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University of Ottawa  
Human Rights Research and  
Education Centre

Mr. Pablo Saavedra Alessandri  
Secretary  
Inter-American Court of Human Rights  
San José de Costa Rica

Ottawa, 30 March 2015

RE: Advisory Opinion Government of Panama – Submission of *Amicus Curiae*

Dear Sir,

I have the honour to address you as the Director of the Human Rights Research and Education Centre (HRREC) at the University of Ottawa. The HRREC was founded in 1981 and our purpose is to bring educators, researchers and students together with practitioners with a multi- and inter-disciplinary perspective, in order to promote the respect, protection and enjoyment of human rights. As a University-based institution, we promote research training and support, and the creation and dissemination of knowledge and analysis with respect to human rights.

The purpose of this communication is to submit, under the terms established in Article 73(3) of the Rules of Procedure of the Inter-American Court of Human Rights (IACtHR), an *amicus curiae* regarding our position on the extent to which legal entities, including companies, have rights under the American Convention on Human Rights. Please convey the attached document to the distinguished Justices of the Court.

It goes without saying that the Advisory Opinion will be of great significance since it will treat questions about the goals of international human rights law and the identification of the appropriate beneficiaries of the rights, freedoms and associated entitlements set out in the American Convention.

The attached *amicus curiae* responds to questions 1, 2, 6 and 7 presented by the Government of the Republic of Panama regarding the standing of legal entities before the IACtHR and the question of whether legal entities may be beneficiaries of the human rights protections set out in the American Convention on Human Rights. In doing so, we confine our focus to corporations and other business enterprises that are legal entities. We therefore make no representations with respect to trade unions, civil society organizations or indigenous organizations that may be legal entities.

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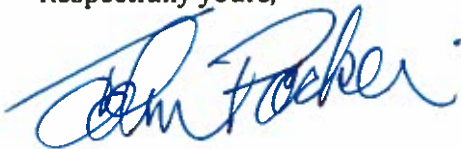
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With respect to the above, please also be informed that in September 2014 launched a Human Rights Clinic and one of our areas of focus is Latin America and the Inter-American Human Rights System. As such, we are closely following and considering developments.

With regard to any communication relating to this submission, I would appreciate that this could be sent to Mr. Salvador Herencia Carrasco, Director of the Human Rights Clinic ([shere045@uottawa.ca](mailto:shere045@uottawa.ca)).

Thank you in advance for your kind attention and assistance.

Respectfully yours,



John Packer  
Director and Associate Professor of Law



***Amicus Curiae* presented to the Inter-American Court of Human Rights  
following a Request for an Advisory Opinion submitted by the  
Government of the Republic of Panama**

***AMICUS CURIAE* PRESENTED BY**

**Human Rights Clinic of the Human Rights Research and Education Centre  
at the University of Ottawa**

**Ottawa, Canada**

**30 March 2015**



## INSTITUTIONAL INFORMATION

### **The Human Rights Research and Education Centre**

Founded in 1981, the Human Rights Research and Education Centre (HRREC) comprises researchers from the Faculties of Common Law, Civil Law, Arts and Social Sciences of the University of Ottawa. The HRREC brings together educators, researchers and students from other disciplines based on the need to approach issues regarding human rights from a multidisciplinary and interdisciplinary perspective, both in order to respect such rights and to explore that which they require in a complex, interconnected world. The HRREC benefits from a bilingual and bijuridical environment. The Centre privileges research, teaching and outreach partnerships, with academic units, governmental and civil society organizations.

The Human Rights Clinic is a project-based initiative of the Human Rights Research and Education Centre at the University of Ottawa that, through an interdisciplinary approach, aims: (i) to strengthen the protection of human rights, by promoting research, training and technical assistance regarding the implementation of human rights standards; (ii) to foster capacity-building and to provide recommendations to ensure that policy, law and practices have a human rights-based approach; and (iii) to promote research regarding the implementation of human rights standards in Canada.

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## ACKNOWLEDGEMENTS

This *amicus curiae* has been developed by the Human Rights Clinic of the Human Rights Research and Education Centre at the University of Ottawa (<http://cdp-hrc.uottawa.ca/>) as part of the “Extractive Industries in Latin America Project”, which aims to analyze the impact of extractive industries on the realization of human rights in Latin America.

Prof. Penelope Simons coordinated the research and co-wrote the final version of the report with Salvador Herencia Carrasco. Students Stephany Caro Mejia, Patrick Connors, Olivia Howard, Mary Amanda Kapron, Emely Beatriz Meléndez Rodríguez and Laura Caitlin O'Brien provided research assistance and assisted in the drafting of the brief.

Prof. John Packer, Associate Professor and Director of the Human Rights Research and Education Centre, provided guidance to the Project and brief.

