for the purposes of the Convention, the notion of "person" refers to human beings. This provision excludes from protection under the Convention other notions of person, such as NGOs, private corporations and other juridical persons.

The Commission has, however, admitted and decided cases under the American Declaration in which the alleged victim was a private organization. In this respect, it must be noted that neither the Declaration or the Statute or Regulations of the Commission define the notion of "person" as the Convention does. The Declaration only refers to "human being" in Article I; in all other articles the Declaration refers to "person." In light of the fact that the ECHR, for example, extends its protection to non-governmental entities, it is possible to conclude that the American Declaration may be properly interpreted as protecting the rights of juridical persons.

One clear example is Case No. 9250, *ABC Color v. Paraguay*.⁴⁶ In this case, the Commission considered that it had competence to examine a claim filed against Paraguay regarding "the closing of the newspaper, ABC Color, that was printed in the city of Asuncion, Paraguay." The Commission stated that

45. Velásquez Rodríguez Case, Judgment of July 29, 1988, Inter-Am.C.H.R., Series C No. 4.

46. Case 9250, Inter-Am. C.H.R. 72, OAS/ser. L/V/II.63, doc. 10, rev. 1 (1984).

Articles IV (right to freedom of investigation, opinion, expression and dissemination) and XXVI (right to due process of law) of the American Declaration were violated by Paraguay. The Commission did not refer to individual members of ABC Color or to other human beings and their right to receive information. Therefore, the state was found to have violated the rights of ABC Color, a juridical person under Articles IV and XXVI of the Declaration, by revoking its license to operate.

Similarly, Case No. 2137, *Jehovah Witnesses v. Argentina*,⁴⁷ the Commission also examined a petition filed under the Declaration. The Commission found that the Argentinean state violated several rights under the Declaration, including the right to freedom of religion (Art. V) and the right of association (Art. XXI), as against the Jehovah Witnesses as a group. The decision makes no reference to individuals, and, only in one fragment, refers to "members of the Jehovah Witnesses group" when discussing the rights to life and personal security as well as to equal opportunity in education.

This notion of person under the Declaration gives rise to several questions regarding the relationship between the American Convention and the American Declaration. If we accept the analysis above as accurately reflecting the Commission's approach, we will in fact be accepting that there are two different notions of "person" in the individual complaint procedures of the Inter-American system, one under the Declaration, which establishes that nongovernmental entities (juridical persons) also have protection under the Declaration, and another under the Convention, which only provides protection for violations of the rights of human beings. A question remains whether juridical persons could assert their rights under the Declaration, when the respondent state has ratified the American Convention. Arguably, according to Article 29.d., ratification of the American Convention by a member State of the OAS does not supersede the obligations under the Charter of the OAS/American Declaration. The less restrictive criteria to interpret the relationship between the Convention and the Declaration could be used in order to avoid the regressive effect of eliminating the rights of certain group of "persons" through the ratification of the Convention.

Under the American Convention, the Commission rejects petitions regarding alleged violations against juridical persons (*e.g.* private corporations). The Commission reviewed such issue in *Shareholders of Banco de Lima v. Peru*,⁴⁸ and considered the petition inadmissible based on the lack of

47. Case 2137, Inter-Am C.H.R. 43, OEA/ser. L/V/II.47, doc. 13, rev. 1 (1978).

48. Case No. 10.169, Inter-Am. C.H.R. 423, OEA/ser. L/V/II.79, doc. 12, rev. 1 (1991). See also Rep. No. 39/99, Inter-Am. C.H.R. 102, OEA/ser.L/V/II., doc. 6, rev. 1 (1998); Rep. No. 106/99, Inter-Am. C.H.R. 106, OEA/ser.L/V/II., doc. 3, rev. 1 (1999); Rep. No. 103/99, Inter-Am. C.H.R. 106, OEA/ser.L/V/II., doc. 3, rev. 1 (1999).

competence to review claims regarding "juridical beings" under the American Convention. The Commission considered that "what is at issue here are not the individual property rights of the individual shareholders, but rather the collective property rights of the company, the Banco de Lima."⁴⁹

More recently, the Commission, in *Tabacalera Boquerón S.A. v. Paraguay*,⁵⁰ similarly rejected the claim that Paraguay violated the right to property, among other rights, of the organization and its shareholders. Following its previous case *Shareholders of Banco de Lima v. Peru*, the Commission considered that *Tabacalera* was not protected under the Convention and that the shareholders could not argue that their individual property was affected. In making this decision, the Commission also considered the fact that domestic remedies were exercised exclusively on behalf of the *Tabacalera* and not the shareholders.⁵¹

In this connection, the approach of the Commission raises some questions. In many instances, property rights by human beings are exercised through juridical persons such as *Tabacalera S.A.* or the Banco de Lima. In domestic courts shareholders do not usually have individual standing before the courts regarding claims of the company against third parties on matters related with the normal course of business. The company performs, in practice, as a representative of the individual interests of the shareholder. So it would be desirable for the Commission to re-think this approach, because the current jurisprudence may be limiting inappropriately the right to private property of persons under the Convention.

VI. CONCLUSION

Decisions of inadmissibility on grounds set in Article 47(b) of the American Convention have a preclusive character, arguably ending any avenue for a petitioner to bring its claim before the inter-American system. As we have mentioned, these decisions are very closely related to the merits of the petitions. They, in fact, are setting human rights standards in specific cases which, of course, increases their importance for the protection and promotion of human rights.

The boundaries of the fourth instance formula are being drawn by the emerging case law of the Commission on this matter. Although these limits are yet to be clearly stated, the Commission's decisions, both in admissibility and in the merits, are the primary reference by which we will be able to discern a reviewable case from a fourth instance formula petition. Much academic work is needed to understand the impact of this doctrine in the human rights

49. Case No. 10.169, *supra* note 48, ¶ 3.

50. Rep. No. 47/97, Inter-Am. C.H.R. 225, OEA/Ser.LVII, doc. 7, rev. 1 (1998).

51. *Id.* ¶¶ 26-27.

individual petition system and more active public scrutiny is required to avoid inconsistencies in its application.

In contrast with the European and United Nations human rights adjudicatory systems, the notion of “victim” in the inter-American system is more related to the merits of a case than to the admissibility requirements of petitions. It is for this reason that the Commission should have a lower level of review of this requirement in its admissibility stage and leave a more comprehensive study of this question to the merits phase of the case.

The question regarding the notion of “person” in the inter-American system requires a more rigorous treatment and further discussion in order to ensure that certain rights and persons are not overlooked by the Commission. It is probably necessary to inquire if the current *de facto* legal situation requires clarification through amendment of its case-law by the Commission or through a Protocol to the American Convention. In either case, it is necessary to recognize the problem and to forward proposals to further improve the current regional machinery.

Finally, we must note that in the Commission’s practice, the admissibility decisions were taken by the Secretariat before communicating the petition to the state and in many instances without any close scrutiny by Commissioners themselves and without public and reasoned decision. Only until recently, the Commission has issued inadmissibility decisions based on Article 47(b), among others, to be published separately and in its Annual Report, which is an important step towards guaranteeing scrutiny by the Commissioners themselves as a safeguard for petitioners. Hopefully, this practice will ensure that no case will be processed by the Commission without a transparent legal debate, and consequently, the substantive standards set in those admissibility cases will be publicly known so that the States can conform their domestic practices to the required international standards.