Karyn Keenan, of the Halifax Initiative (<http://www.halifaxinitiative.org/>), provided insightful comments and suggestions on drafts of the brief.



## TABLE OF CONTENTS

SECTION	PAGE
<b>Executive Summary</b>	<b>5</b>
<b>Questions Presented before the Inter-American Court of Human Rights addressed in the <i>Amicus Curiae</i></b>	<b>6</b>
<b>Introduction</b>	<b>7</b>
<b>Section 1: The American Convention on Human Rights, Natural Persons and Legal Entities</b>	<b>9</b>
<b>Section 2: The Protection of Shareholders Rights under the American Convention on Human Rights</b>	<b>14</b>
<b>Section 3: Exhaustion of Local Remedies and the Rights of Shareholders Under the American Convention on Human Rights</b>	<b>18</b>
<b>Conclusions</b>	<b>22</b>



## EXECUTIVE SUMMARY

The American Convention on Human Rights has contributed to the protection and enforcement of international human rights standards since its adoption in 1969. The Convention's entry into force in 1978 and the development of standards by the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) has established this regional system as one of the most prominent in the world.

In respect of the request for an Advisory Opinion submitted to the IACtHR by the Government of the Republic of Panama, the *Human Rights Clinic of the Human Rights Research and Education Centre at the University of Ottawa* considers that Article 1(2) of the American Convention on Human Rights exclusively and unequivocally protects natural persons. The practice of both the IACHR and the IACtHR has consistently determined that legal entities (i.e. non natural legal persons) do not have such recourse.

In their jurisprudence, both the IACtHR and the IACHR distinguish between the rights of legal entities, which are not protected by the American Convention, and the rights of natural persons, which may include shareholders or members of legal entities, whose rights are protected. Claims by natural persons must show a direct impact on their personal rights.

Therefore, a legal entity, such as a corporation, may not exhaust local remedies on behalf of a natural person who is a member or shareholder of that legal entity. In order for a claim to be brought and accepted by the IACHR, the natural person must be a party to the domestic proceedings. In addition, this natural person must act on his or her own behalf regarding the alleged violations of personal rights, as distinct from the rights or interests of the legal entity.

If States Parties sought to afford protection for legal entities under the Inter-American Human Rights System, as established in the European System, they would be required to amend the American Convention on Human Rights.



## QUESTIONS PRESENTED BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS ADDRESSED IN THE *AMICUS CURIAE*

The request for an Advisory Opinion on the extent to which legal entities, including companies, have rights under the American Convention on Human Rights was submitted to the Inter-American Court of Human Rights by the State of Panama on April 28, 2014. This Advisory Opinion is of great significance since it raises questions about:

- a. The goals of international human rights law; and
- b. The appropriate beneficiaries of the human rights entitlements set out in the American Convention.

The *amicus curiae* will address questions 1, 2, 6 and 7 set out in the request for an Advisory Opinion, namely:

1. Does the second paragraph of Article 1 of the American Convention on Human Rights restrict the inter-American protection of human rights to natural persons and exclude legal entities from the Convention's sphere of protection?

2. Can Article 1(2) of the Convention also protect the rights of legal entities such as cooperatives, trade unions, associations and companies, inasmuch as they are composed of natural persons associated in these entities?

(...)

6. Is a corporation or private company, a cooperative, a civil society organization or commercial company, a trade union (legal entity), a communications medium (legal entity), or an indigenous organization (legal entity), in defense of its rights and/or of its members, able to exhaust the remedies of the domestic jurisdiction and have recourse to the Inter-American Commission on Human Rights on behalf of its members (natural persons associated in, or owners of, the entity or corporation), or must each member or shareholder do so in his or her capacity as a natural person?

7. If a legal entity, in defense of its rights and of the rights of its members (natural persons associated in, or shareholders of, the entity), has recourse to the domestic jurisdiction and exhausts its jurisdictional proceedings, are its members or shareholders able to resort directly to the international jurisdiction of the Inter-American Commission in defense of their rights as natural persons that have been infringed?





## INTRODUCTION

1. The *American Convention on Human Rights* (hereinafter “ACHR”)<sup>1</sup> was adopted by the Organization of American States (hereinafter “OAS”) in 1969, with the purpose of ensuring that State Parties will “(...) 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”.
2. The protection of human rights has been one of the priorities of the OAS, as established in its foundational Charter of 1948. This concern led to the adoption of the *American Declaration on the Rights and Duties of Man*,<sup>2</sup> which serves as a guideline to the work of the OAS, as well as to States that have ratified the ACHR.
3. This *amicus curiae* responds to questions 1, 2 6 and 7 presented by the Government of the Republic of Panama regarding the standing of legal entities before the IACtHR and the question of whether legal entities may be beneficiaries of the human rights protections set out in the ACHR. In doing so, we confine our focus to corporations and other business enterprises that are legal entities. We therefore make no representations with respect to trade unions, civil society organizations or indigenous organizations that may be legal entities.
4. It is our contention that corporations, the aim of which is to generate wealth for their members or shareholders, should be distinguished from other types of legal entities. Natural persons may choose to pursue business activities through corporations and other similar types of business enterprises. Corporations are separate legal persons and generally provide for limited liability of the shareholders. As such they establish significant protections for their shareholders. As separate legal persons, corporations, and not their shareholders, are responsible for the debts and other liabilities incurred by the business.
5. Shareholders’ economic exposure is limited to the value of their shareholding. Equally, under domestic corporate/company laws, corporate groups (domestic or transnational) may legitimately conduct business through a subsidiary in order to shelter the assets of the other members of the corporate group from business activity

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<sup>1</sup> *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123, 9 ILM 99 (entered into force 7 July 1978) [ACHR].

<sup>2</sup> *American Declaration of the Rights and Duties of Man*, OAS Res XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 Doc. 6, rev.1 (1992) at 17.



that may attract legal liability. Natural persons seeking redress for harm caused by such activity, even if they are successful in bringing a suit against the subsidiary, may be unable successfully to enforce their award where the subsidiary has been undercapitalized or the corporate group has transferred funds to other legal entities in the group.

6. In responding to questions 1 and 2, we have chosen to provide analysis of the legal standing and victim status of legal entities under the European Convention on Human Rights and the International Covenant on Civil and Political Rights because, as with the ACHR, these issues are treated with relative clarity and allow us to provide more useful guidance. Questions 6 and 7 will be addressed together based on the practice of the IACHR and the IACtHR.
7. Our goal is to clarify how Article 1(2) of the ACHR should be interpreted and applied while assuring respect for the integrity and purpose of this treaty.



## SECTION 1

### THE AMERICAN CONVENTION ON HUMAN RIGHTS, NATURAL PERSONS AND LEGAL ENTITIES

8. The first question posed by the Government of the Republic of Panama aims to establish the meaning of Article 1(2) of the ACHR and to determine whether this provision could include legal entities within the framework of the Inter-American Human Rights System. Article 1(2) states:

#### **Article 1. Obligation to Protect Rights**

2. For the purposes of this Convention, "person" means every human being.

9. Corporations, which are creations of law or legal fictions and are established for the purpose of generating profit, do not fit easily within the concept of a "victim" of human rights violations. The international human rights system developed in response to the atrocities committed during World War II and had as its purpose the protection of natural persons.<sup>3</sup> The *Universal Declaration on Human Rights* and the *American Declaration on the Rights and Duties of Man*, both adopted in 1948, as well as the major human rights treaties link human rights with the inherent dignity and worth of the human person.<sup>4</sup> It is in this spirit that the ACHR was drafted and adopted in 1969. This focus on natural persons is reflected the ACHR's express exclusion of legal entities from the human rights protections it affords.
10. Nonetheless, some international human rights regimes have allowed legal entities, in certain circumstances and/or with respect to certain rights, to seek remedies as

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<sup>3</sup> The preamble of the *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) [UDHR] states:

"Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people, Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law ..."

<sup>4</sup> See the UDHR, *ibid*, Art. 1 and the preambles of the *American Declaration of the Rights and Duties of Man*, *supra* note 2; the ACHR, *supra* note 1; the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) [ECHR] (the preamble of the ECHR does not specifically mention the dignity of the human person, but rather references the UDHR); *African (Banjul) Charter on Human and Peoples' Rights*, 27 June 1981, 21 ILM 58 (entered into force 21 October 1986) [ACHPR], preamble: "Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of peoples rights should necessarily guarantee human rights"; and the *International Covenant of Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR] ("Recognizing that these rights derive from the inherent dignity of the human person").



victims of human rights abuse, while others restrict victim status to natural persons. The following discussion of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter, “ECHR”)<sup>5</sup>, the *International Covenant on Civil and Political Rights*,<sup>6</sup> the ACHR and the jurisprudence of their respective human rights bodies suggests that in order for legal entities (such as corporations) to be afforded human rights protections under a human rights treaty, such a treaty must either expressly provide that legal entities may be beneficiaries of the human rights protections or, at least, not specifically exclude legal persons as beneficiaries of such rights.

### ***The European Convention on Human Rights***

11. The ECHR expressly recognizes entities beyond natural persons as potential victims of violations of human rights obligations. Article 34 of the ECHR gives the European Court of Human Rights (hereinafter “ECtHR”) the competence to “(...) receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto”.
12. The specified persons and entities have both standing to bring a claim and victim status under the European Convention. Thus the ECtHR has found that a legal entity, such as a corporation, “‘claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention and the Protocols thereto’ may submit an application to it provided that it is a ‘non-governmental organisation’ within the meaning of Article 34 of the Convention” and not a state-owned legal entity.<sup>7</sup>
13. Importantly, however, corporations cannot claim victim status with respect to all of the rights set out in the ECHR. The Court has found that certain human rights under the ECHR, such as the prohibition against torture (Article 3), freedom from arbitrary deprivation of liberty (Article 5) or the right to marry (Article 12) to be “indisputably” inapplicable to corporations as opposed to natural persons.<sup>8</sup>

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<sup>5</sup> See ECHR, *ibid.*

<sup>6</sup> ICCPR, *supra* note 4.

<sup>7</sup> *Islamic Republic of Iran Shipping Lines v Turkey*, No 40998/98, [2007] ECHR at para 78. See for example, *AB Kurt Kellermann v Sweden*, No 41579/98, [2003] ECHR at paras 2-7, 15-18; *Eugenia Michaelidou Developments Ltd and Michael Tymvios v Turkey*, No 16163/90 [2003] ECHR at paras 2-4.

<sup>8</sup> Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (New York: Oxford University Press, 2006) at 110 [Emberland]. On the right to marry, see: Christopher Harding, Uta Kohl & Naomi Salmon, *Human Rights in the Marketplace: The Exploitation of Rights Protection by Economic Actors* (Cornwall: Ashgate, 2008) at 29.



14. Article 1 of Protocol 1 of the ECHR, however, explicitly recognizes legal entities as beneficiaries of the right to the protection of property:

**Article 1. Protection of Property**

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.<sup>9</sup>

15. In addition to the right to peaceful enjoyment of possessions, the ECtHR has found that legal entities, can be the beneficiaries of other rights under the ECHR (and thus claim victim status with respect to such rights), including: (i) Articles 6.1 on the right to a fair trial;<sup>10</sup> (ii) Article 8 on the right to respect for the home;<sup>11</sup> (iii) Article 10 on freedom of expression in terms of protecting commercial expression;<sup>12</sup> (iv) Article 13 on the right to an effective remedy<sup>13</sup>; and (v) Article 41 on the right to just satisfaction in terms of compensating non-pecuniary damage.<sup>14</sup>

***The International Covenant on Civil and Political Rights***

16. The *International Covenant on Civil and Political Rights* (hereinafter “ICCPR”),<sup>15</sup> on the other hand, like the ACHR, explicitly restricts victim status to natural persons. Under Article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights,<sup>16</sup> the Committee on Civil and Political Rights (hereinafter “CCPR”) has the competence “to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant”.

17. The CCPR’s General Comment 31 further clarifies that the “beneficiaries of the rights recognized by the Covenant are individuals”.<sup>17</sup> This has been confirmed in the jurisprudence of the CCPR. Thus, for example, in a case brought by a Trinidadian newspaper company for violations by the State of Trinidad and Tobago regarding its

<sup>9</sup> *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, 213 UNTS 262 (entered into force 18 May 1954) [Protocol 1, ECHR].

<sup>10</sup> Emberland, *supra* note 8 at 110. .

<sup>11</sup> *Société Colas Est and Others v France*, No 37971/97, [2002] ECHR 131 at paras 2, 28 & 50.

<sup>12</sup> *Autronic AG v Switzerland*, No 12726/87, [1990] 12 EHRR 485 at paras 43, 47-48.

<sup>13</sup> Emberland, *supra* note 8 at 110.

<sup>14</sup> *Comingersoll SA v Portugal*, No 35382/97, [2000] ECHR 355, 31 EHRR 772 at paras 31-36.

<sup>15</sup> ICCPR, *supra* note 4

<sup>16</sup> *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>17</sup> General Comment No 31: The Nature of General Legal Obligations Imposed on States Parties to the Covenant, UNHRCOR, 80th Sess, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), at para 9.



rights under Articles 2, 14 and 19 of the ICCPR, the Committee found the complaint to be inadmissible because the complaint failed to indicate:

*(...) whether and to what extent [the company's managing director's] individual rights under the Covenant [had] been violated by the events referred to in the communication. Under article 1 of the Optional Protocol, only individuals may submit a communication to the Human Rights Committee. A company incorporated under the laws of a State party to the Optional Protocol, as such, has no standing under article 1, regardless of whether its allegations appear to raise issues under the Covenant.<sup>18</sup>*

18. The CCPR has, at least on one occasion, found a communication admissible concerning a printing company and a claim that certain language laws of the Canadian Province of Quebec allegedly violated the right to freedom of expression. Canada argued that such communication was inadmissible since companies have no legal standing before the Committee. The Committee however held that the claim was admissible, but in doing so it clearly linked the admissibility of the claim with a violation of human rights of the individual author of the complaint and not the company itself, stating that:

*(...) the Covenant rights which are at issue ..., and in particular the right of freedom of expression, are by their nature inalienably linked to the person. The author has the freedom to impart information concerning his business in the language of his choice. The Committee therefore considers that the author himself, and not only his company, has been personally affected by the contested provisions of Bills Nos. 101 and 178.<sup>19</sup>*

### ***The American Convention on Human Rights***

19. In contrast to the ECHR, and in line with the ICCPR, the American Convention on Human Rights expressly excludes legal entities from the human rights protections it affords. The preamble states that “the essential rights of man are not derived from one’s being a national of a certain state, but are based on attributes of the human personality”. As stated above, Article 1(1) of the ACHR establishes that states 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(2) states that “[f]or the purposes of this Convention, ‘person’

<sup>18</sup> *A Newspaper Publishing Company v Trinidad and Tobago* (1989), CCPR, Communication No 360/1989, UN Doc CCPR/C/36/D/360/1989 at para 3.2, online: University of Minnesota Human Rights Library <<http://www1.umn.edu/humanrts/undocs/session36/360-1989.html>>.

<sup>19</sup> *Singer v Canada* (1994), CCPR, Communication No 455/1991, UN Doc CCPR/C/51/D/455/1991 at para 11.2.



means every human being”. This leaves no room for interpretation as the Convention itself clearly settles this matter.

20. The jurisprudence of the IACHR has consistently held that pursuant to the Preamble and Article 1(2) of the ACHR the protection offered by the Inter-American Human Rights System is “limited to the protection of natural persons and does not include juridical persons”.<sup>20</sup> As such, “a legal entity ... cannot be a ‘victim’ of a human rights violation” under the ACHR.<sup>21</sup>
21. The IACtHR, itself, has observed that “during the preparatory work the words ‘person’ and ‘human being’ were used without the intention of making a distinction between the two terms” and that “Article 1(2) of the Convention specifies that the two terms must be understood as synonyms”.<sup>22</sup> It has further dismissed cases brought by shareholders of a corporation where the claimants did not clearly demonstrate that the damage to the assets of a corporation “translated into an abridgment of the rights of [the claimants] in their capacity as shareholders of such corporation”.<sup>23</sup>
22. Based on the discussion above, in our opinion, for legal entities, such as corporations, to be afforded human rights protections under a human rights treaty, such a treaty must either explicitly include or not specifically exclude legal persons as beneficiaries of the respective human rights protections. Given that Article 1(2) of the ACHR unambiguously limits the human rights protections set out in the Convention to natural persons, and the jurisprudence of the IACHR and the IACtHR has consistently affirmed this position, legal entities are excluded from the Convention’s sphere of protection. Therefore, States Parties would have to amend the ACHR in order to extend victim status to legal entities.

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<sup>20</sup> *Banco de Lima v Peru* (1991), Inter-Am Comm HR, No 10/91, OEA/Ser.L/V/II.79, doc. 12 rev. 1 at para 1.

<sup>21</sup> *Tabacalera Boquerón SA v Paraguay* (1998), Inter-Am Comm HR, No 47/97, OEA/Ser.L/V/II.98, doc. 6 rev. at para 25 [*Tabacalera*]; *Mevopal, SA v Argentina* (1999), Inter-Am Comm HR, No 39/99, OEA/Ser.L/V/II.106, doc 6 rev at paras 16-17.

<sup>22</sup> *Artavia Murillo et al (Costa Rica)* (2012), Preliminary Objections, Merits, Reparations and Costs, Inter-Am Ct HR (Ser C) No 257, at para 219.

<sup>23</sup> *Perozo et al (Venezuela)* (2009), Preliminary Objections, Merits, Reparations and Costs, Inter-Am Ct HR (Ser C) No 195, at para 402 [*Perozo*].



## SECTION 2: THE PROTECTION OF SHAREHOLDERS RIGHTS UNDER THE AMERICAN CONVENTION ON HUMAN RIGHTS

23. A corporation is legally distinct from its shareholders and its managers and directors. Shareholders do not have a right to a corporation's assets until such time as the corporation is wound up and the assets are distributed. As such, as a matter of both domestic and international law, injury to a corporation cannot necessarily be equated with injury to the shareholders.
24. In the *Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v Spain)*,<sup>24</sup> the International Court of Justice held that in light of this doctrine of separate legal personality, except in exceptional circumstances such as where a corporation ceases to exist, a shareholder may not bring a claim where "an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected".<sup>25</sup>
25. In line with this decision, the ECtHR, while it has recognized that shareholders may have victim status in relation to their shares under Article 1 of Protocol 1, has found that, "[a]n act infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected. Such responsibility arises only if the act complained of is aimed at the rights of the shareholder".<sup>26</sup>
26. Only in exceptional circumstances will the ECtHR disregard the separate legal personality of a company. These include "(...) where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or -in the event of liquidation- through its liquidators",<sup>27</sup> or where it can be determined the company is merely a vehicle through which the shareholders are implementing a business plan and "it would be artificial to draw distinctions [between the corporation and the shareholders] as regards their entitlement to claim to be 'victims' of a violation".<sup>28</sup>
27. Similarly, the IACHR and the IACtHR have clearly distinguished between the rights of legal entities and the rights of natural persons that are shareholders of such legal

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<sup>24</sup> *Case concerning the Barcelona Traction, Light and Power Company Limited (Belgium v Spain)*, Judgment, [1970] ICJ Rep 3.

<sup>25</sup> *Ibid* at paras 49 & 46.

<sup>26</sup> *Olczak v Poland*, No 30417/96, [2002] ECHR, Reports 2002-X, at paras 59 & 62.

<sup>27</sup> *Agrotexim Hellas SA and Others v Greece*, No 14807/89, [1995] ECHR, EHRR 250, at para 66.

<sup>28</sup> *Pine Valley Developments Ltd and Others v Ireland*, No 12742/87, [1991] ECHR 9, at para 42.





entities. Claims concerning the violation of the rights of shareholders or members of a cooperative that are natural persons may be protected under the ACHR where such complainants can demonstrate “direct effect on their rights” as opposed to the interests of the legal entity in question.<sup>29</sup> However, the IACHR found inadmissible a claim brought by a natural person alleging a violation of his human rights, where domestic remedies were exhausted on behalf of the corporate entity and not on behalf of the natural person.<sup>30</sup>

28. The IACtHR has also recognized the distinction between the rights of natural persons who are shareholders and the interests of a legal entity. The Court has denied relief where the alleged violations affected the interests of the legal entity as opposed to the rights of the shareholders who are natural persons. Thus in the *Case of Perozo v Venezuela*, the Court, in determining whether the acts of Venezuela violated the rights of the shareholders or the corporation, Globovisión, stated:

*399. (...) the Court has considered in previous cases that, although the figure of legal entities has not been expressly recognized by the American Convention, as it is in Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, this does not mean that, in specific circumstances, an individual may not resort to the Inter-American system for the protection of human rights to enforce his fundamental rights, even when they are encompassed in a legal figure or fiction created by the same system of law.*

*400. However, it is worth making a distinction in order to identify which situations could be examined by this Court within the framework of the American Convention. In this respect, this Court has already examined the possible violation of the rights of individuals when they are shareholders. In such cases, the Court has made a distinction between the rights of a company's shareholders from those of the company itself, indicating that domestic legislation grants shareholders specific direct rights, such as receiving the agreed dividends, attending and voting at general meetings and receiving part of the assets of the company when selling their shares, among others.*

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<sup>29</sup> *Carvallo Quintana v Argentina* (2001), Inter-Am Comm HR, No 67/01, OEA/Ser./L/V/II.114 doc 5, rev. at paras 53-61; *Carlos Arturo Betancourt Estrada and Others v Colombia* (2010), Inter-Am Comm HR, No 122/10, Petition 475.00 at paras 28-29; *Families Belonging to the Balquicet Agricultural Workers Cooperative (COTRAGROBLAN) v Colombia* (2011), Inter-Am Comm HR, No 149/11, Petition 873.06 at paras 43-45.

<sup>30</sup> *Bendeck v Honduras* (1999), Inter-Am Comm HR, No 106/99, OEA/Ser.L/V/II.106, doc. 6 rev. at paras 17-20 [Bendeck].



401. *In this case, it is an undisputed fact in this proceeding that Mr. Alberto Federico Ravell and Guillermo Zuloaga are shareholders of the company UNITEL de Venezuela C.A., which, at the same time, owns the television station Globovisión and the evidence tendered suggest that they were shareholders of, at least partially, the television station of Globovisión at the moment of the alleged facts.*

402. *However, it has been established in the proven facts of the case that, on several occasions, some property of Globovisión was damaged, in particular, its premises, vehicles and part of the technological transmission equipment (supra para. 191, 197, 200, 214, 216, 211, 220 and 239). That is, the damage was caused to the premises and assets of Globovisión, as a company or legal entity. It has not been clearly proven that the damage to such assets was translated into an abridgment of the rights of Mr. Ravell and Zuloaga, in their capacity as shareholders of the company. ...*

403. *The Court considers that the alleged facts as violation of the right to property of Mr. Ravell and Zuloaga coincide with the arguments alleged supra as acts attributable to undetermined individuals who obstructed, on certain occasions, exercise of the profession of the alleged victims. These acts form part of the context and type of situations already analyzed in the chapter related to Article 1(1) of the Convention in connection with Articles 5 and 13 therein. Therefore, the Court deems that it has not been proven that the State violated the right to property of the alleged victims, under the terms of Article 21 of the Convention.<sup>31</sup>*

29. The approach of the IACHR and the IACtHR in distinguishing between the rights of shareholders and the rights of corporations is in line with both general international law and the approach of the ECtHR.

As noted above, only natural persons may be victims of human rights abuses under the ACHR. As confirmed in the jurisprudence of the IACHR and the IACtHR, such individuals must demonstrate both in proceedings before domestic courts (in the course of exhausting local remedies) and in their claim before the IACHR or IACtHR that the alleged acts of the respondent State violated their human rights as natural persons and not simply the rights of the corporation.

30. We submit, therefore that the Court should answer Question 2 in the negative. The ACHR does not protect the rights of legal entities. Natural persons, such as individuals

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<sup>31</sup> *Perozo, supra* note 23 at paras 399-403.



who are shareholders may engage the protection of the ACHR in relation to actions of a respondent State that has allegedly affected the rights and interests of a corporation, only where such natural persons can clearly demonstrate that the alleged State actions violated their rights as natural persons under the ACHR.



### SECTION 3

## EXHAUSTION OF LOCAL REMEDIES AND THE RIGHTS OF SHAREHOLDERS UNDER THE AMERICAN CONVENTION ON HUMAN RIGHTS

31. This section of the *amicus curiae* will address questions 6 and 7 submitted by the Government of the Republic of Panama. These two questions seek to determine whether a legal entity, such as a corporation, may exhaust local remedies on behalf of its shareholders or members who are natural persons.
32. As discussed in the sections addressing questions 1 and 2 of this brief, Article 1(2) of the ACHR expressly establishes that only natural persons can benefit from the human rights protections afforded by the Convention and this has been confirmed in the jurisprudence of the IACHR and the IACtHR.<sup>32</sup>
33. However, both the IACHR and the IACtHR have noted that in certain circumstances, natural persons may resort to “the inter-American system for the protection of human rights to enforce his fundamental rights, even when they are encompassed in a legal figure or fiction”.<sup>33</sup>
34. As discussed above, natural persons bringing such claims will have to demonstrate a direct impact on their personal rights as distinct from the rights and interests of the corporation. For example, in the *Chaparro Álvarez and Lapo Íñiguez v. Ecuador Case*, the IACtHR held that:

*228. The Court has established in this judgment that Mr. Chaparro’s shares in the Plumavit factory had a financial value that formed part of his patrimony. This financial value was directly related to the value of the company itself. The State’s actions, namely the unsatisfactory administration of the property, the delay in the return of the factory, the return of property in a deteriorated condition, and the misplacement of certain property, entailed an impediment to the use and enjoyment of those shares, because the value of the company decreased considerably, and this had an impact on Mr. Chaparro’s patrimony.*<sup>34</sup>

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<sup>32</sup> See also, Hector Faúndez Ledesma, *El Sistema Interamericano de Protección de los Derechos Humanos: Aspectos Institucionales y Procedimentales*, 3rd ed (Costa Rica: Instituto Interamericano de Derechos Humanos, 2009).

<sup>33</sup> *Cantos (Argentina)* (2001), Preliminary Objections, Inter-Am Ct HR (Ser C) No 85, at para 29 [*Cantos*].

<sup>34</sup> *Chaparro Álvarez and Lapo Íñiguez (Ecuador)* (2007), Preliminary Objections, Merits, Reparations and Costs, Inter-Am Ct HR (Ser C) No 170, at para 228.



35. On the other hand, the IACHR, dismissed the claim in the *Bendeck-COHDINSA Case*,<sup>35</sup> where the petitioner failed to demonstrate that the acts of the State in question adversely affected his rights as a natural person as distinct from the rights and interests of the corporation in question:

*17. The Commission therefore considers that the Convention grants its protection to physical or natural persons. However, it excludes from its scope legal or artificial persons, since they represent a legal fiction. This interpretation is confirmed when the true meaning attributed to the phrase "person means every human being" is seen in the text of the Preamble to the Convention, which establishes that the essential rights of man "are based upon attributes of the human personality" and reiterates the need to create conditions that will enable all persons to achieve "the ideal of free men enjoying freedom from fear and want."*

*18. This clarification is particularly relevant in the case in point, since the proof offered by the petitioner and the facts described by him in his complaint reveal a substantial connection between the alleged violations and COHDINSA, the company in which the petitioner is the majority shareholder. In fact, these alleged violations refer to acts or omissions on the part of the officers of COHDEFOR, a Honduran state enterprise, and of the judicial authorities of this member state, which are directly linked with the corporate entity COHDINSA and not with the petitioner. This is clearly reflected in the documents submitted by the petitioner and in the fact that the domestic legal remedies were sought and exhausted by COHDINSA, in its capacity as a legal person.*

36. All international human rights tribunals require claimants to exhaust local remedies<sup>36</sup> as a criterion of admissibility.<sup>37</sup> This rule is reflected<sup>38</sup> in Article 46(1)(a) of the ACHR:

**Article 46**

1. 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; (...)

<sup>35</sup> *Bendeck*, *supra* note 30 at paras 17-18.

<sup>36</sup> Augusto Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (New York: Cambridge University Press, 1983).

<sup>37</sup> See: Silvia D'Ascoli & Kathirn Scherr, "The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection" (2007) Eur U Inst.

<sup>38</sup> See: Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, 2nd ed (Cambridge: Cambridge University Press, 2014) at 92-98.



37. Since, as noted above, only natural persons can benefit from the human rights protections under the ACHR, where a legal entity (or a natural person) brings a claim alleging a violation of the rights of a natural person relating to his or her participation in a corporation as a shareholder or member of such legal entity, the natural person must have exhausted local remedies on his or her behalf for the claim to be admissible.<sup>39</sup>

38. Thus, for example, in the *Bendeck-COHDINSA Case*,<sup>40</sup> the IACHR dismissed the case because the claimant was not a party to the domestic proceedings:

*19. (...) the Commission notes that Mr. Bendeck did not act as a party to any of the court proceedings exhausted by COHDINSA, either on his own behalf or as a shareholder of that company. Nor did he provide evidence that the shareholders of that company or any other natural person were victims of human rights violations. Further, he did not allege that any natural or physical person had exhausted remedies under domestic law, had presented themselves to the national authorities as an injured party, or had given any reason why they were prevented from so doing.*<sup>41</sup>

39. On the other hand, in the *Cantos Case*, the IACtHR held that the claim was admissible where the proceedings brought at the domestic level were all “with the exception of a criminal complaint and an amparo filed in 1972” submitted by the plaintiff (Mr. Cantos) “in ‘his own name and in the name of the companies’”.<sup>42</sup>

40. In summary, a legal entity, such as a corporation, cannot exhaust local remedies on behalf of a shareholder or member whose rights as a natural person have allegedly been violated. In the *Tabacalera Boquerón Case*,<sup>43</sup> the IACHR declared the inadmissibility of the case because:

*25. In this case, the petition has been filed on behalf of Tabacalera Boquerón S.A., and its shareholders. In this sense and according to the aforementioned jurisprudence, the Commission has pointed out that the protection afforded by the inter-American human rights system is limited to natural persons, and excludes legal entities. Therefore, Tabacalera Boquerón S.A., as a legal entity,*

<sup>39</sup> See: *Case of Ivcher-Bronstein (Peru)* (2001), Merits, Reparations and Costs, Inter-Am Ct HR (Ser C) No 74, at para 138.

<sup>40</sup> *Bendeck*, *supra* note 30.

<sup>41</sup> *Ibid* at para 19. See also, *Tabacalera*, *supra* note 21 at paras 25 & 27.

<sup>42</sup> *Cantos*, *supra* note 33 at para 30. Also, see: *Perozo*, *supra* note 23.

<sup>43</sup> *Tabacalera*, *supra* note 21.



*cannot be a "victim" of a human rights violation in the inter-American system, since such bodies are not protected by the Convention. It would, perhaps, be advisable to analyze the situation of individual shareholders, in this case the owners of the company, who also claim to be victims in this case.*

*27. Although in this case we are not dealing with a banking institution, it is also true that both are corporations, that is to say, legal entities, and in the case in question, the party directly affected by the judicial decisions was always Tabacalera Boquerón S.A. and it was also Tabacalera Boquerón S.A. which suffered "damages to its assets." During domestic judicial proceedings, the shareholders were never mentioned as victims of any violation, there were never any initiatives to protect their rights; therefore, just as in the aforementioned case, what is at issue is not the individual property rights of shareholders, but the commercial rights and "assets" of Tabacalera Boquerón S.A., which are not protected by the jurisdiction of the Inter-American Commission on Human Rights.<sup>44</sup>*

41. The jurisprudence of both the IACHR and the IACtHR is clear that a natural person who is a shareholder or member of a legal entity, such as a corporation, must be a party to domestic proceedings and have claimed in such proceedings a violation of his or her rights, distinct from the rights and interests of the corporation. We therefore submit that the Court should answer questions 6 and 7 in the negative.

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<sup>44</sup> *Ibid* at paras 25 & 27.



## CONCLUSIONS

42. Under the ACHR, only natural persons can be the beneficiaries of the human rights protections set out therein. In order for the Inter-American Human Rights System to protect legal entities, Article 1(2) of the ACHR would need to be amended.
43. Natural persons, such as individuals who are shareholders, may engage the protection of the ACHR in relation to actions of a respondent State that have allegedly affected the rights and interests of a corporation, only where such natural persons can clearly demonstrate that the alleged State actions violated their rights as natural persons under the ACHR.
44. A legal entity, such as a corporation, cannot exhaust local remedies on behalf of a shareholder whose rights as a natural person have allegedly been violated.